CHAPTER IV
FLORIDA HANDBOOK ON CIVIL DISCOVERY PRACTICE (2016)
[ALL-IN-ONE DOCUMENT]

CHAPTER IV
DISCOVERY OF WORK PRODUCT AND TRADE SECRETS

E: TextBookDiscrimination@gmail.com
W: www.TextBookDiscrimination.com

visit TBD's website for the most up-to-date information

TABLE OF CONTENTS | CHAPTER IV | DISCOVERY OF WORK PRODUCT AND TRADE...

2016 FLORIDA HANDBOOK ON CIVIL DISCOVERY PRACTICE

CHAPTER IV DISCOVERY OF WORK PRODUCT AND TRADE SECRETS

ITEMS: 4.00 through 4.04

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. Bolda,[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]

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

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).

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. Cooey, 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).

ITEM 4.02 | INCIDENT REPORTS

Incident reports have generally been considered not discoverable as falling within the work product privilege because they are typically prepared solely for litigation and have no other business purpose.[13] Incident reports may be prepared for a purpose other than in anticipation of litigation, and when this is so the reports are not work product. For example, reports prepared solely for personnel reasons, such as to decide whether an employee should be disciplined, are not work product.[14] However, even if an incident report is prepared for one reason not in anticipation of litigation, it will still be protected as work product if it was also prepared for litigation purposes.[15]

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

Footnotes

[13] *Winn-Dixie Stores v. Nakutis*, 435 So. 2d 307 (Fla. 5th DCA 1983) petition for review denied 446 So. 2d 100 (Fla. 1984); *Sligar v. Tucker*, 267 So. 2d 54 (Fla. 4th DCA 1972) cert. denied (Fla. 1972); *Grand Union Co., v. Patrick*, 247 So. 2d 474 (Fla. 3d DCA 1971).

[14] See *Southern Bell Tel. & Tel. Co. v. Deason*, 632 So. 2d 1377, 1385-86 (Fla. 1994).

[15] *Federal Express Corp. v. Cantway*, 778 So. 2d 1052, 1053 (Fla. 4th DCA 2001); see also *District Board of Trustees of Miami-Dade County College v. Chao*, 739 So. 2d 105 (Fla. 3d DCA 1999).

ITEM 4.03 | CLAIMS FILES

A party is not entitled to discovery related to the claim file or the insurer's business practices regarding the handling of claims until the obligation to provide coverage and damages has been determined.[16]

However, the claims file may be discoverable when an insurer is sued for bad faith after any coverage dispute has been settled.[17]

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

Footnotes

[16] *State Farm Mutual Automobile Ins. Co. v. Tranchese*, 49 So. 3d 809, 810 (Fla. 4th DCA 2010); see also *Scottsdale Ins. Co. v. Camara*, 813 So. 2d 250, 251-52 (Fla. 3d DCA 2002).

[17] *Allstate Indem. Co. v. Ruiz*, 899 So. 2d 1121, 1129-30 (Fla. 2005).

ITEM 4.04 | SURVEILLANCE VIDEO

Surveillance video is regarded as work product unless it is going to be used at trial, and if it is, a bright line rule has been established that it need not be produced until the surveilling party has had the opportunity to depose the subject of the video.[18]

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

Footnotes

[18] *Hankerson v. Wiley*,154 So. 3d 511 (Fla. 4th DCA 2015).

APPENDIX

COPYRIGHT NOTICE

ORIGINAL SOURCE

#	Item	Link
1	Original Source	NinthCircuit.org

CONTACT INFORMATION

E: TextBookDiscrimination@gmail.com
W: www.TextBookDiscrimination.com

Congratulations! You're now ***booked up*** on Chapter IV from Florida's Handbook on Civil Discovery Practice (2016)!