

## CHAPTER 3

### ATTORNEY-CLIENT PRIVILEGE

A nursing professional who is the subject of any disciplinary proceeding, any investigation, or any significant legal matter should immediately retain an experienced health care attorney for representation during every phase of the proceedings. Always obtain your own personal attorney to represent you; do not accept the hospital's attorney or the corporation's attorney as you have no assurance your own personal interests will be protected. This chapter focuses on the communications a nursing professional (the client) has with his or her attorney, how to protect the confidentiality of that information and the circumstances that must exist to prevent disclosure of those communications.

Communications between attorneys and their clients are confidential and privileged under both Florida law and Federal law. If a communication is privileged, neither the client nor the client's attorney may be required to disclose the communication in any proceeding. In addition, the client may prevent others from disclosing the communication. Florida's attorney-client privilege is set forth in Section 90.502, Florida Statutes. This statute provides the rules for determining whether a communication is privileged.

#### **I. THE PRIVILEGE**

Section 90.502(2), Florida Statutes, part of the Florida Evidence Code, states the privilege as it applies in Florida. The statute states in relevant part:

A client has a privilege to refuse to disclose, and to prevent any other person from disclosing, the contents of confidential communications when such other person learned of the communications because they were made in the rendition of legal services to the client.

Under the statute, the client holds the privilege, which means it is generally up to the client to exercise the privilege (i.e., to refuse or prevent disclosure). However, the client's attorney may claim the privilege on behalf of the client in some circumstances, discussed more fully below.

A client or attorney may only refuse or prevent disclosure of certain types of communications. The requirements for deeming a communication “privileged” are discussed below.

#### **II. DEFINITIONS**

Section 90.502(1), Florida Statutes, provides the relevant definitions for deciding whether a communication is protected by Florida law.

**A. THE PARTIES INVOLVED**

- (1) A lawyer is a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation.
- (2) A "client" means any person, public officer, corporation, association, or other organization or entity, either public or private, who consults a lawyer for the purpose of obtaining legal services or who is rendered legal services by a lawyer.

**B. WHAT IS A CONFIDENTIAL COMMUNICATION?**

In order to be privileged or protected, a communication must not only be between a lawyer and a client but the communication must also be confidential. Section 90.502(c), Florida Statutes, defines confidential communications. The statute states in relevant part:

- (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.

**C. THE ATTORNEY WORK-PRODUCT PRIVILEGE**

There is a separate privilege that is similar to and often confused with the attorney-client privilege. This is the litigation work-product privilege (sometimes referred to as the "attorney work-product privilege"). The litigation work-product privilege protects any work that is done to investigate or prepare a certain matter for litigation, even if there is no claim or litigation pending. The theory upon which this privilege is based is that if a company (or its agents or attorneys) goes to the expense of investigating and preparing for possible litigation, the other side should not be allowed to take unfair advantage of this by having access to this information. It should be required to do its own work and spend its own money to prepare its own case. There is no statute that recognizes this privilege; however, it is widely recognized by both federal and state courts.

This privilege is very widely applied, however, and is not limited to just the work-product of attorneys. For example, this privilege serves to protect incident reports, safety investigations and other similar investigations and reports prepared by a company because there may be a claim, complaint or litigation that occurs as a result of the incident investigated. For example, Beverly Enterprises, Inc. v. Olvera, 734 So.2d 589 (Fla. 5th DCA 1999) is a Florida case recognizing the work-product privilege for

a risk management investigation performed by a nurse in a facility in order to complete an incident report. (A copy of this case is provided as an appendix to this Chapter.) This privilege will also apply to protect the work done by your insurance company or its claims managers or investigators as a result of the report of a claim, potential claim or adverse incident.

### **III. WHO MAY CLAIM THE PRIVILEGE**

The attorney-client privilege may be claimed by several people under Section 90.502(3), Florida Statutes. First, the client may claim the privilege. For incompetent clients, a guardian or conservator of the client may exercise the privilege. If the client is deceased, his or her personal representative may assert the privilege.

If the client is a business entity, the privilege may be claimed by a successor, assignee, trustee in dissolution, or any similar representative of an organization, corporation, or association or other entity, either public or private, whether or not in existence. For a business entity, the claim is made by its officers, directors, manager, agent, or other corporate official.

The client's lawyer may only exercise the privilege in the limited circumstances provided under Section 90.502(3)(e), Florida Statutes. The attorney may only exercise the privilege on behalf of the client. The lawyer's authority to claim the privilege is presumed in the absence of contrary evidence. An example of when an attorney may claim the privilege on behalf of a client is when an attorney is called to testify. If called to testify, an attorney may refuse to answer when asked to divulge information that he or she believes in good faith to be a privileged communication. However, in some circumstances, a court can require the attorney to testify and disclose the privileged communication.

### **IV. LIMITATIONS ON THE ATTORNEY-CLIENT PRIVILEGE**

The scope of the attorney-client privilege is limited. As discussed above, the privilege only applies to confidential communication between attorney and their clients. In addition, the privilege does not apply to all confidential communication. The courts will not find a communication to be privileged in the circumstances set forth in Section 90.502(4), Florida Statutes. The statute states in relevant part:

- (4) There is no lawyer-client privilege under this section when:
  - (a) The services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew was a crime or fraud.
  - (b) A communication is relevant to an issue between parties who claim through the same deceased client.

(c) A communication is relevant to an issue of breach of duty by the lawyer to the client or by the client to the lawyer, arising from the lawyer-client relationship.

(d) A communication is relevant to an issue concerning the intention or competence of a client executing an attested document to which the lawyer is an attesting witness, or concerning the execution or attestation of the document.

(e) A communication is relevant to a matter of common interest between two or more clients, or their successors in interest, if the communication was made by any of them to a lawyer retained or consulted in common when offered in a civil action between the clients or their successors in interest.

You do not waive the privilege by allowing your insurance company or another who pays for your attorney's fees or your legal defense expenses to obtain information from your attorney. However, this should always be in writing and there should be an express agreement and statement regarding the fact that the information is being provided to ensure payment, is for a limited purpose, and does not constitute a waiver. Most insurance companies and defense attorneys will have such agreements available.

## **V. JOINT DEFENSE PRIVILEGE**

Several or more individuals who are defendants in a case (civil, criminal or administrative) may, through their attorneys agree to cooperate with each other, to share information, evidence, documents and expenses, without waiving the attorney-client privilege. This allows individuals with similar interests to work together and cooperate in defending themselves. It will also allow a more comprehensive, integrated defense and lowers the legal costs in a case. There is no legal requirement that such an agreement be in writing. However, a written agreement is highly recommended and may be expected in federal cases. You should not agree to this except through your own personal attorney.

A sample "Joint Defense Agreement" is included as an Appendix to this chapter. Please note the warning that appears at the beginning of this book. This form, like all others in this book, is being provided for illustration purposes only. Any such forms must be tailored to the specific facts and circumstances of the individual case by a qualified attorney who is familiar with such matters.

**VI. DON'T "BLOW" THE ATTORNEY-CLIENT PRIVILEGE**

It is easy to "blow" or waive your attorney-client privilege. If you yourself do not treat the communications as confidential, then the law will not require anyone else to treat the communication as confidential. Therefore, never:

1. Discuss confidential information that you have disclosed to your attorney in the presence of any outside party, including your employer;
2. Give copies of any documents that you have provided to your attorney to an outside party.
3. Bring an outside party to a meeting with your attorney or allow one to be included in the meeting (including your spouse or significant other). An exception applies to others who are agents of your attorney, who are working for your attorney or who may be sharing in the defense of your case (see "Joint Defense Privilege" above).

If you should have a question regarding the confidentiality of your conversations, you should consult with your health care attorney.

**VII. CONCLUSION**

The definition of the attorney-client privilege is narrow. As discussed above, the communication must meet the definition of "confidential," not fall within one of the exceptions under the statute and be between a person or entity considered to be a client and his, her or its attorney. If the communication is not privileged, a client or his attorney may not prevent disclosure of the communication and must testify regarding the communication if asked. Due to the limitations imposed by the statute, a client should always take precautions to ensure that any communication with an attorney is made in a confidential fashion. Make sure that there are no other persons who can overhear or see communications with your attorney. Make sure that any letters, memos or correspondence with your attorney is marked "CONFIDENTIAL." Protect the confidentiality of your communications with your attorney and the law will, too.