

Estate Planning and the Fiduciary Exception to Attorney-Client Privilege

Protecting Estate Counsel's Advice to Trustees Amid Conflicting Court Rulings

TUESDAY, MAY 26, 2015

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

Tina N. Babel, Principal, **Carmody MacDonald**, St. Louis

Laura E. Morris, Partner, **Warner Norcross & Judd**, Grand Rapids, Mich.

The audio portion of the conference may be accessed via the telephone or by using your computer's speakers. Please refer to the instructions emailed to registrants for additional information. If you have any questions, please contact **Customer Service at 1-800-926-7926 ext. 10.**

Tips for Optimal Quality

FOR LIVE EVENT ONLY

Sound Quality

If you are listening via your computer speakers, please note that the quality of your sound will vary depending on the speed and quality of your internet connection.

If the sound quality is not satisfactory, you may listen via the phone: dial **1-866-961-9091** and enter your PIN when prompted. Otherwise, please **send us a chat** or e-mail sound@straffordpub.com immediately so we can address the problem.

If you dialed in and have any difficulties during the call, press *0 for assistance.

Viewing Quality

To maximize your screen, press the F11 key on your keyboard. To exit full screen, press the F11 key again.

Continuing Education Credits

FOR LIVE EVENT ONLY

For CLE purposes, please let us know how many people are listening at your location by completing each of the following steps:

- In the chat box, type (1) your **company name** and (2) the **number of attendees at your location**
- Click the SEND button beside the box

In order for us to process your CLE, you must confirm your participation by completing and submitting an Official Record of Attendance (CLE Form) to Strafford within 10 days following the program.

The CLE form is included in your dial in instructions email and in a thank you email that you will receive at the end of this program.

Strafford will send your CLE credit confirmation within approximately 30 days of receiving the completed CLE form.

For additional information about CLE credit processing call us at 1-800-926-7926 ext. 35.

Program Materials

FOR LIVE EVENT ONLY

If you have not printed the conference materials for this program, please complete the following steps:

- Click on the ^ symbol next to “Conference Materials” in the middle of the left-hand column on your screen.
- Click on the tab labeled “Handouts” that appears, and there you will see a PDF of the slides for today's program.
- Double click on the PDF and a separate page will open.
- Print the slides by clicking on the printer icon.

Fiduciary Representation: Are the Beneficiaries Your Client?

*A Nationwide Examination of the Fiduciary Exception
to the Attorney-Client Privilege*

Date : May 26, 2015
Authors' Names: Laura E. Morris & Tina N. Babel

The Classic Scenario

- * Shortly before Father died, he made Young New Wife and Corporate Bank the Co-Trustees of his substantial trust
 - * YNW gets income for life
- * Father's Children are the remainder beneficiaries when YNW dies and may request discretionary principal encroachments for maintenance, health, and education from the Co-Trustees

The Classic Scenario

- * You have represented both Co-Trustees for years
 - * You have handled regular administration issues
 - * You have given memos to Co-Trustees about whether YNW had a conflict of interest in denying Father's Children's requests for encroachment, whether the requests were appropriate, and likelihood of success should Co-Trustees be sued for denial
 - * YNW also emailed you regarding the requests, and said not-so-nice things about the Father's Children and about how they do not deserve the money because they did not even attend her wedding and therefore the request was denied

The Classic Scenario

- * Father's Children sue Co-Trustees for Breach of Trust and Breach of Loyalty
 - * You give advice about the Petition, suggest worth of the case, and suggest a T&E Litigator to defend it
- * A year later, in the middle of litigation, Father's Children send you a subpoena for all of your communications and advice to the Co-Trustees from the beginning through present
 - * You claim attorney-client privilege
 - * Father's Children claim that they were the "client" for purposes of the privilege, as you were paid out of the Trust and you/Co-Trustees were working for their best interests

The Attorney-Client Privilege: *Back to Basics*

- * The attorney-client privilege is the oldest of the privileges for confidential communications known to our law
 - * Its purpose is to encourage full and frank communications between attorneys and their clients
 - * This promotes broader public interests in the observance of law and the administration of justice
 - * The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client
 - * Encourages clients to seek early legal assistance
- * The privilege belongs to the client, not the attorney

The Attorney-Client Privilege: *Back to Basics*

- * The attorney-client privilege applies if:
 - * The asserted holder is or sought to become a client
 - * The person to whom the communication was made
 - * Is a member of the bar and
 - * The attorney is acting as a lawyer in connection with the communication
 - * The communication relates to a fact of which the attorney was informed
 - * By the client
 - * Without the presence of strangers
 - * For the purposes of securing either
 - * An opinion on law or
 - * Legal services or
 - * Assistance in some legal proceeding and
 - * Not for the purpose of committing a crime or tort and
- * The privilege has been claimed and not waived by the client

The Attorney-Client Privilege: *For the T&E Attorney or Litigator*

- * But when you represent a trustee – or a personal representative, for that matter – who holds the privilege?
 - * The “Trust” or “Estate?”
 - * The Trustee/Co-Trustees/Personal Rep?
 - * The beneficiaries?
- * In our Classic Scenario, the Father’s Children will argue that they are the “client,” while the Co-Trustees will say that you represented them

The Attorney-Client Privilege: *For the T&E Attorney or Litigator*

- * The Courts have consistently struggled with this question of representation, and some state legislatures have even begun addressing the issue
- * This problem exists in other contexts
 - * Corporate entities
 - * *Upjohn Co. v. U.S.*, 449 U.S. 383 (1981)
 - * ERISA/Insurance companies
 - * *Solis v. Food Employers Labor Relations Ass'n*, 644 F.3d 221 (4th Cir. 2011)
 - * Law Firms (internal communications about liability)
- * Enter in the Fiduciary Exception

The Fiduciary Exception: *What is it?*

- * The “fiduciary exception” to the attorney-client privilege is defined differently depending upon the state and subject, but generally provides that a trustee who obtains legal advice related to the execution of fiduciary obligations is precluded from asserting the attorney-client privilege against beneficiaries of the trust because the beneficiaries are considered the client
- * It is not really an “exception” at all
 - * If the fiduciary exception applies, it really means that the beneficiary is the real client

Fiduciary Exception: *Historical Background*

- * Starting in the 19th Century, English courts have recognized the fiduciary exception
 - * Specifically – when a fiduciary obtained legal advice regarding estate management and paid for that advice with estate assets, the information could not be withheld from the beneficiaries

Fiduciary Exception: *Historical Background*

- * *Talbot v. Marshfield*, 2 Drew & Sm. 549, 62 Eng. Rep. 728 (Ch. 1865)
 - * Plaintiff beneficiaries sued Trustees
 - * Plaintiffs sought production of two legal opinions from the Trustees' counsel
 - * 1st issued before the litigation: discretionary power to make certain distributions
 - * 2nd issued after the litigation: defense of litigation
 - * The Court ordered that the plaintiffs were entitled to production of the first, but not the second
 - * The 1st was taken before proceedings were threatened, and because the beneficiaries had an interest in the due administration of the trust and counsel had a right to be paid out of the estate for its advice, the beneficiaries had a right to see the opinion
 - * The Court found that the 2nd opinion stood on “totally different footing” because it was not to guide the trustees in administration, but to defend the trustees
 - * However, if the trustees could charge for the 2nd opinion out of the Trust funds, then maybe they would have a right to the opinion

Fiduciary Exception: *Historical Background*

- * Other 19th Century English decisions followed
 - * In sum, if the communication related to administration and before litigation was commenced, the courts would order the production to the beneficiaries
- * American treatises' then addressed the exception

Fiduciary Exception: *Historical Background*

- * In 1948, *Bogert on Trusts* recognized that if the beneficiary is “to be able to hold the trustee to proper standards of care and honesty and procure for himself the benefits to which the trust instrument and the doctrine of equity entitle him, he must know of what the trust property consists and how it is being managed.” Section 818 (2d ed. 1948)
- * In 1959, the Restatement (Second) of Trusts provided that a trustee was only entitled to hold back information that he acquired at his own expense and for his own protection. Section 173 cmt. B(1959)
- * In 1967, *Scott on Trusts* agreed with these principles. See Sec. 173 (3d ed. 1967)

The Fiduciary Exception: *Examination of Jurisdictional Differences*

And Recent Developments

Overview:

Spectrum Across Jurisdictions

- * Jurisdictional differences:
 - * BENs are client
 - * BENs are also client with FID
 - * FID only is client
 - * Conflicting authority w/in jurisdiction
- * If BENs = client, FID cannot assert ACP against BENs.

Landmark *Riggs* Case: Recognizes Fiduciary Exception

- * In *Riggs*, TEEs filed petition for instructions.
- * After, TEEs asked their law firm for legal opinion regarding (1) pending petition for instructions, and (2) potential tax litigation between the trust and the State of Delaware.
- * In requesting the legal opinion, TEEs communicated certain facts to their law firm.
- * Firm prepared legal memorandum (the “Memo”), provided to TEEs.
- * Firm invoiced TEEs for its legal services, paid by Trust.
- * About year later, BENs filed surcharge action against TEEs, seeking to compel TEEs to reimburse Trust for damages caused by breaches.
- * Alleged breaches related to potential tax litigation.

Riggs Case Continued

- * During discovery in surcharge action, TEEs declined to produce Memo, asserting ACP.
- * BENs filed motion to compel; argued TEEs by definition were administering Trust for their benefit, so legal advice to TEEs about trust administration was for BENs. “The beneficiaries’ argument is simply that the [memo] cannot be subject to the various privileges asserted by the trustees because, in effect, it was prepared for their benefit and in aid of the administration of the trust.” *Id.* at 711.
- * BENs also argued they indirectly paid for Memo.
- * BENs further argued timing of Memo’s preparation showed was not obtained in anticipation of the surcharge action or to protect TEEs from a breach of fiduciary duty claim: “Because the [memo] was completed over a year before the surcharge claim was filed and months before it was first asserted, they argue that it cannot logically be considered to have been in aid of the trustees’ defense of the surcharge claim.”

Riggs Case Continued

- * Court: Discoverability of Memo depended on “the purpose for which it was prepared, and the party or parties for whose benefit it was procured, in relation to what litigation was then pending or threatened.”
- * When Memo was prepared, only active legal proceeding was TEEs’ petition for instructions, “the very nature of which normally indicates that the trustees were not implicated in any way.”
- * At that time, the only anticipated litigation was tax litigation by the TEEs against the State of Delaware.
- * Thus, legal advice sought by TEEs could only have related to administration.

Riggs Continued

- * Substantively, no indication Memo intended to protect TEEs personally.
- * No reason to believe TEEs had concerns other than BENs' best interests when consulted law firm.
- * TEEs paid law firm from Trust, which was a “strong indication of precisely who the real clients were[,]” given Delaware law only permitted attorney to be paid from Trust when services were necessary for proper trust administration or otherwise benefited trust.
- * “[T]he [memo] was prepared ultimately for the benefit of the beneficiaries of the trust and not for the purpose of the trustees’ own defense in any litigation against themselves.”

Riggs Continued

- * Even if prepared for BENs, could TEE could block access by asserting ACP?
- * Counsel agreed no American case law on point.
- * Court looked to legal treatises.
- * Considered whether trust law (favoring access to information) or evidence law (favoring confidentiality and privilege) took priority: “[T]he question becomes whether the privileges claimed and the policies supporting them should override” the beneficiary’s right to information under trust law.

Riggs Continued

- * TEE is not the real client in the sense that he is personally being served. Very intention of communication is to aid BENs.
- * “In effect, the beneficiaries were the clients of [law firm] as much as the trustees were, and perhaps more so.”
- * “The policy of preserving the full disclosure necessary in the trustee-beneficiary relationship is here ultimately more important than the protection of the trustees’ confidence in the attorney for the trust.”

Riggs Holding

- * ACP did not apply to Memo.
- * BENs motion to compel granted.
- * BENs got Memo prepared by attorney hired by TEE.

Client = BENs

Jurisdictions

- * **Delaware:**

- * *Riggs* still good law. *K.S. Distributors, Inc. v. Tigani*, 2010 WL 2011603 (Del. Ch. May 7, 2010) (citing *Riggs*).

- * *Post-Riggs*, the Delaware Legislature adopted statute: “Except as provided in the governing instrument, a fiduciary may retain counsel in connection with any claim that has or might be asserted against the fiduciary, and the payment of counsel fees and related expenses from the fund with respect to which the fiduciary acts as such shall not cause the fiduciary to waive or to be deemed to have waived any right or privilege including, without limitation, the attorney-client privilege.” Del. Code Ann. Title 12, § 3333 (West 2007).

Client = BENs *Jurisdictions*

- * **Arkansas**: TEE and BENs deemed joint clients for ACP purposes. *In re Estate of Torian*, 564 SW2d 521 (Ark 1978).

Client = BENs

Jurisdictions

- * **Pennsylvania**: “[T]he trustee cannot withhold from any beneficiary documents regarding the management of the trust, including opinions of counsel procured by the trustee to guide the trustee in the administration of the trust, because trust law imposes a duty to make these documents available to the beneficiaries.” *Follansbee v. Gerlach*, 56 Pa. D. & C.4th 483 (Ct. Comm. Pl. 2002).

Client = BENs

Jurisdictions

- * **Federal Courts:** The fiduciary exception has enjoyed more success in federal courts than in state courts.
- * Numerous decisions of both circuit courts of appeal and district courts have recognized the exception. See, e.g., *Wachtel v. Health Net, Inc.*, 482 F.3d 225, 233-234 (3rd Cir. 2007); *In re Long Island Lighting Co.*, 129 F.3d 268, 272 (2nd Cir. 1997); *Wildbur v. Arco Chemical Co.*, 974 F.2d 631, 645 (5th Cir. 1992); *United States v. Evans*, 796 F.2d 264, 265-266 (9th Cir. 1986).
- * Trust and estate litigation is typically brought in state court, so federal cases applying the fiduciary exception most commonly involve shareholder derivative actions or ERISA litigation.

Client = BENs

Jurisdictions

- * **Recent Colorado Federal Case**

- * *Galena Street Fund, L.P. v. Wells Fargo Bank, N.A.*, 2014 WL 943115 (March 10, 2014).

- * The United States District Court of Colorado found that the Colorado Supreme Court would apply the fiduciary exception to an action involving a dispute between a trustee and trust beneficiaries.

- * “However, in order for the fiduciary exception to the attorney-client privilege to apply, the communication must concern legal advice related to the execution of fiduciary obligations and there must be good cause justifying a finding that the privilege was waived.”

- * It also does not apply where the fiduciary seeks legal advice for its own protection against claims by the beneficiary.

Client = BENs

Jurisdictions

- * **U.S. Supreme Court, *Jicarilla*:**
- * In 2002, Jicarilla Apache Nation (the “Nation”) filed breach of trust action against United States (the “Government”) in Court of Federal Claims (the “CFC”), seeking damages for Government’s alleged mismanagement of funds held in trust for the Nation.
- * Government withheld certain documents from production, based on ACP; Nation moved to compel.

Client = BENs

Jurisdictions

- * **U.S. Supreme Court, *Jicarilla Con'd*:**
- * After in camera review, CFC determined some documents related to Government's management of trust funds and granted motion applying fiduciary exception to ACP.
- * "CFC concluded that the trust relationship between the United States and the Indian tribes is sufficiently analogous to a common-law trust relationship that the exception should apply."
- * Supreme Court assumed existence of fiduciary exception under federal common law. "Neither party before this Court disputes the existence of a common-law fiduciary exception, [s]o in deciding this case we assume such an exception exists."
- * Ultimately, Supreme Court concluded Government's administration of trust funds for Nation was too dissimilar from the private trust context to justify application of the fiduciary exception.

Client Can Include BENs: *Jurisdictions*

- * **Arizona**
- * Recent post-*Jicaralla* case: *In re Kipnis Trust*, 235 Ariz. 153 (2014).
- * Holding: Arizona adopts fiduciary exception to ACP.
- * Interesting Addition: Applies to predecessor trustees too.
- * TEE administered trust and managed ownership of LLC owned by trust.
- * TEE hired law firm to advise it on trust administration and management of LLC .
- * Paid law firm with trust funds.
- * Lower court: Payment from trust = beneficiaries are client for all legal work. “A mistake was made by not retaining . . . private counsel to give this advise . . . [and the] trust was charged.”

Client = BENs

Jurisdictions

- * **Arizona, Kipnis Con't**

- * “[W]e hold that a trustee’s attorney-client privilege vis-à-vis a beneficiary extends to all legal advice sought in the trustee’s personal capacity for purposes of self-protection.”
- * “The trial court erred by ordering Northern Trust to disclose legal advice without considering whether Northern Trust had sought that advice in its corporate capacity or whether the advice concerned matters of trust administration.”
- * “A trustee’s attorney-client communications made in a personal capacity do not cease to be privileged merely because the trustee used trust funds to compensate the attorneys or because the same attorneys also provided advice on matters of trust administration.”

Client = BENs *Jurisdictions*

- * **Arizona, Kipnis Con't: Conflicts**
- * “[C]ounsel quickly may be faced with a conflict of interest between the trustee’s individual interests and the interests of the trust. . . . [T]he Rules of Professional Conduct may prevent trust counsel from providing further advice to the trustee regarding its personal interests.”

Client = BENs

Jurisdictions

- * **Arizona, Kipnis Con't:** Successor Trustee
- * Under Arizona code, “trustee” definition includes successor trustees, who succeeds to same powers/duties, including duty to keep BENs “reasonably informed about the administration,” A.R.S. § 14–10813(A), including duty to disclose “legal consultations and advice obtained in the trustee’s fiduciary capacity concerning decisions or actions to be taken in the course of administering the trust.”
- * “To prevent a predecessor trustee from interfering with a successor trustee’s duties and impeding the transition of trustees to the detriment of the beneficiaries, we hold that a predecessor trustee cannot assert the attorney-client privilege against a successor trustee as to legal advice that the predecessor trustee sought in its fiduciary capacity on matters of trust administration.”
- * “However, the limit on the fiduciary exception in the beneficiary context applies with equal weight in the successor trustee context: when a trustee communicates with an attorney in the trustee’s personal capacity on matters not of trust administration, disclosure of that communication may not be compelled by a successor trustee.”

Client = Trustee Only: *Jurisdictions*

- * **California:**

- * “The attorney-client privilege is codified in Evidence Code section 954, which unambiguously provides that it can be limited only by statutory exceptions: the privilege applies “[subject] to Section 912 and except as otherwise provided in this article.”” *Dickerson v. Superior Court*, 185 Cal. Rptr. 97 (Cal. Ct. App. 1982).
- * California Supreme Court states Evidence Code does not recognize the fiduciary exception to the attorney-client privilege, and that California’s courts lack authority to recognize the fiduciary exception at common law. *Wells Fargo Bank v. Superior Court*, 990 P.2d 591 (Cal. 2000).
- * *Wells Fargo* rejected notion that trust paying fees = no ACP.

Client = Trustee Only

Jurisdictions

- * **Connecticut**: Unpublished opinion, Connecticut Superior Court declined to recognize or apply the fiduciary exception. *Hubbell v. Ratcliffe*, 50 Conn. L. Rptr. 856 (Conn. Super. Ct. 2010).

Client = Trustee Only

Jurisdictions

- * **Florida:** Under 2011 statute: “A communication between a lawyer and a client acting as a fiduciary is privileged and protected from disclosure under [Fla. Stat. §] 90.502 [codification of lawyer-client privilege] to the same extent as if the client were not acting as a fiduciary.” Fla. Stat. § 90.5021(2).
- * “In applying [Fla. Stat. §] 90.502 to a communication under this section, only the person or entity acting as a fiduciary is considered a client of the lawyer.”
- * This statute overturned Florida common law’s recognition of a version of the fiduciary exception. *See Jacob v. Barton*, 877 So.2d 935 (Fla. Dist. Ct. App. 2004).

Client = Trustee Only

Jurisdictions

- * **Hawaii:** “An attorney employed by a fiduciary for an estate, guardianship, or trust represents the fiduciary as client as defined in Rule 503(a) of the Hawaii Rules of Evidence and shall have all the rights, privileges, and obligations of the attorney-client relationship with the fiduciary insofar as the fiduciary is acting in a fiduciary role for the benefit of one or more beneficiaries or a ward.” Hawaii R. Probate Rule 42(a).
- * “An attorney for an estate, guardianship, or trust does not have an attorney-client relationship with the beneficiaries of the estate or trust or the ward of the guardianship, but shall owe a duty to notify such beneficiaries or ward of activities of the fiduciary actually known by the attorney to be illegal that threaten the security of the assets under administration or the interests of the beneficiaries.” *Id.* at 42(b).
- * If BENs are not considered clients, then presumably ACP would apply.

Client = Trustee Only

Jurisdictions

- * **Illinois:**

- * The Illinois Court of Appeals has considered the fiduciary exception several times, but each time it has expressly declined to adopt the exception.
- * *MDA City Apartments LLC v. DLA Piper LLP*, 967 N.E.2d 424 (Ill. App. Ct. 2012); *Garvy v. Seyfarth Shaw LLP*, 966 N.E.2d 523 (Ill. App. Ct. 2012); *Mueller Industries, Inc. v. Berkman*, 927 N.E.2d 794 (Ill. App. Ct. 2010).

Client = Trustee Only

Jurisdictions

- * **New York**

- * Initially, New York recognized the fiduciary exception. *Hoopes v. Carota*, 531 N.Y.S.2d 407 (N.Y. App. Div. 1988).
- * 2002: New York legislature adopted statute to limit the fiduciary exception.
- * “For purposes of the [ACP] . . . in the absence of an agreement between the attorney and the personal representative to the contrary: (i) No beneficiary of the estate is, or shall be treated as, the client of the attorney solely by reason of his or her status as beneficiary; and (ii) The existence of a fiduciary relationship between the personal representative and a beneficiary of the estate does not by itself constitute or give rise to any waiver of the privilege for confidential communications made in the course of professional employment between the attorney or his or her employee and the personal representative who is the client.” N.Y. EVIDENCE LAW § 4503(a)2(A) (McKinney 2002).

Client = Trustee Only

Jurisdictions

- * **New York, Con'd.**
- * Under statute, “personal representative” is defined to include an administrator, administrator c.t.a., ancillary administrator, executor, preliminary executor, temporary administrator, and/or trustee “to whom letters have been issued.” *Id.* at § 4503(a)(2)(B).
- * “Letters . . . issued” equal testamentary trustee only. So, “[t]he fiduciary exception would . . . appear to remain viable in disputes between beneficiaries and the trustee of an inter vivos trust.” N.Y. Evidence Law § 4503(a)(2)(A) (McKinney 2002), Practice Commentaries C4503:7.

Client = Trustee Only

Jurisdictions

- * **Ohio:**
- * 2007 Ohio statute: “Absent an express agreement to the contrary, an attorney who performs legal services for a fiduciary, by reason of the attorney performing those legal services for the fiduciary, has no duty or obligation in contract, tort, or otherwise to any third party to whom the fiduciary owes fiduciary obligations.” Ohio Rev. Code Ann. § 5815.16(A) (West 2007).
- * Under statute, “fiduciary” is deemed to mean “a trustee under an express trust or an executor or administrator of a decedent’s estate.” *Id.* at § 5815.16(B).
- * There can be no attorney-client relationship between the fiduciary’s attorney and a beneficiary, where the attorney owes no contractual legal duties to the beneficiary.
- * Consequently, the beneficiaries presumably cannot pierce the privilege between the fiduciary and its legal counsel.

Client = Trustee Only

Jurisdictions

- * **South Carolina:**

- * Fiduciary exception was recognized under South Carolina common law. *Floyd v. Floyd*, 615 S.E.2d 465 (S.C. Ct. App. 2005).
- * South Carolina Legislature enacted a statute expressly intended to overrule *Floyd's* recognition of the fiduciary exception.
- * “Whenever an attorney-client relationship exists between a lawyer and a fiduciary, communications between the lawyer and the fiduciary shall be subject to the attorney-client privilege unless waived by the fiduciary, even though fiduciary funds may be used to compensate the lawyer for legal services rendered to the fiduciary. The existence of a fiduciary relationship between a fiduciary and a beneficiary does not constitute or give rise to any waiver of the privilege for communications between the lawyer and the fiduciary.” S.C. Code Ann. § 62-1-110 (2008).

Client = Trustee Only

Jurisdictions

- * **Texas:**
- * Rejected fiduciary exception. *Huie v. DeShazo*, 922 S.W.2d 920 (Tex. 1996).
- * “Without the privilege, trustees might be inclined to forsake legal advice, thus adversely affecting the trust, as disappointed beneficiaries could later pore over the attorney-client communications in second-guessing the trustee’s actions. Alternatively, trustees might feel compelled to blindly follow counsel’s advice, ignoring their own judgment and experience.”
- * “[W]hile a trustee must fully disclose material facts regarding the administration of the trust, the attorney-client privilege protects confidential communications between the trustee and his or her attorney under Rule 503.”
- * “We conclude that, under Texas law at least, the trustee who retains an attorney to advise him or her in administering the trust is the real client, not the trust beneficiaries.”

Client = Trustee Only *Jurisdictions*

- * **Virginia:** Declined to adopt or apply the fiduciary exception. *Batt v. Manchester Oaks Homeowners Association, Inc.*, 80 Va. Cir. 502 (Va. Cir. Ct. 2010).

Client = Conflicting Authority *Jurisdictions*

- * **Michigan**

- * 1990: Real client was estate, not the PR. *Steinway v Bolden*, 185 Mich App 234, 237-238; 460 NW 2d 306 (1990).
- * Michigan Supreme Court response: Promulgated court rule: “Representation of Fiduciary. An attorney filing an appearance on behalf of a fiduciary shall represent the fiduciary.” MCR 5.117(A).
- * But, post-court rule unpublished case from Michigan Court of Appeals: “[W]hen an attorney is retained by a fiduciary, the attorney represents both the fiduciary and the estate.” *In re Estate of Graves*, unpublished, issued Dec. 3, 2009 (Docket No. 286674).
- * *Graves* court aware of court rule? Unclear. Could have decided court rule did not control because substantive issue of law, but most likely overlooked.
- * Since *Graves*, Court of Appeals on its own motion issued order rescinding *Graves* for publication.
- * Unclear state of fiduciary exception in Michigan.

Checklist Summary: Privileged in My Jurisdiction?

- * State statute or court rule on who client/fiduciary exception?
 - * If so, could be dispositive on issue
- * Who paid fees?
 - * FID Estate/Trust: Supports client = BEN
 - * FID personally: Supports client = TEE
- * Pending or threatened litigation when advised?
 - * No: Supports client = BEN
 - * Yes: Supports client = FID
- * Purpose of advise? How benefits from advice?
 - * Benefits BENs: Supports client = BEN
 - * Benefits FID personally: Supports client = FID

Legal Treatises: *Fiduciary Exception*

- * The Restatement (Third) of Law Governing Lawyers § 84 (2000) provides:

In a proceeding in which a trustee of an express trust or similar fiduciary is charged with breach of fiduciary duties by a beneficiary, a communication otherwise within sec. 68 is nonetheless not privileged if the communication (a) is relevant to the claimed breach; and (b) was between the trustee and a lawyer... who was retained to advise the trustee concerning the administration of the trust.

Legal Treatises: *Fiduciary Exception*

- * In the Comments (b), the Restatement adopts the fiduciary exception and draws the following distinction between administrative vs. litigation:

In litigation between a trustee of an express trust and beneficiaries of the trust charging breach of the trustee's fiduciary duties, the trustee cannot invoke the attorney-client privilege to prevent the beneficiaries from introducing evidence of the trustee's communications with a lawyer retained to advise the trustee in carrying out the trustee's fiduciary duties. . . It does not apply to communications between the trustee and a lawyer specifically retained by the trustee to represent, not the trust or the trustee with respect to executing trust duties, but the trustee in the trustee's personal capacity, such as to assist the trustee in a dispute with a beneficiary or to assert a right against the beneficiary.

- * What constitutes an "adversarial relationship" remains difficult to apply, however. Courts have noted that drawing the distinction "can be difficult."

The Authorities: *Fiduciary Exception*

- * The American Bar Association and ACTEC appear to endorse the position that there should be no fiduciary exception.
 - * ABA FORMAL OPINION 94-380 (May 9, 1994) (“The fact that the fiduciary has obligations to the beneficiaries of the trust or estate does not in itself either expand or limit the lawyer’s obligations to the fiduciary client under the Model Rules, nor impose on the lawyer obligations toward the beneficiaries that the lawyer would not have toward other third parties”).
 - * See Price John R. and Ross, Bruce S., *Reporter’s Note, First Edition, ACTEC Commentaries on the Model Rules of Professional Conduct*, 4th Ed. (2006) (“Under the majority view, a lawyer who represents a fiduciary generally with respect to a fiduciary estate stands in a lawyer-client relationship with the fiduciary and not with respect to the fiduciary estate or the beneficiaries”).

Policy Considerations: *For and Against Fiduciary Exception*

For the Exception

- * Beneficiaries pay for advice
- * Fiduciaries (and therefore attorneys) are working for the benefit of beneficiaries
- * Beneficiaries need info to protect their interests
- * Beneficiaries' expectations

Against the Exception

- * Fiduciaries may avoid legal advice
- * Fiduciaries may blindly follow legal advice
- * Vagueness as to “adversarial”
- * Lack of clarity/reality as to “client”
- * Attorney may not be fully informed
- * Fiduciary's expectations

Summary:

Where on Spectrum?

- * State statute or court rule on who client/ACP?
 - * If so, could be dispositive on issue
- * Who paid fees?
 - * FID Estate/Trust: Supports client = BEN
 - * FID personally: Supports client = TEE
- * Pending or threatened litigation when advised?
 - * No: Supports client = BEN
 - * Yes: Supports client = FID
- * Purpose of advice?
- * *Jicaralla* impact

Back to our Classic Scenario

- * You have been subpoenaed for your (a) memorandums regarding conflict of interest in denying Father's Children's requests for encroachment, whether the requests were appropriate, and likelihood of success, (b) hostile emails with Co-Trustee YNW, and (c) communications re: litigation.
 - * First, look to state laws and statutes.
 - * If recognize exception, can you argue they were all in preparation of litigation (last one surely)?
 - * Who paid the fees?
 - * How do you protect yourself from this in the future?

Best Practices: *When Representing a Fiduciary*

- * Know your state's laws.
 - * They are constantly changing.
- * Identify your client and constantly reassess.
 - * Inform fiduciary in writing.
 - * Inform beneficiaries in writing.
 - * Suggest beneficiaries retain own counsel if they have questions/concerns.
 - * Aware of the one-beneficiary problem.
- * Tell fiduciary about potential privilege issues.
 - * Beyond beneficiary issue, remember “successor” fiduciaries.
- * State attorney-client privileged in bold and underlined in privileged communications.
 - * Restate and explain in body.

Best Practices: *When Representing a Fiduciary*

- * Be mindful of your duties.
 - * Provide information that is reasonably requested.
 - * Do so timely.
 - * Beneficiaries have the right to reasonable requests for books and records.
- * Be mindful of your communications.
 - * Remind fiduciaries to be respectful of beneficiaries in *all* written communications.
 - * Remind fiduciaries not to forward your emails – destroys privilege.
 - * In some jurisdictions, “hostility” toward beneficiaries is a reason for removal.
- * Be mindful of invoices.
 - * Comments made and descriptions.
 - * Be particularly careful when your fees are being paid out of the estate.

Best Practices: *When Representing a Fiduciary*

- * Consider separate files or matter number .
- * Consider separate attorneys – one for trustee individually and one for trust administration .
 - * Colleague vs. counsel outside firm (most conservative).
- * Consider trustee paying out of pocket for advice that only benefits fiduciary.
- * Consider carefully-crafted letter to beneficiaries regarding brewing dispute.
- * Withdraw.
- * Go to Court!
 - * When revealing confidential information, a lawyer may disclose information “to the extent the lawyer reasonably believes necessary . . . to comply with other law or a court order.”
 - * Petition for Instructions and in camera review.

Best Practices: *When Representing a Fiduciary*

- * Be aware of your ethical duties.
 - * Model Rules of Professional Conduct – Rule 1.6(a): Confidentiality of Information:
 - * “A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b) [to prevent death, bodily harm, etc].”
 - * Model Rules of Professional Conduct – Rule 1.6(c):
 - * “A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.”
- * To abide by these rules, you need to constantly question: Who is the client?

Your Presenters: Questions? Comments?

Laura E. Morris, J.D.

Licensed: Michigan
Practice: Probate Litigator
Partner at Warner Norcross & Judd LLP

Rising Star, Super Lawyers Magazine
Published author & regular speaker
Trained Mediator

Contact Information:
Warner Norcross & Judd LLP
111 Lyon Street NW, Suite 900
Grand Rapids, MI 49506
(616) 752-2407
lmorris@wnj.com

Tina N. Babel, J.D.

Licensed: Missouri, Illinois, and
California
Partner at Carmody MacDonald P.C.

Rising Star, Super Lawyers Magazine
Up & Coming Lawyer, Missouri Lawyers
Weekly

Contact Information:
Carmody MacDonald P.C.
120 S. Central, Ste 1800
St. Louis, Missouri 63105
(314) 854-8663
tnb@carmodymacdonald.com