

ITEM 4.01 | TRADE SECRETS

A "trade secret" is defined in section 688.002(4), Florida Statutes, as:

Information, including a formula, pattern, compilation, program, device, method, technique or process that: (a) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and (b) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Section 90.506, Florida Statutes provides:

A person has a privilege to refuse to disclose, and to prevent other persons from disclosing a trade secret owned by that person if the allowance of the privilege will not conceal fraud or otherwise work injustice. When the court directs disclosure, it shall take the protective measures that the interests of the holder of the privilege, the interests of the parties, and the furtherance of justice require.

Trade secrets are privileged under section 90.506, Florida Statutes, but the privilege is not absolute. *Freedom Newspapers, Inc., v. Egly*, 507 So. 2d 1180, 1184 (Fla. 2d DCA 1987). Information constituting trade secrets can be obtained in discovery under certain in certain circumstances. To determine if those circumstances exist, a trial court generally must follow a three-step process:

- (1) determine whether the requested production constitutes a trade secret;
- (2) if the requested production constitutes a trade secret, determine whether there is a reasonable necessity for production; and
- (3) if production is ordered, the trial court must set forth its findings.

Gen. Caulking Coating Co., Inc. v. J.D. Waterproofing, Inc., 958 So. 2d 507, 508 (Fla. 3d DCA 2007).



Trade secrets are defined in Florida's Uniform Trade Secrets Act as:

[I]nformation, including a formula, pattern, compilation, program, device, method, technique, or process that:

a) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use; and

b) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. § 688.002(4), Fla. Stat. (2015).

"When a party asserts the need for protection against disclosure of a trade secret, the court must first determine whether, in fact, the disputed information is a trade secret [which] usually requires the court to conduct an in camera review." Summitbridge Nat'l Invs. V. 1221 Palm Harbor, L.L.C. 12 A trial court may also conduct an evidentiary hearing. Bright House Networks, LLC v. Cassidy, 129 So. 3d 501, 506 (Fla. 2d DCA 2014). Such a hearing may include expert testimony. Lovell Farms, Inc. v. Levy, 644 So. 2d 103, 105 (Fla. 3d DCA 1994).

If the materials are trade secrets, the court must then determine whether there is a reasonable necessity for production. Gen. Caulking Coating Co., supra, at 509. Once a party has demonstrated that the information sought is a trade secret, the burden shifts to the party seeking discovery to demonstrate reasonable necessity for production. Scientific Games, Inc. v. Dittler Bros., Inc., 586 So. 2d 1128, 1131 (Fla. 1st DCA 1991) (citing Goodyear Tire & Rubber Co. v. Cooley, 359 So. 2d 1200, 1202 (Fla. 1st DCA 1978)). This requires a trial court to decide whether the need for producing the documents outweighs the interest in maintaining their confidentiality. See Gen. Caulking Coating Co., supra at 509.

If the trial court ultimately decides to order production of trade secrets, it must set forth findings on these points. Gen. Caulking Coating Co., supra at 509 ("Because the order under review makes no specific findings as to why it deemed the requested information not to be protected by the trade secret privilege we find that 'it departs from the essential requirements of the law for which no adequate remedy may be afforded to petitioners on final review.'")



(quoting *Arthur Finnieston, Inc. v. Pratt*, 673 So. 2d 560, 562 (Fla. 3d DCA 1996))).

Further, if disclosure is ordered, the trial court should take measures to limit any harm caused by the production. See § 90.506 (“When the court directs disclosure, it shall take the protective measures that the interests of the holder of the privilege, the interests of the parties, and the furtherance of justice require.”). Examples of measures taken by courts to protect trade secrets include, but are not limited to, the following: (a) specifying individuals that may have access to the materials for the limited purposes of assisting counsel in the litigation; (b) requiring that the designated confidential materials and any copies be returned or destroyed at the end of the litigation; (c) allowing the disclosure of the trade secret to only counsel and not to the clients; and (d) requiring all attorneys who request access to confidential information to first sign an attached agreement and be bound by its restrictions. See *Capital One, N.A. v. Forbes*, 34 So. 3d 209, 213 (Fla. 2d DCA 2010); *Cordis Corp. v. O’Shea*, 988 So. 2d 1163, 1165 (Fla. 4th DCA 2008); *Bestechnologies, Inc. v. Trident Envtl. Sys., Inc.*, 681 So. 2d 1175, 1177 (Fla. 2d DCA 1996).

Trial Lawyers Section of the Florida Bar
Conference of Circuit Court Judges
Conference of County Court Judges

Footnotes

¹² 67 So. 3d 448, 449 (Fla. 2d DCA 2011); see also *Westco, Inc. v. Scott Lewis’ Gardening & Trimming*, 26 So. 3d 620, 622 (Fla. 4th DCA 2009) (holding that where a party claims a document is privileged and the trial court fails to conduct an in camera review or balancing test, the trial court has departed from the essential requirements of the law).

