



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

CHAPTER X
DISCOVERY OF LAWYER-CLIENT PRIVILEGED COMMUNICATIONS

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2016 FLORIDA HANDBOOK ON CIVIL DISCOVERY PRACTICE

CHAPTER X DISCOVERY OF LAWYER-CLIENT PRIVILEGED
COMMUNICATIONS

ITEMS: 10.00 through 10.06

ITEM 10.00 | CHAPTER 10 INTRO

Confidential lawyer-client communications are, by statute, privileged, and therefore not discoverable.¹ A communication is "confidential" if it is not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of legal services to the client, and those reasonably necessary for the transmission of the communication.² However, the privilege can be waived, intentionally or unintentionally, thus subjecting the communication to discovery. A waiver by the client of part of the privileged communications, serves as a waiver as to the remainder of the communications about the same subject.³

In *Southern Bell Tel. & Tel. Co. v. Deason*,⁴ the Florida Supreme Court set forth the following criteria to judge whether a corporation's communications are protected by the attorney-client privilege:

- (1) the communication would not have been made but for the contemplation of legal services;
- (2) the employee making the communication did so at the direction of his or her corporate superior;
- (3) the superior made the request of the employee as part of the corporation's effort to secure legal advice or services;
- (4) the content of the communication relates to the legal services being rendered, within the scope of the employee's duties; and
- (5) the communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents.

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Footnotes

¹ Fla. Stat. § 90.502; Fla. R. Civ. P. 1.280(b)(1).

² Fla. Stat. § 90.502.

³ *International Tel. & Tel. Corp v. United Tel. Co. of Florida*, 60 F.R.D. 177 (M.D. Fla. 1973).

⁴ 632 So. 2d 1377 (Fla. 1994).

ITEM 10.01 | PRIVILEGE LOGS

Fla. R. Civ. P. 1.280(b)(5) provides, in part, that a party withholding information from discovery claiming that it is privileged shall make the claim expressly, and shall describe the nature of the documents, communications or things not produced or disclosed in a manner that, without revealing the information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protections. It has been suggested that the privilege log should include at a minimum (for documents), sender, recipients, title or type, date and subject matter.⁵

The U.S. District Court for the Southern District of Florida has promulgated a Local Rule for the content required in a privilege log.⁶ In at least one instance, that Local Rule has served as guidance for a Florida court.⁷ Guidance for the content required in a privilege log in the Middle District of Florida can be found in *Arthrex, Inc. v. Parcus Medical, LLC*, M.D., Fla. 2012 (2012 WL 3778981).

The failure to file a privilege log can result in a waiver of the attorney-client privilege.⁸ However, that is not a common sanction, and Florida courts generally recognize that such a sanction should be resorted to only when the violation is serious.⁹ The failure to submit a privilege log at the same time as a discovery response is served, does not waive the privilege. Fla. R. Civ. P. 1.280(b)(5) does not detail the procedure to follow for service of privilege logs and does not specifically address the appropriate sanction to be imposed if a party is tardy in filing a privilege log. If a party does not submit a privilege log within a reasonable time before a hearing on the motion to compel, then the trial court can be justified in finding a waiver because there would be no basis on which to assess the privilege claim. A very late and inadequate privilege log could subject a party to waiver of the privilege.¹⁰

A privilege log is not required until such time as broader, preliminary objections have been addressed. "A party is required to file a [privilege] log only if the information is otherwise discoverable. Where the party claims that the production of documents is burdensome and harassing... the scope of discovery is at issue. Until the court rules on the request, the party responding to discovery does not know what will fall into the category of discoverable documents..."¹¹ Waiver does not apply where assertion of the privilege is not document-specific, but category specific, and the category itself is plainly protected.¹²

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⁵ *Bankers Sec. Ins. Co. v. Symons*, 889 So. 2d 93 (Fla. 5th DCA 2004).

⁶ U.S. District Court, Southern District of Florida, Local Rule 26.1(g)(3)(B)(ii).

⁷ *TIG Ins. Corp. of America v. Johnson*, 799 So. 2d 339 (Fla. 4th DCA 2001).

⁸ *Id.*

⁹ *Gosman v. Luzinski*, 937 So. 2d 293 (Fla. 4th DCA 2006) (“Attorney-client privilege and work-product immunity are important protections in the adversarial legal system, and any breach of these privileges can give one party and undue advantage over the other party. Florida’s courts generally recognize that an implicit waiver of an important privilege as a sanction for a discovery violation should not be favored, but resorted to only when the violation is serious.”).

¹⁰ *Bainter v. League of Women Voters of Fla.*, 150 So. 3d 1115, 1129 (Fla. 2014).

¹¹ *Gosman*, *supra*.

¹² *Nevin v. Palm Beach County School Board*, 958 So. 2d 1003 (Fla. 1st DCA 2007); citing: *Matlock v. Day*, 907 So. 2d 577 (Fla. 5th DCA 2005).

ITEM 10.02 | INADVERTENT DISCLOSURE

As communications technology advances (facsimile, e-mail, test, etc.), the opportunities for inadvertent disclosure of lawyer-client privileged communications increase. Inadvertent disclosure of lawyer-client privileged communications, and the resultant issues of waiver and disqualification have been addressed by Florida courts more frequently in recent years, and in 2010, Fla. R. Civ. P. 1.285 was enacted, governing the inadvertent disclosure of privileged materials. It was amended effective January 1, 2011.¹³ The rule is self-explanatory. To preserve the privileges recognized by law, the party must serve written notice of the assertion of privilege on the party to whom the materials were disclosed, within 10 days of actually discovering the inadvertent disclosure.¹⁴ The rule sets forth the duty of the party receiving such notice;¹⁵ the right to challenge the assertion of the privilege;¹⁶ and, the effect of a determination that the privilege applies.¹⁷

Florida law has always required the recipient of inadvertently disclosed attorney-client privileged communications to act appropriately, or risk being disqualified from the case.¹⁸ An attorney who promptly notifies the sender and immediately returns the inadvertently produced materials without exercising any unfair advantage will, generally, not be subject to disqualification.¹⁹

The recipient still has the right to challenge the claimed privilege on the basis of waiver.²⁰ The rule does not set forth any specific test to determine whether a waiver occurred, however, the courts have addressed this issue in the past. To determine whether the privilege has been waived due to inadvertent disclosure, Florida courts will apply the "relevant circumstances" test. The test involves a factual determination, thus requiring an evidentiary hearing. The court must consider:

- (1) the reasonableness of the precautions taken to prevent inadvertent disclosure in view of the extent of document production;
 - (2) the number of inadvertent disclosures;
 - (3) the extent of disclosure;
 - (4) any delay and measures taken to rectify the disclosures;
- and

(5) whether the overriding interests of justice would be served by relieving a party of its error.^{[21](#)}

One should note the court's consideration of the "precautions taken to prevent inadvertent disclosure." As communications are more commonly transmitted by facsimile/e-mail, the prudent lawyer should carefully consider the protections in place (or not in place) at the recipient's location. For example, many facsimile terminals are used by large groups of people, and may not provide the necessary privacy for the transmission of privileged communications. Facsimile and e-mail communications should, at the very least, always include a lawyer-client privilege notice.^{[22](#)}

Attorneys should also remember that they have ethical duties when they send and receive electronic documents in the course of representing their clients. These ethical responsibilities are now issues in the practice of law where lawyers may be able to "mine" metadata from electronic documents. Lawyers may also receive electronic documents that reveal metadata without any effort on the part of the receiving attorney. Metadata is information about information and has been defined as information describing the history, tracking, or management of an electronic document.

Metadata can contain information about the author of a document, and can show, among other things, the changes made to a document during its drafting, including what was deleted from or added to the final version of the document, as well as comments of the various reviewers of the document. Metadata may thereby reveal confidential and privileged client information that the sender of the document or electronic communication does not wish to be revealed.

In response, The Florida Bar issued Ethics Opinion 06-2 (September 15, 2006), which provides as follows:

A lawyer who is sending an electronic document should take care to ensure the confidentiality of all information contained in the document, including metadata. A lawyer receiving an electronic document should not try to obtain information from metadata that the lawyer knows or should know is not intended for the receiving lawyer. A lawyer who inadvertently receives information via metadata in an electronic document should notify the sender of the information's receipt. The opinion is not intended to address metadata in the context of discovery documents.

Inadvertent disclosure does not always involve disclosure to the opposing party. Privileged materials may be inadvertently disclosed to a party's own expert. In that circumstance, a party does not automatically waive the privilege simply by furnishing protected or privileged material. The court will consider whether the expert relied upon the material in forming his or her opinion.²³

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¹³ Fla. R. Civ. P. 1.285 Inadvertent Disclosure of Privileged Materials.

¹⁴ Fla. R. Civ. P. 1.285(a).

¹⁵ Fla. R. Civ. P. 1.285(b).

¹⁶ Fla. R. Civ. P. 1.285(c).

¹⁷ Fla. R. Civ. P. 1.285(d).

¹⁸ See: *Atlas Air, Inc. v. Greenberg Traurig, P.A.*, 997 So. 2d 1117 (Fla. 3d DCA 2008).

¹⁹ *Abamar Housing & Development, Inc. v. Lisa Daly Lady Decor*, 724 So. 2d 572 (Fla. 3d DCA 1998); citing Fla. Bar Comm. On Professional Ethics, OP. 93-3.

²⁰ Fla. R. Civ. P. 1.285(c)(4).

²¹ *Lightbourne v. McCollum*, 969 So. 2d 326 (Fla. 2007).

²² See: *Nova Southeastern University, Inc. v. Jacobson*, 25 So. 3d 82 (Fla. 4th DCA 2009).

²³ *Mullins v. Tompkins*, 15 So. 3d 798 (Fla. 1st DCA 2009).

ITEM 10.03 | THIRD PARTY BAD FAITH ACTIONS

The lawyer-client privilege between an insurer, the insured and insured's counsel is not waived in a third party bad faith action. Since the insured is not the party bringing the action, it does not waive the privilege.²⁴

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²⁴ *Progressive v. Scoma*, 975 So. 2d 461 (Fla. 2d DCA 2007) (“Few evidentiary privileges are as jealously guarded as the attorney-client privilege. Permitting a third party who brings a bad faith claim to abrogate the attorney-client privilege previously held by the insured and insurer would seem to undermine the policy reasons for having such a privilege, such as encouraging open and unguarded discussions between counsel and client as they prepare for litigation.”).

ITEM 10.04 | EXAMINATION UNDER OATH

The lawyer-client privilege has been held to apply to an examination under oath ("EUO"), conducted by an insurer with its insured. The statements made during the examination were not discoverable in a subsequent criminal case involving the insured, and, the presence of criminal defense counsel at the EUO did not waive the privilege.²⁵

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²⁵ *Reynolds v. State*, 963 So. 2d 908 (Fla. 2d DCA 2007) ("The examination is part of the insurer's fact gathering for the dual purposes of (1) defending the insured, and (2) determining whether the policy covers the incident giving rise to the claim against the insured.").

ITEM 10.05 | REVIEW OF PRIVILEGED DOCUMENTS FOR DEPOSITION

Documents used to refresh testimony prior to testifying are discoverable unless otherwise privileged. Therefore, the use of lawyer-client privileged documents to refresh testimony prior to testifying does not waive the privilege. However, the privilege would be waived if the same documents were used to refresh testimony while testifying.²⁶

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Footnotes

²⁶ *Proskauer Rose v. Boca Airport, Inc.*, 987 So. 2d 116 (Fla. 4th DCA 2008).

APPENDIX

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