PRACTICE CORNER

Probate and Trust Division

The Attorney-Client Privilege Is Alive And Well, Hallelujah!

By Lian de la Riva, Esq., Markowitz, Ringel, Trusty and Hartog, Miami, Florida

The Attorney-Client Privilege is an indispensable tool of any attorney. Practitioners rely on their client's communications and the free flow of information to be effective advocates. The privilege can be loosely traced back to the Roman Republic. In the 16th century, under the rule of Elizabeth I, the privilege was firmly established in English law.[1] During the Elizabethan Era, the privilege was based on a concept of honor and barred any barrister from testifying against their client. Over time, the privilege morphed into the tool we utilize today. The privilege creates a sacred space between the attorney and the client, and therefore allows the attorney to provide "sound legal advice [and] advocacy."[2] The doctrine of the Attorney-Client Privilege has been defined by the distinguished Dean Wigmore as follows: "(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his [or her] capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his [or her] instance permanently protected (7) from disclosure by [the client] or by the legal adviser, (8) except the protection be waived."[3]

Florida first codified the Attorney-Client Privilege in 1976.[4] However, certain privileged communications are not absolutely protected. An exception to the Attorney-Client Privilege was carved out for communications between an attorney and a client who is acting in a fiduciary capacity. This exception can be traced as far back as Trust cases in the English Courts.[5] The Fiduciary Exception was particularly troublesome in the world of Guardianship, Probate and Estate Planning because the exception permitted certain communications to become discoverable. Due to litigants' (typically a beneficiary) creative arguments, the Fiduciary Exception was used to pierce the veil of protected communications, resulting in a chilling effect on the free flow of information from the fiduciary clients, whether a Guardian, a Personal Representative or a Trustee. The District Court of Appeal for the Second District of Florida recognized that billing records and other confidential communications between the fiduciary and her attorney could become discoverable if it was found that the services rendered were for the benefit of a third-party beneficiary. See *Jacob v. Barton*[6] and *Tripp v. Salkovitz*.[7] The United States Supreme Court also turned its attention to the matter of the Attorney-Client Privilege in the context of a fiduciary client in *United States v. Jicarilla Apache Nation*,[8] and held that the fiduciary exception to privileged communications does not apply to the general trust relationship between the United States and Indian tribes.

Given the ambiguity and attacks on the Attorney-Fiduciary Client Privilege, in 2011 the Florida Legislature enacted Fla. Stat. §90.5021, which provides that communications between a lawyer and client acting as a fiduciary are privileged and protected from disclosure to the same extent as if the client were not acting as a fiduciary. Fla. Stat. §90.5021 was intended to clarify Florida law and protect communications between the attorney and the fiduciary client. The Florida Trust Code[9] and Probate Rules[10] were also amended to ensure qualified beneficiaries and interested persons were made aware of the Attorney-Fiduciary Client privilege applicability to both Personal Representatives and Trustees. Most practitioners sighed in relief upon the passing of this statute, but the relief was short lived.

Our state's Supreme Court has been balancing the fiduciary client's privilege versus the need to pierce the Privilege for the benefit of the victim (typically a third-party beneficiary) of that privilege. Although passed in 2011, Fla. Stat. §90.5021, was not adopted until January 25, 2018. In 2014, the Supreme Court questioned the need for and casted doubt on the privilege on what appeared to be procedural grounds.[11] Then again in 2017, the High Court outright declined to adopt the Fla. Stat. §90.5021.[12] Thankfully, in part due to work of the Probate Rules Committee and this Section, the Supreme Court formally adopted Section 90.5021 of the Evidence Code in an out-of-cycle report.[13]

This is a moment to rejoice and then review what many consider basic principles of the Attorney-Client Privilege. For seven years, we have cautiously advised our Fiduciary Clients of the potential litigation and possibility of communications becoming discoverable. Now is the time to take a proactive

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approach and educate our clients about the intricacies of the Privilege, how it works, how it can be lost or waived and how the communications can be used against them. First you should assess each Client's understanding of the privilege and evaluate the dangers of losing it on a case-by-case basis. A key point to review with our clients is when the privilege can be asserted, these basic elements must be present: a *communication* between lawyer and client and the purpose of which is to *seek legal advice*.

It must be understood that the Fiduciary Protection, found under Fla. Stat. §90.5021, is not absolute and can be pierced leading certain communications to become discoverable.[14] Most often the privilege is lost by the intentional or inadvertent production of the communication to a third party, such as a beneficiary in a Trust or Probate Administration. Many times, production of a privileged communication occurs when a Fiduciary Client forwards an email thread including communications between them and their attorney. Fiduciary Clients should be consulted during the engagement process and during the progression of the matter of the dangers of making any disclosures or deciding to include beneficiaries in what would have been a privileged communication. Although cumbersome, a one-time review of communications your client intends on sending to third-parties to assess whether any privileged information is being disclosed is reasonable and efficient way to protect the privilege. Avoid electronic mail threads where privileged and non-privileged communications may be discussed interchangeably. It's better to send separate emails. Finally, writing Attorney-Client Privilege in a subject line of a communication will not provide the protection if the communication is sent to a third party.

Endnotes

1 Edna Selan Epstein, THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE 2 (4th ed. 2001).

2 *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

3 John Henry Wigmore, EVIDENCE IN TRIALS AT COMMON LAW §2292, at 554 (McNaughton 1961 & Supp. 1991).

4 1976 Fla. Laws ch. 237, §1.

5 See In re Mason, 22 Ch. D. 609 (1883); *Talbot v. Marshfield*, 2 Dr. & Sm. 549, 62 Eng. Rep. 728 (1865); *Wynne v. Humberston*, 27 Beav. 165, 54 Eng. Rep. 165 (1858).

6 877 So. 2d 935 (Fla. 2d DCA 2004).

7 919 So. 2d 716 (Fla. 2d DCA 2006).

8 131 S.Ct. 2313 (2011).

9 Fla. Stat. §736.0813(1)(a).

10 Fla. Prob. R. 5.240(b)(2).

11 In re Amendments to the Florida Evidence Code, 144 So. 3d 536 (Fla. 2014).

12 In re Amendments to the Florida Evidence Code, 210 So. 3d 1231 (Fla. 2017).

13 In re Amendments to the Florida Evidence Code — 2017 Out-of-Cycle Report, No. SC17-1005.

14 Notably, in most will and trust contests, exceptions to the Attorney-Client Privilege have been codified to authorize the disclosure of most communications between an estate planning attorney and their deceased client. See, e.g., Fla. Stat. §90.502(4)(b), (d) and (e).