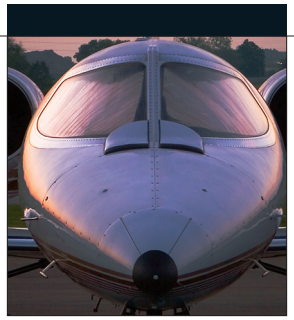

"Fiduciary Exception" to the Attorney-Client Privilege

In some jurisdictions, a fiduciary's claim to the attorney-client privilege can give way to exceptions for beneficiaries and successor fiduciaries.

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The attorney-client privilege is a cornerstone of the legal practice, ensuring that communications between a client and his or her lawyer are not shared with third parties. However, it is not without its limitations. Some jurisdictions have established a "fiduciary exception" to the attorney-client privilege, which entitles beneficiaries and successor fiduciaries to access otherwise privileged communications between the fiduciary and his or her attorney. For example, earlier this year, the Arizona Court of Appeals held, in *Hammerman v. N. Trust Co. (In re Kipnis Section 3.4 Trust)*,[1] that a fiduciary is limited in his or her ability to assert the attorney-client privilege against a beneficiary and a successor fiduciary. Other jurisdictions, such as California and Texas, do not recognize such an exception. This article discusses the reasoning of courts on both sides of the issue. Based on *Hammerman*, as well as case law and legislation in other states, this article also seeks to provide some practical approaches for fiduciaries and their attorneys to ensure that communications between attorney and client are kept privileged to the fullest extent of the applicable law.

Hammerman

In *Hammerman*, Northern Trust Company served as trustee of a trust for Jane Kipnis Hammerman, the sole beneficiary of the trust during her lifetime. Northern Trust also managed a single-member limited liability company (LLC) which was held by the trust. Northern Trust engaged a law firm to advise it in connection with the administration of the trust and the management of the LLC, and paid the firm with trust funds, as the trust instrument authorized.

When the beneficiary and Northern Trust began to have disagreements regarding Northern Trust's strategy for administering the trust, the beneficiary exercised the powers granted to her and removed Northern Trust as trustee. The beneficiary and the successor trustee subsequently asked Northern Trust to send them all files relating to the trust. Northern Trust provided most of its files, but withheld some emails that it claimed were subject to the attorney-client privilege. The beneficiary and the successor trustee then sought to compel the production of these communications.

The lower court determined that the beneficiary had a right to the communications that had been paid for by the trust. The court noted, however, that if Northern Trust had obtained and paid for its own counsel in connection with a potential claim by the beneficiary, the result may have been different.

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The Arizona Court of Appeals disagreed with the trial court's determination that the privileged status of the communications depended on who paid for the legal services. Considering a trustee's duty to provide information to trust beneficiaries under Arizona law, the Arizona Court of Appeals held that communications that would otherwise be subject to the attorney-client privilege must be provided to the beneficiary if those communications related to trust administration. Communications by Northern Trust in its personal capacity, however, such as communications with counsel relating to a potential threat of litigation by the beneficiary, remained privileged.

The capacity in which the fiduciary sought legal counsel is a threshold issue in determining whether a court will allow beneficiaries or successor fiduciaries to access otherwise privileged communications.

Next, the court analyzed the successor trustee's ability to access Northern Trust's otherwise privileged communications. The Court of Appeals stated that under Arizona law, successor trustees succeed to the same powers, and are subject to the same duties, as the original trustee. Therefore, in order to facilitate a seamless transition from predecessor to successor trustee, and to allow the successor to fulfill its duty to keep the beneficiary informed, the court held that the successor trustee should be given access to Northern Trust's privileged communications. However, the court limited the successor trustee's access to communications made by Northern Trust in its fiduciary capacity relating to trust administration, as opposed to communications by Northern Trust in its personal capacity.

As a result of this analysis, the Arizona Court of Appeals reversed the trial court's order and remanded the case so that the trial court could determine whether the otherwise privileged communications were made in the trustee's fiduciary or personal capacity.

Initial threshold question: personal vs. fiduciary capacity

The capacity in which the fiduciary sought legal counsel is a threshold issue in determining whether a court will allow beneficiaries or successor fiduciaries to access otherwise privileged communications. Generally, when a fiduciary seeks advice from an attorney in a personal capacity, such as advice in connection with a claim against the fiduciary, the communications between the fiduciary and counsel are subject to the attorney-client privilege, and no fiduciary exception will apply. If, however, the legal advice was instead sought in a fiduciary capacity with regard to matters of administration of the trust or estate, courts are divided on whether beneficiaries can rely on a fiduciary exception to the attorney-client privilege to compel production of otherwise privileged communications between the fiduciary and attorney.

Although on its face this initial threshold question seems clear, courts have not established a uniform standard for when a communication will be treated as being in the fiduciary's "personal capacity." For example, in *Riggs Nat'l Bank of Wash., D.C. v. Zimmer*,[2] the Court of Chancery of Delaware stated that a trustee's communications with an attorney are made in a "personal capacity" if the communications relate to "allegations of litigation," "threats of it," or an actual proceeding against the fiduciary requiring the fiduciary to personally seek legal advice. In *U.S. v. Mett*,[3] the United States Court of Appeals for the Ninth Circuit relied on a lower threshold for personal capacity, finding that the fiduciary sought advice in a personal capacity merely because there was "[t]rouble in the air" when the beneficiaries were "asking difficult questions," despite no pending legal action by the beneficiaries.

The court in *Hammerman* also relied on a relatively low threshold for personal capacity, stating that all legal advice sought "for purposes of self-protection" would be covered by the attorney-client privilege, and not subject to a fiduciary exception. Arguably, the "self-protection" standard set by the *Hammerman* court could apply to factual inquiries even if there is no potential allegation of a claim by a beneficiary.

If a court makes the factual determination that a fiduciary sought legal advice in a fiduciary capacity, as opposed to a personal capacity, the court will then determine whether to apply the fiduciary exception to the attorney-client privilege.

Theories underlying the fiduciary exception

As discussed in *Hammerman*, the analysis of whether the fiduciary exception applies depends on whether the privileged communications were sought by the beneficiary or the successor fiduciary.

When beneficiaries seek the privileged communication. If a beneficiary seeks to obtain an otherwise privileged communication, courts

1 329 P.3d 1055 (Ariz. Ct. App., 2014).
2 355 A.2d 709 (Del. Ch., 1976).
3 178 F.3d 1058 (CA-9, 1999).

rely on two distinct theories in analyzing the application of the fiduciary exception:

1. "Real client" theory.
2. "Duty to inform" theory.[4]

"Real client" theory. The underlying premise of the "real client" theory is that the fiduciary is a representative for the beneficiaries of the entity that the fiduciary is administering. As a result, because the legal advice is being sought by the fiduciary for the ultimate benefit of the beneficiaries, the beneficiaries should be deemed to be the attorney's "real client" and the holders of the attorney-client privilege.[5] Courts justifying the adoption of the fiduciary exception based on this theory have generally applied a three-factor test, set forth in the seminal case of *Riggs*, to identify whether the beneficiaries are the real clients:

1. The source of payment for the legal advice.
2. Whether there was an adversarial proceeding requiring the advice to be sought.
3. The intended use by the fiduciary of the communications between the fiduciary and attorney.

Riggs factor 1: source of payment. The court in *Riggs* stated that the payment of legal fees out of the trust fund was a significant factor as to the identity of the real client, and, thus, who held the attorney-client privilege. Because the legal advice in *Riggs* was performed at the request of the trustee, and paid for out of the trust fund, the court determined that the beneficiaries were the "real clients" of the attorney, as the advice was ultimately for their benefit. Accordingly, the trustee was not able to assert the privilege with respect to communications between the trustee and his attorney.

This line of reasoning is consistent with the Second Restatement of Trusts, which provides that a trustee is "privileged to refrain from communicating to the beneficiary information acquired by the trustee *at his own expense* and for his own protection."[6] While the Second Restatement does not expressly state that legal advice sought by the trustee for the benefit of the beneficiaries, and paid for out of the trust fund, is not subject to the privilege, there is a negative inference that such communications are not privileged, at least with respect to beneficiaries.

Although the *Riggs* court placed emphasis on the source of funds for payment of the advice sought, other courts have significantly downplayed the importance of this factor. In *Hammerman*, the court stated that "the question of whether the trustee acted in a fiduciary capacity cannot be resolved simply by asking who paid for the advice." Courts adopting similar reasoning to *Hammerman* note that the source of the payment of the legal fees informs, but does not finally determine, the intended use of the communication.[7] This line of thinking is consistent with the Restatement Third of Trusts, which provides that "the 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."[8]

Some courts, like *Hammerman* and *Wells Fargo Bank v. Superior Court*, have stated that if charges against the trust fund for legal advice sought by the fiduciary are determined to be improper, the appropriate remedy is not disclosure of the otherwise privileged information. Instead, these courts suggest that a beneficiary should file a claim for breach of trust and seek to have the probate court surcharge the trustee.

Riggs factor 2: when the advice was sought. The second factor that the *Riggs* court considered in determining if the beneficiaries were the "real client" was when the legal advice was obtained. If the legal advice preceded an adversarial proceeding (or threat of such a proceeding) by a beneficiary, this would tend to indicate that the advice was being sought for the benefit of the beneficiaries and the trust or estate. That would weigh in favor of the beneficiaries being deemed to be the "real client." On the other hand, if the legal advice was sought after a beneficiary brought a claim against the fiduciary, and the advice related to that claim, the beneficiaries may not be seen as the "real client."[9] As discussed above, however, the issue as to when a potential pending claim by a beneficiary becomes sufficiently ripe can be a fact-intensive inquiry.

Riggs factor 3: intended use of the communication. The third factor examined by the *Riggs* court to determine whether the beneficiaries were the "real client" is the intended use of the communication. Following *Riggs*, many courts have placed significant emphasis on this factor. Indeed, Justice Sotomayor, in her dissent in *U.S. v. Jicarilla Apache Nation*,[10] stated that this factor is the "lynchpin" of the real client inquiry.

Similar to the "initial threshold question" of whether advice was sought in a personal or fidu-

4 See, e.g., *Id.*

5 Riggs, *supra* note 2.

6 Restatement (Second) of Trusts § 173 cmt. b (1959) (emphasis added).

7 See, e.g., Wells Fargo Bank v. Superior Court, 22 Cal 4th 201, 990 P.2d 591 (Calif., 2000).

8 Restatement (Third) of Trusts § 82 cmt. f (2007).

9 See, e.g., Mett, supra note 3.

10 131 S.Ct. 2313 (2011).

ciary capacity, the intended use of the communication can be determined by looking at who the legal advice was intended to benefit—the fiduciary or the beneficiaries. Additionally, whether the legal advice was sought as a result of threatened or actual litigation can inform the analysis as to the intended use of the communication.

Duty to inform theory. As an alternative to the "real client" theory, some courts rely on the "duty to inform" theory to justify adopting the fiduciary exception to the attorney-client privilege.[11] While a fiduciary's duty to inform beneficiaries varies among jurisdictions, fiduciaries are often required to provide beneficiaries with basic information, such as information regarding the existence of a trust or estate, and their status as a beneficiary. Additionally, in many jurisdictions, fiduciaries must also keep the beneficiary reasonably informed of significant developments concerning the trust or estate and its administration. These jurisdictions assert that by requiring information to be provided to beneficiaries, the beneficiaries will be in a better position to hold the fiduciary to the proper fiduciary standards of loyalty, care, and honesty, and to otherwise enforce the beneficiaries' rights.[12]

Courts in these jurisdictions, such as the courts in *Hammerman* and *Dotson v. Lillard*,[13] suggest that the duty to provide information to beneficiaries should extend to otherwise privileged communications. Presented with these conflicting legal theories, these courts have apparently determined that the sanctity of the attorney-client privilege should give way to the duty of a fiduciary to keep beneficiaries informed.

As discussed in cases such as *Huie v. DeShazo*,[14] however, fiduciaries could keep beneficiaries reasonably informed of the material facts related to a trust or estate without disclosing privileged communications with the fiduciary's attorney. For instance, even if a fiduciary has confidentially communicated information to an attorney regarding the fiduciary's handling of trust or estate matters, the fiduciary can both comply with the applicable duty to inform, by disclosing these same facts to the beneficiary, and also preserve the attorney-client privilege, by not producing the communication itself.

When successor fiduciaries seek the privileged communication. Although the analysis as to whether a fiduciary exception applies in the context of a requesting successor fiduciary differs from that of a beneficiary, one constant is that even a successor fiduciary would not be entitled to privileged communications that the predecessor sought from an attorney in its personal capacity.[15] Courts generally take the position that successor fiduciaries succeed to the same powers, and are subject to the same duties, as the predecessor fiduciaries. The powers of the fiduciary are therefore not personal to any particular fiduciary, but rather vest in the office of the fiduciary itself.[16] Courts finding an exception to the attorney-client privilege for successor fiduciaries generally believe that the successor also inherits the right of access to confidential communications between the predecessor fiduciary and his or her attorney.

In reaching this determination, courts rely principally on public policy concerns centered on continuous effective administration of the entity during the transition from predecessor to successor fiduciary to ensure no harm is caused to the beneficiary. If the successor fiduciary did not succeed to the rights of his or her predecessor, and thereby gain access to all of the information related to the entity's administration, the successor arguably would be unable to completely fulfill his or her fiduciary obligations, such as the duty to provide information to the beneficiaries. Therefore, many courts argue that for a trust or estate to continue to operate smoothly when a change in fiduciary occurs, the privileged communications must pass from the predecessor fiduciary to the successor.[17]

Incidentally, because the right to assert the privilege is arguably inherent in the office of the trustee or executor, rather than personally held by any one fiduciary, it could be argued that the "exception" with respect to a successor fiduciary is not really an exception at all. In any event, even if the terminology is misleading, the result in these jurisdictions is the same: The successor fiduciary is entitled to otherwise privileged communications from the predecessor.

Obstacles in finding a fiduciary exception

Both policy constraints and statutory constraints can inhibit the finding of a fiduciary exception to the attorney-client privilege.

Policy constraints. Jurisdictions opposing a fiduciary exception to the attorney-client privilege often rely heavily on public policy concerns to support their position. The foundation of the attorney-client privilege is a desire to foster open

11 See, e.g., Hammerman, *supra* note 1 and Dotson v. Lillard, 1994 WL 1031449 (Va. Cir. Ct., 1994).

12 Hammerman, *supra* note 1.

13 Note 11, *supra.*

14 922 S.W.2d 920 (Tex., 1996).

15 Hammerman, *supra* note 1.

16 Moeller v. Superior Court, 16 Cal. 4th 1124, 947 P.2d 279 (Cal., 1997).

17 *Id.*

communication between a client and an attorney. The fiduciary should also be able to communicate freely with an attorney to obtain the best possible legal advice, both for the fiduciary and the beneficiaries of the entity he or she represents. Absent the comfort of the privilege, fiduciaries might forsake legal advice, or alternatively, blindly follow the legal advice they receive. Some jurisdictions are concerned that upholding a fiduciary exception to the attorney-client privilege would enable disappointed beneficiaries to second-guess a fiduciary's actions by reviewing communications between the fiduciary and his or her attorney, thus perhaps encouraging unnecessary, and in some instances, frivolous litigations.[18]

Some courts, such as the courts in *In re Estate of Fedor* and *Moeller v. Superior Court*, have argued that while these public policy considerations may apply in the context of a beneficiary seeking privileged communications, the concerns are not as compelling in the context of successor fiduciaries seeking the communications.[19] Those courts seem to argue that although beneficiaries may have interests that are adverse to the trust or estate, the successor fiduciary's interests are less likely to be adverse. Therefore, because the successor's interests are arguably aligned to some extent with those of the predecessor, making otherwise privileged communications available to successor fiduciaries is less likely to inhibit the behavior of the predecessor.

Keep in mind, however, that if a beneficiary has the ability to appoint successor fiduciaries, as was the case in *Hammerman*, a mechanism for the beneficiary to access privileged communications may be inadvertently created. The beneficiary could appoint a fiduciary who might be more willing to waive the attorney-client privilege and disclose to the beneficiary the otherwise privileged communications of the predecessor fiduciary.

Courts in these jurisdictions suggest that the duty to provide information to beneficiaries should extend to otherwise privileged communications.

Statutory constraints. State-specific statutory constraints are another potential obstacle in finding a fiduciary exception to the attorney-client privilege. For example, in *Wells Fargo*, the Supreme Court of California held that "the privileges set out in the Evidence Code are legislative creations; the courts of this state have no power to expand them or to recognize implied exceptions."[20]

Similarly, in *Huie*, the Supreme Court of Texas held that because the Texas statute codifying the attorney-client privilege did not contain a fiduciary exception, the proper channel for instituting such an exception would be through a statutory amendment, rather than via judicial decision. The Supreme Court of Texas also looked to the Texas Rules of Evidence, which provide a definition of "client," and determined that under Texas law, "the trustee who retains an attorney to advise him or her in administering the trust is the real client, not the trust beneficiaries."[21]

Even where a court has recognized a fiduciary exception, legislatures in jurisdictions such as Florida, South Carolina, and New York have been willing to statutorily eliminate these judicial creations.[22] Interestingly, Delaware has also statutorily overruled the analysis in *Riggs*, the authority cited by several jurisdictions to support the "real client" theory.[23] The Delaware legislation provides that the payment of counsel fees and related expenses from the fund with respect to which the fiduciary acts does not cause the fiduciary to waive or be deemed to waive any right or privilege including, without limitation, the attorney-client privilege. While this effectively overrules the decision in *Riggs*, courts in other jurisdictions continue to look to the reasoning behind *Riggs* as a guide for analyzing, and often upholding, the fiduciary exception.[24]

Most recently, in July 2014, New Hampshire passed Senate Bill 289, which statutorily eliminated the fiduciary exception to the attorney-client privilege.[25] Among other aspects, the Bill explicitly provides that a successor fiduciary is not treated as the attorney's client solely by reason of succeeding the individual with whom the lawyer had an attorney-client relationship. Rather, the predecessor fiduciary and the successor fiduciary would have to come to an agreement with regard to sharing confidential communications.

Tips for practitioners

As discussed above, there is a jurisdictional divide as to whether the fiduciary exception can be relied on by a beneficiary or a successor fiduciary to breach the attorney-client privilege when it comes to commu-

18 See, e.g., Huie, *supra* note 14.

19 In re Estate of Fedor, 356 N.J. Super. 218 (N.J. Super. Ct. Ch. Div., 2001); Moeller, *supra* note 16.

20 See, e.g., Wells Fargo Bank, *supra* note 7.

21 Huie, *supra* note 14.

22 Fla. Stat. § 90.5021 (2013); S.C. Code Ann. § 62-1-110 (2013); N.Y. C.P.L.R. § 4503(a)(2) (2012).

23 Del. Code Ann. tit. 12, § 3333 (2013).

24 See, e.g., Hammerman, *supra* note 1, and Mett, *supra* note 3.

25 N.H. Rev. Stat. Ann. § 564-B:2-205 (2014).

nications between a fiduciary and the fiduciary's attorney. With such differences in approach, it is important for a fiduciary and the fiduciary's counsel to understand the extent to which their communications will be privileged prior to engaging in those communications.

Ascertaining whether the privilege will be upheld is particularly complicated given the fact that some of the typical secondary sources, such as the Uniform Trust Code, refuse to take a position on the fiduciary exception.[26] Instead, these sources leave the issue open until there is more of a consensus among the jurisdictions. Practitioners can, however, look to other sources in order to determine where a particular jurisdiction falls or potentially will fall in its recognition of the fiduciary exception to the attorney-client privilege.

Some jurisdictions have statutes that directly address the fiduciary exception to the attorney-client privilege, making that jurisdiction's stance clear for practitioners. For example, the Rules of Evidence in Florida, the Rules of Civil Procedure in New York, and the Probate Code in South Carolina, all explicitly reject the fiduciary exception.[27] Therefore, for trusts and estates in those states, absent a change in the law or a change of the entity's jurisdiction, communications between a fiduciary and attorney will generally be privileged as to beneficiaries and successor fiduciaries to the same extent as if they were unrelated third parties.

Another available source for a practitioner to review would be applicable case law, which in some states expressly sets forth a jurisdiction's position on the fiduciary exception. For example, pursuant to the holding in *Hammerman*, Arizona now clearly recognizes the fiduciary exception to the attorney-client privilege.

Practitioners in jurisdictions that have not explicitly taken a position regarding the fiduciary exception can look to sources that courts have considered in reaching their decisions. For example, in *Huie*, the Supreme Court of Texas analyzed the Texas Rules of Evidence, which set forth the general rules for the attorney-client privilege; the Texas Property Code, which requires trustees to account to beneficiaries for trust transactions; and relevant case law. The court then determined that the "real client" theory was statutorily precluded and that a fiduciary's duty to provide information to beneficiaries can co-exist with the attorney-client privilege under Texas law. In *Wells Fargo*, the Supreme Court of California analyzed the California Evidence Code and the California Probate Code to reach a similar conclusion.

Practitioners may also consider rules of professional conduct and even legal opinions of their state bar in analyzing whether communications between a fiduciary and attorney will be privileged. For example, in *Hubbell v. Ratcliffe*,[28] the Superior Court of Connecticut in the Judicial District of Hartford cited the Rules of Professional Conduct, which require attorneys to keep information relating to the representation of a client confidential, to stress the importance of upholding the attorney-client privilege.

Similarly, in *Dotson v. Lillard*,[29] the Circuit Court of Virginia in Fairfax County looked to a Legal Ethics Opinion of the Virginia State Bar, which provided that attorneys engaged to represent fiduciaries generally owe no ethical or fiduciary duty to the beneficiaries, as a potential justification for not recognizing a fiduciary exception. However, notwithstanding the Legal Ethics Opinion, the court used similar reasoning to the "duty to inform" theory to ultimately hold that the beneficiaries were entitled to communications between the trustee and counsel concerning trust administration.

Fiduciaries and their counsel who serve in jurisdictions where there either is clear recognition of a fiduciary exception, or no clear position on the matter, can take steps to maximize the available attorney-client privilege, and ensure that communications remain privileged to the fullest extent allowable under applicable law.

Separate fiduciary and personal work. As a general initial threshold matter, as discussed in cases such as *Riggs* and *Mett*, it appears that even courts that recognize a fiduciary exception to the attorney-client privilege will not allow such an exception for communications by the fiduciary in his or her personal capacity.[30] Therefore, to the extent possible, legal work performed for the fiduciary in the fiduciary's personal capacity should be recorded and tracked separately from legal work for the fiduciary in its fiduciary capacity. For example, if the fiduciary anticipates litigation, the fiduciary's attorney should open a separate client number, and issue separate bills for advice sought in the fiduciary's personal capacity. When sending correspondence, avoid combining topics relating to personal matters versus fiduciary matters, even if this causes two emails or letters to be sent instead of one.

A clear way to separate the legal work would be to have the fiduci-

[26] See, e.g., Unif. Trust Code § 813, comment (2006).

[27] Fla. Stat. § 90.5021 (2013); S.C. Code Ann. § 62-1-110 (2013); N.Y. C.P.L.R. § 4503(a)(2) (2012).

[28] 2010 WL 4885631 (Conn. Super. Ct., 2010).

[29] 1994 WL 1031449.

[30] See, e.g., Riggs, *supra* note 2, and Mett, *supra* note 3.

[31] See, e.g., Del. Code Ann. Tit. 12, § 3303 (2013) and Nev. Rev. Stat. § 165.160(1) (2013).

ary retain a separate attorney for advice in a personal capacity versus advice in a fiduciary capacity. While this will serve to help a court better determine which communications are privileged, it may not be practical in all situations. There may be benefits to having the same attorney counseling the fiduciary in both its personal capacity and fiduciary capacity, as the information needed by the attorney to develop legal advice for the fiduciary in both capacities will often overlap.

Consider the source of payment. Under a *Riggs* analysis, a beneficiary could arguably be entitled to view most attorney communications for which the trust or estate paid. Therefore, it may be desirable for the fiduciary to pay for legal services provided to the fiduciary in his or her personal capacity out of the fiduciary's own funds. If allowable under local law, the fiduciary could pay the attorney's invoice and then seek reimbursement from the trust or estate. However, if the trust or estate ultimately pays the bill, the protection that this provides may be minimal, and may not be worth the burden of a "two step" payment process.

Ensure beneficiaries know they may not be the "real client." It may also be advisable for a fiduciary to manage expectations with the beneficiaries as to their standing with respect to the fiduciary's attorney. For example, beneficiaries should be clearly informed from the onset that the attorney represents the fiduciary alone, if that is the case, and that the beneficiaries should seek their own counsel if they so desire. If the attorney also represents the beneficiaries, care should be taken when crafting the attorney's engagement letters to expressly set forth the terms of the various engagements, the impact the multiple representations may have on the attorney-client privilege, and the potential ramifications of any future conflicts among the parties.

Although not considered in *Riggs* or other similar cases which followed, such disclosures may have the effect of clarifying who the "real client" of the attorney is. If an attorney has represented the beneficiaries prior to advising the fiduciary, the "real client" argument may be more compelling.

Observe general considerations regarding keeping communications privileged. Finally, to ensure a communication remains privileged, a fiduciary and the fiduciary's attorney should take care to use the normal safeguards regarding the attorney-client privilege. For example, any communication that is intended to be privileged should include a notation stating that the attorney-client privilege is meant to apply. However, this notation should not be overused. It should be included on only communications that actually meet the requirements for the attorney-client privilege.

In addition, care should be taken prior to including third parties on communications, as the inclusion of a third party on a communication will generally cause the privilege to be waived. This becomes particularly complicated, though, when the third parties are accountants or other professionals. Such intricacies are beyond the scope of this article, but suffice it to say that one should proceed with caution before including any third party on a communication intended to be privileged.

Controlling measures in the drafting process. Where litigation is anticipated from the onset, the fiduciary should attempt to seek to serve in a jurisdiction that protects communications between a fiduciary and his or her attorney. New York, for example, would be preferable to Arizona. Of course, the fiduciary exception to the attorney-client privilege will not necessarily be the deciding factor for a fiduciary to determine whether to serve. In addition, not every fiduciary will have input as to what jurisdiction will govern.

Finally, if allowable under applicable state law,[31] the fiduciary may wish to include language limiting the duty to provide information to the beneficiaries in the governing instrument.

While maximizing the attorney-client privilege and protecting the fiduciary should be important concerns, a fiduciary should always keep in mind that he or she has an obligation to administer the entity and act in the best interests of the entity's beneficiaries.

Conclusion

Whether a beneficiary or successor fiduciary would be entitled to receive otherwise privileged communications between a fiduciary and his or her attorney depends in large part on the laws of the applicable jurisdiction. It is unlikely that a clear, uniform approach to dealing with the fiduciary exception to the attorney-client privilege will emerge in the near future. Until such a time, it is important that fiduciaries and their counsel understand, prior to engaging in communications, the extent to which such communications will be privileged with respect to beneficiaries and successor fiduciaries. Fiduciaries and counsel should also consider the prophylactic measures that this article suggests to ensure that communications between attorney and client are kept privileged to the fullest extent permitted by applicable law. ■