Trustee-Attorney Communications: How Privileged Are They?

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Trustee: "Whatever I tell you here is privileged, right?"
Attorney: "Sure. We need to know all the facts to properly advise you. This is all confidential. Go on."

Not necessarily.

When matters involving the administration of a decedent's estate or a trust become the subject of litigation, a question often arises with respect to the extent of attorney-client protection for communications between the fiduciary and its counsel. Often, the files of the fiduciary and its counsel contain notes of telephone conversations and meetings, memoranda with respect to meetings and decisions made, as well as correspondence between attorney and client.

Many documents are created at a time when the estate or trust was being administered in normal course. Sometimes, however, documents are created at a time when the fiduciary and counsel recognize a potential claim on the horizon. Despite the fact that all such documents would normally be clearly privileged, some courts have held that such materials are freely available to beneficiaries of the trust.

Others have suggested that it is important to know whether the trust, or the fiduciary itself, paid the legal fees for the services involved; some have treated "administrative" matters differently than "defensive" matters; and others, like Pennsylvania, do not appear to have squarely addressed the issue.

Attorney-Client Privilege

In Pennsylvania, "[t]he common law privilege for communications between attorney and client, the oldest of the common law privileges for confidential communications, is codified by the Act of July 9, 1976, P.L. 586, No. 142, §2, 42 Pa. C.S.A. §5928." *Estate of Kofsky*, 487 Pa. 473 (1979). Section 5928 provides: "In a civil matter counsel shall not be competent or permitted to testify to communications made to him by his client, nor shall the client be compelled to disclose the same, unless in either case this privilege is waived upon the trial by the client."

As the Supreme Court explained in *Kofsky*, the language of §5928 "makes it clear that the statute proscribes not only giving evidentiary consideration to confidential communications, but their very disclosure. ... Rather, the privilege is grounded in a policy entirely extrinsic to protection of the fact-finding process; *its purpose is to foster a confidence between client and advocate that will lead to a trusting and open attorney-client dialogue* .... As a consequence, the damage to the administration of justice occurs when the sanctity of the confidence is improvidently violated, not when the evidence is given substantive consideration. [emphasis added]."

Claimed 'Fiduciary Exception'

It will often occur that a party in interest, such as a beneficiary of a trust or estate, will want to examine materials which, on their face, would appear to fall within the attorney-client privilege between a fiduciary and its counsel. Such a beneficiary argues that there is, or should be, a "fiduciary exception" to the attorney-client privilege.

The basis for the "fiduciary exception" to the common law doctrine of attorney-client privilege is a determination that "[a]s a representative for the beneficiaries or the trust he is administering, the trustee is not the real client in the sense that he is personally being served." *Riggs National Bank v. Zimmer*, 355 A.2d at 709 (Del. Ch. 1976).

Thus, in instances in which the trustee is personally being served, the "fiduciary exception" does not apply. In *In re Unisys Corporation*, the court held that documents relating to advice of counsel regarding the termination of the benefit plans at issue were not discoverable because a fiduciary relationship must exist "at the time the privileged communications were made" and such determinations of whether or not to terminate a plan fell outside the scope of the fiduciary relationship. *In re Unisys Corporation Retiree Medical Benefits ERISA Litigation*, 1994 U.S. Dist. LEXIS 1344 (E.D. Pa.) [emphasis added].

California and Texas

In *Wells Fargo Bank v. Superior Court*, 22 Cal.4th 201 (2000), the Supreme Court of California refused to recognize the fiduciary exception.

The California Supreme Court wrote that respondents in *Wells Fargo* "describe Moeller as creating 'rights of inspection' that should be extended to beneficiaries. This is simply incorrect. In *Moeller*, we did not suggest that anyone other than the current holder of the privilege might be entitled to inspect privileged communications. Nor did we create or recognize any exceptions to the privilege ... We merely identified the current holder of the privilege."

The *Wells Fargo* court concluded that, "the trustee may assert the attorney-client privilege against the beneficiaries."

The trustee in *Wells Fargo* had produced documents reflecting communications with its attorneys regarding trust administration, but asserted the attorney-client privilege with respect to documents reflecting communications regarding claims of misconduct. In spite of the claim of privilege only with regard to the defensive documents, the California Supreme Court held that "there is no authority in California law for requiring a trustee to produce communications protected by the attorney-client privilege, regardless of their subject matter."

In *Wells Fargo*, the beneficiaries contended that the trustee was required to produce privileged communications to fulfill its fiduciary duty to inform them about the trust and its administration. Characterizing this argument as "nothing more than a plea for an implied exception" to California's attorney-client privilege statute, the California Supreme Court rejected it.

In a decision similar to that of the Supreme Court of California, the Texas Supreme Court, in *Huie v. DeShazo*, 922 S.W.2d 920 (Tex. 1996), declined to recognize a "fiduciary exception" to the Texas attorney-client privilege.

In so doing, the Texas Supreme Court explained: "The attorney-client privilege serves the same important purpose in the trustee-attorney relationship as it does in other attorney-client relationships. *A trustee must be able to consult freely with his or her attorney to obtain the best possible legal guidance. 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. [emphasis added]"

Pennsylvania and the Privilege Exception

A beneficiary of an estate or trust, or even the estate or trust itself, is not a client of the fiduciary's attorney. In fact, the opposite is true. In *Kreider Estate*, 42 D&C.2d 46 (C.P. Lebanon 1966), *aff'd* 426 Pa. 617, 233 A.2d 226 (1967), a case regarding whether a decedent may bind the selection of counsel for an estate, the court explained that "[a] attorney does not represent the estate at all, but rather the executor individually."

The important distinction between a client (the fiduciary) and a non-client (the trust or its beneficiaries) is fundamental to application of the attorney-client privilege, which strives "to foster a confidence between client and advocate that will lead to a trusting and open attorney-client dialogue," the Pennsylvania Supreme Court said in *Estate of Kofsky*.

Throughout the administration of a trust, a trustee seeks advice of counsel regarding the proper means of administering the trust estate in a manner consistent with the trust instrument and applicable law. Such legal advice inherently implies that a contrary cause of conduct may subject the trustee to a claim of surcharge for breach of fiduciary duty.

Conversely, advice of counsel as to potential personal liability on the part of a trustee contains within it legal advice on how best to administer a trust in a manner consistent with a trustee's fiduciary obligations. Adopting the "fiduciary exception" to the attorney-client privilege might well discourage a trustee from seeking legal advice, for fear of creating potentially adverse evidence in subsequent litigation between the trustee and trust beneficiaries; it also might constrain counsel in giving candid advice, for fear of burdening a trustee with potentially adverse evidence subject to discovery in subsequent litigation. This is exactly what the privilege is intended to avoid.

The fundamental basis of the fiduciary exception, stated by the Court of Chancery of Delaware in *Riggs*, directly contradicts the distinction between a fiduciary, and a trust or its beneficiaries, highlighted by the *Kreider Estate* court. To extend the attorney-client privilege to trust beneficiaries would violate the very purpose of the attorney-client privilege and blur the distinction between a fiduciary and the beneficiaries of a trust recognized by Pennsylvania law.

Similarly, in circumstances in which the communications between a trustee and counsel are "defensive," as opposed to "administrative," the communications are privileged, and the privilege will not pass to a successor fiduciary.

The distinction between "defensive" and "administrative" communications in this context was originally recognized in *Talbot v. Marshfield*, 2 Drew & Sm. 549, 62 Eng. Rep. 728 (Ch. 1865).

In *Talbot*, the court required the disclosure of an opinion of counsel prepared during the normal course of trust administration, but not one which was prepared for the purpose of guiding the trustees regarding their position in an action against them. Similarly, in *Estate of Calloway*, 1996 WL 361504 (Del. Ch.), the Court of Chancery of Delaware held that the "fiduciary exception" did not apply to disclosure of a memorandum created by counsel for the trustee explaining and assessing objections to the trustee's account.

Who Pays Fee Is Not Determinative

Relying on *Riggs* and *Talbot*, beneficiaries have argued that payment of counsel fees from the trust mandates that the attorney-client communications which were the basis for the charges are not privileged.

Although *Talbot* and *Riggs* considered the payment of counsel fees from a trust as a factor in determining whether services are rendered in an "administrative" or "defensive" context, such a

distinction would not be germane in Pennsylvania, because the source of payment of counsel fees for a trustee's successful defense of a surcharge action is the trust itself.

Interpreting California law, which similarly permits payment of counsel fees from trust assets, the California Supreme Court stated in *Wells Fargo*, "[Respondents] contend they are entitled to inspect Wells Fargo's privileged communications with attorneys for the additional reason that the trust paid for the attorney's advice .... *It does not matter. Payment of fees does not determine ownership of the attorney-client privilege*. The privilege belongs to the holder, which in this context is the attorney's client.

"The trustee, rather than the beneficiary, is the client of an attorney who gives legal advice to the trustee, whether on the subject of trust administration ... or of the trustee's own potential liability .... To the extent the source of payment has any significance, it is but one indicium in determining the existence of an attorney-client relationship ... and thus, who holds the privilege. In any event, the assumption that payment of legal fees by the trust is equivalent to direct payment by beneficiaries is of dubious validity [emphasis added].

The *Wells Fargo* court further asserted that the "question of cost allocation does not affect ownership of the attorney-client privilege."

To permit the source of the payment of counsel fees to determine the application of the attorney-client privilege would create a "source of payment" exception to the attorney-client privilege.

For the reasons discussed above limiting the application of the attorney-client privilege would be an improper infringement on the Legislature's enactment of the statutory privilege in Pennsylvania. Furthermore, the Rules of Professional Conduct make clear that, even where a lawyer's fee is paid by one other than the client, information relating to representation remains confidential.

The alleged "fiduciary exception" to the common law doctrine of attorney-client privilege is not, and should not be, recognized in Pennsylvania.