

ITEM 4.00 | CHAPTER 4 INTRO

The work product privilege protects from discovery “documents and tangible things otherwise discoverable” if a party prepared those items “in anticipation of litigation or for trial.” Fla. R. Civ. P. 1.280(b)(3). There is no requirement in this rule that for something to be protected as work product, it must be an item ordered to be prepared by an attorney.¹ Materials may qualify as work product even if no specific litigation was pending at the time the materials were compiled. Even preliminary investigative materials are privileged if compiled in response to some event which foreseeably could be made the basis of a claim.²

The standard to be applied in the First, Second, Third and Fifth District Courts in determining whether documents are protected by the work product doctrine, is whether the document was prepared in response to some event which foreseeably could be made the basis of a claim in the future.³ The Fourth District, for years, applied a slightly stricter standard, finding that documents were not work product unless they were prepared when the probability of litigation was substantial and imminent,⁴ or, they were prepared after the claim had already accrued.⁵ However, the Court recently addressed the issue again in the case of *Millard Mall Servs. v. Bolta*,⁶ and the stricter standard was relegated to the dissenting opinion. See that case for a discussion of the work product privilege and the circumstances under which it has been applied in the various appellate districts.

When a party asserts the work product privilege in response to a request for production, the party need only assert in their response the objection and reason for the objection. It is not required that the objecting party file with the objection an affidavit documenting that the incident report was prepared in anticipation of litigation. If the opposing party wants to pursue the request over the objection, they may move to compel production. If the motion to compel challenges the status of the document as work product, defendants must then show that the documents were prepared in anticipation of litigation.⁷

Under Fla. R. Civ. P. 1.280(b)(3), a party may obtain discovery of an opposing party’s “documents ... prepared in anticipation of litigation ... only upon a showing that the party seeking discovery has 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.” Therefore, the party requesting such privileged material has a considerable burden to show that



the party has both a significant need and an undue hardship in obtaining a substantial equivalent.⁸ Need and undue hardship “must be demonstrated by affidavit or sworn testimony.”⁹ Documents protected by the work product immunity must not be lightly invaded, but only upon a particularized showing of need satisfying the criteria set forth in Rule 1.280. If the moving party fails to show that the substantial equivalent of the material cannot be obtained by other means the discovery will be denied.¹⁰

It should be noted that if attorney work product is expected or intended for use at trial, it is subject to the rules of discovery. The Florida Supreme Court has held that the attorney work product doctrine and work product privilege is specifically bounded and limited to materials not intended for use as evidence or as an exhibit at trial, including rebuttal.¹¹

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Footnotes

¹ See, e.g. *Barnett Bank v. Dottie-G. Dev. Corp.*, 645 So. 2d 573 (Fla. 2d DCA 1994); *Time Warner, Inc. v. Gadinsky*, 639 So. 2d 176 (Fla. 3d DCA 1994).

² *Anchor Nat’l Fin. Servs., Inc. v. Smeltz*, 546 So. 2d 760, 761 (Fla. 2d DCA 1989).

³ See *Marshalls of Ma, Inc. v. Minsal*, 932 So. 2d 444 (Fla. App. 3d Dist. 2006), and the cases cited therein.

⁴ *Liberty Mut. Fire Ins. Co. v. Bennett*, 883 So. 2d 373, 374 (Fla. 4th DCA 2001).

⁵ *Int’l House of Pancakes (IHOP) v. Robinson*, 8 So. 3d 1180 (Fla. 4th DCA 2009).

⁶ 155 So. 3d 1272 (Fla. 4th DCA 2015).

⁷ Fla. R. Civ. P. 1.350. See also *Wal-Mart Stores, Inc. v. Weeks*, 696 So. 2d 855 (Fla. 2d DCA 1997).

⁸ *Metric Eng’g., Inc v.Small*, 861 So. 2d 1248, 1250 (Fla. 1st DCA 2003); *CSX Transp., Inc. v. Carpenter*, 725 So. 2d 434, 435 (Fla. 2d DCA 1999).

⁹ *N. Broward Hosp. Dist. v. Button*, 592 So. 2d 367 (Fla. 4th DCA 1992).

¹⁰ *S. Bell Tel. & Tel Co. v. Deason*, 632 So. 2d 1377, 1385 (Fla. 1994).

¹¹ See, *Northup v. Howard W. Acken, M.D.*, 865 So. 2d 1267 (Fla. 2004).

