

**THE EROSION OF THE ATTORNEY-CLIENT PRIVILEGE**  
**IN TRUST AND ESTATE LITIGATION**

By: Steven K. Mignogna, Esquire  
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Haddonfield, Princeton, Flemington, New Jersey  
Philadelphia, Pennsylvania  
Wilmington, Delaware

1. **Introduction**

A host of attorney-client privilege issues arise in estate and trust lawsuits. Although lawyers are accustomed to thinking of the attorney-client privilege as an absolute protection from inquiry into communications between the lawyer and the client, in fact significant exceptions exist. For example, when a will or trust is contested, many states will not apply that privilege with respect to communications between the lawyer and the client regarding estate planning.

Estate planners must be aware of these privilege issues because the concepts can be contrary to our general notions of being able to maintain in strict confidence communications with clients. In jurisdictions that negate the attorney-client privilege when a will or trust is contested, the estate planner's file is discoverable, and the estate planner will be deposed concerning oral communications with the deceased client.

To generally establish the privilege, these four factors must exist:

- i. The communications must originate in the confidence that they will not be disclosed.
- ii. The element of confidentiality must be essential to the full and satisfactory maintenance of the relationship between the parties.
- iii. The relationship must be one which in the opinion of the community ought to be fostered.
- iv. The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation. Sherwin P. Simmons, Who Is the Client?: Ethical Considerations, SC06 ALI-ABA 769, 772 (1997) (quoting 8 Wigmore on Evidence, § 2285 at 527).

2. **Who is the client?**

When representing a fiduciary, the lawyer must initially determine to whom she owes her loyalty. See, e.g., Peter R. Brown, Clarifying the Role of the Attorney, Executor, and Trustee in Estate and Trust Administration, SC85 ALI-ABA 149, 152 (1998) ("threshold issue is always to whom does the lawyer owe his or her loyalty?"); Steven M. Fast, et al., The Fiduciary Sticky Wicket--Counseling Fiduciaries on Dealing with Receipts and Releases; Requests for Resignation; Conflicts of Interest with Co-Fiduciaries; and Discharge from Tax Liabilities, SC84

ALI-ABA 91 (1999) (asking "is it really the trustee that you represent or is it the trust itself or possibly the trust's beneficiaries?"); Peter Rice, Attorney-Client Privilege in the U.S., Second Edition, §4:45 (March 2003) ("the most common question that has arisen has been who is the client—the trust entity, the trustees or individuals who act for the entity, or the beneficiaries or individuals for whom the entities were created?"); Sherwin P. Simmons, et al., Confidentiality Issues Between Fiduciaries and Their Legal Advisors, SH059 ALI-ABA 535 (2003)(discussing with respect to attorney-fiduciary privilege, "who is the client?"); Jack A. Falk, Jr., The Fiduciary's Lawyer-Client Privilege, Does it Protect Communications from Discovery by a Beneficiary?, 77-MAR Fla. B.J. 18 (March 2003)(reviewing various jurisdictions' approaches to parties subject to attorney-client privilege); John T. Rogers, Jr., Who's the Client? Ethics for Trust and Estate Counsel, SJ036 ALI-ABA 255 (2003) (discussing ethical implications of representation of fiduciary and purview of attorney client relationship).

a. Defining Scope of Attorney-Client Relationship.

- i. Attorneys may be able to define the attorney-client relationship themselves with a tailored retention letter. In Lerner v. Laufer, 359 N.J. Super. 201 (App.Div. 2003), certif. denied, 177 N.J. 223 (2003), the New Jersey Appellate Division held that an attorney is ethically permitted under RPC 1.2, with the consent of the client after consultation, to limit the scope of his representation with a single, specifically tailored form of a retainer agreement. See also Kamaratos v. Palias, 360 N.J. Super. 76, 84 (App. Div. 2003) (citing Lerner); Melvin Hirshman, Tips from Bar Counsel - Agreements with Your Client, 36-DEC Md. B.J. 58 (Nov./Dec. 2003) (citing Maryland Rule of Professional Conduct 1.2(c) and Lerner).

b. Disclosure to Parties Involved.

- i. Lawyers who represent fiduciaries may want to consider a number of practical considerations to further define issues of privilege and representation at the outset of the relationship. First, the attorney can inform beneficiaries that he or she is representing the fiduciary, that the fiduciary is the lawyer's client, and that the lawyer does not represent the beneficiaries. The lawyer can also inform the beneficiaries upfront that communications between the fiduciary and the attorney will be privileged, or even have the beneficiaries sign an acknowledgment to this effect. The lawyer for the fiduciary can also suggest that beneficiaries retain their own counsel. See Jack A. Falk, Jr., The Fiduciary's Lawyer-Client Privilege, Does it Protect Communications from Discovery by a Beneficiary?, 77-MAR Fla. B.J. 18 (March 2003).

c. Majority Rule -- Fiduciary Only as Client.

- i. "[U]nless the lawyer elects to represent the estate or trust as an entity, and there is a written agreement to this effect with the fiduciary," the majority rule is that "the lawyer's only client is the fiduciary." Brown, supra, at 152.

- ii. ABA Formal Opinion 94-380 (May 9, 1994): A lawyer who represents a fiduciary in a trust or estate case is subject to the same limitations as are all other attorneys. The fiduciary's obligations to the beneficiaries do not necessarily impose any obligations on the lawyer toward the beneficiaries. The lawyer also must preserve client confidences.
- iii. Wills (Majority Rule):
  - (1) In Goldberg v. Frye, 266 Cal. Rptr. 483, 488 (Ct. App. 1990), the California Court of Appeals announced that "it is well established that the attorney for the administrator of an estate represents the administrator, and not the estate." Although the attorney performs services that may benefit legatees, the attorney "has no contractual privity with the beneficiaries of the estate." Id.
  - (2) In Grievance Committee, Wyoming State Bar v. Riner, 765 P.2d 925, 927 (Wyo. 1988), the Supreme Court of Wyoming disagreed with an attorney's contention that he represented the estate and not the personal representative. The Court concluded that the personal representative of the estate and the attorney "entered into an attorney-client relationship when she engaged [him] to assist her in performing her duties as a personal representative of the [] estate." Id.
  - (3) Simon v. Zipperstein, 512 N.E.2d 636, 638 (Ohio 1987) ("in absence of fraud, collusion or malice, an attorney may [not] be held liable in a malpractice action by a purported beneficiary of a will where privity is lacking").
  - (4) In re Estate of Wagner, 386 N.W.2d 448, 450 (Neb. 1986) ("[w]hen an attorney is employed to render services in securing the probate of a will or settling an estate, he acts as attorney for the personal representative and not for the estate").
  - (5) In Barner v. Sheldon, 678 A.2d 767 (N.J. Super. Ct. Law Div. 1995), aff'd., 678 A.2d 717 (N.J. Super. Ct. App. Div. 1996), the court held that the executrix's attorney had no duty to inform the beneficiaries of a will of the right to disclaim their bequest in favor of their mother. In reaching this decision, the court explained that a duty is imposed where "reasonable persons would recognize it and agree that it exists." 678 A.2d at 768 (citing W. PAGE KEETON ET AL., PROSSER AND KEATON ON THE LAW OF TORTS, at 359 (5th ed. 1984)). The question of "[w]hether a duty exists is ultimately a question of fairness. The inquiry involves a weighing of the relationship of the parties, the nature of the risk, and the public interest in the proposed solution." Id. at 768 (quoting Goldberg v. Housing Auth. of Newark, 186 A.2d 291, 293 (N.J. 1962). In

determining whether to impose a duty, the court considered the following factors:

- (a) the extent to which the provision was intended to affect the plaintiff;
- (b) the foreseeability of reliance by the plaintiff and the harm it could thereby suffer;
- (c) the degree of certainty that plaintiff has been harmed; and
- (d) the need from a public policy standpoint of preventing future harm without unduly burdening the profession.

Id. at 768 (quoting R. J. Longo Constr. Co. v. Schragger, 527 A.2d 480, 481 (N.J. App. Div. 1987)). In concluding that the attorney had had no duty to inform the will beneficiaries of tax consequences, the court stated that "[a]n attorney's client is the executor of the estate, not the estate itself." Id. at 771.

iv. Trusts (Majority Rule): Trust counsel are agents hired by a trustee, so that trust counsel also owe their duty of loyalty to the fiduciary (the trustee).

- (1) In Huie v. DeShazo, 922 S.W.2d 920, 925 (Tex. 1996), the Supreme Court of Texas held that under Texas law, a trustee who hires an attorney to assist in administering a trust is the actual client of the lawyer, and the trust beneficiaries are not the clients. The court noted it "would strain reality to hold that a trust beneficiary, who has no direct professional relationship with the trustee's attorney, is the real client." Id.
- (2) In Spinner v. Nutt, 631 N.E.2d 542 (Mass. 1994), the Supreme Judicial Court of Massachusetts refused to impute an attorney-client relationship between the attorneys of trustees, who also happened to be beneficiaries under the trust, and plaintiff-beneficiaries of the testamentary trust. The court reasoned that "[s]hould we decide that a trustee's attorney owes a duty not only to the trustee but also to the trust beneficiaries, conflicting loyalties could impermissibly interfere with the attorney's task of advising the trustee." Id. at 545-46. In so declining to recognize an attorney-client relationship between trust beneficiaries and trustee's attorney, the court noted it was agreeing with the majority of other courts. Id. at 546.
  - (i) Breach of a trustee's duty to the trust beneficiaries is probably not sufficient to justify counsel's breach of the duties of loyalty and confidentiality owed to the fiduciary client in most jurisdictions. Robert F.

Phelps, Jr., Representing Trusts and Trustees - Who Is the Client and Do Notions of Privity Protect the Client Relationship, 66 Conn. B. J. 211, 221-22 (1992). If counsel decides she can no longer represent a trustee because of the trustee's handling of the trust, counsel may prefer to resign rather than decide whether the action justifies disclosure. Id.

- (ii) When retained to render personal advice to the trustee, counsel may wish to document the limited representation, noting that she was retained for personal matters and not trust administration and that she was paid with the trustee's personal funds.

- (3) A California court has found that the attorney-client privilege trumps a trustee's reporting duties to trust beneficiaries and therefore shields privileged communications between a trustee and its counsel relating to trust administration. Wells Fargo Bank, N.A. v. Superior Court, 990 P.2d 591 (Cal. 2000). The California Supreme Court refused to recognize an implied exception that would require trustees to share privileged communications about trust administration with trust beneficiaries. The court found that the State's attorney-client privilege is a legislative creation to which judicial exceptions may not be made. Even if the trust pays the fees charged by counsel retained by the trustee, the beneficiaries cannot claim to be joint clients along with the trustee. The privilege, however, does not shield non-privileged information that is forwarded to counsel.

d. Minority View -- Beneficiary of Estate or Trust as Client

- i. The minority view is that, although there is no direct attorney-client relationship, the lawyer may still owe some duties to the beneficiaries. Brown, supra, at 152.
- ii. Discovery has also been allowed even where the beneficiary was not characterized as a client. In these states, the courts reasoned either that the fiduciary was obligated to disclose all information relating to the administration of the trust to the beneficiaries or that the fiduciary client could not reasonably have expected that the lawyer represented her personally. Price, supra, at 1087.

- (1) In Steinway v. Bolden, 460 N.W.2d 306, (Mich. Ct. App. 1990), the Court of Appeals of Michigan held that even though "the personal representative retains the attorney, the attorney's client is the estate, rather than the personal representative." This conclusion was supported by the "fact that the probate court must approve the attorney's fees for services rendered on behalf of the estate and that the fees are paid out of the estate." Id.

- (2) Elam v. Hyatt Legal Servs., 541 N.E.2d 616, 618 (Ohio 1989) ("beneficiary whose interest in an estate is vested is in privity with the fiduciary of the estate, and where such privity exists the attorney for the fiduciary is not immune from liability to the vested beneficiary for damages arising from the attorney's negligent performance").
- iii. Some states treat the beneficiaries of an estate as joint clients of the lawyer for the fiduciary. As a lawyer-client relationship may be found to have existed based on the reasonable subjective belief of a beneficiary, these states permit beneficiaries to discover communications between the fiduciary and the fiduciary's counsel. John R. Price, Duties of Estate Planners to Nonclients: Identifying, Anticipating and Avoiding the Problems, 37 S. Tex. L. Rev. 1063, 1086-87 (1996).
  - (1) In re Estate of Torian, 564 S.W.2d 521, 526 (Ark. 1978), cert. denied, 439 U.S. 883 (1978) (applying joint client exception to attorney-client privilege in holding that communication between an executor and executor's lawyer was discoverable by beneficiary).
  - (2) Riggs Nat'l Bank of Wash., D.C. v. Zimmer, 355 A.2d 709, 714 (Del. Ch. 1976)(the trustees "cannot subordinate the fiduciary obligations owed to the beneficiaries to their own private interests under the guise of attorney-client privilege").
  - (3) Hoopes v. Carota, 531 N.Y.S.2d 407, 409 (App. Div. 1988), aff'd, 543 N.E.2d 73 (N.Y. 1989) (attorney-client privilege did not protect president's questions about the exercise of his duties as a trustee or corporate officer in connection with the various proposals for the sale or buyout of the corporation and the transactions between management and the corporation).
- iv. Regardless of whether a case arises in a majority or minority jurisdiction, an attorney should approach communications with the beneficiaries with care. An attorney should not allow the beneficiaries to believe that she represents their interests. Brown, supra, at 154.
- e. Where the issue is one of trust administration, "the trustee is not the real client in the sense that he is personally being served." Id. at 776. As the Delaware Chancery Court noted in Riggs, the intention of the communication is to aid the beneficiaries. "The policy of preserving the full disclosure necessary in the trustee-beneficiary relationship is...more important than the protection of the trustees' confidence in the attorney for the trust." Riggs, 355 A.2d at 714.
- f. However, if the trustee can demonstrate that he sought advice for his personal benefit, he may invoke the attorney-client privilege. Factors relevant in determining whether the trustee sought advice for his personal use rather than for the administration of the trust are: whether the trustee used his personal funds or those of the estate to pay for the

attorney's services and whether he sought advice relating to a defense in pending litigation.

- g. Related issue: Dissolution of attorney-client privilege as to communications with decedent regarding estate plan, where that estate plan is being litigated. See, e.g., N.J. Rule of Evidence 504; N.J.S.A. §2A:84A-20.

### 3. **The Continuing Erosion of the Privilege**

- a. Moeller v. Superior Court, 16 Cal. 4th 1124 (1997).

The Supreme Court of California ruled in this case that a successor trustee is the holder of the attorney-client privilege over communications between a former trustee and his trust administration counsel. This decision also addresses cases in this area from around the country.

A corporate fiduciary handled the trust at issue for a number of years, including while litigation and related issues were addressed concerning toxic contamination to real property owned by the trust. One of the beneficiaries, Mr. Moeller, became the successor trustee in place of the corporate fiduciary, and sued his predecessor for various losses, including alleged mishandling of the contaminated property and related litigation. Mr. Moeller sought communications and other documents exchanged between the former trustee and its counsel, but the former trustee refused to produce such documents, claiming the attorney-client privilege.

The Supreme Court of California ruled that Mr. Moeller was entitled to all such communications because the privilege belonged to the "office" of trustee, and not to a particular trustee. The Court ruled that all attorney-client communications regarding any trust administrative matter would not be privileged as against a successor trustee. However, with respect to communications between a trustee and counsel on actual or potential breaches of fiduciary duty, the Court ruled that such communications could be protected from disclosure; the Court seemed to suggest that, to ensure the privilege, the fiduciary should obtain its own counsel and pay for such legal services personally.

- b. Eddy v. Fields, 121 Cal. App. 4th 1543, 18 Cal. Rptr. 3d 487 (Cal. Ct. App. 2004).

The court, following Moeller, held that a successor trustee was entitled to the files of the lawyer of the predecessor trustees. The former trustees resigned. The successor trustee requested that the attorney for the former trustees turn over his files. The attorney petitioned the court for guidance on whether the files should be released. The attorney argued that some of the documents had been prepared by him while representing the former trustees and were protected by the work product privilege. The trial court ordered the attorney to turn the files over to the successor trustee.

The court of appeals affirmed, explaining that "a new trustee succeeds to all rights, duties and responsibilities of his or her predecessors, including those related to dealings with an attorney retained to assist the trustee in the management of the trust." 18 Cal. Rptr. 3d 490. The court reasoned that the documents within the file belonged to the client, including all

correspondence, pleadings, expert reports, and other items reasonably necessary to the representation. The court also found that work product privilege had been waived by disclosure.

c. In Estate of Fedor, 356 N.J.Super. 218 (Ch. Div. 2001).

The New Jersey court adopted Moeller.

The beneficiaries alleged mismanagement and self-dealing by the fiduciaries (who were both executors and trustees). In prior proceedings, the court had suspended the two individual fiduciaries of the subject estate and trust, and appointed an attorney as the temporary fiduciary. The substitute fiduciary and the beneficiaries then sought discovery of prior communications between the former fiduciaries and the attorneys and accountants for the estate. The former fiduciaries raised the attorney-client privilege.

The court ruled that the substitute fiduciary became the holder of the privilege and therefore was entitled to have access to all records of the estate, including attorney-client advice previously provided to the suspended fiduciaries by the attorneys and the accountants. Likewise, she was entitled to decide whether to waive the privilege as to the beneficiaries, based on the best interests of the estate. The court denied the beneficiaries' motion without prejudice.

However, the court noted that the beneficiaries did not seek discovery of communications between the former fiduciaries and their "personal" attorney, and the opinion does not address those communications.

d. Bria v. United States, 89 A.F.T.R.2d 2002-2141 (D.Conn. 2002).

The co-executors of an estate retained counsel. However, the attorneys were terminated while in the process of preparing the United States Tax Form 706.

The IRS investigated whether the co-executors understated the value of the estate on the Form 706 that was eventually filed with the IRS. The IRS issued a summons to the former attorneys for the co-executors. An objection was raised based on the attorney-client privilege, especially since some of the information was not listed on the Form 706 which was filed.

Although the court sustained the objection as to certain points, the court still ordered the attorneys to answer questions and produce documents as to certain areas, including joint bank accounts valued at over \$407,000, held by the decedent but not listed on the estate tax return which was filed.

e. Follansbee v. Gerlach, 56 Pa.D.&C.4<sup>th</sup> 483 (2002).

Plaintiffs were the beneficiaries of a trust. The trustee was a bank, and not a party to the litigation. Defendants in the litigation were counsel for the trust. Plaintiffs alleged that defendants had placed themselves in a conflict of interest in representing another beneficiary of the trust and providing inconsistent interpretations of the trust.

Plaintiffs served a subpoena upon the bank trustee, which refused to produce certain documents based on the attorney-client privilege.

The trial court determined that the issue was unresolved under Pennsylvania law. The court thus reviewed the conflicting authorities from other jurisdictions. In the end, the court concluded that the trustee could not withhold documents regarding the “management” of the trust, including opinions of counsel guiding the trustee in the administration of the trust. The court noted that the documents at issue were generated before there was any pending or threatened litigation.

- f. Philadelphia Bar Association Professional Guidance Committee Ethics Opinion 2003-11 (August 2003).

The Committee advised that generally an executor of an estate may consent to the disclosure of confidential information as to the decedent’s attorney. In that case, a resident threatened with eviction from a private recovery facility retained counsel. During the course of negotiations with the facility owner, the client committed suicide. Another resident of the facility informed the attorney that, prior to the client’s suicide, the client argued with the facility owner. The attorney also discovered regulatory problems with the facility, from tenants and from public records.

The father of the deceased resident asked the attorney for information about the events leading to the death. The attorney inquired whether he could disclose the information to the client’s father if the father were appointed executor of the estate.

The Committee applied the Pennsylvania Rules of Professional Conduct and first noted that, under Rule 1.6, if the father was not the executor, the attorney would not be able make disclosures to him because the duty of confidentiality survives death.

Commenting that Rule 1.6 is silent on whether an executor is authorized to consent to disclose confidential client information, the Committee looked to Rule 1.14, dealing with a client under a disability. The Committee concluded by analogy to Rule 1.14 that an attorney may make confidential disclosures to an executor. The Committee cautioned that the attorney should limit the disclosure to information necessary to protect or assert the client’s rights, and that, if the attorney is aware that the deceased client would not consent to the disclosure of the information, then such information should not be disclosed.

#### 4. **The Unique Problem of Document Production and Billing Records**

- a. Discovery techniques in disputes as to administration, including discovery of fiduciary records
- i. Executors, administrators, guardians and trustees are under a duty to keep and preserve accurate accounts, to give to the beneficiary, at reasonable times, complete and accurate information regarding the property entrusted to him, and to allow the beneficiary to inspect the accountings. United Towns Bldg. & Loan Ass’n v. Schmid, 23 N.J.Super. 239 (1952).
  - ii. A trustee is under a duty to provide the beneficiary, at his request, with a copy of the trust agreement and with relevant information about the assets of the trust and the particulars relating to its administration – essentially, a full disclosure of all

facts material to the beneficiary's interests. Restatement (Second) Trusts §173; Uniform Probate Code §7-303(b). These fiduciaries should account for all assets and for each separate trust fund, a separate accounting should also be kept.

- iii. The problem of corporate fiduciaries changing over time.
  - iv. Indirect discovery of fiduciary records.
- b. Document production and billing records: other recent case studies
- i. Jacob v. Barton, 877 So.2d 935 (Fla. Dist. Ct. App. 2004). The Florida District Court of Appeals quashed the lower court's order requiring production of a trust attorney's billing records to a beneficiary. The beneficiary had sued to remove the trustee for mismanagement and for improper payments to the trustee's attorneys. According to the court, when confronted with the issue of privilege, a court must consider whether the attorney represents the interests of the trustee or the beneficiary. The court noted that usually a lawyer retained by a trust represents the trustee, not the beneficiary, and therefore the trustee holds the lawyer-client privilege. However, the court acknowledged that the beneficiary might hold the privilege if he is the person who ultimately will benefit from the legal work the trustee has instructed the attorney to perform, and in that sense may be the "real client." It ruled that, to the extent that the lawyer's work concerned the dispute with the beneficiary, the client is the trustee, not the beneficiary. The court remanded with directions to conduct an in camera review to determine whether the billing entries would be protected by either the lawyer-client privilege or the work product doctrine.
  - ii. Nassau County Ethics Opinion No. 03-04, Inquiry No. 701. A wife retained an attorney to commence an action for divorce against her husband. She had advised the attorney that she did not want her husband to know about her plans for divorce until she had advised the children. She died before the action could be commenced. The husband discovered the attorney's representation from one of his wife's check stubs. The issue was whether the attorney may disclose to the deceased client's husband-executor itemized billing information regarding the attorney's representation of the client-wife. The Committee advised that the attorney may not reveal a client's confidences or secrets against her directions, unless (i) the attorney is satisfied the husband has made a valid and fully informed, knowing waiver of the attorney-client privilege, and consents to disclosure in his fiduciary capacity and in the interests of his wife and her estate; or (ii) the disclosure occurs in compliance with a court order mandating such disclosure. The Committee also advised the attorney to ask the executor-husband whether he would accept the billing information with redactions for any confidential communications imparted to the attorney.
  - iii. Lawrence v. Cohn, 2002 WL 109530 (S.D.N.Y.). This case involved beneficiaries of a will who sued the executor of the estate on their individual behalf and on behalf of the estate, and sought disclosure of documents. The claim

against the executor was for securities fraud in the purchase of a forty percent interest in a property in New York City.

- (1) Underlying Facts and Litigation. In the early 1980's, the executor had arranged for the purchase of, and sought approval by the Surrogate's Court to take, a property interest in a large New York City property for himself rather than for the estate. The beneficiaries argued that this investment opportunity should be reserved to the estate. In May of 1984, the executor and the beneficiaries settled litigation by agreeing that they would share equally the purchased interest. The firm of Weil, Gotshal and Manges ("WGM") provided legal representation to the executor in this capacity for years, including the time period of this settlement and purchase. The estate paid WGM's fees because it advised the executor in his fiduciary capacity. However, the executor hired independent counsel to represent him individually for this settlement and purchase.
- (2) Documents and communications withheld. The beneficiaries sought to compel disclosure of certain documents and communications in connection with the above (not communications regarding the instant litigation). The court first noted that the issues arise under federal privilege laws in that the only remaining claim is a federal cause of action. WGM withheld documents on the basis of attorney - client privilege and for some documents, the work product rule. With respect to the attorney - client privilege, WGM asserted that its client was the executor in his capacity as executor of the estate. The work product rule was claimed to cover documents prepared in two separate litigations: the May 1983 proceeding by the beneficiaries to compel disclosure from the executor and the August 1983 proceeding for advice and direction by executor to approve the purchase of the real estate.
- (3) Exceptions to Privilege. Beneficiaries attempted to argue that the "crime fraud" exception to the attorney-client privilege and work product doctrine applied in this context. The beneficiaries alleged that the executor fraudulently concealed material facts that Chemical Bank was taking a lease on the property for very favorable terms, and that they would have fought for more than half of the interest in the property. The court squarely rejected this argument in that there was no evidence that the attorneys were aware of any fraud nor was the executor aware of the lease before the settlement.
- (4) Holding. The court held that the invocation of the work product doctrine and attorney-client privilege failed for a different reason. The court noted that WGM represented the executor in his capacity

as executor. In that capacity, he owed certain fiduciary responsibilities to the estate and thus to its beneficiaries. The court held that “[g]iven those obligations, he cannot assert the privilege, nor can WGM invoke the work product rule, against the estate or its beneficiaries.” Id. at \*3. The court further stated: “When a fiduciary retains an attorney to advise him in the exercise of his fiduciary responsibilities, his communications with that attorney are not absolutely protected from inquiry by the beneficiaries for whom the fiduciary performs. This principle is recognized in a variety of fiduciary contexts, although the prototype finds its source in the law of trusts.” Id. The court reasoned that there is no question that the executor of the estate had fiduciary obligations to the beneficiaries. Additionally, the litigation he instituted, i.e., advice and direction, was made in his capacity as executor. WGM represented the executor in this capacity only in connection with this litigation. Thus, WGM’s services were rendered on behalf of the estate, and its fees were paid from the estate.

- (5) In the earlier litigation, the court noted that the executor was in effect seeking approval on his own behalf, for the court to approve the purchase of property for his personal benefit. It was because he had two roles to play in that litigation that he also retained independent counsel. His communications with the firm that represented him personally are protected, but his communications with WGM, the firm that represented him in his fiduciary capacity, are not. Id. at \*5.
- (6) Distinguishing Holding. The court went to great lengths to highlight that this was not a case where a fiduciary acts *on behalf of the estate* and his actions were subject to challenge by a beneficiary; in such a circumstance, the fiduciary is entitled to retain counsel to defend against the challenge, and his communications would ordinarily be privileged. Id. at \* 5.
- (7) Federal Precedent. The court also highlighted that such principles have been consistently followed in the federal courts in the context of fiduciary relationships.
- (8) Work product doctrine. The court also stated that the information requested by the beneficiaries cannot be withheld from disclosure under the work product doctrine in that WGM was serving as de facto counsel not only for the executor but for the estate and its beneficiaries as well. Accordingly, counsel may not withhold work product documents from its own client. Id. at \*6.
- (9) Time Records. The court even held that WGM’s time records were subject to disclosure to the beneficiaries insofar as they

reflect advice to the executor or work product by attorneys, pertaining to management of the estate. Id. at \*7.

- (10) The decision in Lawrence v. Cohn has been upheld in various jurisdictions. See, e.g., Stenovich v. Wachtell, Lipton, Rosen & Katz, 756 N.Y.S.2d 367 (2003) (shareholder in breach of fiduciary case was compelled to disclose documents under fiduciary exception to attorney client - privilege); Follansbee v. Gerlach, 56 Pa. D & C.4<sup>th</sup> 483 (2002) (holding that as to beneficiaries, the attorney-client privilege never applies to communications between trustee and attorney consulted in fiduciary capacity regarding trust administration because the trustee is under a duty to make such documents available to beneficiaries).

c. Corporate fiduciary.

- i. Corporate fiduciaries must deal with issues particular to them. For instance, the Office of the Comptroller of the Currency (OCC) is a bureau of the U.S. Department of the Treasury which is responsible for bank supervision operations, including examinations of national banks and other supervisory activities. See [www.occ.treas.gov](http://www.occ.treas.gov).; See 12 C.F.R. Part 9, Fiduciary Activities of National Banks (2001).
- ii. OCC supervision focuses on the accurate evaluation and management of risks by banks. See 12 C.F.R. 9.4, Administration of fiduciary powers; 12 C.F.R. 9.11, Investment of fiduciary funds.
- iii. OCC also imposes obligations of recordkeeping on national bank fiduciaries. See 12 C.F.R. 9.8, Recordkeeping.
- iv. OCC has a broad range of enforcement remedies to ensure a national bank operates in compliance with laws, regulations, and fiduciary principles. See 12 U.S.C. 1818; 12 C.F.R. 9.9, Audit of fiduciary activities.
- v. A national bank which serves as a fiduciary must manage many risks inherent in the financial instruments that it holds and the portfolios it manages, including risks relating to credit, interest rate, liquidity, and price. A corporate fiduciary must manage these risks prudently at the account level, or may incur more wide-ranging risk at the transaction, compliance, strategic, and reputation levels. See 12 C.F.R. 9.4 through 9.18.

5. **The Erosion of the Attorney-Client Privilege: Other Horizons**

a. Uniform Trust Code.

- i. The Uniform Trust Code, drafted by the Uniform Trust Code Drafting Committee, is a tool which has been formulated to answer some of the above

questions regarding the administration of trusts in various jurisdictions which are typically answered by judges in these jurisdictions.

- ii. The UTC has been drafted in tandem with the drafting of the Restatement (Third) of Trusts to address these issues.
  - iii. The UTC, recognizing the split among the courts, leaves open for further consideration the extent to which a trustee may claim an attorney-client privilege against a beneficiary seeking discovery of communications between the trustee and the trustee's attorney. See UTC §813 and Comment thereto ("The drafters of this Code decided to leave open for further consideration by the courts the extent to which a trustee may claim attorney-client privilege against a beneficiary seeking discovery of attorney-client communications between the trustee and the trustee's attorney. The courts are split because of the important values that are in tension on this question."); Sherwin P. Simmons, et al., Confidentiality Issues Between Fiduciaries and Their Legal Advisors, SH059 ALI-ABA 535 (2003).
- b. ABA Privilege Task Force: The ABA has formed a new task force in attorney-client privilege. This task force was formed in response to attorney concerns that the privilege is under attack from law enforcement officials, regulators and others.
  - c. Recent New York changes: Effective August 20, 2002, New York Civil Practice Law and Rule § 4503(2) provides that, if the client is a personal representative and the attorney represents him or her in that capacity, unless the client and attorney have agreed otherwise, no beneficiary of the estate "is, or shall be treated as, the client of the attorney solely by reason of his or her status as beneficiary...." Moreover, the existence of a fiduciary relationship between the personal representative and the beneficiary "does not by itself constitute or give rise to any waiver" of the attorney-client privilege.