Probate and Privilege

Why Fiduciary-Attorney Communications May Be Vulnerable to Discovery

By Geoffrey S. Weed

At first blush, the issue seems simple. Of course, at first blush, many complex legal issues seem simple. The plain language of MCR 5.117(a) states that "[a]n attorney filing an appearance on behalf of a fiduciary shall represent the fiduciary."[1] From that language, one might logically conclude that the attorney-fiduciary relationship is the same as any other attorney-client relationship—that the rules governing attorney-client privilege remain the same whether one is representing a criminal defendant, a civil litigant, or a trustee.

The legal reality, however, is convoluted. From the common law, courts have recognized a fiduciary exception to attorney-client privilege.[2] In the 1865 trust contest *Talbot v Marshfield*,[3] an English court held that a trustee could not assert attorney-client privilege against trust beneficiaries.[4] The court made this decision while reviewing the modern-day equivalent of two requests for production of documents that ordinarily would have been privileged.[5] The *Talbot* court reasoned that the trustee could not assert the privilege because, as a fiduciary, he was obligated to provide the beneficiaries with information regarding the trust.[6] The court further reasoned that the source of the attorney's fees prevented assertion of the privilege; since the trustee had paid his attorney with trust assets—assets which rightfully belonged to the beneficiaries, not the trustee—how could he then hope to assert attorney-client privilege against those same beneficiaries?[7]

Today, while a split of authority exists, the fiduciary exception is alive and well in American jurisprudence.[8] The seminal iteration of the modern exception is found in *Riggs National Bank of Washington, DC v Zimmer*.[9] In *Riggs*, while acknowledging the importance of the attorney-client privilege, the court held that "[t]he policy of preserving the full disclosure necessary in the trustee-beneficiary relationship" outweighed the policy considerations that justify the [attorney-client] privilege.[10] The court reasoned that, in any event, trust beneficiaries are a trust attorney's real clients, going so far as to imply that a trustee cannot, without necessarily breaching the trustee's duties as a fiduciary, obtain legal representation if the attorney-client privilege might later be asserted against beneficiaries.[11]

Since 1976, when the *Riggs* decision was announced, numerous jurisdictions have upheld the fiduciary exception following largely the same reasoning.[12] Often, the potential harshness of

Communications to an attorney by a fiduciary are often deemed to be privileged if they are made in a defensive posture relative to litigation, but communications are not privileged if they are made in relation to normal administration of the trust or estate.

the exception is softened by allowing for a distinction based on the purpose of the communication.[13] Communications to an attorney by a fiduciary are often deemed to be privileged if they are made in a defensive posture relative to litigation, but communications are not privileged if they are made in relation to normal administration of the trust or estate.[14]

On the other hand, several jurisdictions have, either through legislation or judicial decision, done away with the fiduciary exception altogether.[15] The Texas Supreme Court, for instance, has decided against the exception, reasoning that the attorney-client privilege is just as important to the trustee-attorney relationship as it is to any other attorney-client relationship and that the real client is the trustee—after all, a beneficiary cannot sue his or her trustee's attorney for malpractice because no attorney-client relationship exists.[16] Likewise, since 2002, New York, Delaware, South Carolina, and Florida have all enacted statutory schemes that either limit or expressly eliminate the fiduciary exception.[17]

Unfortunately, however, the exception remains unlegislated and largely unlitigated in the majority of jurisdictions.[18] In Michigan, the legal authority is anything but authoritative.[19] In a 1990 published opinion, *Steinway v Bolden*,[20] a panel of the Michigan Court of Appeals held unanimously that, under the Revised Probate Code, the real client of an attorney retained by the personal representative of an estate was the estate itself, not the personal representative.[21] Although attorney-client privilege was not at issue in *Steinway*, the opinion appeared to imply that Michigan would follow the *Riggs* example and embrace the fiduciary exception.[22]

In direct response to *Steinway*, the Michigan Supreme Court promulgated MCR 5.117(a), which stated that "[a]n attorney filing an appearance on behalf of a fiduciary shall represent the fiduciary."[23] The new rule seemingly resolved the question of the fiduciary exception's fate in Michigan.[24] But in 2009, the Michigan Court of Appeals issued another unanimous published opinion, *Estate of Graves v Comerica Bank*,[25] which presumably ignored MCR 5.117(a).[26] In *Graves*, the Court of Appeals held that "when an attorney is retained by a fiduciary, the attorney represents *both* the fiduciary and the estate."[27] Since *Graves* was announced, however, the Court of Appeals, on its own motion, issued an order rescinding publication of the opinion.[28]

While it may seem that the *Graves* court simply ignored MCR 5.117(a), there is another distinct possibility. The authority of the Michigan Supreme Court to establish "rules of practice and procedure" is, of course, beyond question.[29] But it is also axiomatic that "the Court is not authorized to enact court rules that 'establish, abrogate, or modify the substantive law.'"[30] Thus, the Court in *Graves*, while cognizant of MCR 5.117(a), may have decided that the court rule could not control its decision regarding the substantive law of privilege.

Muddying things further still, the most relevant ethics opinion, informal opinion RI-350, has left attorneys to tread water alone in these treacherous ethical currents.[31] The 2010 opinion states that determining the identity of the client "requires an examination of applicable substantive law, which is beyond the scope of the Committee's charge," and goes on to explain that the question of who the real client is has not been conclusively decided as a matter of law in the fiduciary-attorney context.[32] Thus, probate practitioners are left to their own devices in deciding how to deal with the many ethical implications posed by owing duties to multiple masters, to both the trustee and the beneficiary, the personal representative, and the heir.

In the end, that is the position each attorney for a fiduciary faces under the current state of the law. Without sufficient guiding precedent or legislation, each attorney stands alone regarding

FAST FACTS

From the common law, courts have recognized a fiduciary exception to the attorney-client privilege that prevents a fiduciary from asserting the privilege against beneficiaries.

Legal authority is conflicting in this area, so it remains unclear whether the fiduciary exception remains viable in Michigan; accordingly, attorneys should be proactive in clarifying the exact nature of the attorney-client relationship.

The unsettled question of the fiduciary exception exposes probate practitioners to an ethical dilemma: who is the attorney's real client—the trustee or the trust?

the fiduciary exception. A thorough analysis of the law here reveals almost nothing besides a general state of disarray. There is a split of authority in other jurisdictions, a conflict between Michigan precedents, and an ethical morass that threatens to swallow probate practitioners whole. A court rule seems to conflict with caselaw, and there are complex questions of constitutional law and separation of powers.[33] Everything is in flux, and every step the practitioner takes across this legal landscape appears precarious.

Accordingly, when representing fiduciaries, it is imperative to be proactive and clarify the exact nature of the attorney-client relationship from the outset. If you will be representing the fiduciary only, be sure to include language to that effect in your fee agreement or engagement letter. Also, notify the beneficiaries in writing that you do not represent them and that they may wish to consult independent counsel. Conversely, if you consider your true client to be the trust or estate, be sure to inform the fiduciary, include notice of that fact in your engagement letter, and consider having the fiduciary sign an acknowledgment that you represent the fiduciary only as an agent of the trust or estate. Finally, if you are representing a fiduciary in litigation against beneficiaries, explain that it might be in your client's best interests—despite the general availability of the trust or estate assets[34]—to pay the litigation costs from the client's own funds or file a petition asking whether the trust or estate assets can be used without invoking the fiduciary exception. While it might, indeed, be painful for the fiduciary to pay your retainer from personal funds, emphasize that something else could be far worse: being ordered to produce privileged documents and attorney-client communications for opposing counsel's review. ■

Geoffrey S. Weed focuses his Grosse Pointe practice on estate planning and probate matters. He graduated magna cum laude from Thomas M. Cooley Law School, where he won 10 "book awards" and served on the board of the Law Review. Geoff has published several scholarly articles in various legal periodicals and is an active contributor for ICLE. He lives in Macomb County with his wife, Kristin, and two daughters, Erin and Olivia.

ENDNOTES

1. MCR 5.117(a).
2. See, e.g., *Talbot v Marshfield*, 62 Eng Rep 728 (1865).
3. *Id.*
4. Bartolacci, Short & Talen, *The attorney-client privilege and the fiduciary exception: Why frank discussions between fiduciaries and their attorneys should be protected by the privilege*, 48 Real Prop Tr & Est L J 1, 9 (Spring 2013), citing *Talbot*, 62 Eng Rep 728.
5. *Id.*
6. *Id.*
7. *Id.*
8. Babel, *Attorney for the trust: Does attorney-client privilege belong to the trustee or the beneficiary?*, 98 Ill B J 524, 524–525 (2010).
9. Bartolacci, n 4 *supra* at 10, citing *Riggs Nat'l Bank of Washington, DC v Zimmer*, 355 A2d 709 (Del Ch, 1976).
10. *Id.* at 11, quoting *Riggs*, 355 A2d at 714.
11. *Id.*
12. See Babel, n 8 *supra* at 524–526.
13. *Id.*
14. *Id.*
15. See Bartolacci, n 4 *supra* at 17–24.
16. *Id.* at 17–18, citing *Huie v DeShazo*, 922 SW2d 920 (1996).
17. *Id.* at 19–20.
18. See Magee, *Who is the client? Who has the privilege?: The attorney client privilege in trust relationships in Arkansas*, 65 Ark L R 637, 639–648 (2012); Bartolacci, n 4 *supra*; Babel, n 8 *supra* at 524–526.
19. See Supina & Cohen, Michigan Probate Litigation: A Guide to Contested Matters (2d ed, 2001), § 1.8.
20. *Steinway v Bolden*, 185 Mich App 234, 237–238; 460 NW2d 306 (1990).
21. *Id.* at 237–238.
22. See *id.*
23. MCR 5.117(a); see also Supina, n 19 *supra* at § 1.8.
24. See *id.*
25. *In re Estate of Graves*, unpublished opinion of the Court of Appeals, issued December 3, 2009 (Docket No. 286674).
26. See *id.* 2523 (December 3, 2009) (publication rescinded).
27. *Id.* (emphasis added).
28. *In re Estate of Graves*, unpublished order of the Court of Appeals, entered February 18, 2010 (Docket No. 286674).
29. *In re Williams*, 481 Mich 852, 855; 747 NW2d 867 (2008) (Corrigan, J, dissenting), quoting *McDougall v Schanz*, 461 Mich 15, 26; 597 NW2d 148 (1999).
30. *Id.*, quoting *McDougall*, 461 Mich at 27.
31. See Michigan Basic Practice Handbook (6th ed, 2007), § 22.13.
32. RI-350.
33. See *In re Williams*, 481 Mich at 855.
34. MCL 700.7817(w)–(x); MCL 700.3715(w)–(x).