

Attorney-Client Privilege: Is There a Fiduciary Exception? – Part One

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Every lawyer is familiar with the attorney-client privilege. Most, however, have perhaps never encountered what is often referred to as the "fiduciary exception" to that privilege.

The attorney-client privilege, of course, exists in order to allow free communication between an attorney and a client without fear that information concerning that communication will be shared with others. If the client involved is a fiduciary, such as a trustee, that client owes fiduciary duties to third parties, such as beneficiaries. Those duties owed by the trustee to beneficiaries include a duty to provide reasonable information concerning the trust to the beneficiaries.

As a result, some courts, albeit a minority, have found that where the trustee-client obtains legal advice from an attorney relating to the trust, that legal advice, like all other information relating to the affairs of the trust, must be shared with the beneficiaries, whose trust generally has paid the cost of attorney fees for obtaining the advice.

The limited exception has its roots in English cases from the mid-1800s, first making its appearance in the United States in the 1970s. One of the only cases to have addressed the existence of the exception in Pennsylvania is a trial court opinion from Judge R. Stanton Wettick in Pittsburgh in 2002. See *Follansbee v. Gerlach*, 56 Pa. D. & C. 4th 483, 22 Fiduc. Rep. 2d 319, 6 All. Co. Disc. Op. 15 (Civ. Div. Allegh., June 13, 2002). Although that opinion has obtained relatively widespread familiarity among Pennsylvania trusts and estates lawyers, it remains relatively unsupported by other reported opinions and without support in any Pennsylvania appellate decision.

The fiduciary exception to attorney-client privilege exists in some states but has been rejected in others. In the 10 years since last writing on this topic, the exception has gotten more attention, but less support. The exception has correctly been rejected, by both courts and legislatures, because, *inter alia*, it: (1) creates an exception to the oldest privilege known to the common law; (2) is too uncertain in its application; and (3) ties the existence of the privilege to who is paying the lawyer involved, a factor that is generally not determinative.

In 2002, at the time of our former article, Texas and California had already explicitly rejected any fiduciary exception to attorney-client privilege. See *Huie v. DeShazo*, 922 S.W.2d 920, (Tex. 1996); *Wells Fargo Bank v. Superior Court*, 22 Cal.4th 201 (2000).

The *Wells Fargo* court found that, because the attorney-client privilege is statutory in California, there was no basis for creating exceptions to statutorily created privileges. In light of the importance of the attorney-client privilege, the California Supreme Court opined that if the legislature had intended to restrict the privilege, it would have declared that intention unmistakably, instead of leaving it to courts to find a restriction. This rationale applies equally in Pennsylvania, where the privilege is also statutory.

PA. SECONDARY SOURCES

The Pennsylvania Bar Institute presents a seminar every other year titled "Litigating in Orphans' Court." In 2011, practitioners were advised:

" Trust and estate beneficiaries are entitled to copies of correspondence between the fiduciary and its lawyer. Unless the communications are clearly in anticipation of litigation and designated as privileged communications, no communications between a fiduciary and its counsel are considered confidential under Rule 1.6 or protected by the lawyer-client privilege. *Follansbee Estate*, 22 Fiduc. Rep. 2d 319 (Civ. Div. Allegh. 2002)." See "Practical Applications of the Rules of Professional Conduct," reviewed and updated in 2011 by Paul C. Heintz, Esquire, PBI No. 2011-6732.

Similarly, *Pennsylvania Law Encyclopedia*, 51 PLE, Trusts § 182, n.14 (Bender 2007), advises that "a 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 administration of the trust, because trust law imposes a duty to make these documents available to the beneficiaries."

These are pretty broad statements based on one Allegheny County Court of Common Pleas opinion.

THE UNIFORM TRUST CODE

When the National Conference of Commissioners on Uniform State Laws was considering the issue in the context of the Uniform Trust Code, they explained:

"The drafters of this code decided to leave open for further consideration by the courts the extent to which a trustee may claim attorney-client privilege against a beneficiary seeking discovery of attorney-client communications between the trustee and the trustee's attorney. The courts are split because of the important values that are in tension on this question."

There is authority for the view that the trustee is estopped from pleading attorney-client privilege in such circumstances. In the leading case, *Riggs National Bank v. Zimmer*, 355 A.2d 709, 713 (Del Ch. 1976), the court reasoned that the beneficiary, not the trustee, is the attorney's client: ... This beneficiary-as-client theory has been criticized on the ground that it conflicts with the trustee's fiduciary duty to implement the intentions of the settlor, which are sometimes in tension with the wishes of one or more beneficiaries. See Louis H. Hamel Jr., "Trustee's Privileged Counsel: A Rebuttal," 21 ACTEC Notes 156 (1995); Charles F. Gibbs & Cindy D. Hanson, "The Fiduciary Exception to a Trustee's Attorney/Client Privilege," 21 ACTEC Notes 236 (1995). Prominent decisions in California and Texas have refused to follow Delaware in recognizing an exception for the beneficiary against the trustee's attorney-client privilege. *Wells Fargo Bank v. Superior Court (Boltwood)*, 990 P.2d 591 (Cal. 2000); *Huie v. DeShazo*, 922 S.W. 2d 920 (Tex. 1996)." See Uniform Trust Code § 813, comment (2005).

The *Riggs* court, which was construing the privilege under Delaware law, had to decide whether to establish an exception to a judicially created privilege. The same is not true in Pennsylvania.

THE FIRST QUESTION: WHO IS THE CLIENT?

In Pennsylvania, a trustee's attorney represents only the trustee, not the trust beneficiaries or the trust itself. See *In re Pew Trust*, 16 Fiduc. Rep.2d 73 (O.C. Montgomery 1995) (holding that "in the absence of an express agreement to the contrary, the only client of counsel to the fiduciary is the fiduciary"). With this proposition, even Follansbee agrees. See 56 Pa. D. & C.4th at 486 (rejecting authority in some jurisdictions that characterizes trust beneficiaries as the true clients of the attorney); see also *Dorsett v. Hughes*, 509 A.2d 369, 371 n. 3 (Pa. Super. 1986) (holding that "an attorney does not represent the estate or the heirs of the estate, but only the executor or personal representative of the estate").

Notwithstanding this general principle, in *Follansbee*, Wettick held that trustees may not withhold from beneficiaries trust management documents, 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." In articulating this "fiduciary exception" to the attorney-client privilege, Wettick cited several cases from other jurisdictions, as well as the Restatement (Second) of Trusts §173, cmt. b, which states that trustees need not furnish to beneficiaries opinions of counsel obtained at the trustee's sole expense and for the trustee's own protection. Even states that have recognized the fiduciary exception do not apply the exception when communications occur between a fiduciary and its counsel after the fiduciary has received an overt threat of a claim. See *Fortier v. Principal Life Ins.*, 2008 WL 2323918 (E.D. N.C. Sept. 17 2008). In other words, even where it exists, there are exceptions to the exception to the privilege.

COMMUNICATIONS ON TRUSTEE COMPENSATION

The rationale underlying the fiduciary exception is that, as a fiduciary, the trustee shares with the beneficiaries mutual interests that the attorney's advice seeks to advance. See, e.g., *In re Long Island Lighting*, 129 F.3d 268, 271-72 (2d Cir. 1997) (referring to the fiduciary exception as "well settled"). It is now clear that the privilege is far from well settled. Some courts have recognized that, even if the fiduciary exception does exist, there must be an exception to the fiduciary exception where the trustee's and beneficiaries' interests diverge, such as in instances involving communications regarding trustee compensation. When the subject of a trustee-attorney communication relates to the fees and commissions due to the trustee from the trust, the trustee's interests "diverge sufficiently from those of the beneficiaries that the justifications for the fiduciary exception no longer outweigh the policy underlying the attorney-client privilege." See *Wachtel v. Health Net*, 482 F.3d 225, 234 (3d Cir. 2006).

In its *Commentaries on the Model Rules of Professional Conduct*, the American College of Trust and Estate Counsel (ACTEC) acknowledges that the fiduciary exception does not apply to cases in which counsel for a trustee provides advice "for the limited purposes of advancing the interests of the fiduciary and not necessarily the interests of the fiduciary estate or its beneficiaries." ACTEC is a nonprofit association of lawyers who are elected "by demonstrating the highest level of integrity, commitment to the profession, competence, and experience as trust and estate counselors," according to its website.

In the same commentary, ACTEC notes that examples of this type of representation are retention of counsel "to negotiate with the beneficiaries with respect to the fiduciary's compensation or to defend the fiduciary in litigation charging misadministration." Accordingly, when the subject of a dispute between trustees and trust beneficiaries centers on the fees and commissions due to the trustee, the parties' interests diverge such that the fiduciary exception, where it is acknowledged, does not apply.

WHO BORE THE EXPENSE SHOULDN'T AFFECT PRIVILEGE

The "payment of counsel out of trust funds does not convert trust beneficiaries into clients of the trustees' counsel." See *Hubbell v. Ratcliffe*, 2010 Conn. Super. LEXIS 2853, at *15 (Conn. Super. Nov. 8, 2010). It is relatively commonplace that one person (e.g., a parent) might pay counsel fees for another (e.g., a child), but it is clear that the financial arrangement does not make the parent a client, and that the confidential relationship is with the child.

UNCERTAIN PRIVILEGE IS LITTLE BETTER THAN NO PRIVILEGE

The existence of a fiduciary exception to the attorney-client privilege for communications between a trustee and its counsel creates uncertainty regarding the scope of the privilege. Such uncertainty would naturally have a chilling effect on attorney-client communications.

In *Gillard v. AIG Ins.*, 15 A.3d 44 (Pa. 2011) the Pennsylvania Supreme Court warned against uncertainty concerning the scope of the attorney-client privilege; in that case, the court held that the privilege is broader than the literal wording of 42 Pa.C.S. §5928, the Judicial Code's provision regarding the privilege. In so holding, the court announced that "it would be imprudent to establish a general rule to require the disclosure of communications which likely would not exist ... but for the participants' understanding that the interchange was to remain private." See also *Upjohn v. United States*, 449 U.S. 387, 393 (1981) (holding that "the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected"); *Rhone-Poulenc Rorer v. Home Indem.*, 32 F.3d 851, 863 (3d Cir. 1994) (acknowledging that "[a]n uncertain privilege ... is little better than no privilege") (internal citations omitted).

Adoption of a fiduciary exception would create the same uncertainty against which the Gillard court cautioned. Trustees, knowing that their communications with counsel may be subject to discovery by beneficiaries, might forsake legal advice altogether or blindly follow any advice given by counsel, forsaking the critical exchange between attorney and client upon which the best legal advice is based, to the detriment of the trust. See *Huie*, 922 S.W.2d at 924 (Tex. 1996).

Part II will review developments in the states over the last 10 years.

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