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Florida's Fiduciary Lawyer-Client Privilege Adopted by the Florida Supreme Court

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Last week, the Florida Supreme Court adopted section 90.5021, Fla. Stat. – Florida's fiduciary lawyer-client privilege – to the extent it is procedural and held that the decision is retroactive to the Florida legislature's enactment of the statute in 2011.

The statute provides for application of the lawyer-client privilege when that client is a fiduciary, such as a trustee, personal representative or executor, or guardian.

This fiduciary lawyer-client privilege was enacted as part of Florida's evidence code. The evidence code, however, is a creature of both substantive law and procedural law. While substantive law is governed by the Florida legislature, procedural law is governed by the Florida Supreme Court. Therefore, after evidence statutes are enacted by the legislature, it is standard practice for the Florida Supreme Court to review those statutes. Generally, the evidence statutes are adopted to the extent they are procedural.

In 2014, however, 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. What was considered a matter of course, at least since the enactment of the 2011 statute, became a debatable point. And with no clear guidance as to whether questions of lawyer-client privilege are substantive or procedural in nature, many practitioners were left uneasy about the state of the law.

Therefore, the Florida Bar's Probate Rules Committee and the Code and Rules of Evidence Committee asked the Florida Supreme Court to reconsider its 2014 decision. The Court did so and, reversing its prior opinion, decided to adopt the fiduciary lawyer-client privilege to the extent it is procedural.

The 2011 enactment of the statute ended a long-running debate among Florida practitioners and judges. The debate stems from the fact that fiduciaries, of course, owe a duty to beneficiaries. In essence, they are really working for the benefit of beneficiaries. Therefore, one might conclude that fiduciaries' communications with a lawyer, likewise, are for the benefit of beneficiaries. If that were true, then a beneficiary should have access to all advice given to fiduciaries by their lawyer. The statute, though, gave lawyers and their fiduciary clients comfort that their communications are indeed privileged. That is, until the Florida Supreme Court called the statute into question.

The petition to the Florida Supreme Court pointed out an apparent conflict. After the legislature adopted the fiduciary lawyer-client privilege in 2011, the Probate Rules Committee 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. However, after the Court declined to adopt the fiduciary lawyer-client privilege itself, practitioners began to question why the Court had adopted a procedural requirement that fiduciaries give notice to beneficiaries of the existence of the fiduciary lawyer-client privilege – a privilege that the Court was now declining to adopt.

The Court did not state whether this apparent conflict was the reason for its decision last week to adopt the fiduciary lawyer-client privilege. Practitioners, however, can now be comfortable, once again, in relying on the privilege in representing and communicating with fiduciaries.

You can read more about Florida's fiduciary lawyer-client privilege in a previous blog post .

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