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Florida's Fiduciary Lawyer-Client Privilege is on the Books, But is it Good Law?

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In 2011, Florida's legislature enacted section 90.5021, Fla. Stat., which provides for application of the lawyer-client privilege – even when the client is a fiduciary.

Specifically, the statute protects communications between a lawyer, on the one hand, and a client who is a trustee, personal representative or executor, or guardian, on the other hand. The privilege applies to the same extent as if the client were not acting as a fiduciary.

Why the need for a specialized statute? Isn't the standard lawyer-client privilege statute good enough to protect communications between a lawyer and a fiduciary?

Well, after years of debate among Florida practitioners, and some ambiguous case law along the way, it was determined that because fiduciaries owe a duty to the beneficiaries, and are really working for the benefit of the beneficiaries, one might conclude that fiduciaries' communications with a lawyer, likewise, are for the benefit of the beneficiaries. If that were true, then a beneficiary should have access to all advice given to fiduciaries by their lawyer – at least, when there is no adversary relationship between beneficiaries and the fiduciary.

To end the debate, the Florida legislature passed section 90.5021, and the privilege became firmly entrenched. At the same time, the Florida Probate Rules Committee – which governs court procedure, and which therefore is subject to approval by the Florida Supreme Court only – petitioned the Court to adopt rule 5.240(b)(2). That rule provides that fiduciaries must give notice to beneficiaries of the fiduciary lawyer-client privilege, to avoid any confusion on the part of the beneficiaries. The rule was adopted by the Florida Supreme Court.

Florida's evidence code, however, is a creature of both substantive law, governed by the legislature, and procedural law, governed by the Florida Supreme Court. Therefore, after being enacted by the legislature, it is standard practice for the Florida Supreme Court to review evidence statutes, where they are routinely adopted to the extent they are procedural.

In 2014, when the Florida Supreme Court reviewed the fiduciary lawyer-client privilege, it *declined* to adopt it, and it questioned the need for the privilege to the extent it is procedural, without stating more. Suddenly, what was considered a matter of course, became a debatable point. And, with no

clear answer as to whether the privilege is substantive or procedural in nature, it is an issue that remains, to this day, murky at best.

Last year, in *Bivins v. Rogers*, the Southern District of Florida dipped its toe in the privilege waters and emerged squarely in favor of the legislature. Sure, the Florida Supreme Court had said that it questioned the need for the privilege to the extent it is procedural, but that did not "vitiate or overturn the statute." The need for the statute was merely questioned, but not because it was unconstitutional or otherwise unlawful, said the federal court.

However, this year, the Florida Supreme Court complicated the matter a bit more. In declining to adopt a different evidence statute, this Court recognized its usual practice of adopting evidence statutes, but stated that "on occasion the Court has declined to adopt legislative changes to the Evidence Code because of significant concerns about the amendments, including concerns about the constitutionality of an amendment." The Court included a footnote and cited its ruling declining to adopt section 90.5021 as support. It seemed that the Florida Supreme Court was implying that its decision not to adopt the privilege was because of some constitutionality problem.

As a result, this year, the Florida Probate Rules Committee and the Code and Rules of Evidence Committee have begun taking steps, in concert, to raise the issue with the Florida Supreme Court. Put simply, the question to be presented is how can the Florida Supreme Court adopt rule 5.240(b)(2), which requires fiduciaries to give notice to beneficiaries of the fiduciary lawyer-client privilege, and then question the propriety of such a privilege in the first place?

It is a question that Florida practitioners may not have an answer to anytime soon.

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