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NOTES FROM THE EDITOR

The Trust & Estate Section is committed to maintaining the high quality of this newsletter and will continue to publish articles on substantive legal matters as well as information about the activities of the Section's various committees. Please feel free to contact the *Council Notes* Editor, Jennifer M. Spitz at 303-776-5380 or jspitz@flanderslaw.com with proposed articles or announcements and other comments, criticisms, or suggestions.

WHAT'S INSIDE?

FIDUCIARIES BEWARE: YOUR SECRETS MIGHT NOT BE SAFE

BY HERBERT E. TUCKER AND MICHELLE R. MIERAS

You are meeting with a new client in just a few hours. He serves as trustee of a fairly large trust with many beneficiaries, some of whom are not very fond of each other, let alone your client. Your thoughts immediately focus on the application of the attorney-client privilege to communications between you and your new client. No? Well even if attorney-client privilege issues don't top your fiduciary representation checklist, the complexities of the attorney-client privilege as it applies to personal representatives and trustees deserve consideration and should play a role in properly defining the scope of your representation.

While the attorney-client privilege generally prohibits an attorney from disclosing to third parties communications with and advice to the client[1], waivers and exceptions eat away at this protection. The standard waivers and exceptions involved in any representation also apply when representing a fiduciary. For example, the attorney-client privilege can be impliedly or expressly waived by the fiduciary client. This could occur through disclosure of the otherwise protected information to third parties, or by asserting a claim or defense that places that information directly at issue.[2] Communications in furtherance of a fraud or crime will also be subject to discovery pursuant to the crime-fraud exception, as will communications between a testator and his attorney after the testator's death through the testamentary exception, to the extent that the communications relate to the testator's intent in drafting a will or trust.[3] In the case of fiduciary representation, however, a new exception comes into play. The "fiduciary exception" prevents a fiduciary from asserting the attorney-client privilege against the very beneficiaries on behalf of whom the fiduciary supposedly acts.[4]

Colorado sides with the majority of states in recognizing the fiduciary exception to the attorney-client privilege.[5] The application also extends to the work product doctrine.[6] Controversy remains, however, about the application of the fiduciary exception in certain jurisdictions. The official comments to Section 813 of the Uniform Trust Code recognize this uncertainty, noting the

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ongoing tension between encouraging full and frank disclosure by ensuring protection and encouraging proper conduct of a fiduciary by allowing beneficiaries access to a fiduciary's communications with counsel.[7]

Limitations on the Fiduciary Exception

The fiduciary exception does not provide a *carte blanche* by which a beneficiary has free access to any communication by the fiduciary and his counsel. The exception only applies to those communications directly related to the administration of the estate or trust. For example, courts have upheld the attorney-client privilege for communications between a fiduciary and counsel retained at his own expense for the purpose of obtaining advice regarding potential breaches of fiduciary duty.[8]

Rationale Behind the Fiduciary Exception

Courts applying the fiduciary exception recognize that the nature of a fiduciary's duties to the beneficiaries justifies mitigating the protection afforded by the attorney-client privilege. As noted by William McGovern, the fiduciary owes a duty of loyalty to the beneficiaries which by necessity requires the disclosure of information related to the administration of the estate or trust to them.[9] A fiduciary indeed has a duty of loyalty to the beneficiaries and a duty to administer a trust or estate with their interests in mind. This duty should prevent the fiduciary from being able to assert the attorney-client privilege against the beneficiaries, because while the attorney is retained by the fiduciary, the representation is indirectly on behalf of the beneficiaries.[10] Additionally, fiduciaries often use estate or trust funds to pay the fiduciary's counsel, causing the burden of the representation to fall on the beneficiaries' shoulders. It would be unjust to prevent the beneficiaries from accessing the very communications stemming from representation that was to inure to their benefit, and for which they ultimately paid.

In one of the first cases recognizing the fiduciary exception, *Riggs National Bank v. Zimmer*, 355 A.2d 709 (Del. Ch. 1976), the court noted that a beneficiary's interest in the management and administration of the trust should be encouraged, rather than thwarted. By removing the privilege bar for communications between a fiduciary and his attorney in that capacity, not only are beneficiaries better able to monitor the affairs of a trust or estate should they choose to do so, but fiduciaries may be discouraged from engaging in questionable activities.

Some may reason that because the attorney indirectly represents the beneficiaries, the rules applying to joint representation apply. Subject to Rules of Professional Conduct 1.6 and 1.7, more than one client with related interests can be represented by one attorney. But when one joint client provides information to the attorney, the attorney-client privilege cannot be later invoked to prevent the other joint clients from discovering the communication.[11] The argument is that under this theory, a beneficiary - as an indirect client - can compel discovery of communications with the actual client, the fiduciary. The ABA Committee on Ethics and Responsibility has provided some guidance in this area. In ABA Formal Opinion 94-380, the Committee concludes that when representing a fiduciary, the fiduciary is the client, while the beneficiaries are not, unless otherwise specifically provided. The majority of jurisdictions agree.

A word of warning among similar lines. Although the fiduciary exception abrogates the attorney-client privilege among fiduciaries and beneficiaries, counsel should not take this as an invitation to jointly represent beneficiaries and fiduciaries. Counsel must carefully evaluate the conflicts among the fiduciaries and beneficiaries, and heed the professional rules. Failure to do so can result in disciplinary action.[12]

While the majority of jurisdictions do recognize the fiduciary exception, some courts still refuse to apply it. Courts that refuse to invoke the fiduciary exception have taken the position that the statutory nature of the attorney-client privilege prevents the courts from expanding or restricting its scope.[13] Jurisdictions refusing to recognize the fiduciary exception include California,[14] Florida,[15] Texas[16] and Massachusetts[17].

Application to Successor Fiduciaries

A resigning fiduciary may not recognize the vulnerability of the paper trial he leaves behind. Courts generally permit successor fiduciaries to discover the prior fiduciary's communications with counsel.[18] The rationale is similar to that of allowing beneficiaries to have access. The new fiduciary takes over the role of protector for the beneficiaries' inter-

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ests, making the exception to the attorney-client privilege favorable to ensure protection of the beneficiaries' interests.

Application of Crime-Fraud Exception to Fiduciary Representation

Although the crime-fraud exception would seem to take a hiatus in the average fiduciary representation case, scenarios exist where this general exception comes into play. The majority of jurisdictions extend the crime-fraud exception to include instances of civil fraud. This expansion prevents the attorney-client privilege from attaching to communications between counsel and a fiduciary who consults with counsel for purposes of furthering a continuing or future fraud.[19] To date, no Colorado case has applied the crime-fraud exception in a fiduciary context.[20] The Colorado Court of Appeals has, however, upheld the application of the attorney-client privilege in a case based in part on allegations of breach of fiduciary duty, without discussing the potential application of the crime-fraud exception.[21]

Other courts have applied the crime-fraud exception in cases where a fiduciary refused to provide full disclosure of material information to the beneficiaries, equating this with fraudulent misrepresentation and concealment.[22] Other cases recognize the concept of "constructive fraud", potentially expanding the fiduciary exception to those circumstances in which the fiduciary's conduct so similarly resembles fraud and results in consequences and legal effects, that it should be considered fraudulent.[23]

Preventing the Unexpected Application of the Fiduciary Exception

Given the favorable reception of the fiduciary exception in Colorado, counsel should take certain precautions when representing a fiduciary to prevent the unexpected application of the fiduciary exception down the road. First and foremost, discuss with your client the attorney-client privilege and the general waivers and exceptions. Caution your client that disclosure of your advice and communications to third parties can waive the privilege, making attorney-client communications subject to discovery. In this regard, the use of e-mail should be specifically addressed. Your client should be forewarned of the risks of using an e-mail address to which others have access.

Second, discuss with your client the scope of your representation. When representing a personal representative or trustee solely in their fiduciary capacity, make sure they understand the scope of the representation, in that you are assisting the fiduciary in administering the trust or estate in compliance with the duties owed to the beneficiaries. Explain that the beneficiaries may be able to discover communications in the event of future litigation concerning the matters covered by the representation. Thinking ahead and anticipating the conflicts likely to arise in each case not only helps to clearly define the scope of your representation, but can help to mitigate an unintentional waiver of the attorney-client privilege.

During the course of representation, beware of circumstances that lead to the fiduciary seeking advice on potential breaches of their fiduciary duties. If it becomes apparent that the fiduciary will be defending himself against beneficiaries' claims of breach of fiduciary duties, carefully consider the necessity and advisability of referring your client to separate litigation counsel. The use of separate counsel will ensure that the attorney-client privilege remains intact for those communications made while defending these claims. Should you decide to undertake representation of your fiduciary client in the litigation arena as well, be sure to take the necessary precautions to separate each side of your double representation. Separate files should be created for your representation of the fiduciary in their administrative capacity and for your representation of the defendant-fiduciary. Separate billing records are also imperative, and the fiduciary should not use trust or estate funds to pay litigation fees. A well-drafted engagement letter addressing the scope of your representation can prove invaluable when the application of the fiduciary exception becomes an issue. Should your representation expand with litigation, an additional engagement letter should be used to identify the secondary but separate context of your representation.

A Final Thought

The fiduciary exception adds another hole to the already riddled attorney-client privilege, subjecting the fiduciary's communications to potential discovery by beneficiaries. While we may not be able to escape the fiduciary exception, we can take the proper precautions to ensure that its effects do not catch the client off-guard and result in the disclosure of information which he intended to

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remain private. A simple discussion with your client at the beginning of your representation about the risks of potential discovery can go a long way toward avoiding complications in the attorney-client relationship caused by the unexpected discovery of information the fiduciary had thought was private.

NOTES

1. *See* Section 13-90-107(1)(b), C.R.S.

2. *Wesp v. Everson*, 33 P.3d 191 (Colo. 2001); *Lanari v. People*, 827 P.2d 495 (Colo. 1992); *Mountain States Tel. & Tel. Co. v. DiFede*, 780 P.2d 533, 542 (Colo. 1989); *People v. Salazar*, 835 P.2d 592 (Colo. App. 1992); *Bogert, Trusts and Trustees*, § 901 (2d Ed. 1982).

3 . *Wesp v. Everson, supra* note 2. *See* also, *Swidler & Berline v. U.S.*, 118 S.Ct. 2081 (1998).

4. *Western Gas Processors, Ltd. v. Enron Gas Processing Co.*, 1989 WL 20529 (D. Colo. 1989); *Patty Lea, Inc. v. Distr. Court*, 423 P.2d 27 (Colo. 1967).

5 . *See, e.g., Lewis v. UNUM Corp. Severance Plan*, 203 F.R.D. 615 (D. Kan. 2001); *U.S. v. Mett*, 178 F.3d 1058 (9th Cir. 1999); *Martin v. Valley Nat'l Bank of Arizona*, 140 F.R.D. 291 (S.D.N.Y. 1991).

6 . *Cobell v. Norton*, 213 F.R.D. 1 (D. D.C. 2003). For a discussion of the scope of the work product doctrine, see *Hawkins v. Distr. Court*, 638 P.2d 1372 (Colo. 1982).

7. Uniform Trust Code, § 813, official comment (2000).

8. *Barnett National Bank v. Compson*, 629 So.2d 849 (Fla. App. 1993).

9. William M. McGovern, Jr., *Undue Influence and Professional Responsibility*, 28 Real Prop., Prob. & Tr. J. 643 (1994).

10. *Lewis v. UNUM Corp. Severance Plan, supra* note 5, *Martin v. Valley Nat'l Bank of Arizona, supra* note 5; *Garner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970).

11. *Western Gas Processors, Ltd. v. Enron Gas Processing Co., supra* note 4.

12. *See, e.g., People v. Cozier*, 74 P.3d 531 (Colo. 2003); *Estate of Klarner*, 98 P.3d 892 (Colo. App. 2003), cert. granted on other grounds, 2004 WL 2211536 (Colo. 2004).

13. *Wells Fargo Bank v. Superior Court* (Boltwood), 990 P.2d 519 (Cal. 2000).

14. *Id.*

15. *Barnett Nat'l Bank v. Compson, supra* note 8.

16 . *Huie v. DeShazo*, 922 S.W.2d 920 (Tex. 1996).

17. *Symmons v. O'Keeffe*, 644 N.E.2d 631 (Mass. 1995).

18 . *Moeller v. Superior Court*, 947 P.2d 279 (Cal. 1997); Commodity Future Trading Comm'n v. Weintraub, 471 U.S. 343 (1986).

19. Pacelli Bros. Transp. v. Pacelli, 456 A.2d 325 (Conn. 1982); First Union Nat'l Bank v. Turney, 824 So.2d 172 (Fla. App. 2001); Estate of Gump, 1 Cal. App. 4th 582 (Cal. App. 1991).

20 . See, e.g., Wesp v. Everson, 33 P.3d 191 (Colo. 2001); Caldwell v. Distr. Court, 644 P.2d 26 (Colo. 1982).

21. Genova v. Longs Peak Emergency Physicians, P.C., 72 P.3d 454 (Colo. App. 2003).

22. Pacelli Bros. Transp. v. Pacelli, supra note 19; First Union Nat'l Bank v. Turney, supra note 19.

23. Estate of Thurston, 16 P.3d 776 (Ariz. App. 2000); Estate of Gump, 1 Cal. App. 4th 582 (Cal. App. 1991); First Union Nat'l Bank of Florida v. Whitener, 715 So.2d 979 (Fla. App. 1998).

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Upcoming Joint Section Topical Luncheon CLEs

The Trust and Estate Section sponsors Joint Section Topical Luncheon CLEs which are held on the second Wednesday of each month. Many of these CLE presentations are co-sponsored by the Tax Section and other Sections of the CBA. The presentations are held at noon at the Warwick Hotel, at 1776 Grant Street in Denver. The cost for 1 hour of CLE credit and lunch is $25.00. Details will be e-mailed to Trust and Estate Section members. The topics of upcoming presentations are as follows:

January 12, 2005	**February 9, 2005**	**March 9, 2005**
Annual Survey of Colorado Law	Conservation Easements	Topic and speaker to be
Speakers to be announced	Presented by Bruce Nelson	announced

You can participate in the luncheon seminars by phone from your office and also get CLE credit. The cost for the call-in is $20.00. To register for the call-in program contact the CBA by calling (303) 860-1115, ext. 727, or by e-mailing lunches@cobar.org. Once you have registered, the Bar Association staff will e-mail you the materials as well as the call-in number and further instructions.