

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 781 Psychotherapist-Patient Privilege
SPONSOR(S): Ross
TIED BILLS: None **IDEN./SIM. BILLS:** SB 1594

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Health Care	23 Y, 0 N	Mitchell	Collins
2) Judiciary	14 Y, 0 N	Jaroslav	Havlicak
3)			
4)			
5)			

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. Currently, communications with persons authorized to practice medicine; licensed or certified psychologists; licensed or certified clinical social workers, marriage and family therapists, and mental health counselors are covered by the psychotherapist-patient privilege. Also included are other treatment personnel who are employed by certain licensed health facilities and who are primarily engaged in the diagnosis and treatment of mental health and substance abuse conditions.

This bill revises the definition of "psychotherapist" in the psychotherapist-patient privilege section of the Florida Evidence Code to include advanced registered nurse practitioners ("ARNPs") whose primary scope of practice is the diagnosis or treatment of mental health and substance abuse conditions.

The bill provides communications with ARNPs who are practicing as psychiatric mental health nurses the same evidentiary privilege as those currently provided with respect to communications with other specified mental health professionals.

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.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

STORAGE NAME: h0781c.ju.doc
DATE: March 24, 2004

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 checked="" type="checkbox"/> | No <input type="checkbox"/> | N/A <input 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:

Present Situation: 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.¹

The Florida Evidence Code (“the Code”), ch. 90, F.S., became effective July 1, 1979.² The Code provides that except as otherwise provided by the chapter, any other statute, or the Constitution of the United States or of the State of Florida, no person in a legal proceeding has a privilege to: refuse to be a witness; refuse to disclose any matter; refuse to produce any object or writing; or prevent another from being a witness, from disclosing any matter, or from producing any object or writing.³ Included among the Code’s provisions was a psychotherapist-patient privilege first enacted in narrower terms fourteen years earlier.⁴ 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

¹ In mentioning the common law of evidentiary privileges, it is worth noting for purposes of comparison to Florida’s experience that Rule 501 of the Federal Rules of Evidence, rather than providing specific detailed privilege rules for the federal courts to adhere to (as the Standing 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).

² 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).

³ See s. 90.501, F.S.

⁴ 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.

experiencing such problems to obtain assistance.”⁵ 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. This privilege includes any diagnosis made, and advice given, by the psychotherapist in the course of that relationship.⁶

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.”⁷ 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;⁸ 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.⁹

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.¹⁰ 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.¹¹ Under s. 90.503(1), F.S., for purposes of the privilege, the term “psychotherapist” includes:

- Any person authorized to practice medicine in any state or nation, or reasonably believed by the patient to be, who is engaged in the diagnosis or treatment of a mental or emotional condition, including alcoholism and other drug addiction;
- A person licensed or certified as a clinical social worker, marriage and family therapist, or mental health counselor under Florida law, who is engaged primarily in the diagnosis or treatment of a mental or emotional condition, including alcoholism or other drug addiction; and
- Treatment personnel of Florida-licensed hospitals, mental health facilities, and substance abuse treatment centers, who are engaged primarily in the diagnosis or treatment of a mental condition, including alcoholism or other drug addiction.

Present Situation: 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.¹²

⁵ *Cedars Healthcare Group, Ltd. v. Freeman*, 829 So.2d 390, 391 (Fla. 3d DCA 2002).

⁶ Section 90.503(2), F.S.

⁷ Sections 90.503(1)(a)1 (medicine) and 90.503(1)(a)2 (psychology), F.S.

⁸ See s. 40, ch. 90-347, L.O.F. (enacting current s. 90.503(1)(a)4, F.S.).

⁹ See s. 1, ch. 92-57, L.O.F. (enacting current s. 90.503(1)(a)3, F.S.).

¹⁰ See s. 90.503(3), F.S.

¹¹ See s. 90.503(3)(d), F.S.

¹² 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.

Advanced registered nurse practitioners perform all duties of a registered nurse as well as advanced level nursing in accordance with established protocols, including managing selected medical problems, monitoring and altering drug therapies, initiating appropriate therapies for certain conditions, performing physical examinations, ordering and evaluating diagnostic tests, ordering physical and occupational therapy, and initiating and monitoring therapies for certain uncomplicated acute illnesses. Advanced registered nurse practitioners may perform medical acts under the general supervision of a medical physician, osteopathic physician, or dentist within the framework of standing protocols which identify the medical acts to be performed and the conditions for their performance. Although advanced registered nurse practitioners may prescribe medications in accordance with a protocol, they cannot prescribe controlled substances.

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;¹³ 2) certification by an appropriate specialty board;¹⁴ or 3) graduation from a program leading to a master's degree in a nursing clinical area.¹⁵ The NPA requires the Board of Nursing to adopt rules authorizing advanced registered nurse practitioners to perform acts of medical diagnosis and treatment, prescription, and operation which are identified and approved by a joint committee. The Board of Nursing and the Board of Medicine have filed identical administrative rules setting forth standards for the protocols which establish obligations on medical physicians, osteopathic physicians, and dentists who enter into protocol relationships with advanced registered nurse practitioners.¹⁶

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 diagnosis or treatment of mental or emotional conditions.

C. SECTION DIRECTORY:

Section 1. Amends s. 90.503, F.S., to add certain advanced registered nurse practitioners to the definition of "psychotherapist" for purposes of the psychotherapist-patient privilege.

Section 2. Provides an effective date of July 1, 2004.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

¹³ See s. 464.012(1)(a), F.S.

¹⁴ See s. 464.012(1)(b), F.S.

¹⁵ 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; i.e., only nurse midwives may now seek certification by one of the other two methods.

¹⁶ See ss. 64B-4.0120 and 64B-35.002, Fla. Admin. Code.

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 appear to require counties or municipalities to take an action requiring the expenditure of funds, does not appear to reduce the authority that counties or municipalities have to raise revenue in the aggregate, and does not appear to reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Many advanced nurse practitioners are already included within the current definition of "psychotherapist," since they are covered as staff of a licensed hospital, mental health facility or substance abuse center.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

None.