

11.2 SAMPLE MOTION MEMORANDUM OF LAW

SUPERIOR COURT OF MAJOR,  
JAMNER COUNTY

GLENNA WASHINGTON,	)	
	)	No. 7-43-20XX
Plaintiff,	)	
	)	
v.	)	DEFENDANT PROUST’S MOTION
MARC PROUST,	)	FOR PROTECTIVE ORDER
	)	
Defendant.	)	
_____	)	

I. RELIEF REQUESTED

Defendant Marc Proust respectfully requests that the Court grant Defendant’s Motion for a Protective Order prohibiting Plaintiff Washington from discovering the psychological treatment records of Defendant Marc Proust.

II. STATEMENT OF THE CASE

A complaint alleging negligent operation of a vehicle and resulting personal injury and property damage was filed in the Major Superior Court on November 1, 20XX-1 by Plaintiff, Glenna Washington. Plaintiff’s request for a jury trial accompanied her complaint. On December 7, 20XX-1, Defendant Marc Proust filed an answer and a counter-claim, also alleging negligence. The parties are currently in the process of discovery. No trial date has yet been set.

III. STATEMENT OF THE FACTS

This memorandum is in support of defendant Marc Proust’s motion for a Protective Order to protect the medical records of Proust’s psychological treatment from discovery by plaintiff Glenna Washington in the action of *Washington v. Proust*.

*Washington v. Proust* arises from a rear-end collision which occurred on September 12, 20XX-1. Washington is claiming personal injury and property damages totaling \$25,000, and special damages of \$5,600. Proust denies any liability and is counterclaiming for \$1,500 property damage.

Plaintiff Washington sent defendant Proust interrogatories and a request for production of documents. Interrogatory no. 10(E) requested production of the following items:

- All medical bills, statements, narrative medical reports, hospital records, medical test results, receipts for prescriptions, written documents, notes

and other materials concerning the defendant's injuries and/or damages as a result of the incident which is the subject matter of this lawsuit.

A copy of the request is attached as Exhibit B. Defendant Proust has fully complied with this overly broad request, with the exception of notes and evaluations made in the course of Proust's psychological treatment under Dr. Johnson. It should be noted that Proust, totally unrelated to this case, is currently undergoing psychological treatment with Dr. Joaquin Johnson, a licensed psychologist. Proust has been under Dr. Johnson's care for the past three years for treatment of arachnophobia, the unreasonable fear of spiders. (Exhibit C.)

Proust seeks to prevent disclosure of these documents on the following grounds: 1) the notes and evaluations are not relevant to the subject matter of the action pursuant to Court Rule 26(b)(1); and 2) the notes and evaluations are privileged matter pursuant to Civil Rule 26(b)(1). Alternatively, Proust seeks to prevent disclosure of the notes and to limit the disclosure of the evaluations to an *in camera* examination pursuant to Civil Rules 26(c)(1)(B) and 26(c)(1)(D).

#### IV. ISSUE PRESENTED

Where the psychological treatment records of Marc Proust are unrelated to the cause of action and are privileged should a protective order be granted to prohibit discovery of those records?

#### V. ARGUMENT

##### A. THE NOTES AND EVALUATIONS ARISING OUT OF PSYCHOLOGICAL THERAPY ARE PRIVILEGED AND IRRELEVANT TO THE PENDING ACTION.

Civil Rule 26(b)(1) provides:

Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense ...

A party may not discover privileged matter or matter irrelevant to the action. To ensure that such matters are not disclosed, a party may bring a motion for a Protective Order pursuant to Civil Rule 26(c)(1), which provides:

A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending—or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: ... (B) specifying terms,

including time and place, for the disclosure or discovery; ... (D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters ...

Thus, the court may order that discovery of certain matters be prohibited, or limited in scope, or both.

#### B. THE NOTES AND EVALUATIONS ARE NOT RELEVANT TO THE ACTION

The threshold test for discovery is relevance to the pending action. Civil Rule 26(b)(1) requires that the matter sought to be discovered be relevant to the subject matter of the pending action. Proust's mental condition is not an issue in the action, nor does his mental condition bear on a claimed issue or defense. The documents arising out of psychological therapy simply are not relevant to this action.

#### C. THE PSYCHOLOGICAL/PATIENT PRIVILEGE

Once the psychologist/patient privilege attaches, pretrial discovery as to the privileged matter is prohibited. *Clark v. Dist. Ct.*, 668 Maj.2d 3 (1983). Dr. Johnson is a licensed psychologist in the State of Major. His relationship with Proust is a psychologist/patient relationship. Moreover, notes and evaluations arising out of such therapy are protected by this privilege.

Effective diagnosis and treatment require protecting the patient from the embarrassment and humiliation caused by the psychologist's disclosure of information revealed during therapy. *Bond v. Dist. Ct.*, 682 Maj.2d 33, 38 (1984). The affidavit of Dr. Johnson, Exhibit C, discussing the nature of Proust's therapy states:

Because his initial childhood trauma and subsequent manifestations are so very personal, successful treatment necessarily depends on Proust's sense of security and confidentiality in his communication with me.

Dr. Johnson emphasizes that Proust's therapy would be severely impaired by disclosure of the notes and evaluations of treatment. Further, current and future treatment would be impaired by a loss of confidentiality.

The privilege may be waived by the patient. *Clark* at 8. The patient has waived the privilege when he has "injected his mental condition into the case as a basis of a claim or an affirmative defense." *Clark* at 10. Proust has not waived the psychologist/patient privilege and the notes and evaluations arising out of that relationship are privileged and not discoverable.

#### D. ALTERNATIVELY, THE COURT MAY EXAMINE THE EVALUATIONS *IN CAMERA*

If the court finds that the evaluations are not protected by the psychologist/patient privilege or that the evaluations are relevant to the action, we request an *in camera* examination of the evaluations by the court.

Civil Rule 26(c)(1) provides:

A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending ... The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: ... (B) specifying terms, including time and place, for the disclosure or discovery ... (D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters[.]

There is sufficient cause to limit the disclosure of the documents. Dr. Johnson's affidavit emphasizes the personal and potentially embarrassing nature of the therapy. Dr. Johnson also warns that disclosure of the documents is likely to severely impair the current psychologist/patient relationship as well as future treatment. By limiting disclosure to an *in camera* examination of the documents, the dangers arising from complete disclosure are mitigated.

The notes taken during therapy may be misleading because they express the thoughts and observations of Dr. Johnson during treatment. While we request that the evaluations should also be protected, the notes are far less dispositive and are potentially more destructive to Proust's therapy than the evaluations. The evaluations provide a more accurate estimate of Proust's mental condition.

Thus, we request that the court examine the evaluations *in camera*, since a wrongful disclosure of the evaluations would cause unwarranted damage to Proust's therapy that could not be cured on appeal.

#### VI. CONCLUSION

Court Rule 26 prohibits discovery of privileged matters that are irrelevant to the action. Likewise, the Rule limits discovery when a party is likely to be unduly oppressed or embarrassed. Thus, the Rule enables all relevant matter to be discovered while ensuring that parties will not be discouraged from necessary litigation by the fear that every aspect of their lives will be scrutinized. Since the records of psychological treatment are unrelated to this action, the motion for a Protective Order should be granted.

DATED: February 19, 20XX.

*B. Y. Davis, P.S.*

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