

ETHICAL AND LIABILITY ISSUES IN REPRESENTING SURROGATE FINANCIAL DECISIONMAKERS

by Professor Karen E. Boxx
University of Washington
School of Law
316 William H. Gates Hall
Box 353020
Seattle, WA 98185-3020
206-616-3856
E-mail: kboxx@u.washington.edu

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Karen Boxx is an associate professor at the University of Washington School of Law, where she teaches in the areas of trusts and estates, estate planning, community property and professional responsibility. Before joining the Law School faculty in 1997, she was a partner in the Keller Rohrback firm, where her practice focused on estate planning, probate, non-profit organizations and family business planning. She is currently of counsel at Keller Rohrback LLP. She graduated from the University of Washington School of Law in 1983. She is a Fellow in the American College of Trust and Estate Counsel.

Many thanks to Professor Thomas R. Andrews, who allowed me to incorporate passages from his previous writings on representing fiduciaries into these materials

These materials address ethical and liability concerns as applied to the circumstance of representing a fiduciary. Because we are discussing various fiduciary relationships (such as attorney-in-fact/principal, trustee/beneficiary, personal representative/estate beneficiary, guardian/ward), for convenience the materials will, unless otherwise noted, use the terms fiduciary and beneficiary to refer to the parties in any of the various fiduciary relationships.

An extremely helpful resource on these and other ethical issues facing estate planning and probate lawyers is the American College of Trust and Estates Counsel (ACTEC) Commentaries on the Model Rules of Professional conduct (3d ed. 1999) and the accompanying Sample Engagement Letters. Both these documents are available in print form from ACTEC for a modest fee and are available (for free!) on the ACTEC website (www.actec.org) under Resources (scroll towards the bottom of the Resources page). An order form for the print versions is available on the ACTEC website. A fourth edition of the Commentaries is expected soon.

These materials make frequent reference to the ACTEC Commentaries.

I. CONFIDENTIALITY

ABA Model Rule 1.6 states:

“a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the

client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(6) to comply with other law or a court order.”

Confidentiality when representing a fiduciary presents a few unique difficulties. First is the issue of the confidential protection that the fiduciary's communication to the lawyer enjoys from disclosure to the beneficiaries. Second is the difficulties presented when the lawyer represents multiple parties. Third is the extent to which communications of the beneficiary to the lawyer are privileged, if the lawyer considers herself lawyer for the fiduciary.

A. Disclosures to Beneficiaries by the Lawyer for the Fiduciary.

The most significant concern here is where the lawyer who is representing a fiduciary learns that the client has committed misconduct in his or her fiduciary role.

In 1985, for example, a law firm sought advice from the Iowa bar ethics committee as to the appropriate course of action when it discovered that an executor represented by the firm had never opened an estate account as instructed and had commingled estate funds with her personal funds. The committee concluded that the past misconduct was protected by the attorney client privilege, but that failure to remedy the misconduct would constitute an unprivileged future violation of the law. If the executor refused to rectify the misconduct, the law firm would be required to disclose the matter to the court and seek to withdraw. Iowa Ethics Opinion 85-3 (Nov. 15, 1985), reprinted in I NATIONAL REPORTER ON LEGAL ETHICS AND PROFESSIONAL RESPONSIBILITY (1986)("NATIONAL REPORTER").

In a similar situation, the South Carolina bar was called upon to advise whether a lawyer was entitled to disclose the fraud of the son/executor of a deceased client where doing so might disclose confidences or secrets of the deceased client. The son/executor was not the lawyer's client. The committee concluded that the lawyer was obliged to reveal the fraud to the probate court: "It was never intended for the confidences of a client to enable a fraud to be worked upon the courts or other judicial or administrative tribunals." S.C. Ethics Opinion 87-02 (1987), reprinted in II NATIONAL REPORTER (1987).

The recent changes to 1.6, allowing a lawyer to disclose confidences to prevent a client from committing a crime or fraud that would cause substantial financial injury, and to

disclose confidences to prevent, mitigate or rectify harm from a client's past crime or fraud for which the client used the lawyer's services should allow an attorney to take steps where a fiduciary client has violated fiduciary duty.

Interestingly, in 1994, the ABA Special Study Committee on counseling fiduciaries came to a similar conclusion as to past fraud, despite different wording in the existing rule. Report of the Special Study Committee on Professional Responsibility, "Counseling the Fiduciary," 28 Real Prop., Prob. & Trust J. 763, 849 (1994). According to the Special Study Committee, while the lawyer for a fiduciary is clearly not permitted to disclose confidential information to a "third party",

the lawyer should not be required to withhold such information from the beneficiaries. A fiduciary is a unique type of client, one who has special responsibilities to others and who has assumed this role with knowledge and acceptance of the fiduciary duties that define, and are crucial to, the role. The fiduciary's duty is to administer the estate or trust for the benefit of the beneficiaries. A lawyer whose assignment is to provide assistance to the fiduciary during administration is also working, in tandem with the fiduciary, for the benefit of the beneficiaries, and the lawyer has the discretion to reveal such information to the beneficiaries, if necessary to protect the trust estate. The interests of the beneficiaries should not be compromised by a barrier of confidentiality..... Where the lawyer's job is to assist fiduciary administration, in " (but not a duty) to disclose breaches of fiduciary duty during administration is implied." Id at 849-50.

The Special Study Committee pointed out that under some circumstances a beneficiary can compel discovery of communications between a fiduciary and its lawyer under the evidentiary attorney-client privilege. Id. at 850-51. In addition, under the laws of agency, the fiduciary (agent) owes a duty of loyalty to the beneficiaries (principal) that is inconsistent with withholding information from them. Id. at 851.

The fiduciary exception to attorney-client privilege (as opposed to the ethical duty of confidentiality) has a very long history. First adopted by the English courts in the 1800's (see *Wynne v. Humberston*, 27 Beav. 421 (ch. 1858), and *Talbot v. Mansfield*, 62 Eng. Rep. 728 (ch. 1865)), it has been accepted by courts in this country, although not universally. See, e.g., RESTATEMENT OF LAW GOVERNING LAWYERS ("RLGL") section 134A and comment; *United States v. Mett*, 178 F.3d 1058 (9th Cir. 1999) (containing an eloquent description and history of the exception, authored by Judge Betty Fletcher); *United States v. Evans*, 796 F.2d 264, 265-66 (9th Cir. 1986); *Washington-Baltimore Newspaper Guild, Local 35 v. Washington Star Co.*, 543 F.Supp. 906, 908-10 (DDC 1982); *Riggs Nat'l Bank v. Zimmer*, 355 A.2d 709, 713-14 (Del.Ch. 1976), Wigmore 2286; but see *Wells Fargo Bank, N.A. v. Superior Court*, 22 Cal.4th 201 (2000)(court concluded that the California statute on privilege precluded the fiduciary exception). Geoffrey Hazard has commented:

The attorney-client privilege ordinarily does not shield the fiduciary from disclosure in favor of the beneficiaries ... regardless of the identity of the client...Most probate lawyers ... view their relationship with the fiduciary as not only confidential but personal. However much they may wish that this is the law, it is not, any more than corporate counsel has a personal relationship with the CEO.

Letter from Geoffrey C. Hazard, Jr., to Jeffrey N. Pennell (Dec.2, 1992)(quoted in Pennell, *Representations Involving Fiduciary Entities: Who is the Client?*, 62 Ford.L.Rev. 1319, 1326 n.21 (1994).

In order for the fiduciary evidentiary exception to apply, the court looks at the purpose of the advice given and the source of payment of attorney fees for such advice. “On the one hand, where [a] ... trustee seeks an attorney’s advice on a matter of ... administration and where the advice clearly does not implicate the trustee in any personal capacity, the trustee cannot invoke the attorney-client privilege against the ... beneficiaries. On the other hand, where a ... fiduciary retains counsel in order to defend herself against the ... beneficiaries..., the attorney-client privilege remains intact. *Mett*, 178 F.3d at 1064. The seminal *Zimmer* case also asked the question of who paid the lawyer – if the fiduciary paid personally, the advice was protected, but if the trust (or other fiduciary estate) paid, then the advice given belonged to the fiduciary estate and the exception applied.

The rationale given for denying the protection of the privilege in this situation, is that the attorney-client relationship that an attorney has with a fiduciary is *supposed* to be for the benefit of the beneficiaries of the fiduciary’s duties, so that it seems inappropriate to deny them access to the information that was exchanged if the beneficiaries come to believe that the fiduciary has breached his/her or its obligations sufficiently to justify a lawsuit against them. However, the ABA Special Study Committee concluded that the absence of the attorney-client privilege can be extended to the ethical duty of client confidentiality; in other words, that there is no ethical duty of confidentiality that prevents counsel for a fiduciary from disclosing information to beneficiaries as non-clients. That conclusion was quite controversial because it has long been recognized that the ethical duty of confidentiality is much broader than the attorney-client privilege and protects far more information.

The ACTEC Commentaries to MRPC 1.6 have several interesting things to add to the discussion of this issue. First, they say, that

"the fiduciary's retention of the lawyer to represent the fiduciary generally in the administration of the fiduciary estate may impliedly authorize the lawyer to make disclosures in order to protect the interests of the beneficiaries. In addition, the lawyer's duties to the court may require the lawyer for a court-appointed fiduciary to disclose to the court certain acts of misconduct committed by the fiduciary. In any event, the lawyer may not knowingly provide the beneficiaries or the court with false or

misleading information." ACTEC Commentaries to MRPC 1.6 at 125-126.

The Commentaries also point out that the lawyer and the fiduciary client may agree between themselves at the outset of the representation that the lawyer may disclose to the beneficiaries or to an appropriate court any action or inaction on the part of the fiduciary that might constitute a breach of trust. *Id.* at 125. And they also point out that a lawyer drafting estate planning documents for a client may quite properly advise the client to condition appointment of a fiduciary upon the fiduciary's agreement that the lawyer retained by the fiduciary to represent the fiduciary with respect to the fiduciary estate may disclose breaches of trust to beneficiaries and/or an appropriate court. *Id.* at 127.

Finally, it should be noted that the ABA ethics committee issued a formal ethics opinion in 1994 on "Counseling a Fiduciary." ABA Form. Op. 94-380 (May 9, 1994). In general, the opinion identifies no right or duty on the part of the lawyer for a fiduciary to disclose wrongdoing by the fiduciary, whether prospective or past wrongdoing, and sticks strictly to the letter of the ABA Model Rules as written in 1994. See ABA Form. Op. 94-380 at fn.7: "[ABA] Rule 1.6 does not authorize the disclosure of information on the basis that the lawyer knows that the fiduciary is committing or will commit a criminal or fraudulent act."

There is, however, one narrow circumstance where the prior version of the ABA rules would warrant disclosure of a fiduciary's wrongdoing. Where the fiduciary has caused the lawyer to offer material evidence to a tribunal and the lawyer later learns the evidence was false (had he known in advance, the lawyer could not have offered it), the lawyer is instructed to take "reasonable remedial measures...even if compliance requires disclosure of information otherwise protected by Rule 1.6." ABA MRPC 3.3(a)(4) and (b). But the ABA ethics committee stopped short of pointing this out, preferring instead to say only that if the lawyer knows that the fiduciary client has breached his/her duties, the lawyer is precluded from presenting a false accounting to the court or to the beneficiaries, since this would be to assist the fiduciary in committing fraud. *Id.* at fn.6.

These discussions under prior ABA rules are helpful in jurisdictions that have not adopted the extensive exceptions to confidentiality now contained in Rule 1.6. In states that have adopted the revisions to Rule 1.6, a lawyer may now reveal confidences "to the extent reasonably necessary" when a fiduciary client is violating fiduciary duties in a manner that will cause or has caused substantial financial or bodily harm. The lawyer must still tread carefully to reveal only to the extent necessary. See *In re Schafer*, 149 Wn.2d 148, 66 P.3d 1036 (2003) (lawyer suspended for revealing client confidences to disclose breach of fiduciary duty of sitting judge while such judge was acting as executor of estate; lawyer had informed local papers and the IRS, among others). In the context of a trust or estate, the lawyer could use the authority of the rule to reveal fiduciary abuses to the beneficiaries, but the lawyer's position is more difficult where the fiduciary is an attorney-in-fact. If physical abuse or neglect is present, the lawyer could presumably notify another family member, and if that is not sufficient, the state agency charged with

protecting vulnerable adults. Financial harm would justify the same steps, but the lawyer's actions should be proportionate to the harm threatened.

B. Confidentiality After Death of Client

It is useful to remember that the duty of confidentiality continues after the death of the client. *Martin v. Shaen*, 22 Wn.2d 505, 156 P.2d 681 (1945); see also ABA Informal Opinion 1293 (June 17, 1974). The continuation of the attorney-client privilege after death has been reaffirmed by the U.S. Supreme Court, as a matter of federal evidentiary law, in *Swidler v. United States*, 66 U.S.L.W. 4538 (1998)(Vince Foster case). For an interesting case holding that the privilege held by "informal" business entities that managed Bing Crosby's "entertainment empire continued with the successor limited partnership formed to carry on the management of this empire after his death, see *HLC Properties Limited v. Superior Court*, 112 Cal. App. 4th 305 (2003) rev. granted 7 Cal. Rptr. 3d 779, 81 P.3d 223 (Cal. 2003). The party challenging the privilege claimed that while the privilege succeeded to Bing Crosby's executor, once the estate was closed, the privilege expired.

C. Confidentiality and Multiple Representation.

Where the lawyer is attempting to represent not only the fiduciary but also beneficiaries other than the fiduciary, the confidentiality problems are compounded. Suppose that a lawyer jointly representing the fiduciary and one of the beneficiaries learns that the fiduciary is misbehaving and it is quite clear that the fiduciary does not want the lawyer to disclose this to the beneficiaries. What is the lawyer required or permitted to do? Resolution of the issue is very complex and uncertain, illustrating the danger of multiple representation in such contexts. See ACTEC Commentaries to MRPC 1.6; R LGL §112, comment 1; Kaplan, *Legal Ethics Forum, The Case of the Unwanted Will*, 65 ABA J. 484, 486 (1979); Shaffer, *The Legal Ethics of Radical Individualism*, 65 TEX. L.REV. 963 (1987); Husband and Wife, *supra*, 28 REAL PROP PROB. & TRUST J. at 765. Of course, under the new version of Rule 1.6, if substantial financial or bodily harm is threatened, disclosure is permitted. However, it is easy to contemplate circumstances where the lawyer is uncertain whether disclosure is permitted under such a standard.

If the confiding client refuses to allow disclosure to the nonconfiding client, then the lawyer is faced with the choice between breaching the duty of communication owed to the nonconfiding client under RPC 1.4 and breaching the duty of confidentiality owed the confiding client under RPC 1.6. If the lawyer chooses not to disclose, the lawyer is likely to compound the problem by actively assisting the confiding client in deceiving the nonconfiding client. Alternatively, if the lawyer withdraws from representing the nonconfiding client, it is likely that the withdrawal itself will have the effect of disclosing the confidence, or the existence of a problem at any rate, to the nonconfiding client. And even if withdrawal does not have that effect, it is not clear that the lawyer is entitled to withdraw from representing the nonconfiding client without fully informing that client of

the confidence so that the client can decide what to do. The information was received, after all, during the attorney/client relationship and the obligation under RPC 1.4 is to provide sufficient information to permit the “client to make informed decisions regarding the representation.” Conversely, if the lawyer terminates the representation of the confiding client and continues to represent the nonconfiding client, he cannot do that ethically without disclosing to his (now) sole client the confidence, but that would be a breach of the continuing duty of confidentiality owed to the (now) former client. The lawyer could withdraw from representing both clients, but this approach has some of the same problems as just withdrawing from one representation.

The ACTEC Commentaries suggest in such a situation:

If the communicating client continues to oppose disclosing the confidence to the other client, the lawyer faces an extremely difficult situation with respect to which there is often no clearly proper course of action. In such cases the lawyer should have a reasonable degree of discretion in determining how to respond to any particular case. In fashioning a response the lawyer should consider his or her duties of impartiality and loyalty to the clients; any express or implied agreement among the lawyer and the joint clients that information communicated by either client to the lawyer regarding the subject of the representation would be shared with the other client; the reasonable expectations of the clients; and the nature of the confidence and the harm that may result if the confidence is, or is not, disclosed.

ACTEC COMMENTARIES TO MRPC 1.6 at 122. The RESTATEMENT goes further and states that if the lawyer is forced to withdraw as a result of this irreconcilable conflict,

In the course of withdrawal, the lawyer has discretion to warn the affected co-client that a matter seriously and adversely affecting that person’s interests has come to light, which the other co-client refuses to permit the lawyer to disclose. Beyond such a limited warning, the lawyer, after consideration of all relevant circumstances, has the further discretion to inform the affected co-client of the specific communications if, in the lawyer’s reasonable judgment, the immediacy and magnitude of the risk to the affected co-client outweigh the interest of the communicating client in continued secrecy. In making such a determination, the lawyer may take into account superior legal interests of the lawyer or of affected third persons, such as an interest implicated by a threat of physical harm to the lawyer or another person.”

RLGL §112, comment 1. However, such disclosure would probably not be allowed.

There may certainly be some circumstances where joint representation of a fiduciary and some of the beneficiaries may be desirable, since fiduciaries and beneficiaries do have a number of common interests. The ABA Special Committee Report on "Counseling the Fiduciary" notes, for example, that "[n]ormally the fiduciary and the beneficiary are joined in the endeavor of putting the grantor's wishes into effect and preserving the fiduciary estate from outsiders. Unless there are specific indications to the contrary, the lawyer can assume that the goals of the fiduciary and the beneficiaries are in harmony." Counseling the Fiduciary, supra, 28 REAL PROP PROB & TRUST J. at 842. Usually, for example, the lawyer for the fiduciary would be entitled to advise the beneficiaries as to the nature of their beneficial interests and the duties of the fiduciary. Id. at 840-43. This kind of advice is very limited and might not even be considered the representation of the beneficiaries. For the fiduciary's lawyer to give the advice may be an important part of representing the fiduciary. It is when the fiduciary's lawyer is asked to go beyond this kind of advice giving to the beneficiary that potential conflicts can emerge. When, for example, the beneficiary asks the fiduciary's lawyer to advocate for the beneficiary with the fiduciary, or requests the lawyer to analyze critically the performance of the fiduciary, or assert claims against the fiduciary. Id. at 841. At that point, the beneficiaries' interests have become potentially adverse to those of the fiduciary, and the lawyer should decline to perform in the capacity requested and should, instead, advise the beneficiaries that he/she represents the fiduciary and not the beneficiaries. RPC 4.3; ACTEC COMMENTARIES to MRPC 4.3 at 259. At a minimum, before undertaking to represent both a fiduciary and beneficiaries, the lawyer should satisfy ensure that the requirements of RPC 1.7 and 2.2 are satisfied. He or she should also reach an understanding with all the clients, in advance, that confidential information may be freely shared among them. For further discussion of this issue, the reader is referred to the Special Committee's report on "Counseling the Fiduciary", 28 REAL PROP PROB & TRUST J. at 839-48.

The attorney for the fiduciary must always keep in mind, when dealing with beneficiaries, the duties under RPC 4.1 and 4.3. RPC 4.3 specifies that when a lawyer is dealing with an unrepresented person and "reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding." RPC 4.1 prohibits a lawyer from "knowingly" failing to "disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by rule 1.6." Rule 1.6 does not prohibit disclosure when reasonably necessary to prevent the client from committing a crime. The implications of this set of duties were illustrated by *Bohn v. Cody*, 119 Wn.2d 357 (1992) where Mr. Cody apparently gave incomplete advice to a non-client, the parent of a client, about the security she was getting as part of a loan transaction. "It was not enough in this case that Cody told Bohn that he was not acting as her attorney....if the attorney undertakes to tell part of the story to an unrepresented party with whom the attorney's client is doing business, the attorney must take reasonable steps to tell the whole story, not just the self-serving portions of it."

The following New Jersey case, while not a fiduciary representation case, is an interesting illustration of the problem of the confiding joint client refusing to allow disclosure to the nonconfiding client.

A v. B v. Hill Wallack, 158 N.J. 51, 726 A.2d 924 (NJ 1999).

Husband and Wife retained the Hill Wallack firm for estate planning purposes and signed a retention letter waiving any conflict of interest. The letter explained that information provided by one spouse “could become available to the other” and advised further that a testamentary transfer to one spouse would permit that spouse to dispose of the property as he/she desired. The firm drafted and the clients signed reciprocal wills leaving their respective residuary estates to one another. The contingent beneficiaries for the second spouse to die were the testator’s “issue.” Before the wills were signed, the firm was retained to represent a woman (the Mother) in a paternity action against the Husband for whom the firm was doing estate planning. The firm ran a conflicts check but did not show Husband as a current client because the surname had been misspelled due to a clerical error when the estate planning file was opened. When the Husband was contacted by the Hill Wallack lawyer representing the Mother, Husband did not reveal that he, too, was a client of Hill Wallack and did not object to the firm’s representation of the Mother. He had retained another firm to represent him in the paternity action. That lawyer told Hill Wallack that the firm’s estate planning department was doing legal work for the Husband. The firm immediately withdrew from representing the Mother in the paternity suit. It then wrote to the Husband that it felt it had an ethical duty to disclose to his Wife the existence, but not the identity, of his illegitimate child and that it would do so unless the Husband did so by a date certain. He joined Hill Wallack in the paternity action to enjoin the disclosure. The trial court refused to direct Hill Wallack not to disclose, but the intermediate appeals court reversed and ordered that an injunction be issued. In this posture, the New Jersey Supreme Court concluded that Hill Wallack was entitled to disclose this information to Wife. The opinion contains a thorough discussion of the rules, the Restatement of the Law Governing Lawyers and the leading commentary on this problem. The court gave the following grounds for concluding that the firm was entitled to disclose: (a) RPC 1.4(b) requires that a lawyer explain matters to a client (Wife) to the extent reasonably necessary to permit informed decisions; (b) New Jersey’s RPC 1.6(c) permits disclosure of confidences “to rectify the consequences of a client’s criminal, illegal or fraudulent act in furtherance of which the lawyer’s services had been used,” and (c) the Husband’s deliberate failure to tell Wife of his illegitimate child constituted a fraud on the Wife. “When discussing their respective estates with the firm, the husband and wife reasonably could expect that each would disclose information material to the distribution of their estates, including the existence of children who are contingent residuary beneficiaries. The husband breached that duty.” Interestingly, New Jersey’s ethics code, in contrast to Washington’s, requires a lawyer to disclose confidences if the lawyer reasonably believes it necessary to prevent a client from committing a “criminal, illegal or fraudulent act ...likely to result in death or substantial bodily harm or substantial injury to the financial interest or property of another.” NJRPC 1.6(b)(1). But the Court held that this mandatory

duty had not been triggered in this case. Hill Wallack was permitted, but not required, to disclose to the Wife.

Finally, there is a fascinating Georgia case, *Bowen v. Hunter*, 525 S.E.2d 744 (1999), where the attorney for the personal representative, also the widow of the decedent, did not disclose to the other family members (surviving mother and sister) the existence of a prenuptial agreement that would have disinherited the widow, because he concluded it was invalid.

One can head off such problems by clarifying in advance, in the engagement letter, that there will be no confidences as between the various parties. See the ACTEC Sample Engagement letters for illustrative language.

The situation is exacerbated when the lawyer represents a principal under a power of attorney and then later the attorney-in-fact looks to the lawyer for assistance in carrying out that rule. This situation is discussed in more detail in the section on Conflicts of Interest.

B. Confidentiality of Communications with Beneficiary

Generally, confidentiality and privilege is waived by the client when a third party is present during the communication. What is the extent of confidentiality where there is three way communication among the attorney, the guardian and the ward, or the principal and attorney-in-fact? To some extent, this may depend on who the attorney identifies as the client, the guardian or the ward. California's statute, for example, allows the presence of a guardian ad litem during communications between a child client and lawyer, because the GAL is reasonably necessary for transmission of the information to the lawyer or the accomplishment of the purpose for which the attorney was consulted. Cal. Evid. Code 952. Similarly, in *De Los Santos v. Superior Court*, 27 Cal. 3d 677 (1980), a child was the plaintiff in a personal injury action, and his mother was appointed his guardian ad litem. The mother spoke with the child in order to assist the attorney in answering interrogatories, and the court held that those conversations were protected by the attorney-client privilege.

The ambiguous duty that the lawyer for a fiduciary owes to the beneficiaries, and the fiduciary exception to the attorney-client privilege, muddies the water concerning the extent to which communications among fiduciaries, beneficiaries and the lawyers remains confidential among that group.

II. CAPACITY

ABA Rule 1.14 STATES THAT

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

See generally ACTEC COMMENTARIES to MRPC 1.14.

The RESTATEMENT includes language substantially equivalent to this, but goes further by stating that where no guardian or other representative exists, or is able to act, the lawyer “must ... pursue the lawyer’s reasonable view of the client’s objectives or interests as the client would define them if able to make adequately considered decisions on the matter, even if the client expresses no wishes or gives contrary instructions.” RESTATEMENT OF THE LAW (THIRD): THE LAW GOVERNING LAWYERS §35(2). The ACTEC COMMENTARIES suggest that such authority to act in the best interests of a disabled client is perhaps implicit in the attorney-client relationship. ACTEC COMMENTARIES to MRPC 1.14 at 217. However, this is a dangerous power. If the lawyer guesses incorrectly about the client’s capacity, the client may make a claim against the lawyer for revealing attorney-client confidences or other ethical offenses. For that reason the RESTATEMENT commentary counsels that “[w]here practicable and reasonably available, independent professional evaluation of the client’s capacity may be sought.... A lawyer may bring the client’s lack of competence before a tribunal when doing so is reasonably calculated to advance the client’s objectives or interests as the client would define them if able to do so rationally.” RLGL §35, comment d.

See also ABA Formal Opinion 96-404.

The language added into the new ABA rule 1.14(c) may ease a lawyer’s hesitance to take action in such circumstances.

This issue can be particularly problematic if the lawyer suspects incapacity of a fiduciary client. Failure on the part of the attorney to act could harm not only the fiduciary client but the beneficiaries as well.

Illustrative Cases: *Estate of Lint*, 135 Wn.2d 518, 957 P.2d 755 (1998). In the *Lint* case, the attorney took very clever action when faced with a client's evident incapacity and a third party's apparent undue influence. For another interesting example of a lawyer's unique approach in the face of a client's incapacity, see Katharine Graham's description of the actions of her husband's lawyer when dealing with a very powerful man (Phil Graham) requesting a Will where the lawyer had well-founded concerns about the client's capacity, at K. Graham, Personal History 334-35 (New York: Vintage Books 1998).

See also, Fleming and Morgan, *Lawyers' Ethical Dilemmas: a "Normal" Relationship When Representing Demented Clients and Their Families*, 35 Ga. L. Rev. 735 (2001).

III. CONFLICT OF INTEREST

ABA RULE 1.7 PROVIDES:

a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

The potential for conflict of interest when representing a fiduciary is great. For example, the fiduciary could also be a beneficiary, and may want the attorney to assert positions that benefit her personal interests. Another potential conflict scenario is where the lawyer has represented an elderly client with estate planning matters and then an adult child calls, concerned about the client's failing capabilities and inquiring about the possibility of a guardianship. Even more complex is where the lawyer drafted a power of attorney for the principal and once the document is activated, the attorney-in-fact calls, looking for legal advice in carrying out her duties to the principal. In many instances, the principal would want the attorney to stay involved as the attorney for the agent. Conflicts are possible, however, and not just in the circumstance where the attorney-in-fact may be

acting improperly. The principal and the attorney-in-fact may disagree about the principal's capacity, for example. Another example of a conflict is when the principal becomes suspicious of the attorney-in-fact, perhaps due to undue influence from another person, and wants to revoke the power of attorney. To protect yourself, you should consider discussing the issue with the principal and obtaining written authorization from the principal to permit representation of the attorney-in-fact. If the principal wants limits on that authorization, or does not want you to represent the attorney-in-fact, that should also be noted in your file. That written authorization does not resolve actual conflicts, however. The ethical rule is a two part test of which written consent is only one part. The lawyer must also reasonably believe that the dual representation does not adversely affect the representation of each client.

A conflict may arise in even more ambiguous circumstances. For example, the lawyer who is hired by the attorney-in-fact to assist in carrying out those duties may be considered the lawyer for the principal for conflict of interest purposes. This was the costly result for a Maine attorney. In *Estate of Keatinge v. Biddle*, 789 A.2d 1271 (Me. 2002), a state's highest court addresses the critical question of a lawyer's loyalties when representing an attorney-in-fact. A federal district court certified the following (paraphrased) question to the Maine Supreme Court: when an attorney-in-fact hires a lawyer to help with activities as attorney-in-fact (such as selling the principal's property) can the lawyer ever be considered the lawyer for the principal? The court stated that "the mere retention of counsel by the holder [of the power] does not by itself create an attorney-client relationship between the attorney and the grantor [of the power]. To hold otherwise would leave the attorney hired to represent the holder ... in the untenable position of being subject to ill-defined professional responsibilities and create the reality of conflicting loyalties." These are comforting words to lawyers. However, the court pointed out that it is possible for other surrounding circumstances to create an attorney-client relationship between the principal and the lawyer for the attorney-in-fact. Their answer to the certified question was therefore yes, it is possible. It should be noted that in holding that something more than the mere representation of an attorney in fact is needed to create a duty to the principal, the court pointed to its holding that beneficiaries of a will could not sue a drafting attorney for malpractice, because a contrary holding would create conflicting loyalties for the lawyer. The court declined to answer two other questions certified by the district court, one, whether the state's formulation of necessary evidence to prove an attorney client relationship was modified in this context, and two, whether the court would adopt the Restatement (Third) of Lawyers 14(1)(b) approach that a person claiming an attorney-client relationship in this context could prove the lawyer consented to the relationship by a showing that the lawyer knew or should have known the principal reasonably relied on the lawyer to provide the services.

As to the underlying facts of this case, the lawyer in question had represented the son/attorney-in-fact in selling some of the principal's real property. She had one conversation with the principal about her fees, and she signed some documents as attorney-in-fact for the principal because the son/attorney-in-fact authorized her to sign in his place as attorney-in-fact. Later, the son/attorney-in-fact sued the principal, his father, for breach of an agreement to set up a trust for the son. The lawyer represented the son in

this lawsuit. The suit was settled, the father/principal sued the lawyer and the jury awarded the father /principal \$660,000 in his claim against the lawyer. It was at that point in the litigation that the district court asked the state court whether a finding of an attorney-client relationship between the principal and the son's lawyer was possible.

A North Carolina case hints at an interesting scenario where the identity of the lawyer's client may be unclear. In *Estate of Graham v. Morrison*, 2005 N.C. App. LEXIS 151, a niece was appointed attorney-in-fact and entered into several questionable transactions that were challenged by a daughter of the principal. One of the challenged actions was use of the principal's funds to pay the niece's legal expenses. However, the niece had used the funds to pay a lawyer she hired to represent "herself and [the principal]" in an incompetency hearing filed by the principal's daughter. The court allowed that expense since it was for the benefit of the principal. However, it raises an interesting dilemma for the lawyer being hired by the attorney-in-fact to represent the principal in an incompetency hearing, presumably to protect the attorney-in-fact's continued authority over the principal's assets.

IV. POTENTIAL LIABILITY FOR FIDUCIARY'S MALFEASANCE

The lawyer can be the target for blame when the fiduciary causes harm. One case that gives some comfort in this situation is *Persinger v. Holst*, 639 N.W.2d 594 (Mich. App. 2001). In that case, an attorney was contacted by a former client to draw up estate planning documents for an elderly widow. The documents named the former client as her sole beneficiary and named him as attorney-in-fact for the widow. The client abused the powers as attorney-in-fact and a guardian was appointed, who initiated proceedings against the attorney-in-fact as well as the drafting attorney. A conflict of interest claim against the attorney was not properly brought, but on appeal the court considered the issue of whether the attorney could be held liable for failing to dissuade the widow from a choice of proposed agent when the attorney knows the proposed agent is incapable of handling the client's affairs. The court refused to impose on the attorney the duty to ensure that the client choose an appropriate agent. Such a rule would impermissibly widen the scope of a lawyer's duty to "infinite proportions," such as holding an attorney liable for a client's choice of business partner. Additionally, the guardian claimed the lawyer should be liable for allowing the widow to sign the power of attorney at a time when she was allegedly incompetent. The court held that "an attorney cannot justifiably be deemed an insurer of a client's mental competency" and the attorney here made a reasonable inquiry into the widow's understanding of the documents and there was no overt evidence of incapacity at the time of signing.

A more troubling case is a recent unreported decision from California. In *Harris v. Heller*, 2004 Cal. App. Unpub. LEXIS 8797, in 1983 the law firm prepared a living trust for the client, a widow, that named her three children as co-trustees. All three children signed the document as co-trustees, but it was understood among the widow's children that brother Bart would be primarily responsible for handle their mother's financial affairs. The law firm later prepared a durable power of attorney naming Bart as attorney-in-fact. Bart turned out to be a poor choice for money manager and embezzled millions.

The other two children sued the law firm, alleging that the law firm represented the entire family, not just the widow when it prepared the trust agreement and power of attorney, that it failed to properly advise the other two children of their duties and powers as co-trustees, that the firm failed to tell them about the power of attorney and that the firm allowed the widow to sign the documents when she was mentally impaired. The law firm won a summary judgment on the grounds that the claims were time barred. The court of appeals affirmed, agreeing that the children had been put on notice of the law firm's alleged negligence back in 1983 when the documents were signed. The children attempted to avoid the time bar by arguing that the claims were tolled under a California statute that tolls malpractice cases for as long as the attorney continues to represent the client in the subject matter. Cal Code Civ. Proc. section 340.6(a)(2). The court held that there was no continuous representation of the plaintiff children, because the widow, not the family, was the client in 1983. To the extent the widow would have had a claim against the lawyers for the alleged malpractice, that claim would have been tolled under the statute until her death. The children, however, did not become clients of the law firm until the mother died and they consulted the law firm about terminating the trust. What is troubling about the case is the suggestion that the law firm was somehow responsible for Bart's malfeasance, because the negligence claim appeared to be based only on the fact that the law firm allowed one child to be put in charge and that child turned out to be dishonest. The law firm escaped litigating on that issue by the time bar, but that would not have been available had the children been able to successfully claim that the law firm was also representing them at the time the trust agreement was signed. In light of the general test that the attorney client relationship is formed if the purported client believes the lawyer is representing him or her, the case is a good warning that the lawyer in such situations must make clear to the children that only the parent is the client.

Two recent Washington state cases imposing liability on attorneys for guardians raise even more troubling issues. Previous to these two decisions, Washington had adopted a modified form of the California balancing test to determine an attorney's duty to a third party (*Lucas v. Hamm*, 364 P.2d 685 (Cal. 1983)) and the simpler Illinois test, which just asks whether the third party was "intended to benefit from the attorney-client relationship." *Pelham v. Griesheimer*, 440 N.E.2d 96, 99 (Ill. 1982). In *In re Karan*, 38 P.3d 396 (2002), a mother hired an attorney to set up a guardianship for her minor daughter, who was the beneficiary of her deceased father's life insurance policy. There was a statutory requirement that the guardian post a bond, or in the alternative, the guardian had to place liquid assets in a blocked account. However, the order appointing the mother guardian required neither, and the mother took for her own use the majority of the funds. A successor guardian sued the attorney for the mother, alleging a breach of duty to the ward in failing to ensure compliance with the bonding and blocking requirements. The court of appeals held that each case depends on its own facts, and that there is no clear rule that the attorney for a guardian does or does not owe a duty to the ward. In this case, the attorney was held liable to the ward, applying the balancing test. Factors that led to this conclusion included the incompetency of the third party who was the subject of the representation (and therefore could not protect herself), the attorney had been hired for the sole

purpose of setting up a guardianship for the benefit of the ward, and the ward was in a nonadversarial relationship with the mother/client (and thus the attorney did not have divided loyalty issues). A Washington court of appeals again held a guardian's attorney liable for the guardian's malfeasance in *Estate of Treadwell v. Wright*, 61 P.3d 1214 (Wa. App. 2003). In that case, a woman hired a lawyer to have herself appointed guardian of her elderly aunt. The order required the guardian to post a \$30,000 bond and required funds in excess of that amount be placed in blocked accounts. The lawyer had letters of guardianship issued and sent them to the guardian with a letter detailing her responsibilities, including the blocked account requirement. The guardian took control of the assets and spent them herself rather than putting them in blocked accounts. The court of appeals held that the applicable state statute required that blocked accounts and bonding be in place before the letters of guardianship are issued, and that the lawyer had breached the duty to the ward by failing to carry out that requirement. See also Bruce Ross, CONSERVATORSHIP LITIGATION AND LAWYER LIABILITY: A GUIDE THROUGH THE MAZE, 31 Stetson L. Rev. 757 (2002).

In *Albright v. Burns*, 503 A.2d 386 (N.J. App. 1986), a nephew holding a power of attorney for his uncle wanted to use his uncle's funds in his business, and obtained reluctant consent from his uncle, then in failing health. When the nephew went to his own attorney to set up the transaction as a loan, the lawyer at first advised against the transaction as a conflict of interest. The nephew did it anyway, and then delivered the funds, payable to the uncle, to the lawyer. The lawyer prepared a promissory note for his client, the nephew, to sign (unsecured of course) and disbursed the funds to the nephew. The lawyer never notified the uncle of the transaction. When the uncle died, the nephew was appointed executor and hired the lawyer to represent the estate, so the lawyer represented both the estate and the estate's principal debtor (the nephew). The nephew's sister, a 50% beneficiary of the estate, complained. The court of appeals reversed a summary judgment in the lawyer's favor, holding that the lawyer could be liable to the uncle's estate under a balancing test similar to the California test.

An interesting set of facts in *Barrett v. Freise*, 82 P.3d 1179 (Wa. App. 2003), illustrates the lawyer's dilemma when a conflict arises midstream. In that case, husband was severely injured by a drunk driver, and the wife, on behalf of herself, her husband and her minor children, hired an attorney to pursue the personal injury claim. Early in the case, the UIM settlement proceeds were received and disbursed to the wife, who now held a power of attorney for the disabled husband. As the case dragged on, the wife decided to obtain a divorce. The husband's brother took over, had a new set of lawyers take over the personal injury case, and sued the first lawyer. One accusation was that the lawyer had been negligent in disbursing the UIM funds to the soon to be ex-wife. The court held that payment to the wife was proper since there was no information that the wife was contemplating divorce at that time (and it did not hurt that the wife had spent the funds properly, on care for her husband and two small children).

V. CONCLUSION

Representing a fiduciary starts with the difficult question of who is your client and continues into other ambiguous territory regarding to whom can you talk, to whom do you owe a duty, and if so, what sort of duty. In other words, there are many shades of gray, and the lawyer must start with a presumption that he or she may be answerable for a fiduciary client's actions. The cases indicate that the best protection is disclosure, disclosure and more disclosure, and then proceeding with caution.

ARTICLES AND OTHER RESOURCES

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Russell Allen, Discovery Controversies: A Primer For Trusts and Estate Lawyers, 37 Heckerling Institute on Estate Planning ch. 13 (2003).

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Price, Duties of Estate Planners to Nonclients: Identifying, Anticipating and Avoiding the Problems, 37 S.Tex.L.Rev. 1063 (1996)

PROCEEDINGS OF THE CONFERENCE ON ETHICAL ISSUES IN REPRESENTING OLDER CLIENTS, 62 Ford.L.Rev. 961-1583 (1994), including, among other things, the following four articles:

Report of Working Group on Representing Fiduciaries, 62 Ford.L.Rev. 1045 (1994)

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Pennell, Representations Involving Fiduciary Entities: Who is the Client? , 62 Ford.L.Rev. 1319 (1994)

Report of the Special Study Committee on Professional Responsibility: Counseling the Fiduciary, 28 Real Prop, Prob. and Trust J. 825 (1994)

RESTATEMENT OF THE LAW (THIRD): THE LAW GOVERNING LAWYERS (MAY 1998) §§73, 112, 117A, 131, 134A, 211, 216

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