

PROBATE CORNER

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ARTICLE: STATUTORY EXCEPTIONS TO THE ATTORNEY-CLIENT PRIVILEGE

There are five statutory exceptions to the lawyer-client privilege. If one of the exceptions applies, there is no attorney-client privilege on that issue and the attorney is free to discuss relevant privileged communications with the interested persons. The five exceptions to the lawyer-client privilege are as follows:

1. **CRIME/FRAUD EXCEPTION:** Pursuant to §90.502(4)(a), there is no attorney-client privilege when the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew was a crime or fraud.

The "crime-fraud exception to the attorney-client privilege . . . assures that the 'seal of secrecy,' . . . between lawyer and client does not extend to communications 'made for the purpose of getting advice for the commission of a fraud' or crime." *American Tobacco Company v. State*, 697 So. 2d 1249, 1253 (Fla. 4th DCA 1997) (quoting *United States v. Zolin*, 491 U.S. 554, 563, 105 L. Ed. 2d 469, 109 S. Ct. 2619 (1989)).

In *First Union National Bank vs. Turney*, 824 So. 2d 172 (Fla. 1st DCA 2001), the trustee's predecessor bank allowed a mortgage held by the trust to be subordinated to one held by an affiliated bank. The beneficiary was not told of any conflict of interest. The mortgagee later borrowed funds from a third bank, whose mortgage was taken over by the Federal Deposit Insurance Corporation (FDIC) after this bank failed. As the FDIC's mortgage had priority over the trusts, there were insufficient funds to pay off the latter when the security was liquidated. The predecessor hired counsel to represent the trust in its dealings with the FDIC and the mortgagee, and to explore the predecessor's defenses against the beneficiary.

The court found that the crime-fraud exception applied because: (1) the bank acted fraudulently when it sought to obtain a general release from the beneficiary, in exchange for a loan to the trusts to finance purchasing the FDIC's interest in the marina property, without making full disclosure of all material facts; and (2) the bank's lawyers, on behalf of the trustee, took steps designed to set up a defense under the statute of limitations to defeat the beneficiary's potential claims for breach of fiduciary duty by giving the beneficiary an accounting while concealing material facts about the bank's breaches of fiduciary duty.

The court concluded that a "trustee's communications with the trustee's attorneys are confidential. But when, with the help of an attorney, a trustee deliberately sets out to defeat the rights of a beneficiary, by withholding material information in violation of the trustee's fiduciary duty, communications to that end between the trustee and the trustee's attorney fall within the crime-fraud exception to the attorney-client privilege, and lose their confidential character."

2. **TESTAMENTARY EXCEPTION:** Pursuant to §90.502(4)(b), there is no lawyer-client privilege when a communication is relevant to an issue between parties who claim through the

same deceased client. The rationale for such disclosure is that it furthers the client's intent. *Swindler vs. United States*, 524 U.S. 399; 118 S. Ct. 2081(1998).

Additionally, this section authorizes the introduction of an attorney's testimony regarding evidence of the decedent's intent when two claimants are claiming the same bank accounts through the decedent who was the attorney's client. *Caputo v. Nouskhajian*, 871 So. 2d 266 (Fla. 5th DCA 2004).

3. **BREACH OF DUTY:** Pursuant to §90.502(4)(c), there is no lawyer-client privilege when a communication is relevant to an issue of breach of duty by the lawyer to the client or by the client to the lawyer, arising from the lawyer-client relationship.

4. **INTENTION OR COMPETENCE OF A CLIENT:** Pursuant to §90.502(4)(d), there is no lawyer-client privilege when the communication is relevant to an issue concerning the intention or competence of a client executing an attested document to which the lawyer is an attesting witness, or concerning the execution or attestation of the document.

Thus, an estate planning lawyer who is an attesting witness to a will or trust instrument may, pursuant to subpoena, testify with respect to the circumstances surrounding execution of the instrument, including opinions on the issue of the client's competence at the time. The Law Revision Council note to this subsection makes it clear that the exception is limited to communications "relevant to the attestation," and that all other communications concerning the documents remain privileged. Under this exception, testimony "concerning the intention" of a client is limited to the client's intention to execute the document, and does not extend to the client's communications of intent in regard to the disposition of the estate or having the document drafted. In *Re Guardianship of Muller*, 650 So. 2d 698 (Fla. 4th DCA 1995).

Irrespective of this exception, certain observations by the attorney are not confidential and are fair game for the probate litigator. Wigmore says: "[T]hose data which would have come to the attorney's notice in any event, by mere observation, without any action on the client's part - such as the color of his hat or the pattern of his shoe - and those data which become known by such acts as the client would ordinarily have done in any event, without any purpose of communicating them to the attorney as his adviser - such as the style of his handwriting or the amount of money in the roll of bills from which he pays his retainer - these are not any part of the communications of the client. . . ." 8 Wigmore, *Evidence* § 2306 (McNaughton rev. 1961). See: *Anderson v. State*, 297 So. 2d 871 (Fla. 2nd DCA 1974)

5. **COMMON INTEREST EXCEPTION:** Pursuant to §90.502(4)(e), there is no lawyer-client privilege when a communication is relevant to a matter of common interest between two or more clients, or their successors in interest, if the communication was made by any of them to a lawyer retained or consulted in common when offered in a civil action between the clients or their successors in interest.

This statutory exception is based on "a matter" of common interest. The concept of "a matter" is a flexible concept and typically involves "one transaction, event, or occurrence". Additionally, the common interest exception applies only to communications to an attorney "retained or

consulted in common." *Cone v. Culverhouse*, 687 So.2d 888 (Fla. 2d DCA 1997). A typical example: Both the husband and wife retain an attorney to prepare their estate planning documents. In litigation between the decedent's estate and the surviving spouse, the prior communications between the lawyer and the surviving spouse are not privileged.