

ETHICS:
Privilege Differences for Attorneys and Accountants¹
CHICAGO ESTATE PLANNING COUNCIL
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Standard Club
320 S. Plymouth Street, 5th Floor, Ballroom
Chicago, IL
TERRENCE M. FRANKLIN AND DAN COOK

I. ATTORNEY-CLIENT PRIVILEGE

Any discussion of ethics in estate litigation will inevitably result in protracted discussions about the attorney-client privilege. The attorney-client privilege is considered one of the most sacrosanct of all privileges. It is, in essence, an exception to the rule that parties to litigation must produce all relevant information to their adversary, if that information is requested during discovery.

However, the attorney-client privilege is itself subject to a number of significant limitations and exceptions. We will discuss some of the more significant limitations, as well as the survival of the privilege after the death of an estate-planning client and the “fiduciary exception” to the attorney-client privilege.

A. Waiver of the Privilege by Presence of a Third-Party

1. Agents Assisting the Client

Although individual state law will dictate the precise terms of the attorney-client privilege, the general elements of the privilege typically include the following:

- (1) Information transmitted between a lawyer and her client;
- (2) In the course of the attorney-client relationship; and
- (3) In confidence.

The classic definition of the attorney-client privilege was articulated by John Henry Wigmore as applying “[w]here legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal adviser, except the protection may be waived.” 8 Wigmore, Evidence § 2292, at 554 (1961).

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A frequent subject of dispute arises when third parties are included in communications that would otherwise be protected from disclosure by the attorney-client privilege. This situation comes up frequently in the context of an estate planner's meetings with his/her clients, many of whom may be elderly and request the assistance and advice of family members, friends, or consultants. Does the presence of the third party operate to waive the attorney-client privilege? Has the "confidence" of the communication been breached?

This analysis often centers on whether the third party is considered an indispensable agent of the client. For example, a third party who is present to translate between the attorney and the client is unlikely to operate as a waiver of the attorney-client privilege. On the other hand, a third party who is present solely to offer moral support to the client may not survive this scrutiny, and a court could find that the attorney-client privilege has been compromised.

In between these two extremes are a wide variety of third parties who are present as advisors to the client. Courts in New York, California, Illinois, and Texas have taken a liberal approach to third-party advisors for the purpose of attorney-client privileged communications. These courts have allowed the presence of financial advisors, accountants, business consultants, and insurance agents without violating the attorney-client privilege. *See* Sevenson Environmental Services, Inc. v. Sirius American Insurance Co., 883 N.Y.S. 2d 423 (N.Y. App. Div. 2009); Segerstrom v. United States, No. C 00-0833 SI, 2001 U.S. Dist. LEXIS 2949, at *9-10 (N.D. Cal. Feb. 6, 2001); Caremark, Inc. v. Affiliated Computer Services, Inc., 192 F.R.D. 263, 267-68 (N.D. Ill. 2000); National Converting & Fulfillment Corp. v. Bankers Trust Corp., 134 F. Supp. 2d 804, 805, 807 (N.D. Tex. 2001).

On the other hand, courts in Vermont, New Jersey, and Pennsylvania have taken a narrower view and found a waiver of the attorney-client privilege when an accountant, a financial advisor, or a business consultant has been present for an otherwise attorney-client privileged communication. *See* In re Fabermark, Inc., 330 B.R. 480, 499-500 (Bankr. D. Vt. 2005); In re G-I Holdings, Inc., 218 F.R.D. 428 (D.N.J. 2003); In re Grand Jury Matter, 147 F.R.D. 82, 87 (E.D. Pa. 1992).

2. Joint Defense or Common Interest Doctrine

The presence of a third party may also be an issue in the context of complex trust and estate litigation, where there may be multiple parties with shifting allegiances. For example, a trustee may have different counsel for trust administration and trust litigation, and those attorneys may need to communicate for purposes of defending the trustee. The trustee could also have separate tax counsel. There may be multiple co-trustees, or a former trustee, with whom the current trustee shares a common interest. The "common interest" doctrine may serve to protect attorney-client communications, even when those communications have been shared with individuals outside the strict scope of attorney and client.

California has codified this doctrine in several Evidence Code sections:

A disclosure in confidence of a communication that is protected by a privilege provided by Section 954 (lawyer-client privilege) . . . when disclosure is reasonably necessary for the accomplishment of the purpose for which the lawyer . . . was consulted, is not a waiver of the privilege.

Cal. Evid. Code § 912(d).

As used in this article, “confidential communication between client and lawyer” means information transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted, and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship.

Cal. Evid. Code § 952 (emphasis added).

Further, the California courts have crafted two requirements for applying the “common interest” doctrine to protect communications shared between two (or more) parties. There must be an expectation of privacy that information disclosed will remain confidential, and the disclosure of information must be reasonably necessary for the accomplishment of the purpose for which the lawyer was consulted. “Thus, ‘[f]or the common interest doctrine to attach, most courts seem to insist that the two parties have in common an interest in securing legal advice related to the same matter – and that the communications be made to advance their shared interest in securing legal advice on that common matter.’” Oxy Resources California LLC v. Superior Court, 115 Cal. App. 4th 874, 891 (2004).

Many states recognize some version of the common interest doctrine, and it is also recognized by the Restatement:

If two or more clients with a common interest in a litigated or nonlitigated matter are represented by separate lawyers and they agree to exchange information concerning the matter, a communication of any such client that otherwise qualifies as privileged under §§ 68-72 [the attorney-client privilege] that relates to the matter is privileged as against third persons. Any such client may invoke the privilege, unless it has been waived by the client who made the communication.

Restatement (Third) of Law Governing Lawyers, § 76(1) (2000).

However, different courts may be more or less receptive to the common interest defense, and attorneys embarking on trust and estate litigation should carefully consider at the outset of

the case the extent of any joint defense agreements. The author of these materials has spent considerable time in discovery disputes over the application of the attorney-client privilege when communications were shared among a great many attorneys and clients, all of whom arguably shared a “common interest.” Courts are increasingly suspicious of the defense as the number of individuals with the alleged “common interest” increases.

B. Exceptions to the Privilege Specific to Estate Litigation

Many states also have exceptions to the attorney-client privilege specifically in the context of estate litigation. These exceptions raise a practical question at the outset – who has control of the attorney-client privilege after the death of the initial client? The survival of the attorney-client privilege was definitively confirmed by the U.S. Supreme Court in Swidler & Berlin v. United States, 524 U.S. 399, 410 (1988) (affirming the survival of the privilege based largely on long-standing common law assumption: “It has been generally, if not universally, accepted, for well over a century, that the attorney-client privilege survives the death of a client . . .”).

In general, most states find that the privilege passes to the client’s personal representative. “Modern evidence codes reflect the view that the privilege may be asserted by the personal representative of a deceased client (either an executor or an administrator).” Restatement (Third) of Law Governing Lawyers § 77 cmt. c (2000). In some states, the privilege exists only until the personal representative has been discharged. *See, e.g., HLC Properties, Ltd. V. Superior Court*, 35 Cal.4th 54 (2005).

Knowing who can exercise and waive the privilege leads to further consideration of the exceptions to the attorney-client privilege in the context of estate litigation. The Restatement recognizes one form of this exception:

The attorney-client privilege does not apply to a communication from or to a decedent relevant to an issue between parties who claim an interest through the same deceased client, either by testate or intestate succession or by an inter vivos transaction.

Restatement (Third) of Law Governing Lawyers § 81 (2000). The commentary to this section explains the rationale for the exception:

The exception in the Section is sometimes justified on the ground that the decedent would have wished full disclosure to facilitate carrying out the client’s intentions. The dispute might involve either testate or intestate succession or claims arising from inter vivos transactions to which the decedent was a party. The witness will most often be the decedent’s lawyer, who is in a position to know the client’s intentions and whose testimony ordinarily will not be tainted by personal interest. Suppressing such testimony would hamper the fair resolution of

questions of testator intent in will-contest and similar types of cases. It is therefore probable that the exception does little to lessen the inclination to communicate freely with lawyers

Restatement (Third) of Law Governing Lawyers § 81 cmt. b (2000).

In some states, there is a highly developed body of statutory and case law on the subject. For example, California has a statute codifying the Restatement section 81 discussed above, as well as a number of additional statutes that exempt the privilege concerning the deceased client's intention regarding any writing, or the validity of any writing, that affects an interest in property, or when the attorney is a witness to an estate-planning document. *See* Cal. Evid. Code §§ 957, 959-61.

While California couches its statutes as permissive, in that the attorney may disclose relevant communications because of an exception to the attorney-client privilege, other states invoke a mandatory disclosure. For example, New York's governing statute requires the attorney to disclose certain information about the "preparation, execution or revocation" of an estate planning document, but then prevents the attorney from disclosing any privileged communication that would "tend to disgrace the memory of the decedent."

In any action involving the probate, validity or construction of a will, an attorney or his employee shall be required to disclose information as to the preparation, execution or revocation of any will or other relevant instrument, but he shall not be allowed to disclose any communication privileged under subdivision (a) which would tend to disgrace the memory of the decedent.

N.Y. Civ. Prac. L & R. 4503(b).

Because the grey line between what is privileged and what is not may vary from state to state, it is important for any trust and estate lawyer to be familiar with both the evidence rules and the ethics rules in any state in which he practices.

Illinois has long followed the general concept of the Restatement establishing a testamentary exception to the attorney-client privilege upon the death of the client. See, e.g. Eizenga v. Unity Christian School of Fulton, 2016 IL App (3d) 150519 (2106), 54 N.E. 3d 907. "Both the attorney-client privilege and the testamentary exception arose from the common law (Brunton v. Kruger, 2015 IL 117663, ¶ 55, 392 Ill.Dec. 259, 32 N.E.3d 567) and the testamentary exception was recognized by our supreme court in the nineteenth century. Fossler v. Schriber, 38 Ill. 172, 173-174 (1865)...." But until recently, there was no express authority in Illinois on the question of whether the exception to the attorney-client privilege only applied in the context of will contests, as opposed to trust contests. Eizenga addressed that question. In that case, the trustee of an inter vivos trust brought an interpleader action against the current and former beneficiaries to determine whether various trust amendments were invalid on the ground

of undue influence allegedly exerted by the grantor's attorney. The Eizenga court, after discussing the history of the testamentary exception concluded, "this case presents no material difference between a will contest for purposes of the testamentary exception to the attorney-client privilege. Because this case fits squarely within the purview of the rationale behind the testamentary exception, we hold that the circuit court did not err when it ruled that [drafting attorney's] documents were not protected by the attorney client privilege." Eizenga, at ¶ 29 (citations omitted.)

C. Attorney Work Product Doctrine

The attorney work product doctrine is often considered jointly with the attorney-client privilege, but is actually a separate doctrine. The purpose of the work product doctrine has been identified to "[p]reserve the rights of attorneys to prepare cases for trial with that degree of privacy necessary to encourage them to prepare their cases thoroughly and to investigate not only the favorable but the unfavorable aspects of those cases." Cal. C. Civ. Proc. § 2018.020(a). It is also intended to "[p]revent attorneys from taking undue advantage of their adversary's industry and efforts." Id. § 2018.020(b).

The Restatement defines work product as follows:

- (1) Work product consists of tangible material or its intangible equivalent in unwritten or oral form, other than underlying facts, prepared by a lawyer for litigation then in progress or in reasonable anticipation of future litigation.
- (2) Opinion work product consists of the opinions or mental impressions of a lawyer; all other work product is ordinary work product.
- (3) Except for material which by applicable law is not so protected, work product is immune from discovery or other compelled disclosure to the extent stated in §§ 88 (ordinary work product) and 89 (opinion work product) when the immunity is invoked as described in § 90.

Restatement (Third) Law Governing Lawyers § 87 (2000).

This scheme sets up two tiers of attorney work product. The first tier consists of writings that reflect an attorney's opinions or mental impressions. Generally speaking, this tier of "opinion work product" is absolutely protected and cannot be discovered under any circumstances. The second tier consists of all other work product, and can be discovered by court order if the court determines that the requesting party has a substantial need for the material to prepare for trial, and cannot obtain without undue hardship the substantial equivalent of the material by other means. *See* Restatement (Third) of Law Governing Lawyers §§ 88-89 (2000).

The work product protection may be invoked along with the attorney-client privilege to prevent disclosure of certain types of information. Many estate planners take notes of their

conversations with clients. On the surface, these notes would qualify for work product protection and would not be subject to production without a court order. However, one can imagine circumstances when the failure to produce an estate planner's notes might prejudice the requesting party, such as if the relevant estate planning document was lost, or the notes contain the only evidence of a client's intent. In those instances, if the work product does not contain the attorney's impressions, conclusions, opinions, legal research, or theories, a court could order its disclosure.

The work product doctrine differs from the attorney-client privilege in a number of significant ways. First, there may not be specific statutory exceptions to the work product doctrine in the probate litigation context. Although there are cases that discuss the doctrine in this context, the general law of attorney work product applies in probate litigation. Second, the holder of the work product protection is the attorney, while the holder of the attorney-client privilege is the client.

The California Court of Appeal explored the boundaries of the attorney work product doctrine in the context of complex trust litigation in Lasky, Hass, Cohler & Munter v. Superior Court, 172 Cal. App. 3d 264 (1985).

Lasky concerned discovery propounded by the beneficiaries of the Getty Trust to the attorneys for the Trustee. The Lasky firm represented the Trustee, and the firm refused to produce its internal work product, which had not been transmitted to the Trustee. Although the Lasky court specifically limited its discussion to work product that had not been delivered to the client, subsequent appellate decisions have removed that distinction. *See* BP Alaska Exploration, Inc. v. Superior Court, 199 Cal. App. 3d 1240, 1253 (1988) ("We conclude that the attorney's absolute work product protection continues as to the contents of a writing delivered to a client in confidence."). Therefore, the protection applies to all of the attorney's work product, regardless of whether it has been transmitted to the client or not.

First, the Lasky court affirmed that "the attorney is the sole holder of the [work product] privilege and may effectively assert it even as against a client." Lasky, 172 Cal. App. 3d at 278. In addition, the Lasky court also held that the trust beneficiaries were not entitled to the protected writings by virtue of the Trustee's fiduciary duty to make full disclosure to the beneficiaries. "[W]hile we are mindful of the strong public policy interest in maintaining full disclosure under the fiduciary relationship between trustee and beneficiary . . . we are persuaded that the absolute language in which the Legislature cast the work-product privilege in California requires that this difficult choice be made in favor of preserving the privilege." Id. at 282.

Finally, the Lasky court also confirmed that the trust beneficiaries were not clients of the Trustee's attorneys. The beneficiaries urged the court to find that they were "secondary or joint clients of the trustee's attorneys by virtue of the analysis that all the legal services performed by

the attorneys, to assist the trustee in administration of the trust, were intended to ultimately benefit the beneficiaries.” Id. The Court of Appeal declined to make that finding.

The Lasky opinion centers on the attorney work product doctrine, but at its core, much of the discussion is also relevant to the “fiduciary exception” to the attorney-client privilege, which is discussed below.

Illinois also addressed the issue of the attorney work product doctrine in the context of trust litigation in the Eizinga case, supra. Eizinga acknowledged that Illinois “has taken a narrow approach to the discovery of attorney work product. The overriding considerations under our discovery rule are ascertainment of the truth and expedited disposition of the lawsuit....Thus, under our rule, ordinary work product, which is any relevant material generated in preparation for trial which does not disclose ‘conceptual data’, is freely discoverable. Opinion or ‘core work product, which consists of materials generated in preparation for litigation which reveal the mental impressions, opinions, or trial strategy of an attorney, is subject to discovery upon a showing of impossibility of securing similar information from other sources.” Eizinger, at ¶ 32. (Citations omitted.) The narrow application of the work product doctrine justified the disclosure of the drafting attorney’s files in Eizinger.

D. The “Fiduciary Exception” to the Attorney-Client Privilege

In recent years, the question of whether a “fiduciary exception” to the attorney-client privilege exists has generated a lot of attention. The fiduciary exception is recognized by the Restatement:

In a proceeding in which a trustee of an express trust or similar fiduciary is charged with breach of fiduciary duties by a beneficiary, a communication otherwise within § 68 is nonetheless not privileged if the communication (a) is relevant to the claimed breach; and (b) was between the trustee and a lawyer (or other privileged person within the meaning of §70) who was retained to advise the trustee concerning the administration of the trust.

Restatement (Third) of Law Governing Lawyers § 84 (2000).

The United States Supreme Court considered the fiduciary exception in the highly anticipated (among trust and estate lawyers) case of United States v. Jicarilla Apache Nation, 131 S. Ct. 2313 (2011). Many observers thought Jicarilla would allow the high court to conclusively establish or reject the fiduciary exception. However, the Court decided the case on narrower grounds, holding that the United States does not occupy the role of trustee for purposes of the fiduciary exception with respect to Indian tribes, and therefore, the exception did not apply.

Jicarilla involved the United States’ claims of attorney-client privilege over documents created during its ongoing management of the proceeds derived from natural resources located on the Jicarilla Apache reservation. The lower court and the Court of Federal Claims ordered the

United States to turn over the documents, on the basis of the fiduciary exception and the theory that the United States served as a trustee for the Jicarilla Apache tribe.

The United States appealed to the Supreme Court, but the question that most interested trust and estates practitioners – the existence of the fiduciary exception – was conceded by both sides, and relegated to a footnote in the final opinion:

Today, “[c]ourts differ on whether the [attorney-client] privilege is available for communications between the trustee and counsel regarding the administration of the trust.” A. Newman, G. Bogert & G. Bogert, *Law of Trusts and Trustees* § 962, p. 68 (3d ed. 2010) (hereinafter Bogert). Some state courts have altogether rejected the notion that the attorney-client privilege is subject to a fiduciary exception. See, e.g., *Huie v. DeShazo*, 922 S.W.2d 920, 924 (Tex.1996) (“The attorney-client privilege serves the same important purpose in the trustee-attorney relationship as it does in other attorney-client relationships”); *Wells Fargo Bank v. Superior Ct.*, 22 Cal.4th 201, 208–209, 91 Cal.Rptr.2d 716, 990 P.2d 591, 595 (2000) (“[T]he attorney for the trustee of a trust is not, by virtue of this relationship, also the attorney for the beneficiaries of the trust” (internal quotation marks omitted)). Neither party before this Court disputes the existence of a common-law fiduciary exception, however, so in deciding this case we assume such an exception exists.

Jicarilla, 131 S. Ct. at 2321 n.3.

After assuming the existence of the exception, the Supreme Court went on to conclude that the relationship between the United States and Indian tribes was not the same as the relationship between a trustee and beneficiary of a private trust, and therefore, the fiduciary exception did not apply.

In some states, the fiduciary exception has been rejected by statute. See Fl. St. § 90.5021(2) (“A communication between a lawyer and a client acting as a fiduciary is privileged and protected from disclosure under s. 90.502 to the same extent as if the client were not acting as a fiduciary.”); N.Y. Civ. Prac. L. & R. 4503(a)(2)(A)(ii) (“The existence of a fiduciary relationship between the personal representative and a beneficiary of the estate does not by itself constitute or give rise to any waiver of the privilege for confidential communications made in the course of professional employment between the attorney or his or her employee and the personal representative who is the client.”). However, the fine print of New York’s Civil Practice Law and Rules defines “personal representative” to include trustees of testamentary trusts, but not of inter vivos trusts. This leads to the rather curious result that New York courts recognize the fiduciary exception solely in the context of inter vivos trusts, but not in the context of other fiduciary relationships.

While some state legislatures have acted to eliminate the fiduciary exception, other states have left it to the courts to resolve. Courts have considered a variety of factors in defining the scope of the fiduciary exception. A recent decision of the Delaware Court of Chancery affirmed the validity of the exception, and identified a number of factors considered by Delaware courts in determining the scope of the exception: (1) the purpose of the legal advice, (2) whether litigation was pending or threatened between the trustee and the beneficiaries at the time the advice was obtained, and (3) the source from which the legal fees associated with the advice were paid. Master's Report (Motion to Compel and Motion to Intervene), at 8, Mennen v. Wilmington Trust Co., C.A. No. 8432-ML, 2013 WL 4083852 (Del. Ch. July 25, 2013).

In Mennen, trust beneficiaries filed a complaint for breach of fiduciary duty against the Co-Trustees of the Mennen Trust. One of the Co-Trustees was Wilmington Trust Company and the other was an individual family member. Both Wilmington Trust and the individual Co-Trustee withheld documents from production during discovery, claiming the attorney-client privilege. The beneficiaries moved to compel the production of those documents on the basis of the fiduciary exception and the argument that the beneficiaries were the ultimate clients of the attorneys representing the Co-Trustees.

The Master's Report grouped the withheld documents into subject matters, and analyzed each group with respect to the factors identified above. One group of documents concerned communications between Wilmington Trust and its attorneys regarding a prior lawsuit on a subject similar to the current dispute. The Master's Report concluded: (1) the purpose of the legal advice in those communications was to protect Wilmington Trust, not the beneficiaries, (2) there was a threat of litigation between the trustee and the beneficiaries at the time the advice was given, and (3) Wilmington Trust paid for this advice from its own assets, not the Trust's assets. As such, the Master's Report did not apply the fiduciary exception to these documents and denied the motion to compel with respect to this group.

On the other hand, another group of documents concerned advice given to Wilmington Trust regarding its duties and powers under the trust instrument. The Master's Report concluded that this type of advice was not protected from disclosure by the attorney-client privilege, on the grounds that the beneficiaries had a right to "opinions of counsel procured by the trustee to guide him in the administration of the trust." Id. at 15.

The reasoning in Mennen is similar to that of other states, which draw a distinction for purposes of the fiduciary exception on a variety of factors, including whether a successor trustee or a beneficiary is seeking the information, whether the attorney was representing the trustee for "administrative" matters or "defensive" matters, and whether the attorney provided her work product to successor counsel.

For example, in California, courts have rejected the fiduciary exception when a beneficiary seeks attorney-client privileged information from the trustee. *See* Wells Fargo Bank

v. Superior Court, 22 Cal. 4th 201, 206 (2000) (“[T]here is no authority in California law for requiring a trustee to produce [to a beneficiary] communications protected by the attorney-client privilege, regardless of their subject matter.”).

Meanwhile, a successor trustee in California may succeed to the attorney-client privilege of a predecessor trustee with respect to “administrative” matters, but not with respect to “defensive” matters.

Most importantly, the successor trustee inherits the power to assert the privilege only as to those confidential communications that occurred when the predecessor, *in its fiduciary capacity*, sought the attorney’s advice *for guidance in administering the trust*. If a predecessor trustee seeks legal advice in its personal capacity out of a genuine concern for possible future charges of breach of fiduciary duty, the predecessor may be able to avoid disclosing the advice to a successor trustee by hiring a separate lawyer and paying for the advice out of its personal funds.

Moeller v. Superior Court, 16 Cal. 4th 1124, 1134 (1997) (italics in original).

Pursuant to Moeller, a successor trustee may be able to compel the production of attorney-client privileged information from a predecessor trustee, particularly if the representation concerned administration of the trust.

Even the states that do recognize the fiduciary exception to the attorney-client privilege, such that a beneficiary may compel traditionally protected attorney-client communications between a trustee and his/her lawyer, may make a further distinction between communications concerning the trustee’s administrative duties, and communications concerning the fiduciary’s own potential liability, as the court in Mennen did. Although this distinction may have an intellectual appeal, in practice the distinction between so-called “administrative” advice and “defensive” advice can be rather hard to discern, particularly where a trustee relies on the same attorney to perform both functions.

At this point, Illinois has not adopted the fiduciary exception to the attorney-client privilege. Illinois first addressed the question in Mueller Industries, Inc. v. Berkman, 399 Ill.App.3d 456 (2010). In that case, a corporation, Mueller, brought claims against its former president, Berkman, for breach of contract and breach of fiduciary duty. The corporation alleged that Berkman had formed a competing company and received bribes and kickbacks from one of the corporation’s primary suppliers. Katten, Muchin & Rosenman LLP, had represented both the former president and the corporation. When the corporation sought the production of, among other things, documents relating to legal advice the former president received from Katten about his relationship with a new company in which Berkman president had an interest, the former president objected, asserting the attorney-client privilege. The trial court held that the privilege did not shield the documents from production because of Katten’s dual representation of the

former president and the corporation, since there was no expectation of confidentiality. The Second District Court of Appeal addressed the corporation's claim that the fiduciary exception required production of the records. It discussed the history of the exception, noting its origin in trust law, and its increasing acceptance in recent years in various jurisdictions. Ultimately, however, the court noted that "Illinois has not yet adopted the fiduciary-duty exception", and declined to apply it under the facts of Mueller. Id., at 469.

The Mueller case came one year before the U.S. Supreme Court case of Jicarilla, supra. However, subsequent Illinois cases in the malpractice context, have continued to cite Mueller favorably in noting that Illinois has not yet adopted the fiduciary-duty exception. Garvy v. Seyfarth Shaw LLP, 2012 IL App (1st) 101115 (2012), 966 N.E.2d 523 ("The cases relied on by Garvy and the circuit court do not persuade us to create new law in Illinois by adopting [the fiduciary duty exception] here.") Id. ¶ 31, and MDA City Apartments v. DLA Piper LLP, 2012, 967 N.E.2d 424, citing Garvy, ("We observed that an argument that there can never be an expectation of confidentiality on the part of a fiduciary based on the duties a fiduciary owes 'is simply an attempt to avoid a discussion of the applicability of the fiduciary-duty exception by calling it something other than an exception, thereby rendering the exception itself meaningless.')

Id. ¶ 39."

While it is clear that Illinois has not yet adopted the fiduciary-duty exception to the attorney-client privilege as a general matter, it appears that there are no cases that have yet sought to apply the exception in a trust litigation case, where beneficiaries have sought to obtain communications between the trustee and its counsel. It remains to be seen what Illinois court's would do under those circumstances.

Finally, attorneys representing multiple trustees should carefully evaluate whether to disclose their work product to each other. In Eddy v. Fields, 121 Cal. App. 4th 1543 (2004), two attorneys representing former trustees were ordered to turn over their entire files to the successor trustee, over Attorney Fields' work product objection. The Court of Appeal found that Attorney Fields had waived the protection by turning over the documents to the other attorney for the trustees, Attorney Merzon, and thereby making the documents available to the clients – the former trustees. Because the former trustees had access to the documents, the Court of Appeal reasoned that the successor trustee also should have access to the documents.

The Court of Appeal noted the following with respect to the identity of the party seeking the documents:

We emphasize that we reach this result because Merzon was an agent of one or more former trustees, and Jacqueline is a successor trustee. If an adversarial third party, rather than a client of Merzon's, had been seeking the documents, we would be hard pressed to say the privilege had been waived. A disclosure of work product to an attorney who represents a mutual client or a client with common interests does not necessarily operate as a waiver to third parties.

Eddy v. Fields, 121 Cal. App. 4th at 1550.

Unless and until the United States Supreme Court actually resolves this issue, it appears that the fiduciary exception will be left to a patchwork of state statutes, case law, and scholarly commentary – a potential landmine for those who practice in this ever-shifting area.

II. ROLE AND POTENTIAL LIABILITY OF COURT-APPOINTED COUNSEL

In many states, courts regularly appoint counsel for one of the parties in certain types of probate disputes. For example, in both New Jersey and California, counsel is appointed for the ward/conservatee in guardianship/conservatorship proceedings. *See* New Jersey Rule 4:86-4 and Cal. Prob. Code § 1470 *et seq.* (Proceedings involving an incapacitated adult are called guardianships in New Jersey and conservatorships in California.)

Once a court-appointed counsel is in place, ethical questions are sometimes presented about the role of the court-appointed counsel. These questions might relate to the scope of that counsel's authority, the binding effect of his/her decisions, and the counsel's immunity from liability for those decisions. Does counsel have an obligation to speak for his/her client, even if counsel believes the client's position is not in the client's best interest? Or is counsel's role to provide an independent voice to evaluate alternatives and make a recommendation to the court? Or a little of both?

A. Ethical Dilemmas for Court-Appointed Counsel

The Model Rules of Professional Conduct provide some guidance to court-appointed attorneys whose clients have diminished capacity. Model Rule 1.14 provides in relevant part:

- (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.

The American College of Trust & Estate Counsel (ACTEC) Commentaries on the Model Rules of Professional Conduct provide further insight into the intersection of this rule and an attorney's other ethical guidelines, including the duty to keep client confidences.

[T]he client who suffers from diminished capacity may wish to have family members or other persons participate in discussions with the lawyer. The lawyer must keep the client's interests foremost. Except for disclosures and protective actions authorized under MRPC 1.14, the lawyer should rely on the client's directions, rather than the contrary or inconsistent directions of family members, in fulfilling the lawyer's duties to the client. In meeting with the client, the lawyer should consider the impact of a joint meeting on the attorney-client evidentiary privilege.

ACTEC Commentaries on the Model Rules of Professional Conduct, Commentary on MRPC 1.14, at 131 (4th ed. 2006).

The attorney appointed for a client with diminished capacity faces a particularly challenging circumstance if her client wishes to make or amend an estate plan. The ACTEC Commentaries provide general guidance, but leave a great deal uncertain for attorneys. The Commentaries suggest both that “[t]he lawyer generally should not prepare a will, trust agreement or other dispositive instrument for a client who the lawyer reasonably believes lacks the requisite capacity,” while also advising that “the lawyer may properly assist clients whose testamentary capacity appears to be borderline.” *Id.* at 131. Court-appointed counsel should tread carefully when trying to assess which clients have “borderline” testamentary capacity.

In addition, state and local rules may apply another layer of obligations on the court-appointed attorney. In Los Angeles, court-appointed counsel in conservatorships are known as PVP (Probate Volunteer Panel) counsel. Los Angeles Superior Court Rule 4.125 provides as follows:

PVP counsel's primary duty is to represent the interests of his or her client in accordance with applicable laws and ethical standards. The PVP attorney's secondary duty is to assist the court in the resolution of the matter to be decided. The PVP attorney must, if practical, ensure that the client is afforded an opportunity to address the court directly.

As evidenced by this local rule, the Los Angeles Superior Court has placed primary responsibility on the PVP counsel to advocate on behalf of her client, and secondary responsibility to assist the court. However, this can present an ethical dilemma to counsel, when her client takes a position with which the PVP counsel does not personally agree.

A common example occurs in the following situation. In Los Angeles, a PVP attorney is typically appointed as soon as a petition for appointment of a conservator is filed. The PVP attorney will then visit her client and make a recommendation to the court about whether a conservatorship is necessary. Many potential conservatees will advise their PVP attorney that they do not want or need a conservatorship. However, PVP counsel may observe circumstances that lead the attorney to believe that a conservatorship would be helpful. For example, the

attorney may observe that the potential conservatee appears vulnerable to undue influence, or seems confused about his assets, or needs assistance taking medications.

Under these circumstances, what should the ethical PVP attorney do? Under the terms of the Los Angeles County Local Rule, she should advocate for her client's wishes. However, many experienced PVP attorneys report that they are often able to advocate for their client's wishes, while at the same time presenting an accurate picture of the circumstances to the court. For example, a PVP attorney may report to the court that the potential conservatee did not recall any details about his assets, income, or expenses, but that he did not want a conservatorship. The court will likely ascertain that the PVP attorney is reporting her client's wishes, as required by the local rule, but may have some hesitation about her client's position. Ultimately, the court will make the final decision as to whether a conservator should be appointed.

In other circumstances, creative PVP counsel may be able to accomplish the client's goals, while at the same time satisfy himself that his client's needs are being met. For example, if a potential conservatee needs help taking medications, but does not otherwise appear to require a conservator, the PVP attorney may be able to assist the potential conservatee in selecting and retaining an appropriate caregiver to assist with medications. The PVP attorney can then report to the court that the potential conservatee neither needs nor wants a conservator because the concerns about medication have been resolved.

Similarly, if the potential conservatee appears to have some difficulty handling his finances, the PVP attorney might suggest that a power of attorney be utilized to authorize an agent to handle the finances. Or if the potential conservatee has a trust, the attorney might suggest that all assets be consolidated in the trust and a professional trustee appointed to manage the assets. Again, under those circumstances, the PVP attorney could report to the court that the financial concerns have been resolved, and no conservatorship is necessary.

If the PVP attorney cannot reconcile his client's wishes with his own personal beliefs, the attorney has a number of options. The attorney can attempt to bring his client to court to advocate on his own behalf. The Los Angeles County Rules suggest this alternative in the final sentence of Rule 4.125: "The PVP attorney must, if practical, ensure that the client is afforded an opportunity to address the court directly." Under these circumstances, the PVP attorney may not need to advocate for a position in which he does not believe, if the client comes to court and advocates on his own behalf.

Alternatively, the PVP attorney may ask the court to appoint an expert to advise the court as to the best interests of the conservatee. One form PVP report that is used by many PVP attorneys in Los Angeles requires the attorney to confirm the following:

- I informed the proposed temporary conservatee that I am required to report to the court his/her wishes.

- When my own observations, recommendations, or opinions as to what action(s) are in the proposed conservatee's best interests are different than his/her wishes, then I will advise the court that an expert (Evidence Code section 730) should be appointed in this matter.

As a last resort, the PVP attorney can resign or ask to be discharged. The attorney may need to advise the court that he has a conflict with the representation and cannot continue, but the attorney should not be required to identify the conflict. However, this alternative should truly be considered a last resort. If the PVP attorney resigns, the client is being denied the effective assistance of counsel that underlies the entire system of court-appointed counsel for these vulnerable individuals.

B. The Scope of Court-Appointed Counsel's Role

In addition to ethical questions about the positions taken by a court-appointed counsel, there can be further uncertainty about the role of court-appointed counsel in some cases. Counsel may be appointed for a single petition and then discharged, or they may be appointed for the duration of a case, particularly in complex litigation. If counsel is appointed for the duration of the case, will that counsel opine on every issue that comes before the court? There is little concrete guidance on this question.

A practical limitation to some appointments will be the availability of fees. In California, court-appointed counsel must petition for their fees, and the Los Angeles Superior Court has a policy that limits a court-appointed attorney to a total of 22 hours of service, unless the court authorizes additional fees. This limitation on fees may serve as a deterrent to over-eager court-appointed attorneys who wish to be involved in every decision.

At a minimum, court-appointed counsel should be aware of any petition that is pending before the court. In fact, another Los Angeles County Rule requires the signature of the PVP attorney on any order submitted to the court. *See* Los Angeles County Rule 4.29(c). Because the PVP attorney is asked to weigh in on most matters of substance before the court, and because the PVP counsel's secondary responsibility is to "assist the court in the resolution of the matter to be decided," the PVP attorney's opinion often carries great weight. The PVP attorney is often seen as a neutral outsider, without an interest in the litigation. Accordingly, the PVP attorney's recommendations are often highly influential with the court.

When involved in complex conservatorship disputes, the author of these materials has often "lobbied" PVP counsel in an attempt to persuade the PVP attorney to view the facts in a manner most favorable to the author's clients. Sometimes this has been successful, and sometimes it has not. But rest assured that your adversary is also courting the PVP attorney's opinion, so be prepared to make your best case for the PVP.

A related question arises if the court-appointed attorney is not friendly to your client. Under those circumstances, can you seek to have the attorney removed?

The author of these materials has tried, without success, to remove a PVP attorney who consistently advocated against the author's client. One can see the danger of a slippery slope here – if the court allowed every PVP counsel to be removed for recommending a course of action that did not sit well with one party or another, the courts could be overrun with parties asking to remove a PVP attorney whenever the PVP attorney makes a recommendation with which the party does not agree.

While courts would likely remove court-appointed counsel for grievous misconduct, in most circumstances, the court-appointment is likely to last, for better or for worse.

C. Immunity for Court-Appointed Counsel

Attorneys who apply to serve as court-appointed counsel may do so for a variety of reasons – to learn about this area of the law, as a means of employment, and as a way of “giving back” to the community. However, court-appointed attorneys may not necessarily envision the possibility of being held liable for their decisions. Cases around the country suggest that they should probably consider the possibility.

Although some states grant court-appointed counsel absolute immunity in probate cases, there is no uniform national trend. Maryland and New Jersey do not apply across-the-board immunity to court-appointed attorneys. *See Fox v. Wills*, 390 Md. 620 (Md. 2006); *Starr v. Reinfeld*, 630 A.2d 801 (N.J. Super. 1993). In many other states, there is no clear precedent confirming whether immunity does or does not exist.

In 2012, the Connecticut Supreme Court wrangled with these questions in the highly publicized case of *Gross v. Rell*, 304 Conn. 234 (Conn. 2012). The *Gross* case began when a conservatorship was imposed on Daniel Gross in 2005. Gross's court-appointed attorney, Jonathan Newman, failed to bring several defects in the request for conservatorship to the attention of the court, including the fact that Gross was not a Connecticut resident, he did not receive proper notice of the hearing, and there was no basis for imposing a conservatorship on Gross, who Newman reported was “alert and intelligent” and “wanted to live at home and manage his own affairs.” *Gross*, 304 Conn. at 240. Despite these defects, Kathleen Donovan was appointed as Gross's conservator.

Gross eventually filed a petition for writ of habeas corpus and was released from the assisted living facility where Donovan had placed him. The Connecticut Superior Court that granted the writ of habeas corpus called his case “a terrible miscarriage of justice.” *Id.* at 243. After his release, Gross filed a complaint in federal district court alleging a multitude of claims, including civil rights violations, intentional infliction of emotion distress, breach of fiduciary duty, and malpractice against the probate judge, the conservator (Donovan), the court-appointed

attorney (Newman), and the assisted living facility. The district court dismissed the claims, and Gross appealed. The Second Circuit referred the following questions to the Connecticut Supreme Court:

1. Under Connecticut law, does absolute quasi-judicial immunity extend to conservators appointed by the Connecticut Probate Court?
2. Under Connecticut law, does absolute quasi-judicial immunity extend to attorneys appointed to represent respondents in conservatorship proceedings or to attorneys appointed to represent conservatees?
3. What is the role of conservators, court-appointed attorneys for conservatees, and nursing homes in the Connecticut probate court system, in light of the six factors for determining quasi-judicial immunity outlined in Cleavinger v. Saxner?

Gross, 304 Conn. at 237-38.

The Connecticut Supreme Court concluded that quasi-judicial immunity extends to conservators only when the conservator executes an order of the court, or the conservator's actions have been approved by the court. Id. at 238. The court then concluded that court-appointed attorneys are not entitled to quasi-judicial immunity, precisely because they are not acting in a quasi-judicial role. Id. at 259. Here, the court considered the same ethical questions discussed above, namely, whether the court-appointed attorney's role is to advocate for his client, or to assist the court in protecting the client's best interests. The court concluded as follows:

[W]ith respect to attorneys for respondents in conservatorship proceedings, the primary function of such attorneys under rule 1.14 of the Rules of Professional Conduct is to advocate for the client's express wishes. Although an attorney might be required in an exceptional case to act as the client's *de facto* guardian, that is not the attorney's primary role.

Id. at 263.

Finally, the court also found that assisted living facilities are not entitled to quasi-judicial immunity for the same reasons, i.e., the living facility is not acting in a quasi-judicial role.

The Gross opinion suggests that the weight of popular opinion may be shifting, and court-appointed attorneys in the probate context may need to consider enhanced liability going forward. In the absence of clear precedent in each jurisdiction, cautious attorneys should proceed under the assumption that, in the worst-case scenario, they may be liable for their actions as court-appointed counsel in probate disputes.