



PROGRAM MATERIALS

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The Seven Privileges: Protecting Confidentiality of Florida Defendants

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The Seven Privileges: Protecting Confidentiality of Florida Defendants

The Seven Privileges

Spousal communications privilege

Accident report privilege

Work product privilege

Mediation privilege

Medical information privilege

Privilege against self-incrimination

Attorney-client privilege

Privilege No. 1: Spousal Communications Privilege

Florida Statutes Section 90.504(1):

A spouse has a privilege during and after the marital relationship to refuse to disclose, and to prevent another from disclosing, communications which were intended to be made in confidence between the spouses while they were husband and wife.

“Communications . . . between the spouses while they were husband and wife”

State v. Norris, 352 So. 2d 875 (Fla. 3d DC 1977):

- Does not apply to observations
- Does not apply to pre-marriage communications

“Intended to be made in confidence”

Yokie v. State, 773 So. 2d 115 (Fla. 4th DCA 2000): presumed to be confidential absent evidence to contrary (nature of the message, circumstances under which it was delivered)

Hanger Orthopedic Group, Inc. v. McMurray, 181 F.R.D. 525 (M.D. Fla. 1998): business communications not intended to be confidential

“Intended to be made in confidence”

Boyd v. State, 17 So. 3d 812 (Fla. 4th DCA 2009): must have reasonable expectation of privacy

Hernandez v. State, 180 So. 3d 978 (Fla. 2015): not intended to be confidential when third parties present

Humphrey v. State, 979 So. 2d 283 (Fla. 2d DCA 2008): cell phone records not showing substance of communications are not protected

When and Who to Raise

Gonzalez v. State, 306 So. 3d 195 (Fla. 3d DCA 2020): can be raised even after one spouse's death

Statute: can be raised by either spouse

Waiver

Kerlin v. State, 352 So. 2d 45 (Fla. 1977): can be waived by communicating spouse

Tibado v. Brees, 212 So. 2d 61 (Fla. 1968): voluntarily testifying regarding communications at deposition waives privilege

Bolin v. State, 650 So. 2d 21 (Fla. 1995): instructing to ask my spouse may be enough for waiver, but one spouse taking deposition of the other does not in itself cause waiver

Statutory Exceptions

Proceeding by one spouse against the other

Two criminal contexts

- Proceeding where one spouse is charged with crime against the other
- Proceeding where offered in evidence by a defendant spouse

Privilege No. 2: Accident Report Privilege

Florida Statutes Section 316.066(4):

Except as specified in this subsection, each crash report made by a person involved in a crash and any statement made by such person to a law enforcement officer for the purpose of completing a crash report required by this section shall be without prejudice to the individual so reporting. Such report or statement may not be used as evidence in any trial, civil or criminal. . . .

Examples

Durse v. Henn, 68 So. 3d 271 (Fla. 4th DCA 2011): officer's opinion on which driver caused accident not admissible in part because based solely on statements at scene. Dinowitz v. Weinrub, 493 So. 2d 29 (Fla. 4th DCA 1986)

Hammond v. Jim Hinton Oil Co., 530 So. 2d 995 (Fla. 1st DCA 1988): includes diagram if based in part on statements

Stewart v. Draleaous, 226 So. 3d 990 (Fla. 4th DCA 2017): extends to all involved in accident, not just declarant

“Any statement”

State v. Edwards, 463 So. 2d 551 (Fla. 5th DCA 1985): does not cover officer's independent observations. Hammond v. Jim Hinton Oil Co., 530 So. 2d 995 (Fla. 1st DCA 1988); Hills v. Allstate Ins., 404 So. 2d 156 (Fla. 3d DCA 1981)

“Made by a person involved in the crash”

Sottilaro v. Figueroa, 86 So. 3d 505 (Fla. 2d DCA 2012): does not apply to observations of witness not involved in accident. Stewart v. Draleaus, 226 So. 3d 990 (Fla. 4th DCA 2017); Navarro v. Kohan, 566 So. 2d 895 (Fla. 4th DCA 1990); McTevia v. Schrag, 446 So. 2d 1183 (Fla. 4th DCA 1984)

“To a law enforcement officer”

City of Tamarac v. Garchar, 398 So. 2d 889 (Fla. 4th DCA 1981): does not cover statements overheard by officer at emergency room

“For the purpose of completing a crash report”

Spurlin v. Scheiner, 531 So. 2d 988 (Fla. 2d DCA): motorist’s failure to complain to officer of injury was privileged

Nash Miami Motors, Inc. v. Ellsworth, 129 So. 2d 704 (Fla. 3d DCA 1961): does not need to be actually used in the report to be privileged

McTevia v. Schrag, 446 So. 2d 1183 (Fla. 4th DCA 1984): does not cover statements not required to be made to officer. *State v. Coffey*, 212 So. 2d 632 (Fla. 1968); *McTevia v. Schrag*, 446 So. 2d 1183 (Fla. 4th DCA 1984); *Porter v. Pappas*, 368 So. 2d 909 (Fla. 3d DCA 1979); *Standley v. White*, 326 So. 2d 68 (Fla. 1976)

Waiver

Dinowitz v. Weinrub, 493 So. 2d 29 (Fla. 4th DCA 1986): privileged not waived merely by calling officer to testify

Application to Pre-Trial Discovery

Selected Risks Ins. v. White, 447 So. 2d 455 (Fla. 4th DCA 1984):
written statement privileged from discovery

Anderson v. Mitchell, 300 So. 3d 693 (Fla. 2d DCA 2019): applies to
admission at trial, not discovery

Privilege No. 3: Work Product

Florida Rule of Civil Procedure 1.280(b)(4):

a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that party's representative, including that party's attorney, consultant, surety, indemnitor, insurer, or agent, 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.

Incident Reports

United States Sugar Corp. v. Estate of Mullins, 211 So. 3d 110 (Fla. 4th DCA 2017): lawsuit need not be filed

Universal City Property Management v. Sevdinoglou, 658 So. 2d 1062 (Fla. 5th DCA 1995): incident reports. Royal Caribbean Cruises, Ltd. v. Doe, 964 So. 2d 713 (Fla. 3d DCA 2007); Scotty's, Inc. v. Olivieri, 713 So. 2d 1020 (Fla. 5th DCA 1998); Albertsons, Inc. v. Howells, 518 So. 2d 291 (Fla. 2d DCA 1997); Sears, Roebuck and Co. v. Scott, 481 So. 2d 968 (Fla. 4th DCA 1986)

Incident Reports

District Board of Trustees v. Chao, 739 So. 2d 105 (Fla. 3d DCA 1999): still protected despite containing plaintiff's un-adopted statement

Intercontinental Properties, Inc. v. Samy, 685 So. 2d 1035 (Fla. 3d DCA 1997): reports of other incidents not discoverable when information can be obtained in other ways

Martin v. Lea of Broward, Inc., 890 So. 2d 1244 (Fla. 4th DCA 2005): produce it if you want to use it at trial

Photographs / Videofootage

Waste Management, Inc. v. Florida Power & Light Co., 571 So. 2d 507
(Fla. 2d DCA 1990)

The Special Case of Store Surveillance

Richardson v. State, 228 So. 3d 131 (Fla. 4th DCA 2017); Target Corp. v. Vogel, 4 So. 3d 962 (Fla. 4th DCA 2010): the case for production

Dodson v. Persell, 390 So. 2d 704 (Fla. 1980); Business Telecommunications Svs., Inc. v. Madrigal, 265 So. 3d 676 (Fla. 3d DCA 2019); Hankerson v. Wiley, 154 So. 3d 511 (Fla. 4th DCA 2015); McClulre v. Publix Super Markets, Inc., 124 So. 3d 998 (Fla. 4th DCA 2013); St. Farm and Cas. Co. v. H Rehab, Inc., 56 So. 3d 55 (Fla. 3d DCA 2011): the case against production

Some real-life dispositions

Insurance Claims Files

Liberty Mut. Fire Ins. v. Kaufman, 885 So. 2d 905 (Fla. 3d DCA 2004):
claims / litigation files. Cavallere v. Graham, 432 So. 2d 756 (Fla. 5th
DCA 1983); Utica Mut. Ins. v. Croft, 432 So. 2d 196 (Fla. 1st DCA 1983)
Allstate Indem. Co. v. Ruiz, 899 So. 2d 1121 (Fla. 2005); Genovese v.
Provident Life and Accident Ins., 74 So. 3d 1064 (Fla. 2011):
exceptions for first party and bad faith

The “Special” Case of Background / Social Media Checks

REQUEST FOR PRODUCTION NO. 10:

Copies of all claim forms, accident or incident reports, lawsuit papers, health care records, Autotrax reports, claim history detail reports or any other document that evidence any personal injury or permanent injury or disability sustained by Plaintiff prior or subsequent to the accident that is the subject of this case.

RESPONSE:

██████████ will produce to Plaintiff copies of all nonparty records for which Plaintiff files a request for copies. Beyond this, ██████████ objects to this request because it is vague, ambiguous, overbroad and encompasses items protected from production from the work product doctrine. Plaintiff already knows the information sought here, and the only purpose of this request is for Plaintiff to assess the extent of ██████████’s investigation into Plaintiff’s legal claims.

Rule 1.280(b)(4) Backstop

In ordering discovery of the materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

Privilege No. 4: Mediation Privilege

Florida Statutes Section 44.405(1):

Except as provided in this section, all mediation communications shall be confidential. A mediation participant shall not disclose a mediation communication to a person other than another mediation participant or a participant's counsel.

Examples

Drummond v. Zimmerman, 454 F. Supp. 3d 1207 (S.D. Fla. 2020): mediation communications in motion violate the privilege. Abrams-Jackson v. Avossa, 282 F. Supp. 3d 1268 (S.D. Fla. 2017)

Moultroup v. Geico, 2020 WL 5372296 (Fla. 4th DCA 2020): especially useful in bad faith cases

Sanctions for Violating

Florida Statutes Section 44.405(1):

A violation of this section may be remedied as provided by s. 44.406. If the mediation is court ordered, a violation of this section may also subject the mediation participant to sanctions by the court, including, but not limited to, costs, attorney's fees, and mediator's fees.

Exceptions (Part One)

Florida Statutes Section 44.405(4):

Notwithstanding subsections (1) and (2), there is no confidentiality or privilege attached to a signed written agreement reached during a mediation, unless the parties agree otherwise, or for any mediation communication:

1. For which the confidentiality or privilege against disclosure has been waived by all parties;
2. That is willfully used to plan a crime, commit or attempt to commit a crime, conceal ongoing criminal activity, or threaten violence;
3. That requires a mandatory report pursuant to chapter 39 or chapter 415 solely for the purpose of making the mandatory report to the entity requiring the report;

Exceptions (Part Two)

4. Offered to report, prove, or disprove professional malpractice occurring during the mediation, solely for the purpose of the professional malpractice proceeding;
5. Offered for the limited purpose of establishing or refuting legally recognized grounds for voiding or reforming a settlement agreement reached during a mediation; or
6. Offered to report, prove, or disprove professional misconduct occurring during the mediation, solely for the internal use of the body conducting the investigation of the conduct.

Privilege No. 5: Medical Information

Florida Constitution, Article I, Section 23: right to privacy encompasses medical information. *Poston v. Wiggins*, 112 So. 3d 783 (Fla. 1st DCA 2013); 45 CFR Part 160 and 164, Subparts A and E.

Florida Statutes Section 395.3025(4)(d), 456.057(7)(a): when a plaintiff sues for personal injuries, disclosure allowed because medical condition placed at issue

Poston v. Wiggins, 112 So. 3d 783 (Fla. 1st DCA 2013): when sought from a defendant, court must use Rule 1.280 balancing test

Balancing Test

McEnany v. Ryan, 44 So. 3d 245 (Fla. 4th DCA 2010): plaintiff must proffer a sufficient link between issues in lawsuit and medical information sought. Bergmann v. Freda, 829 So. 2d 966 (Fla. 4th DCA 2002)

McEnany v. Ryan, 77 So. 2d 921 (Fla. 4th DCA 2012): round two

James v. Veneziano, 98 So. 3d 697 (Fla. 4th DCA 2012): must be narrowly tailored. Rodriguez v. Smith, 141 So. 3d 217 (Fla. 3d DCA 2014)

Florida Supreme Court Approved Interrogatories to Defendants

Were you suffering from physical infirmity, disability or sickness at the time of the incident described in the complaint? If so, what was the nature of the infirmity, disability or sickness?

Do you wear glasses, contact lenses or hearing aids? If so, who prescribed them, when were they prescribed, when were your eyes or ears last examined, and what is the name and address of the examiner?

Florida Supreme Court Approved Interrogatories to Defendants

Did you consume any alcoholic beverages or take any drugs or medications within 12 hours before the time of the incident described in the complaint? If so, state the type and amount of alcoholic beverages, drugs or medication which were consumed, and when and where you consumed them.

Privilege No. 6: Privilege against Self-Incrimination

Fifth Amendment to U.S. Constitution: no person “shall be compelled in any criminal case to be a witness against himself.”

Magid v. Winter, 654 So. 2d 1037 (Fla. 4th DCA 1995): must have reasonable grounds to believe answers can prove elements of crime

Meek v. Dean Witter Reynolds, Inc., 458 So. 2d 412 (Fla. 4th DCA 1984): must show realistic probability answers will be used against him

The Tradeoff

Fernandez v. Blue Sky/Venecia Food Corp., 40 So. 3d 779 (Fla. 1st DCA 2010): court has multiple tools for compensating

- Stay of case
- Adverse inference

Privilege No. 7: Attorney-Client Privilege

Florida Statutes Section 90.502(c):

A communication between lawyer and client is “confidential” if it is not intended to be disclosed to third persons other than:

1. Those to whom disclosure is in furtherance of the rendition of legal services to the client.
2. Those reasonably necessary for the transmission of the communication.

Insured Clients

Progressive Exp. Ins. Co. v. Scoma, 975 So. 2d 461 (Fla. 2d DCA 2007): applies to tripartite relationship. United Svs. Auto. Assoc. v. Law Offices of Herssein and Herssein, P.A., 233 So. 3d 1224 (Fla. 3d DCA 2017).

Client Intermediaries

Gerheiser v. Stephens, 712 So. 2d 1252 (Fla. 4th DCA 1998):
encompasses family members and others acting as client's agent

Joint Defense

Asplundh Tree Expert Co. v. Barnes, 689 So. 2d 1200 (Fla. 4th DCA 1997): applies across defendants who share common interests, joint defenses , pooled information, etc. Visual Scene, Inc. v. Pilkington Bros., plc, 508 So. 2d 487 (1987)

Thank you



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