

# SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: Judiciary Committee

BILL: SB 544

SPONSOR: Senator Smith

SUBJECT: Psychotherapist-Patient Privilege

DATE: March 8, 2005

REVISED: 03/10/05

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Munroe</u>	<u>Wilson</u>	<u>HE</u>	<b>Favorable</b>
2.	<u>Cibula</u>	<u>Maclure</u>	<u>JU</u>	<b>Fav/1 amendment</b>
3.	<u>                    </u>	<u>                    </u>	<u>                    </u>	<u>                    </u>
4.	<u>                    </u>	<u>                    </u>	<u>                    </u>	<u>                    </u>
5.	<u>                    </u>	<u>                    </u>	<u>                    </u>	<u>                    </u>
6.	<u>                    </u>	<u>                    </u>	<u>                    </u>	<u>                    </u>

## Please see last section for Summary of Amendments

- Technical amendments were recommended
- Amendments were recommended
- Significant amendments were recommended

### I. Summary:

This bill expands the group of mental health professionals to which the psychotherapist-patient privilege applies to include advanced registered nurse practitioners whose primary scope of practice is the diagnosis or treatment of mental or emotional conditions. Communications between a psychotherapist and a patient which are subject to the privilege are, generally, confidential and not discoverable or admissible in legal proceedings.

This bill substantially amends section 90.503, Florida Statutes.

### II. Present Situation:

The Florida Evidence Code, codified as ch. 90, F.S., creates the following evidentiary privileges in addition to the psychotherapist-patient privilege:

- Journalist's privilege;
- Lawyer-client privilege;
- Sexual assault counselor-victim privilege;
- Domestic violence advocate-victim privilege;
- Husband-wife privilege;
- Privilege with respect to communications with clergy;

- Accountant-client privilege; and
- Privilege with respect to trade secrets.

An evidentiary privilege prohibits the discovery, subpoena, or admission of what otherwise might be admissible evidence in a legal proceeding.<sup>1</sup> “Privileges are impediments to the search for truth, finding their justification in the priority of societal values they serve.”<sup>2</sup> Privileges are strictly construed because they are in derogation of the common law.<sup>3</sup>

### **Psychotherapist-Patient Privilege**

Under the psychotherapist-patient privilege, a patient’s records and communications between a psychotherapist and a patient are generally confidential when made for the purposes of diagnosis or treatment of a mental or emotional condition, including alcoholism and drug addiction.<sup>4</sup> The “patient has a privilege to refuse to disclose, and to prevent any other person from disclosing, [the] confidential [information].”<sup>5</sup> The privilege does not apply in the following circumstances:

- in proceedings in which a psychotherapist believes a patient is in need of hospitalization for mental illness;
- in court-ordered mental examinations;
- in proceedings in which a person’s mental or emotional condition is at issue; or
- in situations involving child abuse, abandonment, or neglect.<sup>6</sup>

For purposes of the psychotherapist-patient privilege, a psychotherapist may include a physician, psychologist, clinical social worker, marriage and family therapist, mental health counselor, and treatment personnel of certain licensed facilities.<sup>7</sup>

The policy supporting the existence of the psychotherapist-patient privilege:

is to enable a person suffering from mental, emotional, or behavioral disorders, to seek services and treatment without being needlessly exposed to public scrutiny, as it is clearly to society’s advantage to encourage people experiencing such problems to obtain assistance.<sup>8</sup>

The privilege “reflects . . . awareness that ‘confidentiality is essential to the conduct of successful psychiatric care.’”<sup>9</sup>

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<sup>1</sup> See *In re Grand Jury Proceedings*, 664 F.2d 423, 429 (5th Cir. 1981) and *The Florida Bar v. Forrester*, 818 So. 2d 477, 481-482 (Fla. 2002).

<sup>2</sup> *In re Grand Jury Proceedings*, 664 F.2d at 429 (quoting *United States v. Brown*, 605 F.2d 389, 396 (8th Cir. 1979)).

<sup>3</sup> *O’Neill v. O’Neill*, 823 So. 2d 837, 839 (Fla. 5th DCA 2002)

<sup>4</sup> Section 90.503, F.S.

<sup>5</sup> Section 90.503(2), F.S.

<sup>6</sup> Section 90.503(4) and s. 39.204, F.S.

<sup>7</sup> Section 90.503(1)(a), F.S.

<sup>8</sup> *Cedars Healthcare Group, Ltd. v. Freeman*, 829 So. 2d 390, 391 (Fla. 3d DCA 2002).

<sup>9</sup> *O’Neill*, 823 So. 2d at 840 (quoting *Attorney ad Litem for D.K. v. Parents of D.K.*, 780 So. 2d 301, 306 (Fla. 4th DCA 2001)).

### **Advanced Registered Nurse Practitioners**

Advanced registered nurse practitioners perform all duties of a registered nurse and advanced level nursing in accordance with established protocols, including managing selected medical problems, monitoring and altering drug therapies, initiating appropriate therapies for certain conditions, performing physical examinations, ordering and evaluating diagnostic tests, ordering physical and occupational therapy, and initiating and monitoring therapies for certain uncomplicated acute illnesses.

Part I of ch. 464, F.S.,<sup>10</sup> requires the Board of Nursing to adopt rules authorizing advanced registered nurse practitioners to perform acts of medical diagnosis and treatment, prescription, and operation which are identified and approved by a joint committee. Advanced registered nurse practitioners may perform medical acts under the general supervision of a medical physician, osteopathic physician, or dentist within the framework of standing protocols that identify the medical acts to be performed and the conditions for their performance. The Board of Nursing and the Board of Medicine have filed identical administrative rules setting forth standards for the protocols,<sup>11</sup> which establish obligations on medical physicians, osteopathic physicians, and dentists who enter into protocol relationships with advanced registered nurse practitioners. The Board of Osteopathic Medicine and the Board of Dentistry, which have regulatory jurisdiction over osteopathic physicians and dentists, respectively, are not required to adopt administrative rules regarding the standards for advanced registered nurse practitioner protocols. Although advanced registered nurse practitioners may prescribe medications in accordance with a protocol, they cannot prescribe controlled substances.

### **III. Effect of Proposed Changes:**

This bill expands the group of mental health professionals to which the psychotherapist-patient privilege applies to include advanced registered nurse practitioners whose primary scope of practice is the diagnosis or treatment of mental or emotional conditions. Communications between a psychotherapist and a patient which are subject to the privilege are, generally, confidential and not discoverable or admissible in legal proceedings.

The bill takes effect July 1, 2005.

### **IV. Constitutional Issues:**

#### **A. Municipality/County Mandates Restrictions:**

None.

#### **B. Public Records/Open Meetings Issues:**

None.

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<sup>10</sup> Also commonly called the Nurse Practice Act.

<sup>11</sup> See Rules 64B9-4.010 and 64B8-35.002, F.A.C.

C. Trust Funds Restrictions:

None.

**V. Economic Impact and Fiscal Note:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

**VI. Technical Deficiencies:**

Existing law in subparagraphs (1)(a)1. through (1)(a)4. of s. 90.503, F.S., specifies which medical professionals are governed by the psychotherapist-patient privilege. The bill, however, incorrectly labels the new language relating to advanced registered nurse practitioners as subsection (5) rather than subparagraph 5. For consistency with existing law and clarity of legislative intent, the bill should be amended to re-designate the new language as subparagraph (1)(a)5.

**VII. Related Issues:**

None.

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This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.

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## **VIII. Summary of Amendments:**

### **Barcode 220592 by Judiciary:**

Re-designates new language as subparagraph 5. of s. 90.503(1)(a), F.S., instead of subsection (5) of s. 90.503, F.S.

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