

## Title

The fiduciary exception to the attorney-client privilege in the trust context

## Text

The drafters of the Uniform Trust Code back in 2000 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 lawyer, the courts now being profoundly split on the question of whom trust counsel represents. See UTC §813 cmt. Reconciling two contradictory inventions of equity, the lawyer’s fiduciary duty to his or her client and the trustee’s fiduciary duty to the beneficiaries, has proven easier said than done when it comes to the disclosure of communications between trustee and trust counsel. One can hardly fault the UTC for being less than enthusiastic about relieving the judiciaries of this hot potato, equity, itself, being a creature of the courts. Now at least one justice on the Supreme Court of Pennsylvania, via *In re Estate of McAleer* (2021), has signaled that he would be just as happy were Pennsylvania’s legislature to take over attempting to sort out whether there should be some kind of a fiduciary exception to the attorney-client privilege: “In this respect, I submit that the General Assembly has superior tools to gather empirical information and assess advantages and disadvantages on a developed legislative record.” *In re Estate of McAleer*, 248 A.3d 416, 438 (Penn. 2021) (Justice Saylor’s concurrence). While the Court’s actual disposition in *McAleer* lurks tentatively at the intersection of the main opinion and the three concurring opinions, the opinions taken together constitute an exhaustive and scholarly treatise on the confusion reigning nation-wide in this particular corner of fiduciary jurisprudence, at least as of April 7, 2021. Whom the trust’s scrivener and trust counsel represent is taken up generally in §8.8 of *Loring and Rounds: A Trustee’s Handbook* (2021), which section is reproduced in its entirety in the appendix below.

## Appendix

### §8.8 Whom Do the Trust’s Scrivener and Trust Counsel

Represent? [from *Loring and Rounds: A Trustee’s Handbook* (2021), with enhancements].

*The drafters of ... [the Uniform Trust]... 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.*<sup>1</sup>—Uniform Trust Code

*When the roles and objectives of legal consultation are unclear, the*

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<sup>1</sup>UTC §813 cmt. On the one hand, the attorney-client 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.” UTC §813 cmt. (citing *Upjohn Co. v. United States*, 449 U.S. 383 (1981)). On the other hand, the UTC “requires that a trustee keep the qualified beneficiaries reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests, which could include facts that the trustee has revealed only to the trustee’s attorney.” UTC §813 cmt.

*question of who has paid for the legal services, or who ultimately will be required to pay those expenses, although potentially relevant, involves other and complicated considerations so that this matter is not determinative in resolving issues of privilege.*<sup>2</sup>—Restatement (Third) of Trusts

**At the drafting stage.** *The privity of contract sticking point.* As a general rule, the lawyer who drafts a trust instrument represents the settlor and only the settlor. Thus, under classic common law principles, the lawyer cannot be held liable to third parties, such as the beneficiaries or the intended beneficiaries, for professional negligence in preparing the trust document itself, absent special facts.<sup>3</sup> Such third parties are not in privity of contract with the lawyer, *i.e.*, they are not parties to a lawyer-client agency relationship.<sup>4</sup> The lawyer and the settlor, however, are.<sup>5</sup> The lawyer-agent's duties run solely to the client-principal.<sup>6</sup> The so-called privity barrier in estate planning malpractice cases has been under attack for some time, at least since *Lucas v. Hamm* was decided in California in 1961.<sup>7</sup>

In Wisconsin, for example, “an attorney can be liable to a party named in a will if the attorney was negligent in drafting or supervising the execution of the will, but only if the attorney’s negligence ‘thwarted the decedent’s clear intent.’”<sup>8</sup> Presumably, the attorney’s liability would extend to the designated beneficiaries of any testamentary trust that the decedent had intended be established under the will; or in the case of a pour-over provision, beyond the four corners of the will to the beneficiaries of the intended recipient inter vivos trust.

Pennsylvania has a narrow and somewhat arbitrary exception to strict privity: “Stated another way, we hold an executed testamentary document naming an individual as a legatee is a prerequisite to that individual’s ability to enforce the contract between the testator and the attorney he hired to draft that particular testamentary document.”<sup>9</sup>

*The attorney-client privilege.* Counsel’s direct inter vivos communications with the settlor regarding estate planning matters, *as well as communications with other true agents of the settlor*, generally are protected postmortem by the attorney-client privilege.<sup>10</sup> Thus, counsel’s inter vivos discussions with the trustee of the settlor’s revocable inter vivos trust regarding how the settlor’s

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<sup>2</sup>Restatement (Third) of Trusts §82 cmt. f.

<sup>3</sup>See, *e.g.*, *Fredrikson v. Fredrikson*, 817 N.Y.S.2d 320 (App. Div. 2006).

<sup>4</sup>See, *e.g.*, *Peleg v. Spitz*, 2007 Ohio 6304 (Ct. App. 2007) (in part defining the concept of privity).

<sup>5</sup>See generally Charles E. Rounds, Jr., *Lawyer Codes Are Just About Licensure, the Lawyer’s Relationship with the State: Recalling the Common Law Agency, Contract, Tort, Trust, and Property Principles the Regulate the Lawyer-Client Fiduciary Relationship*, 60 *Baylor L. Rev.* 771 (2008).

<sup>6</sup>See generally Charles E. Rounds, Jr., *Lawyer Codes Are Just About Licensure, the Lawyer’s Relationship with the State: Recalling the Common Law Agency, Contract, Tort, Trust, and Property Principles the Regulate the Lawyer-Client Fiduciary Relationship*, 60 *Baylor L. Rev.* 771 (2008).

<sup>7</sup>See, *e.g.*, *Fabian v. Lindsay*, 410 S.C. 475, 765 S.E.2d 132 (2014) (“We find ... [the *Lucas v. Hamm*]... reasoning sound and adopt it here.”); *Lucas v. Hamm*, 56 Cal. 2d 583, 15 Cal. Rptr 821, 364 P.2d 685 (1961).

<sup>8</sup>*MacLeish v. Boardman & Clark, LLP*, 381 Wis. 2d 471 (Ct. App. 2018).

<sup>9</sup>*Estate of Agnew v. Ross*, 152 A.3d 247 (Pa. 2017) (involving an unexecuted amendment to a revocable inter vivos trust). Pennsylvania’s executed-document requirement would seem to complicate the attorney-client agency relationship while at the same time placing a serious standing hurdle in the way of postmortem victims of estate planning malpractice.

<sup>10</sup>See, *e.g.*, *Adler v. Greenfield*, 990 N.E.2d 1219 (Ill. App. Ct. 2013).

various estate planning instruments might be fine-tuned, or better effectuate the settlor's intentions, may well be privileged,<sup>11</sup> unless the testamentary exception to the attorney-client privilege is applicable.<sup>12</sup>

*Cross-reference.* For more on the privity defense in the trust drafting context, the reader is referred to §8.15.61 of this handbook.

*The funding Achilles' heel.* That is not to say that trust beneficiaries litigating in a jurisdiction that has a privity barrier will never have any arrows in their quivers. If, for example, the drafting attorney had also prepared the funding documentation, then he or she might be liable to the beneficiaries for any harm to the trust that was funding related. Faulty advice rendered to the trustee of an irrevocable life insurance trust with respect to the purchase of a life insurance contract and the negligent preparation of a deed of real estate into the trust come to mind.<sup>13</sup> The trustee, of course, might be liable as well.<sup>14</sup>

*Statutes of limitations for estate planning malpractice.* In any case, the trust scrivener whose professional duties to the settlor-client actually do cease at the time of document execution may expect that the applicable statute of limitations for lawyer malpractice will then begin to run against the settlor-client. At least one court has so held.<sup>15</sup> Whether a trust scrivener owes continuing postexecution duties will hinge on the particular facts and circumstances of the representation.<sup>16</sup> Note also that if the scrivener breached a *fiduciary* duty to the settlor-client in the course of preparing the documentation, such as the duty of undivided loyalty, then the applicable statute of limitations, at least under classic agency principles, ought not to run against the settlor-client until such time as the settlor-client acquires an actual subjective understanding of the material facts of the breach, as well as a general appreciation of why as a matter of law there has been a breach.

*Scrivener liability in tort to settlor's probate estate.* Assume the scrivener negligently prepares an estate plan for a client. A revocable inter vivos trust is a component of that estate plan. Due to scrivener's substandard estate planning, after the death of the settlor-client, more estate or generation-skipping taxes are owed than would have been owed had the estate plan conformed to the standards of the estate planning profession. May the personal representative of the deceased settlor-client maintain a legal malpractice tort action against the scrivener for substandard estate planning? Unlikely in Kansas.. "We answer this question 'no' because the cause of action arose

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<sup>11</sup>See, e.g., *Adler v. Greenfield*, 990 N.E.2d 1219 (Ill. App. Ct. 2013).

<sup>12</sup>See, e.g., *Zook v. Pesce*, 438 Md. 232, 91 A.3d 1114 (2014) (the court not finding the exception applicable "in this case" but reaffirming "that in a dispute between putative heirs or devisees under a will or trust, the attorney-client privilege does not bar admission of testimony and evidence regarding communication between the decedent and any attorneys involved in the creation of the instrument, provided that evidence or testimony tends to help clarify the donative intent of the decedent").

<sup>13</sup>See generally §§5.4.1.8 of this handbook (right and standing of beneficiary to proceed in stead of trustee against those with whom the trustee has contracted, against tortfeasors, and against the trustee's agents, *i.e.*, against third parties) and 7.2.9 of this handbook (personal liability of third parties, including the trustee's agents, to the beneficiary; investment managers; directors and officers of trust companies; lawyers; brokers).

<sup>14</sup>See generally §8.32 of this handbook (can the trustee escape liability for making a mistake of law if he acted in good faith on advice of counsel).

<sup>15</sup>See *Babb v. Hoskins*, 733 S.E.2d 881 (N.C. App. 2012).

<sup>16</sup>See, e.g., *Carlson v. Houk*, No. A14-0633, 2014 Minn. App. Unpub. LEXIS 1171 (Minn. Ct. App. Nov. 17, 2014) (unpublished) (alleged negligent providing of estate-planning and charitable-giving legal advice and drafting of two trust instruments).

after the decedent's death which means it does not qualify as a survival claim under K.S.A 60-1801."<sup>17</sup>

**After the trust has been created.** *Whether trust counsel owes duties to the beneficiaries as well as the trustee.* The question of whether counsel represents the trustee, the beneficiaries, or both, is a difficult one and depends to some extent on the facts and circumstances. The issues are subtle.<sup>18</sup> When the trust is revocable and the settlor is of full age and legal capacity, counsel represents the settlor and only the settlor. Otherwise, if counsel is advising the *office of trustee* as it were, the trustee is the primary client.<sup>19</sup> Some courts have ruled, however, that counsel has certain "restrictive" duties that run to the beneficiary as well.<sup>20</sup> Counsel, for example, may not exploit, to the detriment of either party, confidential information acquired in the course of his or her representation.<sup>21</sup> Nor may counsel withhold from the beneficiary information to which the beneficiary is entitled.<sup>22</sup> The Restatement (Third) of Trusts, for example, takes the position that "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 ... are subject to the general principle entitling a beneficiary to information that is reasonably necessary to the prevention or redress of a breach of trust or otherwise to the enforcement of the beneficiary's rights under the trust."<sup>23</sup> Because counsel has an obligation to advise the trustee on the nature of the trustee's fiduciary responsibilities and how best to carry them out, as well as a right to be paid from the trust, it is said that the beneficiary enjoys the status of a "derivative" or "secondary" client.<sup>24</sup> (It is even suggested that counsel would have an affirmative duty to disclose to the beneficiary any serious wrongdoing on the part of the trustee, *e.g.*, embezzlement). Commentators have referred to this as the *entity* approach.<sup>25</sup>

Other courts, however, have held that the trustee is the only client,<sup>26</sup> suggesting that to say that

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<sup>17</sup>*Jeanes v. Bank of Am., N.A.*, 295 P.3d 1045, 1046 (Kan. 2013).

<sup>18</sup>*See generally* John P. Frank, *The Legal Ethics of Louis D. Brandeis*, 17 *Stan. L. Rev.* 683, 694 (1965) (the Warren matter).

<sup>19</sup>*See* Gadsden, *Ethical Guidelines for the Fiduciary's Lawyer*, 134 *Tr. & Est.* 8, 10 (Mar. 1995); Ross, *Particularized Guidance for the Estate and Trust Lawyer*, 133 *Tr. & Est.* 10, 14 (July 1994).

<sup>20</sup>*See* Gadsden, *Ethical Guidelines for the Fiduciary's Lawyer*, 134 *Tr. & Est.* 8, 10 (Mar. 1995) (stating duties are restrictive in nature). *But see* *Roberts v. Fearey*, 162 *Or. App.* 546, 986 P.2d 690 (1999) (where no allegation that attorney knowingly aided or assisted the trustee in the commission of a breach of fiduciary duty, attorney's duty of care ran only to trustee); *Spinner v. Nutt*, 417 *Mass.* 549, 631 N.E.2d 542 (1994) (holding no duty of reasonable care imposed with respect to beneficiaries if it would conflict with duty owed to fiduciary-client); 2A *Scott on Trusts* §173. *Cf.* *Witzman v. Gross*, 148 F.3d 988, 990 (8th Cir. 1998) (holding that the general rule of trust law that a beneficiary cannot bring an action at law in a trust's stead against a third party for torts or other wrongs extends to beneficiaries who attempt to sue a trustee's attorneys for legal malpractice).

<sup>21</sup>*See* Christopher H. Gadsden, *Ethical Guidelines for the Fiduciary's Lawyer*, 134 *Tr. & Est.* 8, 16 (Mar. 1995) (confidentiality requirements).

<sup>22</sup>*See* Christopher H. Gadsden, *Ethical Guidelines for the Fiduciary's Lawyer*, 134 *Tr. & Est.* 8, 16 (Mar. 1995) (confidentiality requirements).

<sup>23</sup>Restatement (Third) of Trusts §82 cmt. f. *See generally* 3 *Scott & Ascher* §17.5.

<sup>24</sup>*See* Hazard, Hodes & Jarvis, *The Law of Lawyering* §2.07 (4th ed. & 2019-2 Supp.).

<sup>25</sup>*See, e.g.*, Jeffrey N. Pennell, *Representation Involving Fiduciary Entities: Who Is the Client?*, 62 *Fordham L. Rev.* 1319 (1994); Restatement (Third) of Trusts §82 cmt. f, Reporter's Notes thereto.

<sup>26</sup>*See* *Sullivan v. Dorsa*, 128 *Cal. App. 4th* 947, 964, 27 *Cal. Rptr. 3d* 547, 560 (2005) (noting that, in general, an attorney engaged by a trustee does not thereby become an attorney for the trust's beneficiaries).

the *trust* is the real client is inconsistent with the law of trusts.<sup>27</sup> At least one jurisdiction has confirmed this by statute: “Unless expressly provided otherwise in a written employment agreement, the creation of an attorney-client relationship between a lawyer and a person serving as fiduciary shall not impose upon the lawyer any duties or obligations to other persons interested in the estate, trust estate, or other fiduciary property, even though fiduciary funds may be used to compensate the lawyer for legal services rendered by the fiduciary. This section is intended to be declaratory of the common law and governs relationships in existence between lawyers and persons serving as fiduciaries as well as such relationships hereafter created.”<sup>28</sup>

*Representing cotrustees.* A lawyer may represent cotrustees in their fiduciary capacity. The lawyer, however, should make it clear that each cotrustee is entitled to all information that flows between the lawyer and the other cotrustee or cotrustees. Accordingly, it is difficult to see how one lawyer can practically or ethically represent cotrustees, in either their representative or individual capacities, who are in conflict with one another.

*Representing trustees of different trusts.* The lawyer who simultaneously represents the trustee of Trust X and the trustee of Trust Y is asking for trouble if the trusts themselves are in conflict. This could happen if, for example, Trust X is a QTIP trust and Trust Y is a revocable trust established by the beneficiary of the QTIP trust. Let us assume the beneficiary has died. If Trust X’s class of remaindermen does not perfectly intersect with Trust Y’s class of remaindermen and if the tax apportionment provision of Trust Y is vague or ambiguous, the trustee of the QTIP trust may have a fiduciary duty to take the position that Trust Y should bear the burden of the federal estate tax liability attributable to the inclusion of the QTIP assets in the federal gross estate of the decedent. The trustee of the revocable trust may have a fiduciary duty to take the position that the default law applies, namely that the QTIP assets must bear the burden of their allocable share of the estate taxes. The situation would be exacerbated if the lawyer also were the trustee of one of the trusts, as was the case in *In re Estate of Klarner*:

The Law Firm is also a trustee of the QTIP Trust and owes a fiduciary duty to Albert’s daughters. Simultaneously, the Law Firm is a trustee of Marian’s [revocable] Trust and represents the cotrustees, Marian’s sons, in this litigation. Therefore, the Law Firm owes fiduciary duties to its clients, Marian’s sons, while also owing fiduciary duties to Albert’s daughters. The Law Firm is in the precarious position of advocating in this litigation an advantageous position for its clients, Marian’s sons, that, if successful, would operate to the detriment of the beneficiaries to whom it owes a duty of loyalty.<sup>29</sup>

*The trustee’s personal defense counsel.* If counsel has been retained by the trustee as his *personal lawyer* to advise him on matters such as how to defend an action for breach of trust,

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<sup>27</sup>See, e.g., *Huie v. DeShazo*, 922 S.W.2d 920 (Tex. 1996) (holding that the attorney-client privilege protects communications between a trustee and his or her attorney relating to trust administration from discovery by a trust beneficiary, only the trustee, not the beneficiary, being the client of the trustee’s attorney); *Spinner v. Nutt*, 417 Mass. 549, 631 N.E.2d 542 (1994) (holding trustee owed no duty of reasonable care to beneficiaries if it would conflict with duty owed to fiduciary-client). See generally §3.5 of this handbook (trustee’s relationship to the trust estate) (suggesting that a trust, unlike a corporation, is not a legal entity).

<sup>28</sup>S.C. Code §62-1-109.

<sup>29</sup>*In re Estate of Klarner*, 98 P.3d 892 (Colo. Ct. App. 2003), *rev’d*, 113 P.3d 150 (Colo. 2005).

counsel would have no duties to the beneficiary.<sup>30</sup> The Restatement (Third) of Trusts is generally in accord.<sup>31</sup> The important thing to remember when it comes to legal representation is that the parties at all times must understand who represents whom. Or perhaps more important, who does *not* represent whom.<sup>32</sup> If it is reasonable for a beneficiary to assume that counsel is representing the beneficiary's interests when counsel is not, then, at minimum, counsel has a duty to communicate to the beneficiary that the beneficiary is in fact unrepresented.<sup>33</sup>

The way around all of this is for counsel, at the time he or she is hired by the trustee, to communicate directly with the beneficiaries regarding the nature of the representation. Certainly when storm clouds are gathering on the horizon—when trouble is brewing between the trustee and the beneficiary or between the beneficiary and other beneficiaries—counsel and the trustee have an affirmative duty to advise the beneficiary in a timely fashion that the beneficiary ought to retain his or her own independent counsel. The prudent trustee sees to it that this advice is rendered in writing and that there is a record of its having been received.

*Representing a trustee-beneficiary who is not the only beneficiary.* It has been suggested that there are only three possible answers to the question of whether one lawyer may ethically represent a trustee (hereinafter “the client”) who is also a beneficiary, but not the only beneficiary: (1) the client must have separate representation for each conflicting role; (2) the client is one person, and therefore, may be represented by one lawyer in all roles; and (3) the lawyer may represent the client in all roles, unless there is an actual conflict that limits the lawyer's ability to represent the client competently and diligently.<sup>34</sup> We suggest there is a fourth possible answer, namely that the client may be represented by one lawyer in all roles, conflict or no conflict, provided *the other beneficiaries* are represented by fully-informed independent counsel. That having been said, the UTC's §1005(c) “ultimate repose” feature, discussed further on in this section, could ensnare the lawyer in conflicts that are, for all intents and purposes, unresolvable no matter what.

*The relevancy of who pays trust counsel.* Ordinarily the trustee's counsel fees are deductible from the trust estate, unless they relate to matters in which the trustee is personally at fault, *e.g.*, unauthorized acts of self-dealing. On the other hand, even in cases when the trustee is not personally at fault, “... [I]f the trustee employs an attorney for the trustee's own benefit and not for that of the trust, the trustee is personally liable for the attorney's fees and is not entitled to

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<sup>30</sup>See, *e.g.*, *First Nat'l Bank of Fla. v. Whitener*, 715 So. 2d 979, 982 (Fla. 1998) (holding that trustee was the “true client,” the trustee having retained counsel after it realized “there were problems, including a perceived conflict of interest” and after the beneficiary had retained counsel). See also Wingfield, *Fiduciary Attorney-Client Communications: An Illusory Privilege?*, 8 Prob. & Prop. 60, 62 (1994) (protected communications); §3.5.2.3 of this handbook (right in equity to exoneration and reimbursement, *i.e.*, indemnity; payment of attorneys' fees). See generally 3 Scott & Ascher §17.5.

<sup>31</sup>Restatement (Third) of Trusts §82 cmt. f.

<sup>32</sup>See, *e.g.*, *Chinello v. Nixon, Hargrave, Devans & Doyle*, 788 N.Y.S.2d 750 (App. Div. 2005) (beneficiary who had at one time been represented by the law firm representing the trustee unsuccessfully sued the firm for legal malpractice and breach of fiduciary duty based on the beneficiary's execution of a waiver of citation and consent to accounting). See generally Rust E. Reid, William R. Mureiko, D'Ana H. Mikeska, *Privilege and Confidentiality Issues When a Lawyer Represents a Fiduciary*, 30 Real Prop. Prob. & Tr. J. 541, 556 (1996).

<sup>33</sup>See Christopher H. Gadsden, *Ethical Guidelines for the Fiduciary's Lawyer*, 134 Tr. & Est. 8, 17 (Mar. 1995) (citing *Butler v. State Bar*, 42 Cal. 3d 323, 721 P.2d 585 (1986)).

<sup>34</sup>See Karen E. Boxx & Philip N. Jones, *Janus as a Client: Ethical Obligations When Your Client Plays Two Roles in One Fiduciary Estate*, 44 ACTEC L.J. 223 (Summer 2019).

reimbursement from the trust estate.”<sup>35</sup> Thus, absent special facts, fees incurred by a trustee in obtaining a legal opinion as to whether he would be entitled to charge the trust estate a commission for his brokerage services that is over and above his regular fiduciary compensation ordinarily would not be reimbursable, particularly if the trust would not have been disadvantaged had the brokerage business been directed to a third party. They certainly would not be reimbursable if the trust would have been advantaged had the business been directed elsewhere.

*The attorney-client privilege.* Whom trust counsel does and does not represent implicates the attorney-client privilege, which has the following elements: “Where legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal advisor ...”<sup>36</sup> Voluntary disclosure by the privilege-holder, in this case the trustee, to a third party constitutes a waiver of the privilege. The privilege-holding trustee’s pursuit of an advice-of-counsel defense in a breach-of-trust action could constitute a partial waiver of the privilege.<sup>37</sup>

*Whether the trustee may assert the attorney-client privilege against the beneficiary.* In a suit by the beneficiary against the trustee, is the trustee entitled to assert the attorney-client privilege against the beneficiary, or is there a fiduciary exception to the privilege?<sup>38</sup> As to communications with trust counsel uttered *after* the onset of hostilities, the trustee may effectively assert the privilege.<sup>39</sup> As to communications uttered *before* the onset of hostilities, he may well not be able to.<sup>40</sup> One Arizona court has drawn a line between legal advice that the trustee seeks in his fiduciary capacity and legal advice that he seeks in his individual or corporate capacity.<sup>41</sup> The former is discoverable by the beneficiary under the fiduciary exception to the attorney-client privilege. The latter is not. Thus, legal advice on “matters of trust administration” is discoverable by the beneficiary, while legal advice sought by the trustee “for purposes of ... [the trustee’s]... self-protection” is not.<sup>42</sup>

One South Carolina court in denying a trustee the right to assert the attorney-client privilege

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<sup>35</sup>3 Scott & Ascher §18.1.2.4.

<sup>36</sup>United States v. Evans, 113 F.3d 1457, 1461 (7th Cir. 1997) (citing 8 John Henry Wigmore, Evidence in Trials at Common Law §2292 (John T. McNaughton ed., 1961)).

<sup>37</sup>See Mennen v. Wilmington Trust Co., No. 8432-ML, 2013 Del. Ch. LEXIS 238 (Del. Ch. Sept. 18, 2013) (“The waiver is ‘partial’ in the sense that it does not open to discovery all communications between the client and its attorney, but only those communications that relate to the subject matter of the disclosed communications.”).

<sup>38</sup>See generally 3 Scott & Ascher §17.5 (Duty to Furnish Information).

<sup>39</sup>See generally 3 Scott & Ascher §17.5 (Duty to Furnish Information). See, e.g., First Union Nat’l Bank of Fla. v. Whitener, 715 So. 2d 979, 982 (Fla. Dist. Ct. App. 1998) (the court finding no fraud that would abrogate the trustee’s right to assert the attorney-client privilege). See generally Charles F. Gibbs & Cindy D. Hanson, *The Fiduciary Exception to a Trustee’s Attorney/Client Privilege*, 21 ACTEC Notes 236 (1995).

<sup>40</sup>Charles F. Gibbs & Cindy D. Hanson, *The Fiduciary Exception to a Trustee’s Attorney/Client Privilege*, 21 ACTEC Notes 239 (1995); Lewin ¶123-08 (England). In New York, a trustee may invoke the attorney/client privilege only for “good cause.” See Hoopes v. Carota, 142 A.D.2d 906, 531 N.Y.S.2d 407 (App. Div. 1988), *aff’d*, 74 N.Y.2d 716, 543 N.E.2d 73, 544 N.Y.S.2d 808 (1989). *But see* Huie v. DeShazo, Judge, 922 S.W.2d 920 (Tex. 1996) (suggesting there is no “fiduciary exception” to the attorney/client privilege); Wells Fargo, N.A. v. Superior Court, 990 P.2d 591 (Cal. 2000) (denying beneficiary access even to attorney-trustee communications that involved routine trust administration matters).

<sup>41</sup>See Hammerman v. N. Trust Co. (*In re Kipnis Section 3.4 Trust*), 235 Ariz. 153 (Ct. App. 2014).

<sup>42</sup>Hammerman v. N. Trust Co. (*In re Kipnis Section 3.4 Trust*), 235 Ariz. 153 (Ct. App. 2014).

against his beneficiary found persuasive the fact that counsel fees had been paid from the trust estate.<sup>43</sup> The Restatement (Third) of Trusts, on the other hand, downplays the significance of “who pays,”<sup>44</sup> as did the Arizona court.<sup>45</sup>

In any case, the prudent trustee should assume that any prefrontation communications with counsel are discoverable and act accordingly.<sup>46</sup> And if it is any consolation to the trustee, the attorney-client privilege has its limitations. One court has issued the following general warning: “The attorney-client privilege does not permit a trustee to withhold ‘material facts’ from a beneficiary simply because the trustee has communicated those facts to the attorney.”<sup>47</sup> Another court, after having ruled that certain documents in the trustee’s file were covered by the privilege, cautioned against employing the privilege as a litigation tactic: “Nonetheless, the trustee may not use the privilege as a shield, and then, at trial, surprise the movants by using any of the requested documents as a sword.”<sup>48</sup> Still another court has provided a useful hypothetical to explain how a no-exception approach to the attorney-client privilege arguably squares with the trustee’s fiduciary duty to disclose material facts to the beneficiary:

Assume that a trustee who has misappropriated money from a trust confidentially reveals this fact to his or her attorney for the purpose of obtaining legal advice. The trustee, when asked at trial whether he or she misappropriated the money, cannot claim the attorney-client privilege. The act of misappropriation is a material fact of which the trustee has knowledge independently of the communication. The trustee must therefore disclose the fact (assuming no other privilege applied), even though the trustee confidentially conveyed the fact to the attorney. However, because the attorney’s only knowledge of the misappropriation is through the confidential communication, the attorney cannot be called on to reveal this information.<sup>49</sup>

As noted above, the drafters of the UTC back in 2000 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 lawyer, the courts now being profoundly split on the question of whom trust counsel represents.<sup>50</sup> Reconciling two contradictory inventions of equity, the lawyer’s fiduciary duty to his or her client and the trustee’s fiduciary duty to the beneficiaries, has proven easier said than done

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<sup>43</sup>Floyd v. Floyd, 365 S.C. 56, 87–88, 615 S.E.2d 465, 482 (2005).

<sup>44</sup>Restatement (Third) of Trusts §82 cmt. f, Reporter’s Notes thereto. *See also* 3 Scott & Ascher §17.5.

<sup>45</sup>Hammerman v. N. Trust Co. (*In re Kipnis Section 3.4 Trust*), 235 Ariz. 153 (Ct. App. 2014).

<sup>46</sup>Charles F. Gibbs & Cindy D. Hanson, *The Fiduciary Exception to a Trustee’s Attorney/Client Privilege*, 21 ACTEC Notes 239, 240 (1995) (“Assuming the inchoate existence of some fiduciary exception rule in your jurisdiction, the question for the attorney is: how do my fiduciary clients and I conduct our communications *prior* to the time a beneficiary asserts a claim ...? Alertly, carefully, and clearly is the certain answer.”). *See generally* Michael G. Desmarais, *The Fiduciary, His Counsel and the Attorney-Client Privilege*, 136 Tr. & Est. 29 (No. 6, May 1997).

<sup>47</sup>Hammerman v. N. Trust Co. (*In re Kipnis Section 3.4 Trust*), 235 Ariz. 153 (Ct. App. 2014).

<sup>48</sup>Matter of Will of Poster, 884 N.Y.S.2d 838, 842 (Sur. Ct. 2009).

<sup>49</sup>Huie v. DeShazo, 922 S.W.2d 920, 923 (Tex. 1996). *See generally* §§5.4.1.1 of this handbook (discussing the beneficiary’s right to information) and 6.1.5.1 of this handbook (duty to provide information) (discussing duty of trustee to provide information to the beneficiary).

<sup>50</sup>UTC §813 cmt.



when it comes to the disclosure of communications between trustee and trust counsel. One can hardly fault the UTC for being less than enthusiastic about relieving the judiciaries of this hot potato, equity, itself, being a creature of the courts. Now at least one justice on the Supreme Court of Pennsylvania, via *In re Estate of McAleer*, has signaled that he would be just as happy were Pennsylvania's legislature to take over attempting to sort out whether there should be some kind of a fiduciary exception to the attorney-client privilege: "In this respect, I submit that the General Assembly has superior tools to gather empirical information and assess advantages and disadvantages on a developed legislative record."<sup>1</sup> While the Court's actual disposition in *McAleer* lurks at the intersection of the main opinion and three concurring opinions, the opinions taken together constitute an exhaustive and scholarly treatise on the confusion reigning nation-wide in this particular corner of fiduciary jurisprudence, at least as of April 7, 2021.

*Asserting the privilege against the inquisitive successor trustee.* In a suit by a successor trustee against a predecessor trustee, is the predecessor entitled to assert the attorney-client privilege against the successor? Courts have held that when the office of trustee passes from one person to another, the power to assert the attorney-client privilege passes as well.<sup>51</sup> This would include the power to assert the privilege with respect to confidential communications between a predecessor trustee and an attorney on matters of trust administration. Bottom line: The predecessor may not assert the privilege as against the successor when it comes to matters of administration.<sup>52</sup>

As to matters of personal fiduciary liability exposure, on the other hand, the predecessor enjoys a qualified privilege. One California court explains: "[I]t is not the content or nature of the communication, or the fact that the communication later becomes relevant to the issue of the trustee's personal liability, that is dispositive under California privilege law; rather, it is the fact that, at the time the legal advice was sought, the purpose of obtaining the advice was protection against personal liability."<sup>53</sup> If that was then the purpose, then the legal advice that is received would not be involuntarily discoverable by the successor trustee.

As to communications between the predecessor trustee and his, her, or its personal attorney, the predecessor enjoys, or should enjoy, an unqualified privilege.<sup>54</sup> "If a predecessor trustee seeks legal advice in its personal capacity out of a genuine concern for possible charges of breach of fiduciary duty, the predecessor may be able to avoid disclosing the advice to a successor trustee by hiring a separate lawyer and paying for the advice out of its personal funds."<sup>55</sup>

*Asserting the attorney-client privilege against those not party to the trust relationship.* Assume the following: (1) counsel renders confidential tax advice to the trustee, which the trustee voluntarily passes on to the beneficiary; (2) the IRS seeks to discover that advice; and (3) the trustee asserts the attorney-client privilege against the IRS. Has the trustee waived the privilege by so informing the beneficiary of that advice? If there is a fiduciary exception to the attorney-client privilege, then the privilege presumably has not been waived, the trustee and the beneficiary being essentially coclients. Now if trust counsel represents the trustee and only the trustee, then the privilege may have been waived *by the trustee* when he communicated the confidential tax advice

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<sup>1</sup> *In re Estate of McAleer*, 248 A.3d 416, 438 (Penn. 2021) (Justice Saylor's concurrence).

<sup>51</sup> *See, e.g., In re Estate of Fedor*, 356 N.J. Super. 218, 811 A.2d 970 (Ch. Div. 2001).

<sup>52</sup> *See, e.g., Morgan v. Superior Court*, 23 Cal. App. 5th 1026, 233 Cal. Rptr. 3d 647 (2018).

<sup>53</sup> *Fiduciary Trust Int'l of Cal. v. Klein*, 9 Cal. App. 5th 1184, 216 Cal. Rptr. 3d 61 (2017).

<sup>54</sup> *See, e.g., Hammerman v. N. Trust Co. (In re Kipnis Section 3.4 Trust)*, 235 Ariz. 153 (Ct. App. 2014).

<sup>55</sup> *Fiduciary Trust Int'l of Cal. v. Klein*, 9 Cal. App. 5th 1184, 216 Cal. Rptr. 3d 61 (2017).

to the beneficiary, who would essentially have been a third party to the attorney-client relationship. The waiver might even apply to all the other beneficiaries, as well. “In view of the unsettled state of the law in the US regarding the existence of, and basis for, the fiduciary exception to the attorney-client privilege, trustees should carefully consider the potential waiver implications of disclosing privileged legal advice to beneficiaries. Moreover, in appropriate circumstances, trustees may wish to obtain Court directions before disclosing confidential legal advice.”<sup>56</sup>

In §6.1.5.1 of this handbook, we discuss the trustee’s duty to provide information to the beneficiaries of the trust. There is, however, a countervailing duty not to furnish beneficiaries with information if doing so would “not be in the best interests of the beneficiaries as a whole, but ... [would]... be prejudicial to the ability of the trustees to discharge their obligations under the trust.”<sup>57</sup>

*The perverse incentives inherent in §1005(c) of the Uniform Trust Code.* The UTC, specifically §1005(c), provides that under certain circumstances a trust beneficiary has only five years to bring a breach-of-trust action against the trustee even should the beneficiary lack actual or constructive notice of the breach. Assume four years have run since a breach of trust has occurred. The trustee and the beneficiary remain totally in the dark as to the fact and nature of the breach. One more year and the trustee is off the hook. Trust counsel, on the other hand, becomes aware of the breach. Here is a situation in which counsel may have to respond to two potentially conflicting duties: (1) to represent the trustee in his official capacity and (2) to protect the trustee personally. If he informs the trustee of the breach and the trustee takes no action to remedy it, the trustee’s fraudulent inaction may toll the running of the statute. On the other hand, if counsel keeps quiet, the five-year period will expire and the trustee will be personally off the hook. Still the trustee will have breached virtually the entire panoply of fiduciary duties that had been owed to the beneficiary, duties that are the subject of Chapter 6 of this handbook.

What is an innocent trust counsel to do in such a situation? One court has proffered the following advice: When a trustee is faced with a personal-fiduciary conflict, “the trustee can mitigate or avoid the problem by retaining and paying out of his own funds separate counsel for legal advice that is personal in nature.”<sup>58</sup> But how exactly is trust counsel to get the trustee to retain at his own expense separate personal counsel without causing a fraud-based tolling of the running of the statute and/or without trust counsel, himself, ending up constructively participating in the breach of trust? Might the only way out of the cul-de-sac be the *deus ex machina* of a repeal of §1005(c)? Under default laches doctrine trust counsel would no longer be conflicted in that the trustee would be personally benefited by a full disclosure of the breach to the beneficiary. This is because full disclosure would trigger a start of the running of any statute of limitations that might be applicable to such a breach of fiduciary duty, or, in the absence of such a statute, a start of the running of the “reasonable” laches period that a fully informed trust beneficiary would have to bring suit against the trustee for a breach of trust.

One commentator on ethical lawyering is floating a general proposal that might at least eliminate our §1005(c) fraud-disclosure conundrum, although in a given situation the fall-out from

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<sup>56</sup>Basil Zirinis, Marina Bezrukova, Richard Corn & James Gadwood, *Unintended Consequences*, 8(4) Tr. Q. Rev. 15 (2010) [a STEP publication].

<sup>57</sup>David Hayton, Paul Mathews & Charles Mitchell, Underhill and Hayton, *Law Relating to Trusts and Trustees* §60.58 (17th ed. 2006).

<sup>58</sup>*Stewart v. Kono*, No. B234722, 2012 WL 4427096 (Cal. Ct. App. Sept. 26, 2012) (unpublished).

the cure would likely be nastier than the disease. He proposes that each state “adopt a rule” along the lines of the following: “A lawyer, to the extent the lawyer reasonably believes necessary, may reveal information relating to the representation of a client to inform a tribunal or a beneficiary about any material breach of fiduciary responsibility when the client is serving as a fiduciary such as a guardian, personal representative, trustee, or receiver.”<sup>59</sup>

This UTC §1005(c) statute of ultimate repose is covered generally in §7.1.3 of this handbook and in §7.2.10 of this handbook.

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<sup>59</sup>Kennedy Lee, *Representing the Fiduciary: To Whom Does the Attorney Owe Duties?*, 37 ACTEC L.J. 469, 492 (Winter 2011).