

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: Judiciary Committee

BILL: SB 2190

INTRODUCER: Senator Campbell

SUBJECT: Fiduciary Lawyer-Client Privilege

DATE: April 24, 2006

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Cibula	Maclure	JU	Pre-meeting
2.	_____	_____	_____	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

The bill provides that communications between a fiduciary, who administers fiduciary property, and a lawyer are privileged to the same extent as other clients who seek legal advice.

This bill creates section 90.5021, Florida Statutes.

II. Present Situation:

The Lawyer-Client Privilege¹

Florida recognizes a lawyer-client privilege applicable to confidential communications between a lawyer and client.² 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.³ 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

¹ The bulk of this analysis is derived from materials 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?*

² Section 90.502, F.S.

³ 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 DCA 1997); s. 2.01, F.S. (1849); *Keir v. State*, 152 Fla. 389, 11 So. 2d 886, 888 (1943)).

obtaining legal services or who is rendered legal services by a lawyer.”⁴ A person, bank, or trust company who serves as a trustee or personal representative is unquestionably a “client” as that term is defined.⁵

Fiduciary Obligations Owed to Beneficiary

A trustee is charged with a fundamental duty to administer a trust diligently for the benefit of the beneficiaries.⁶ A personal representative has a similar duty to administer an estate diligently for the benefit of the beneficiaries and creditors.⁷ 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.⁸ 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.

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

⁴ Section 90.502(1)(b), F.S.

⁵ Falk, *supra*. note 3.

⁶ Section 737.301, F.S.

⁷ Section 733.602, F.S.

⁸ Falk, citing (*Griffin v. Griffin*, 463 So. 2d 569 (Fla. 1st DCA 1985); *Van Dusen v. Southeast First Nat’l Bank of Miami*, 478 So. 2d 82, 92 (Fla. 3d DCA 1985) (“The duty of loyalty owed by trustees is of the highest order.”)).

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."⁹

III. Effect of Proposed Changes:

The bill provides that communications between a fiduciary, who administers fiduciary property, and a lawyer are privileged to the same extent as other clients who seek legal advice.

The bill takes effect July 1, 2006.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill provides that communications between a fiduciary, who administers fiduciary property, and a lawyer are privileged to the same extent as other clients who seek legal advice.

C. Government Sector Impact:

None.

⁹ *Id.* at 186.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

VIII. Summary of Amendments:

None.

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