

CHAPTER SEVEN

LITIGATION PROCEDURES, PUBLIC RECORDS, TESTIFYING

7.0 **Introduction**

When a case goes into litigation, Department enforcement personnel play a role different than that played when they investigate a case. The Department attorney becomes the case manager, and enforcement personnel must coordinate all actions taken in the case with the attorney. Transferring a case to OGC does not mean “OGC will handle it from now on,” and the District’s responsibilities are over, however. Enforcement personnel must be able to testify about what they know in order to convince the authority deciding the case of the correctness of the Department's position. In addition to testifying, enforcement personnel must be ready to conduct further investigation, assist in preparing the case for trial or hearing, evaluate settlement proposals, track down witnesses and documents, and perform other activities that are necessary for successful litigation.

7.1 **Communication with the Opposing Lawyer and Party**

After a petition for formal hearing in response to an NOV has been sent to DOAH or judicial proceedings have been initiated, Department employees should not discuss any aspect of the case with the opposing lawyer or party without the knowledge and express consent of the Department lawyer handling the case. Communications between lawyer and client are confidential, but the privilege to keep those communications private is waived if they are discussed with persons who are not employed by the Department. Inquiries made to the district office by the opposing party or his attorney must be referred to the Department attorney for response, unless the Department attorney expressly approves some other arrangement. If direct

communications occur between Department staff and the opposing party, the Department attorney should be notified of the date, nature, and substance of the communication as soon as possible.

7.2 Public Records

Section 119.01, Florida Statutes, provides that it is the policy of the state that "all state, county, and municipal records shall at all times be open for a personal inspection by any person." "Public records" are defined by the statute as "all documents, papers, letters, maps, books, tapes, photographs, films, sound recording or other material, regardless of physical form or characteristics, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency." With limited exceptions, all Department records are open for inspection upon demand.

7.2.1 Exemptions from the Public Records Act

The Department may keep certain records confidential. These records fall into four principal classes and are described in the following sections:

(1) documents that involve trade secrets or certain confidential business information provided to the Department;

(2) documents containing information revealing the identity of a confidential informant or a confidential source;

(3) attorney "work product" documents; and

(4) documents created as part of a criminal investigation.

7.2.1.1 Trade Secrets

Section 403.111, Florida Statutes, makes confidential "any information, other than effluent data, relating to secret processes, which may be required, ascertained, or discovered by

inspection or investigation . . ." This exemption protects such records from ordinary disclosure, but not from disclosure in enforcement proceedings to prosecute violations of Chapter 403. That section requires that the person supplying the information must request that the Department keep the information confidential and explain the reasons for the request. The Department attorney should always be consulted before a determination is made as to whether such information should be disclosed.

7.2.1.2 Confidential Informants

The Department frequently receives reports of possible violations from citizens who do not want their identities revealed. The identity of such informants can be protected from disclosure pursuant to the Public Records Act.

Records that identify confidential informants should be kept secure and separate from other Department files, and they should not be released without express permission of the Department attorney. A note should be placed in files relating to the subject of the informant's statement indicating where the confidential statement is filed.

7.2.1.3 Attorney "Work Product"

Attorney "work product" is information obtained or prepared in anticipation of litigation by a party, his attorney, or other representative. Work product materials generally cannot be discovered in litigation, but are only exempt from disclosure if the records reflect a mental impression, conclusion, litigation strategy, or legal theory of the attorney or agency that was prepared exclusively for or in anticipation of civil, criminal, or adversarial administrative proceedings. The document can be created by the attorney or by someone else if they are directed to do so by the attorney. Only the attorney makes the determination that a record is work product. Whenever there is a question about whether a record is privileged, the doubt will

be resolved in favor of releasing the record. All documents that are confidential should be clearly marked and filed in a manner that will prevent them from being disclosed inadvertently.

A good example of an attorney work product document that the district staff will routinely be involved with is the Case Report. At the request of OGC, the Case Report is prepared by the Department staff as a matter of standard operating procedure for any case in which the district is requesting a complaint or petition for enforcement be filed in court. The portion of the Case Report that is written by the Department staff can be kept confidential. However, if the documents attached to the Case Report are not prepared at the express direction of the attorney, they will most likely not be exempt from disclosure. After litigation is concluded, the Public Records law no longer protects work product documents. If the Department staff has any questions about what should be disclosed, OGC should be consulted.

7.2.1.4 Criminal Investigation Documents

Any documents created by Department staff as part of an ongoing criminal investigation are exempt from disclosure under the Public Records Act. Documents that are compiled or gathered by Department or law enforcement staff for use in a criminal investigation or prosecution are not exempt unless the documents were actually created during the criminal investigation. For example, inspection reports created by Department staff prior to a criminal investigation are not exempt even if they are requested and used by the state attorney's office.

7.2.2 Draft Documents

The most confusion about public records seems to concern draft documents. Many people are under the mistaken belief that if a document is in draft, it does not have to be disclosed, but whether a document is a draft is not determinative of whether it has to be disclosed in response to a public records request. All draft documents concerning the business of the

agency that are intended to communicate information to another person are public records that must be disclosed unless they meet the criteria for one of the specific exemptions discussed above.

For example, a draft consent order that is reviewed by another employee or another party is a public record that would have to be disclosed in response to a public records request. It does not matter how rough the draft is. If the draft consent order is only going to be used or reviewed by the person drafting it, however, it is not a public record, and it would not have to be disclosed. This might occur if an initial draft is prepared that is to be used by the drafter to prepare a later draft, which will then be reviewed by others.

7.3 Subpoenas

At some time, you may be served with a subpoena. A subpoena is a legal document issued by the Division of Administrative Hearings or a Circuit or County Court commanding you to appear at a certain time and place to testify or produce certain documents. Subpoenas may be issued in administrative, civil, and criminal proceedings. They may be issued for deposition, for testimony at trial, or to produce documents either alone or in conjunction with testimony.

If you receive a subpoena for any case where you are called to testify in your official capacity as a Department employee, notify your attorney immediately and send him or her a copy of the subpoena. It is not likely that you can avoid testifying even if you do not know anything about the case. If you have any questions, you should contact an enforcement attorney. If a check for witness fees accompanies the subpoena, the check should be transmitted to Finance and Accounting for handling.

7.4 Preparation for Hearing

The attorney should prepare witnesses for hearing by going over the case and reviewing questions prior to the hearing. The Department witnesses should review their files prior to testimony and prior to preparation with the Department attorney. The following are suggestions for witnesses:

7.4.1 Before Testifying

If you are going to testify concerning records, review the records carefully. You should know what the records contain and be able to refer to them easily. This is especially important if you are asked to authenticate or verify the records.

If you are going to testify concerning some event that happened months or even years before, try to refresh your recollection. Talking with friends or co-workers who were there may help you to recall details that you had forgotten. However, do not try to develop a common story. Your testimony must state what you recall, not what somebody else remembers.

7.4.2 Day of the Hearing

- (a) Please dress neatly. Business attire is recommended. Appearances do count.
- (b) If you have received a subpoena, take it with you.
- (c) Avoid any undignified behavior, such as loud laughter, from the moment you enter the hearing room. Smoking and eating are not permitted in the hearing room itself.
- (d) Take your personal notes or records concerning the case with you to the hearing so that you may refer to them to refresh your memory. However, those notes can be reviewed by the opposing party and their attorney.

7.4.3 When You are on the Stand

- (a) When you are called as a witness, try not to be nervous. There is no reason to be nervous.

(b) While you are on the witness stand, you are sworn to tell the truth. Tell it! The Department does not want it any other way.

(c) Do not cover your mouth with your hand. Speak clearly and loudly enough so that you can be heard.

(d) There is no need to memorize your testimony beforehand. Memorization is likely to make your testimony sound "pat" and unconvincing. Be yourself.

(e) Listen carefully to each question and make sure you understand it before you start to answer. Pause before you answer. This will allow you to collect your thoughts and give your attorney time to object to the question, where needed. This is harder than you think. Concentrate. Have the question repeated if necessary. If you still do not understand it, say so. Never answer a question that you do not fully comprehend or before you have thought your answer through.

(f) Answer directly and simply, with a "yes" or "no" if possible. Answer only the question asked. Do not volunteer additional information that is not requested. Otherwise, your answer may become legally objectionable or may cause you to appear biased. If, however, an explanation is required, say so. Sometimes an attorney will try to limit you to a "yes" or "no" answer. If that happens, simply say that you cannot answer the question "yes" or "no".

(g) State the facts that you yourself have observed, not what someone else told you. You cannot give your conclusions or opinions unless you are qualified as an expert and the opinion is within your field of expertise. Usually, you will be unable to testify about what someone else told you.

(h) When at all possible, give positive, definite answers. Avoid saying "I think," "I believe," or "I assume," when you actually know the facts. If you do not know or are not sure of the

answer, say so. Never guess or assume facts to be correct or incorrect. There is absolutely nothing wrong with saying "I don't know." You can be positive about the important things without remembering all the details. If you are asked about little details that you do not remember, just answer that you do not recall.

(i) Do not exaggerate. Avoid overboard generalizations. You may have to retract them later. Be wary of a question that begins, "Wouldn't you agree that...?" Absolutes like "always" and "never" are dangerous and should be used rarely, if at all. Leave yourself an out without sounding wishy-washy.

(j) If your answer was wrong or unclear, correct it immediately. It is much more desirable to correct a mistake yourself than to have the opposing attorney discover an error in your testimony. If you realize that you have answered incorrectly, say, "May I correct something I said earlier?" Or say, "I realize now that something I said earlier should be corrected."

(k) Stop instantly when the judge interrupts you or when an attorney poses an objection. Do not try to sneak in an answer.

(l) Always be polite even if the attorney is not. Do not be argumentative or sarcastic. Do not show anger. In fact, try very hard not to let the opposing attorney make you angry or upset you in any way.

(m) Do not let an attorney rattle you. If you are sure of your testimony, stick to it.