

**HOUSE OF REPRESENTATIVES STAFF ANALYSIS**

**BILL #:** HB 263                      Psychotherapist-Patient Privilege  
**SPONSOR(S):** Ross  
**TIED BILLS:** none                      **IDEN./SIM. BILLS:** none

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REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Judiciary	14 Y, 5 N	Jaroslav	Havlicak
2)			
3)			
4)			
5)			

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**SUMMARY ANALYSIS**

The Florida Evidence Code provides a rule of evidence known as psychotherapist-patient privilege. This privilege makes communications or records made for the purpose of diagnosing or treating mental or emotional health conditions inadmissible as evidence, although the privilege may be waived. This bill extends the psychotherapist-patient privilege to cover communications with and records of licensed advanced registered nurse practitioners who are certified in the mental health field and who are engaged in clinical practice primarily involving mental health treatment.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. DOES THE BILL:

- |                                      |                              |                             |   |
|--------------------------------------|------------------------------|-----------------------------|---|
| 1. Reduce government?                | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 2. Lower taxes?                      | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. Expand individual freedom?        | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. Increase personal responsibility? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. Empower families?                 | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a “no” above, please explain:

#### B. EFFECT OF PROPOSED CHANGES:

##### Psychotherapist-Patient Privilege

Rules of evidence determine what information can, and cannot, be admitted for use in civil and criminal judicial proceedings. Historically, courts developed these rules over time as common law. Among these were various rules called privileges that, for policy reasons, allowed witnesses to refuse to testify about their private communications with someone else with whom they shared a relationship that the courts regarded as important. Examples that arose under common law include the relationship between attorney and client; clergy and penitent; and husband and wife.<sup>1</sup>

The Florida Evidence Code (“the Code”), ch. 90, F.S., became effective July 1, 1979.<sup>2</sup> Included among its provisions was a psychotherapist-patient privilege first enacted in narrower terms fourteen years earlier.<sup>3</sup> Courts have stated that the purpose of the privilege “is to enable a person suffering from mental, emotional, or behavioral disorders, to seek services and treatment without being needlessly exposed to public scrutiny, as it is clearly to society’s advantage to encourage people experiencing such problems to obtain assistance.”<sup>4</sup> The operative language defining the privilege provides:

A patient has a privilege to refuse to disclose, and to prevent any other person from disclosing, confidential communications or records made for the purpose of diagnosis or treatment of the patient’s mental or emotional condition, including alcoholism and other drug addiction, between the patient and the psychotherapist, or persons who are participating in the diagnosis or treatment under the direction of the psychotherapist.

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<sup>1</sup> In mentioning the common law of evidentiary privileges, it is worth noting for purposes of comparison to Florida’s experience that Federal Rule of Evidence 501, rather than providing specific detailed privilege rules for the federal courts to adhere to (as the Advisory Committee of the Federal Judicial Conference recommended), simply authorizes them to continue developing federal common law on the subject. Pursuant to that authorization, the Supreme Court of the United States has held that there is a psychotherapist-patient privilege in the federal courts, although the Court has left elaborating the detailed contours of that privilege to later cases. See *Jaffee v. Redmond*, 518 U.S. 1 (1996).

<sup>2</sup> See chs. 76-237, 77-77, 77-174, 78-361 and 78-379, L.O.F. See also *In re Florida Evidence Code*, 372 So.2d 1369 (Fla. 1979).

<sup>3</sup> See s. 5, ch. 65-386 and s. 1, ch. 65-404, L.O.F. It is not entirely clear whether Florida common law recognized the privilege prior to this. It did not recognize a general doctor-patient privilege. See *Morrison v. Malmquist*, 62 So.2d 415 (Fla.1953). The Code currently recognizes privileges for: journalist and source, see s. 90.5015, F.S.; attorney and client, see s. 90.502, F.S.; psychotherapist and patient, see s. 90.503, F.S.; sexual assault counselor and victim, see s. 90.5035, F.S.; domestic violence counselor and victim, see s. 90.5036, F.S.; husband and wife, see s. 90.504, F.S.; clergy and penitent, see s. 90.505, F.S.; accountant and client, see s. 90.5055, F.S.; and for protecting trade secrets, see s. 90.506, F.S. The Code further provides that other privileges cannot be created by common law. See s. 90.501, F.S.

<sup>4</sup> *Cedars Healthcare Group, Ltd. v. Freeman*, 829 So.2d 390, 391 (Fla. 3d DCA 2002).

This privilege includes any diagnosis made, and advice given, by the psychotherapist in the course of that relationship.<sup>5</sup>

The Code expanded the definition of “psychotherapist” under the privilege to include not only licensed psychiatrists, but any person “authorized to practice [medicine or psychology] in any state or nation, or reasonably believed by the patient so to be, who is engaged in the diagnosis or treatment of a mental or emotional condition.”<sup>6</sup> In 1990, the definition was further expanded to cover treatment personnel of state-licensed hospitals, mental health facilities and substance abuse treatment centers, when those personnel are primarily engaged in mental health diagnosis or treatment;<sup>7</sup> in 1992, it was expanded once more to encompass state-licensed or certified social workers, marriage and family therapists, and mental health counselors, again only if primarily engaged in mental health treatment or diagnosis.<sup>8</sup>

Florida’s psychotherapist-patient privilege may be asserted by the patient, by a guardian or conservator of the patient, or by the personal representative of the estate of a deceased patient.<sup>9</sup> It may also be asserted by the psychotherapist, but only on the patient’s behalf; such an assertion by the psychotherapist raises a rebuttable presumption that it is made on the patient’s behalf.<sup>10</sup>

### Advanced Registered Nurse Practitioners

Nursing in Florida is regulated under the Nurse Practice Act (“NPA”), ch. 464, F.S. Under the NPA, nurses already licensed in Florida may seek certification as advanced registered nurse practitioners; such certification authorizes them to “perform acts of medical diagnosis and treatment, prescription, and operation which are identified by” a joint committee of the Board of Nursing and the Board of Medicine.<sup>11</sup> To be certified as an advanced registered nurse practitioner, a nurse must demonstrate either: 1) successful completion of a course in advanced nursing which is at least one academic year in length and primarily meant to prepare nurses for advanced or specialized practice;<sup>12</sup> 2) certification by an appropriate specialty board;<sup>13</sup> or 3) graduation from a program leading to a master’s degree in a nursing clinical area.<sup>14</sup>

### Effect of Proposed Changes

This bill amends s. 90.503(1)(a), F.S., the definition of “psychotherapist” with respect to the psychotherapist-patient privilege, to include within that definition advanced registered nurse practitioners who are certified in mental health nursing and are engaged in clinical practices primarily involving treatment of mental or emotional conditions.

## C. SECTION DIRECTORY:

Section 1. Amends s. 90.503, F.S., relating to psychotherapist-patient privilege.

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<sup>5</sup> Section 90.503(2), F.S.

<sup>6</sup> Sections 90.503(1)(a)1 (medicine) and 90.503(1)(a)2 (psychology), F.S.

<sup>7</sup> See s. 40, ch. 90-347, L.O.F. (enacting current s. 90.503(1)(a)4, F.S.).

<sup>8</sup> See s. 1, ch. 92-57, L.O.F. (enacting current s. 90.503(1)(a)3, F.S.).

<sup>9</sup> See s. 90.503(3), F.S.

<sup>10</sup> See s. 90.503(3)(d), F.S.

<sup>11</sup> Section 464.003(3)(c), F.S. The Board of Nursing is a division of the Department of Health, while the Board of Medicine is a division of the Department of Business and Professional Regulation. This joint committee is composed of three members from each Board, plus the Secretary of the Department of Health or the Secretary’s designee. The rules promulgated by the joint committee to “identify” these acts may currently be found at ss. 4.009 and 4.010, ch. 64B9, Fla. Admin. Code.

<sup>12</sup> See s. 464.012(1)(a), F.S.

<sup>13</sup> See s. 464.012(1)(b), F.S.

<sup>14</sup> See s. 464.012(1)(c), F.S. This requirement is mandatory for nurse anesthetists graduating after October 1, 2001 and for nurse practitioners graduating after October 1, 1998. In other words, only nurse midwives may now seek certification by one of the other two methods.

Section 2. Provides an effective date of upon becoming law.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

### D. FISCAL COMMENTS:

None.

## III. COMMENTS

### A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not require counties or municipalities to spend funds or take an action requiring expenditure of funds.

2. Other:

None.

### B. RULE-MAKING AUTHORITY:

None.

### C. DRAFTING ISSUES OR OTHER COMMENTS:

Many advanced nurse practitioners are already included within the definition of "psychotherapist," since they are covered as staff of a licensed hospital, mental health facility or substance abuse center. Moreover, unlike the medical personnel currently covered by the definition of "psychotherapist," this bill appears to cover those advanced registered nurse practitioners who are not already covered only if their practice includes treatment of mental or emotional health conditions, not merely diagnosis.

#### **IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES**

On March 5, 2003, the House Judiciary Committee reported this bill favorably.