

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Judiciary Committee

BILL: SB 708

INTRODUCER: Senator Thrasher

SUBJECT: Lawyer-Client Privilege

DATE: April 11, 2011

REVISED: _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|----|----------|----------------|-----------|--------------------|
| 1. | O'Connor | Maclure | JU | Pre-meeting |
| 2. | | | CJ | |
| 3. | | | RC | |
| 4. | | | | |
| 5. | | | | |
| 6. | | | | |

I. Summary:

The bill provides that communications between a client acting as a fiduciary 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:

Evidentiary Privileges

Under Florida law, a person may not: refuse to be a witness, refuse to disclose a matter, refuse to produce any object or writing, or prevent another from doing so, unless the person is the holder of an evidentiary privilege.¹ These privileges are created by statute, the state and federal constitutions, and court rules.² Chapter 90, F.S., the Florida Evidence Code, “recognizes privileges when the legislature judges the protection of an interest or a relationship is sufficiently important to justify the sacrifice of facts which might be needed for the administration of justice.”³

Under the Florida Evidence Code, the Legislature has recognized the following evidentiary privileges:

¹ Section 90.501, F.S.; Charles W. Ehrhardt, FLORIDA EVIDENCE, 332-33 (2010 ed.).

² *Id.*

³ Ehrhardt, *supra* note 1, at 332-33.

- Journalist’s privilege;⁴
- Lawyer-client privilege;⁵
- Psychotherapist-patient privilege;⁶
- Sexual assault counselor-victim privilege;⁷
- Domestic violence advocate-victim privilege;⁸
- Husband-wife privilege;⁹
- Privilege with respect to communications with clergy;¹⁰
- Accountant-client privilege;¹¹ and
- Privilege with respect to trade secrets.¹²

Lawyer-Client Privilege¹³

Florida recognizes a lawyer-client privilege applicable to confidential communications between a lawyer and client.¹⁴ 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.¹⁵ The privilege was first codified in 1976.¹⁶ Florida law provides that the lawyer-client privilege does not apply where legal advice is sought in the furtherance of crime or fraud.¹⁷

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.”¹⁸ A person, bank, or trust company who serves as a trustee or personal representative, as well as a person acting on behalf of another’s person, property, or both, fits the statutory definition of a “client” when seeking legal advice.¹⁹

⁴ Section 90.5015, F.S.

⁵ Section 90.502, F.S.

⁶ Section 90.503, F.S.

⁷ Section 90.5035, F.S.

⁸ Section 90.5036, F.S.

⁹ Section 90.504, F.S.

¹⁰ Section 90.505, F.S.

¹¹ Section 90.5055, F.S.

¹² Section 90.506, F.S.

¹³ The bulk of this analysis is derived from materials supplied by the Real Property, Probate, and Trust Law Section of The Florida Bar and a Florida Bar Journal article by Jack A. Falk, Jr., titled *The Fiduciary’s Lawyer-Client Privilege: Does It Protect Communications from Discovery by a Beneficiary?*

¹⁴ Section 90.502, F.S.

¹⁵ 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 (March 2003) (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*, 11 So. 2d 886, 888 (1943)).

¹⁶ Chapter 76-237, s. 1, Laws of Fla.

¹⁷ Section 90.502(4)(a), F.S.

¹⁸ Section 90.502(1)(b), F.S.

¹⁹ Falk, *supra*. note 15.

Fiduciary Obligations Owed to Beneficiary

The relationship between a trustee and a beneficiary is one that Florida courts have frequently addressed, with results leading to uncertainty in the applicability of the lawyer-client privilege to communications between a client acting as a fiduciary and his or her lawyer. A trustee is charged with a fundamental duty to administer a trust diligently for the benefit of the beneficiaries.²⁰ A personal representative has a similar duty to administer an estate diligently for the benefit of the beneficiaries and creditors.²¹ 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.²² 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 relevant cases on this issue are discussed below.

In *Tripp v. Salkovitz*, the personal representative of an estate filed a complaint against the decedent's guardian for failure to properly manage his financial affairs and sought to compel production of confidential communications between the guardian and his attorney.²³ The court ruled that the trial court could require the guardian and attorney to produce confidential documents for in camera inspection, but could not preclude them from raising the attorney-client privilege at a deposition.²⁴ Furthermore, *Jacob v. Barton* 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."²⁵ 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*, even though the court refused to permit the beneficiary access to communications between the fiduciary and lawyer because the plaintiff beneficiary's position in the suit was antagonistic to the aligned beneficiaries of the trust.²⁶ There, the court employed the analysis set forth in the seminal case decided in 1976 in Delaware, *Riggs National Bank v. Zimmer*, which held that communications between the fiduciary and lawyer about administering fiduciary property were not privileged and were discoverable.²⁷ 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. The court held that she stood to benefit in her personal

²⁰ Section 736.0802(1), F.S.

²¹ Section 733.602, F.S.

²² Falk, *supra* note 15 (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.")).

²³ *Tripp v. Salkovitz*, 919 So. 2d 716 (Fla. 2d DCA 2006).

²⁴ *Id.*

²⁵ *Jacob v. Barton*, 877 So. 2d 935, 937 (Fla. 2d DCA 2004) (citing *Riggs National Bank v. Zimmer*, 355 A.2d 709 (Del. Ch. 1976)).

²⁶ *Barnett Banks Trust Co. v. Compson*, 629 So. 2d 849 (Fla. 2d DCA 1993).

²⁷ *Riggs National Bank v. Zimmer*, 355 A.2d 709 (Del. Ch. 1976).

capacity, but not in her capacity as a beneficiary of the trust, unlike the beneficiary in *Riggs*. Under the *Riggs* reasoning, if a trust beneficiary's interest in a suit against a trustee is aligned with the other beneficiaries, and if the claim is consistent with their status as a beneficiary, the suing beneficiary would be deemed the "real client" of the lawyer retained by the fiduciary for the administration of the trust.

The First District Court of Appeal noted in *First Union Nat'l Bank v. Turney* that usually a lawyer retained by a trust represents the trustee, not the beneficiary.²⁸ The court in *In re Estate of Gory* 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.²⁹

The court in *Turney* declined to determine whether to apply an exception to the fiduciary privilege by instead applying the crime-fraud exception to permit discovery.³⁰ The court therefore did not have to decide whether a "fiduciary exception" to the attorney-client privilege exists in Florida.³¹

Fiduciary Acting on Behalf of the Person and/or Property

There are other fiduciary relationships not specifically protected by the existing lawyer-client privilege that may not always involve the administration of property. For example, a guardian, as defined in statute, is "a person who has been appointed by the court to act on behalf of a ward's person or property, or both."³² A guardian's communications with counsel in connection with the administration of the guardianship is not specifically privileged under current law.

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. Additionally, the privilege specified by the bill would also extend to clients acting on behalf of a person where the fiduciary relationship does not involve property, such as in the case of a court-appointed guardian and other fiduciary relationships as enumerated in the bill. The bill does not affect the existing statutory exception to the lawyer-client privilege when legal advice is sought in the furtherance of crime or fraud.

The bill provides an effective date of July 1, 2011.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

²⁸ *First Union Nat'l Bank v. Turney*, 824 So. 2d 172, 185-86 (Fla. 1st DCA 2001); *see also Compson*, 629 So. 2d at 851.

²⁹ *In re Estate of Gory*, 570 So. 2d 1381 (Fla. 4th DCA 1990).

³⁰ *Turney*, 824 So. 2d 172.

³¹ *Id.* at 186.

³² Section 744.102(9), F.S.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:**A. Committee Substitute – Statement of Substantial Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.