IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENTS TO THE FLORIDA EVIDENCE CODE **SC17-**

OUT-OF-CYCLE REPORT
OF THE CODE AND RULES OF EVIDENCE COMMITTEE
AND THE FLORIDA PROBATE RULES COMMITTEE

Co-Chairs of the Florida Probate Rules Committee Michael Travis Hayes and Jon Scuderi; Gregory Paul Borgognoni, Chair of the Code and Rules of Evidence Committee; and John F. Harkness, Jr., Executive Director of The Florida Bar, file this joint out-of-cycle report. This report is filed pursuant to Florida Rule of Judicial Administration 2.140.

Though it is recognized that this Court does not historically accept out-of-cycle reports pertaining to the Code and Rules of Evidence Committee ("CREC"), the CREC urges the Court to recognize the uniqueness of the below situation and accept this filing. The CREC approved, by a vote of 26-0, submitting a report to ask the Court to resolve a conflict between a Florida Probate Rule and this Court's ruling to decline to adopt section 90.5021, Florida Statutes, to the extent it is procedural. (*See* Appendix G–5-G–6.) The Florida Probate Rules Committee ("FPRC") approved, by a vote of 30-0, submitting a report to ask the Court to reconsider that ruling and adopt section 1 of Chapter 2011-183, Laws of Florida, to the extent that it is procedural, thus resolving the conflict between rules sets. The Board of Governors voted 41-0 to approve the proposal. The proposal was published in the November 16, 2016, edition of The Florida Bar *News*. (*See* Appendix E). Comments were received from Charles B. Bavol and James D. Camp Jr.

For the Court's understanding, the conflict that raised this concern is rooted from the timing of: (1) a law that was passed; (2) a conforming rule amendment that was proposed by FPRC and adopted by the Court; and (3) the law upon which the rule is based not being adopted to the extent it is procedural. In 2011 the Florida Legislature adopted section 1 of chapter 2011-183, Laws of Florida, which became effective June 21, 2011. Section 1 of chapter 2011-183, Laws of Florida, created section 90.5021, Florida Statutes, which eliminated the common law fiduciary exception to the attorney-client privilege to the extent that exception

existed in Florida. "In tandem with the adoption of 90.5021, the legislature adopted amendments to section 733.212, Florida Statutes, which, in part provided that a notice of estate administration shall include a statement that 'the fiduciary lawyer-client privilege in section 90.5021, Florida Statutes, applies with respect to the personal representative and any attorney employed by the personal representative.' 2011-183, Laws of Florida, § 8." (*See* Appendix A–2-A–3 and Appendix B.) In reaction to the legislation, the FPRC proposed an amendment to Florida Probate Rule 5.240 (Notice of Administration) to include the underlined language:

> (b)(2) the name and address of the personal representative and of the personal representative's attorney, and that the fiduciary lawyer-client privilege in section 90.5021, Florida Statutes, applies with respect to the personal representative and any attorney employed by the personal representative.

The Court adopted, effective September 28, 2011, the FPRC's proposal in *In re Amendments to the Florida Probate Rules*, 73 So. 3d 205 (Fla. 2011). (*See* Appendix C.)

In 2013, within its regular-cycle report, the CREC asked the Court to adopt chapter 2011-183, Laws of Florida, to the extent it is procedural. (*See* Appendix D–3-D–4.) In its opinion, the Court "decline[d] to follow the Committee's recommendation to adopt the new provision of the Code because we question the need for the privilege to the extent that it is procedural." (*See In re Amendments to the Florida Evidence Code*, 144 So. 3d 536, at 537 (Fla. 2014).) (*See* Appendix D–13.)

This apparent conflict of law has led to confusion in the practice of representing fiduciaries, including personal representatives. As explained by Robert W. Goldman in his letter to the Court requesting an amendment:

> Based on the foregoing [conflict between the Florida Probate Rules, the Florida Evidence Code, and Florida Statutes], lawyers in Florida must notify estate beneficiaries that section 90.5021 apples and establishes a fiduciary-exception free attorney-client privilege for communications between a personal representative and his or her attorney when, in fact, section 90.5021 may not even be enforceable (if it is procedural in nature). Currently lawyers cannot honestly advise a fiduciary that the privilege applies and is free from a fiduciary exception. Currently lawyers cannot honestly advise

> beneficiaries (even though they are required by rule to do so) that the privilege applies to communications between the fiduciary and its counsel and is free from a fiduciary exception. Similarly, lawyers for beneficiaries may have an obligation to pursue discovery of communications that may or may not be privileged despite the clear language of section 90.5021. Circuit court judges are equally hampered by the murky state of the law. And, as the attorney-client privilege is fundamental to the lawyer-client relationship, this is a genuine issue of concern. (*See* Appendix A–3-A–4.)

This Court's ruling not to adopt section 90.5021, Florida Statutes, has left doubt as to whether the statute applies to protect communications between a fiduciary and its counsel. There is not a business day that goes by without a fiduciary somewhere in this state communicating with its counsel on matters concerning the administration of an estate or trust. It is simply untenable for there to be doubt as to whether the attorney-client privilege applies to protect those communications. As this Court has stated, "[t]he confidential relationship of attorney and client is a sacred one, and one that is indispensable to the administration of justice." *Seaboard Air Line R. Co. v. Timmons*, 61 So. 2d 426, 428 (Fla. 1952). There is no question under Florida law that the fiduciary is the client, not the beneficiaries. R. Regulating Fla. Bar 4-1.7 (Comment) ("in Florida, the personal representative is the client rather than the estate or the beneficiaries"); *Estate of Gory*, 570 So. 2d 1381, 1383 (Fla. 4th DCA 1990).

Prior to the enactment of section 90.5021, Florida Statutes, there was uncertainty concerning whether the fiduciary exception to the attorney-client privilege existed for fiduciaries in Florida, and if so, which communications were subject to the exception. The Real Property, Probate and Trust Law Section of The Florida Bar ("RPPTL") asked the legislature to eliminate the uncertainty as to whether communications between a fiduciary and its counsel were privileged. The RPPTL Section is a group of Florida lawyers who practice in the areas of real estate, guardianship, trust, and estate law. The RPPTL Section is dedicated to serving all Florida lawyers and the public in these fields of practice. The RPPTL Section produces educational materials and seminars, assists the public *pro bono*, drafts legislation, drafts rules of procedure, and occasionally serves as a friend of the Court to assist on issues related to its fields of practice. The RPPTL Section has over 10,000 members. The RPPTL Section membership consists of attorneys who represent fiduciaries, attorneys who represent beneficiaries, and attorneys who work for corporate fiduciaries. All of those types of attorneys have a stake in eliminating the uncertainty and unnecessary litigation caused by the fiduciary

exception to the attorney-client privilege and all had input in the proposed bill that resulted in the adoption of section 90.5021, Florida Statutes.

As the RPPTL Section said in its own internal white paper proposing section 90.5021, Florida Statutes:

> The proposed F.S. 90.5021 will clarify Florida law to ensure 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. This serves the salutary 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. As Florida case law currently stands, there is great uncertainty about whether communications between a fiduciary client and lawyer are privileged. This discourages clients from disclosing important information to their lawyer. It also may affect the manner in which the lawyer renders advice to the client. Neither of these developments serves the public interest of encouraging fiduciary clients to obtain proper legal advice to properly carry out their responsibilities.

This issue is too important and should be resolved now. Simply, the FPRC believes there is no downside to approving section 90.5021, Florida Statutes, to the extent it is procedural. Beneficiaries will be protected as this statute in no way impacts a fiduciary's duty to keep the beneficiaries informed. Further, it will also protect the beneficiaries from unwanted complications and expenses that arise from the uncertainty created by the fiduciary exception to the attorney-client privilege. (*See* Appendix A–5, last paragraph.)

In his comment, Charles D. Bavol reargues the position his firm unsuccessfully propounded in *Bivens v. Rogers*, 2016 WL 4702682 (S.D. FL. Case No. 15-CV-81298 Sept. 7, 2016). It is not clear whether that underlying lawsuit remains pending and whether or not Mr. Bavol's firm remains interested in the outcome. It is the Committee's understanding that Mr. Bavol would prefer amendments to section 90.502(4)(c). Mr. Bavol's argument seems to be based on the erroneous belief that counsel for the guardian represents the ward. (*See* Appendix F-1). In fact, the guardian's counsel represents the guardian and not the ward, although counsel may owe duties to the ward. *See Saadeh v. Connors*, 166 So. 3d 959 (Fla. 4th DCA 2015). It is therefore inaccurate to say that the

guardian's counsel represents the ward in the same manner as an attorney representing a fully competent person. Finally, Mr. Bavol incorrectly suggests that section 90.5021, Florida Statutes would prevent a ward from suing the guardian or the guardian's counsel for breach of duty. Of course, that cannot be true. Proof of a breach of duty is not dependent on the disclosure of attorney client privileged communications. Mr. Bavol believes the statute should be amended to exclude guardians, something only the Legislature can do.

In his comment, James D. Camp, Jr. suggests that Florida Probate Rule 5.240 (Notice of Administration) should be amended to "advise the beneficiary that he or she has the right to request a copy of the will." (*See* Appendix F–6.) The FPRC believes this request is outside the scope of the publication notice and has referred the suggestion to a subcommittee for review.

WHEREFORE, the Florida Probate Rules Committee respectfully requests the Court reconsider its previous ruling and treat this privilege like other privileges codified in chapter 90 and adopt chapter 2011-183, Laws of Florida, to the extent it is procedural. The Code and Rules of Evidence Committee respectfully requests the Court resolve the conflict between the rules sets.

Respectfully submitted on May 30, 2017.

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was furnished by e-mail, via the Portal, on May 30, 2017, to:

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CERTIFICATE OF COMPLIANCE

We certify that these rules were read against Thomson Reuters' *Florida Rules of Court—State* (2017 Edition).

We certify that this report was prepared in compliance with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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