

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received DEC - 2005

GENERAL INFORMATION

Submitted By Real Property Probate and Trust Law Section of The Florida Bar
(List name of the section, division, committee, bar group or individual)

Address _____
(List street address and phone number)

Position Type Probate and Trust Litigation Committee of RPPTL of The Florida Bar
(Florida Bar, section, division, committee or both)

CONTACTS

Board & Legislation

Committee Appearance Brian J. Felcoski, Goldman Felcoski & Stone P.A., 95 Merrick Way, Suite 440, Coral Gables, FL 33134 Telephone (305) 446-2800; Martha J. Edenfield, Pennington, Moore, Wilkinson, Bell & Dunbar, PO Box 10095, Tallahassee FL 32302-2095 Telephone (850) 222-3533
(List name, address and phone number)

Appearances before Legislators Brian J. Felcoski (305) 446-2800 and Martha J. Edenfield (850) 222-3533 (List name and phone # of those appearing before House/Senate Committees)

(List name and phone # of those appearing before House/Senate Committees)

Meetings with Legislators/staff Brian J. Felcoski (305) 446-2800 and Martha J. Edenfield (850) 222-3533; Jack Falk (305) 529-1500
(List name and phone # of those having face to face contact with Legislators)

PROPOSED ADVOCACY

All types of partisan advocacy or nonpartisan technical assistance should be presented to the Board of Governors via this request form. All proposed legislation that has *not* been filed as a bill or a proposed committee bill (PCB) should be attached to this request in legislative format - Standing Board Policy 9.20(c). Contact the Governmental Affairs office with questions.

If Applicable, List The Following

(Bill or PCB #)

(Bill or PCB Sponsor)

Indicate Position Support Oppose Technical Assistance Other _____

Proposed Wording of Position for Official Publication:
See attached.

Reasons For Proposed Advocacy:

To improve and clarify the law on the lawyer-client privilege held by a fiduciary in estate and trust matters.

PRIOR POSITIONS TAKEN ON THIS ISSUE

Please indicate any prior Bar or section positions on this issue to include opposing positions. Contact the Governmental Affairs office if assistance is needed in completing this portion of the request form.

Most Recent Position

(Indicate Bar or Name Section) (Support or Oppose) (Date)

Others

(May attach list if more than one)

(Indicate Bar or Name Section) (Support or Oppose) (Date)

REFERRALS TO OTHER SECTIONS, COMMITTEES OR LEGAL ORGANIZATIONS

The Legislation Committee and Board of Governors do not typically consider requests for action on a legislative position in the absence of responses from all potentially affected Bar groups or legal organizations - Standing Board Policy 9.50(c). Please include all responses with this request form.

Referrals

1. Evidence and Code Committee of The Florida Bar No position
(Name of Group or Organization) (Support, Oppose or No Position)
2. Trial Lawyers Section of The Florida Bar No position
(Name of Group or Organization) (Support, Oppose or No Position)
3. _____
(Name of Group or Organization) (Support, Oppose or No Position)

Please submit completed Legislative Position Request Form, along with attachments, to the Governmental Affairs Office of The Florida Bar. Upon receipt, staff will further coordinate the scheduling for final Bar action of your request which usually involves separate appearances before the Legislation Committee and the Board of Governors unless otherwise advised. For information or assistance, please telephone (904) 561-5662 or 800-342-8060, extension 5662.

5c(1)(a)(i)(2)

Proposed Statute

90.5021 Fiduciary Lawyer- Client Privilege

(1) A communication between a lawyer and client acting as a fiduciary described in subsection (2) shall be privileged and protected from disclosure under section 90.502 to the same extent as if the client were not acting as fiduciary. For the purpose of applying section 90.502 to such a communication, the person or entity acting as fiduciary is the lawyer's only, real and true client.

(2) For the purpose of this section, a fiduciary is a personal representative as defined in section 731.201, an administrator ad litem as used in section 733.308, a curator as used in section 733.501, a guardian or guardian ad litem as defined in section 744.102, a conservator as defined in section 710.102, a trustee as used in section 731.201 (35), and an attorney-in-fact as used in Chapter 709.

5c(1)(a)(i)(3)

WHITE PAPER

PROPOSED F.S 90.5021

I. SUMMARY

This legislation clarifies the law to ensure that communications between a lawyer and client acting as a fiduciary in estate and trust related matters are privileged to the same extent as if the client were not acting as a fiduciary. The bill does not have a fiscal impact on state funds.

II. CURRENT SITUATION

Florida recognizes a lawyer-client privilege that is applicable to confidential communications between a lawyer and client under F.S. 90.502. 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. The most recent case to address this issue, *Jacob v. Barton*, 877 So. 2d 935, 937 (Fla. 2d DCA 2004), 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." 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 in Florida have discussed the fiduciary's lawyer-client privilege in administering fiduciary property. The Second District appeared to embrace an exception to the privilege in *Barnett Banks Trust Co. v. Compson*, 629 So. 2d 849 (Fla. 2d DCA 1993), even though the court refused to permit the beneficiary access to communications between the fiduciary and lawyer. There, the court employed the analysis set forth in the seminal case decided in 1976 in Delaware, *Riggs National Bank v. Zimmer*, 355 A. 2d 709 (Del. Ch. 1976), which held that communications between the fiduciary and lawyer about administering fiduciary property were not privileged. 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. Her interests in the litigation were found to be antagonistic to the trust, unlike the beneficiary in *Riggs*.

The First District noted in *First Union Nat'l Bank v. Turney*, 824 So. 2d 172, 185-86 (Fla. 1st DCA 2001), that usually a lawyer retained by a trust represents the trustee, not the beneficiary. See also *Compson*, 629 So. 2d at 851. The court in *In re Estate of Gory*, 570 So. 2d 1381 (Fla. 4th DCA 1990), 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.

5c(1)(g)(i)(4)

The court in *First Union Nat'l Bank v. Turney*, 824 So. 2d 172 (Fla. 1st DCA 2001), side-stepped a determination of whether to apply an exception to the fiduciary privilege by instead applying the crime fraud exception to permit discovery. The court therefore did not have to decide whether a "fiduciary exception to the attorney-client privilege existed in Florida." *Turney*, 824 So. 2d at 186.

III. EFFECT OF PROPOSED CHANGES

A. GENERALLY

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.

B. SECTION BY SECTION ANALYSIS

F.S. 90.5021. This new section makes the lawyer-client privilege in section 90.502 applicable to fiduciaries administering fiduciary property and protects from disclosure communications between the fiduciary and lawyer to the extent it would be protected if the client were not acting as a fiduciary.

IV. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

The proposal does not have a fiscal impact on state or local governments.

V. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR

The proposal will not have a direct economic impact on the private sector.

VI. CONSTITUTIONAL ISSUES

There appear to be no constitutional issues raised by this proposal.

VII. OTHER INTERESTED PARTIES

None are known at this time.

5c(1)(a)(i)(5)

90.5021 Fiduciary Lawyer- Client Privilege

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(2) For the purpose of this section, a client acts as a fiduciary when serving as personal representative as defined in section 731.201, an administrator ad litem as used in section 733.308, a curator as used in section 733.501, a guardian or guardian ad litem as defined in section 744.102, a conservator as defined in section 710.102, a trustee as used in section 731.201 (35), and an attorney-in-fact as used in Chapter 709.

Sc(1)(a)(i)(6)