



## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. HOUSE PRINCIPLES ANALYSIS:

Safeguard individual liberty -- This bill serves the purpose of fostering a confidential relationship between lawyer and client that enables the lawyer to understand and accurately assess the client's situation and render frank and unvarnished advice.

#### B. EFFECT OF PROPOSED CHANGES:

##### **Current Law**

##### The Lawyer-Client Privilege<sup>1</sup>

Florida recognizes a lawyer-client privilege applicable to confidential communications between a lawyer and client.<sup>2</sup> The lawyer-client privilege is the oldest of the privileges for confidential communications known in the common law and existed as part of the common law of Florida until its codification.<sup>3</sup> The privilege was first codified in 1976 and remains so to this day.

A client is defined in the evidence code as "any person, public officer, corporation, association or other organization or entity, either public or private, who consults a lawyer with the purpose of obtaining legal services or who is rendered legal services by a lawyer."<sup>4</sup> A person, bank, or trust company who serves as a trustee or personal representative is unquestionably a "client" as that term is defined.<sup>5</sup>

##### Fiduciary Obligations Owed to Beneficiary

A trustee is charged with a fundamental duty to administer a trust diligently for the benefit of the beneficiaries.<sup>6</sup> A personal representative has a similar duty to administer an estate diligently for the benefit of the beneficiaries and creditors.<sup>7</sup> A trustee has an array of duties owed to a beneficiary in addition to the duties of good faith and loyalty in administering the trust for the benefit of the beneficiaries.<sup>8</sup> Because the fiduciary's efforts must be driven and circumscribed by these duties, courts have come to differing conclusions about whether the lawyer-client privilege overrides the fiduciary's duties to a beneficiary.

The existing statute does not expressly address whether the privilege applies to communications between a client, who is acting as a fiduciary by a written instrument in administering fiduciary property, and an attorney. A few recent cases on this issue are discussed below.

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<sup>1</sup> The bulk of this analysis is derived from materials graciously supplied by the Real Property Probate & Trust Law Section of the Florida Bar and a Florida Bar Journal article by Jack A. Falk, Jr. entitled *The Fiduciary's Lawyer-Client Privilege: Does It Protect Communications from Discovery by a Beneficiary?*

<sup>2</sup> Section 90.502, F.S.

<sup>3</sup> Jack A. Falk, Jr., *The Fiduciary's Lawyer-Client Privilege: Does It Protect Communications from Discovery by a Beneficiary?*, Florida Bar Journal, Volume LXXVII, No. 3, 18 citing (*Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981); *American Tobacco Co. v. State*, 697 So. 2d 1249, 1252 (Fla. 4th D.C.A. 1997); s. 2.01, F.S. (1849); *Keir v. State*, 152 Fla. 389, 11 So. 2d 886, 888 (1943)).

<sup>4</sup> Section 90.502(1)(b), F.S.

<sup>5</sup> Falk, *supra*.

<sup>6</sup> Section 737.301, F.S.

<sup>7</sup> Section 733.602, F.S.

<sup>8</sup> Falk, citing (*Griffin v. Griffin*, 463 So. 2d 569 (Fla. 1st D.C.A. 1985); *Van Dusen v. Southeast First Nat'l Bank of Miami*, 478 So. 2d 82, 92 (Fla. 3d D.C.A. 1985) ("The duty of loyalty owed by trustees is of the highest order.")).

In *Tripp v. Salkovitz*, 919 So. 2d 716 (Fla. 2d DCA 2006) the court ruled that the trial court could not entirely preclude the guardian and the attorney from raising the attorney-client privilege at a deposition. Furthermore, *Jacob v. Barton*, 877 So. 2d 935, 937 (Fla. 2d DCA 2004), states that if the beneficiary is the person “who will ultimately benefit from the legal work” the fiduciary has instructed the attorney to perform, the beneficiary may be considered the “real client.” When the beneficiary is determined to be the real client, the beneficiary holds the privilege and is entitled to communications between the fiduciary and the attorney.

Other cases have discussed the fiduciary’s lawyer-client privilege in administering fiduciary property. The Second District Court of Appeal appeared to embrace an exception to the privilege in *Barnett Banks Trust Co. v. Compson*, 629 So. 2d 849 (Fla. 2d DCA 1993), even though the court refused to permit the beneficiary access to communications between the fiduciary and lawyer. There, the court employed the analysis set forth in the seminal case decided in 1976 in Delaware, *Riggs National Bank v. Zimmer*, 355 A. 2d 709 (Del. Ch. 1976), which held that communications between the fiduciary and lawyer about administering fiduciary property were not privileged. The *Compson* court did not permit the beneficiary to avail herself of the rule in *Riggs* because she sought to deplete, rather than return, trust assets. Her interests in the litigation were found to be antagonistic to the trust, unlike the beneficiary in *Riggs*.

The First District Court of Appeal noted in *First Union Nat’l Bank v. Turney*, 824 So. 2d 172, 185-86 (Fla. 1st DCA 2001), that usually a lawyer retained by a trust represents the trustee, not the beneficiary. See also *Compson*, 629 So. 2d at 851. The court in *In re Estate of Gory*, 570 So. 2d 1381 (Fla. 4th DCA 1990), addressed an alleged conflict involving the personal representative’s lawyer and determined that the lawyer did not have a lawyer-client relationship with the beneficiaries.

The court in *First Union Nat’l Bank v. Turney*, 824 So. 2d 172 (Fla. 1st DCA 2001), side-stepped a determination of whether to apply an exception to the fiduciary privilege by instead applying the crime fraud exception to permit discovery. The court therefore did not have to decide whether a “fiduciary exception to the attorney-client privilege existed in Florida.” *Turney*, 824 So. 2d at 186.

### **Effect of Bill**

The bill provides that communications between a fiduciary, who is acting under a written instrument to administer fiduciary property, and a lawyer, are privileged to the same extent as other clients who seek legal advice.

#### **C. SECTION DIRECTORY:**

Section 1 creates s. 90.5021, F.S.

Section 2 provides an effective date of July 1, 2006.

## **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 appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor 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:

None.

**IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES**

None.