The Trust Being a Multi-Party Relationship, Whom Legal Counsel Represents Can Get Complicated

The trust being a multi-party relationship, it is not always that easy to discern at any given time whom legal counsel is representing, or should be representing, in matters relating to the trust's creation and administration. Charles E. Rounds, Jr. explains in Section 8.8 of *Loring and Rounds: A Trustee's Handbook* (2013). The section is reprinted in its entirety below.

§8.8 Whom Does Counsel Represent?

[Reprinted from Charles E. Rounds, Jr., *Loring and Rounds: A Trustee's Handbook* (2013)]

> *The drafters of…[the Uniform Trust]…Code decided to leave open for further consideration by the courts the extent to which a trustee may claim attorney-client privilege against a beneficiary seeking discovery of attorney-client communications between the trustee and the trustee's attorney. The courts are split because of the important values that are in tension on this question.*[1]—Uniform Trust Code

> *When the roles and objectives of legal consultation are unclear, the question of who has paid for the legal services, or who ultimately will be required to pay those expenses, although potentially relevant, involves other and complicated considerations so that this matter is not determinative in resolving issues of privilege.*[2]—Restatement (Third) of Trusts

At the drafting stage. As a general rule, the lawyer who drafts a trust instrument represents the settlor and only the settlor. Thus, under classic common law principles, the lawyer cannot be held liable to third parties, such as the beneficiaries or the intended beneficiaries, for professional negligence in preparing the trust document itself, absent special facts.[3] Such third parties are not

[1]Uniform Trust Code §813 cmt. (available on the Internet at <http://www.law.upenn.edu/library/archives/ulc/ulc/php>). On the one hand, the attorney-client privilege "recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client." Uniform Trust Code §813 cmt. (citing Upjohn Co. v. United States, 449 U.S. 383 (1981)). On the other hand, the Uniform Trust Code "requires that a trustee keep the qualified beneficiaries reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests, which could include facts that the trustee has revealed only to the trustee's attorney." Uniform Trust Code §813 cmt.

[2]Restatement (Third) of Trusts §82 cmt. f.

[3]*See, e.g.*, Fredrikson v. Fredrikson, 817 N.Y.S.2d 320 (App. Div. 2006).

in privity with the lawyer, *i.e.,* they are not parties to a lawyer-client agency relationship.[4] The lawyer and the settlor, however, are.[5] The lawyer-agent's duties run solely to the client-principal.[6] The so-called privity barrier in estate planning malpractice cases has been under attack for some time, at least since *Lucas v. Hamm* was decided in California in 1961.[7] For more on the privity defense in the trust drafting context, the reader is referred to Section 8.15.61 of this handbook.

That is not to say that trust beneficiaries litigating in a jurisdiction that has a privity barrier will never have any arrows in their quivers. If, for example, the drafting attorney had also prepared the funding documentation, then he or she might be liable to the beneficiaries for any harm to the trust that was funding related. Faulty advice rendered to the trustee of an irrevocable life insurance trust with respect to the purchase of a life insurance contract and the negligent preparation of a deed of real estate into the trust come to mind.[8] The trustee, of course, might be liable as well.[9]

In any case, the trust scrivener whose professional duties to the settlor-client actually do cease at the time of document execution may expect that the applicable statute of limitations for lawyer malpractice will then begin to run against the settlor-client. At least one court has so held.[1] Whether a trust scrivener owes continuing post-execution duties will hinge on the particular facts and circumstances of the representation. Note also that if the scrivener breached a *fiduciary* duty to the settlor-client in the course of preparing the documentation, such as the duty of undivided loyalty, then the applicable statute of limitations, at least under classic agency principles, ought not to run against the settlor-client until such time as the settlor-client acquires an actual subjective understanding of the material facts of the breach, as well as a general appreciation of why as a matter of law there has been a breach. What follows is a discussion of counsel's liability once the trust is up and running.

After the trust has been created. *Whether trust counsel owes duties to the beneficiaries as well as the trustee.* The question of whether counsel represents the trustee, the beneficiaries, or both, is a difficult one[10] and depends to some extent on the facts and circumstances. The issues

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[4]*See, e.g.,* Peleg v. Spitz, 2007 WL 4200611 (Ohio App. 8th Dist.) (in part defining the concept of privity).

[5]*See generally* Charles E. Rounds, Jr., *Lawyer Codes Are Just About Licensure, the Lawyer's Relationship with the State: Recalling the Common Law Agency, Contract, Tort, Trust, and Property Principles the Regulate the Lawyer-Client Fiduciary Relationship*, 60 Baylor L. Rev. 771 (2008).

[6]*See generally* Charles E. Rounds, Jr., *Lawyer Codes Are Just About Licensure, the Lawyer's Relationship with the State: Recalling the Common Law Agency, Contract, Tort, Trust, and Property Principles the Regulate the Lawyer-Client Fiduciary Relationship*, 60 Baylor L. Rev. 771 (2008).

[7]56 Cal. 2d 583, 364 P.2d 685 (1961).

[8]*See generally*§§5.4.1.8 of this handbook (right and standing of beneficiary to proceed in stead of trustee against those with whom the trustee has contracted, against tortfeasors, and against the trustee's agents, *i.e.*, against third parties) and 7.2.9 of this handbook (personal liability of third parties, including the trustee's agents, to the beneficiary; investment managers; directors and officers of trust companies; lawyers; brokers).

[9]*See generally*§8.32 of this handbook (can the trustee escape liability for making a mistake of law if he acted in good faith on advice of counsel).

[1] *See* Babb v. Hoskins, 733 S.E.2d 881 (N.C. App. 2012).

[10]Existing case law is confused, incomplete, and insufficient. *See* Dominic J. Campisi, *The Search for the Deep Pocket—Is It Yours?*, 25 ACTEC Notes 246 (1999) (noting that the law regarding the role and liability of counsel for the fiduciary is in a state of perpetual flux because

are subtle.[11] When the trust is revocable and the settler is of full age and legal capacity, counsel represents the settlor and only the settler. Otherwise, if counsel is advising the *office of trustee* as it were, the trustee is the primary client.[12] Some courts have ruled, however, that counsel has certain "restrictive" duties that run to the beneficiary as well.[13] Counsel, for example, may not exploit, to the detriment of either party, confidential information acquired in the course of his or her representation.[14] Nor may counsel withhold from the beneficiary information to which the beneficiary is entitled.[15] The Restatement (Third) of Trusts, for example, takes the position that "legal consultations and advice obtained in the trustee's fiduciary capacity concerning decisions or actions to be taken in the course of administering the trust…are subject to the general principle entitling a beneficiary to information that is reasonably necessary to the prevention or redress of a breach of trust or otherwise to the enforcement of the beneficiary's rights under the trust."[16] Because counsel has an obligation to advise the trustee on the nature of the trustee's fiduciary responsibilities and how best to carry them out, as well as a right to be paid from the trust, it is said that the beneficiary enjoys the status of a "derivative" or "secondary" client.[17] (It is even suggested that counsel would have an affirmative duty to disclose to the beneficiary any serious wrongdoing on the part of the trustee, *e.g.*, embezzlement). Commentators have referred to this as

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of the balancing tests used to determine the status, standards, and liabilities involved in such representation); Pennell, *Representations Involving Fiduciary Entities: Who Is the Client?*, 62 Fordham L. Rev. 1319, 1321–1326 (1994); ACTEC Commentaries on Model Rules of Professional Conduct (ACTEC Foundation) (3d ed. June 1999): Reporter's Note, Reporter's Note (2d ed.), Reporter's Note (3d ed.) (hereinafter "ACTEC Commentaries")). *See generally* Reid, Mureiko, & Mikeska, *Privilege and Confidentiality Issues When a Lawyer Represents a Fiduciary*, 30 Real Prop. Prob. & Tr. J. 541 (1996); Johns, *Fickett's Thicket: The Lawyer's Expanding Fiduciary and Ethical Boundaries When Serving Older Americans of Moderate Wealth*, 32 Wake Forest L. Rev. 445 (1997). *See also*§5.4.1.1 of this handbook (right to information and confidentiality) (discussing the beneficiary's right to information).

[11]*See generally* Frank, *The Legal Ethics of Louis D. Brandeis*, 17 Stan. L. Rev. 683, 694 (1965) (the Warren matter). *See generally*§8.38 of this handbook (the Warren trust (a.k.a. the Mills trust)).

[12]*See* Gadsden, *Ethical Guidelines for the Fiduciary's Lawyer*, 134 Tr. & Est. 8, 10 (Mar. 1995); Ross, *Particularized Guidance for the Estate and Trust Lawyer*, 133 Tr. & Est. 10, 14 (July 1994).

[13]*See* Gadsden, *Ethical Guidelines for the Fiduciary's Lawyer*, 134 Tr. & Est. 8, 10 (Mar. 1995) (stating duties are restrictive in nature). *But see* Roberts v. Fearey, 162 Or. App. 546, 986 P.2d 690 (1999) (where no allegation that attorney knowingly aided or assisted the trustee in the commission of a breach of fiduciary duty, attorney's duty of care ran only to trustee); Spinner v. Nutt, 417 Mass. 549, 631 N.E.2d 542 (1994) (holding no duty of reasonable care imposed with respect to beneficiaries if it would conflict with duty owed to fiduciary-client); 2A Scott on Trusts §173. *Cf*. Witzman v. Gross, 148 F.3d 988, 990 (1998) (holding that the general rule of trust law that a beneficiary cannot bring an action at law in a trust's stead against a third party for torts or other wrongs extends to beneficiaries who attempt to sue a trustee's attorneys for legal malpractice).

[14]*See* Gadsden, *Ethical Guidelines for the Fiduciary's Lawyer*, 134 Tr. & Est. 8, 16 (Mar. 1995) (confidentiality requirements).

[15]*See* Gadsden, *Ethical Guidelines for the Fiduciary's Lawyer*, 134 Tr. & Est. 8, 16 (Mar. 1995) (confidentiality requirements).

[16]Restatement (Third) of Trusts §82 cmt. f. *See generally* 3 Scott & Ascher §17.5.

[17]*See* Hazard & Hodes, The Law of Lawyering, A Handbook on the Model Rules of Professional Conduct §1.3:108 (2d ed. 1994).

the *entity* approach.[18]

Other courts, however, have held that the trustee is the only client,[19] suggesting that to say that the *trust* is the real client is inconsistent with the law of trusts.[20] At least one jurisdiction has confirmed this by statute:

> Unless expressly provided otherwise in a written employment agreement, the creation of an attorney-client relationship between a lawyer and a person serving as fiduciary shall not impose upon the lawyer any duties or obligations to other persons interested in the estate, trust estate, or other fiduciary property, even though fiduciary funds may be used to compensate the lawyer for legal services rendered by the fiduciary. This section is intended to be declaratory of the common law and governs relationships in existence between lawyers and persons serving as fiduciaries as well as such relationships hereafter created.[21]

Representing cotrustees. A lawyer may represent cotrustees in their fiduciary capacity.[22] The lawyer, however, should make it clear that each cotrustee is entitled to all information that flows between the lawyer and the other cotrustee or cotrustees. Accordingly, it is difficult to see how one lawyer can practically or ethically represent cotrustees, in either their representative or individual capacities, who are in conflict with one another.

Representing trustees of different trusts. The lawyer who simultaneously represents the trustee of Trust *X* and the trustee of Trust *Y* is asking for trouble if the trusts themselves are in conflict. This could happen if, for example, Trust *X* is a QTIP trust and Trust *Y* is a revocable trust established by the beneficiary of the QTIP trust. Let us assume the beneficiary has died. If Trust *X* 's class of remaindermen does not perfectly intersect with Trust *Y* 's class of remaindermen and if the tax apportionment provision of Trust *Y* is vague or ambiguous, the trustee of the QTIP trust may have a fiduciary duty to take the position that Trust *Y* should bear the burden of the federal estate tax liability attributable to the inclusion of the QTIP assets in the federal gross estate of the decedent. The trustee of the revocable trust may have a fiduciary duty to take the position that the default law applies, namely that the QTIP assets must bear the burden of their allocable share of the estate taxes. The situation would be exacerbated if the lawyer also were the trustee of one of the trusts, as was the case in *In re Estate of Klarner*:

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[18]*See, e.g.*, J. Pennell, *Representation Involving Fiduciary Entities: Who Is the Client?*, 62 Fordham L. Rev. 1319 (1994); Restatement (Third) of Trusts §82, cmt. f, Reporter's Notes thereto.

[19]*See* Sullivan v. Dorsa, 128 Cal. App. 4th 947, 964, 27 Cal. Rptr. 3d 547, 560 (2005) (noting that, in general, an attorney engaged by a trustee does not thereby become an attorney for the trust's beneficiaries).

[20]*See, e.g.*, Huie v. DeShazo, 39 Tex. Supp. Ct. J. 288, 922 S.W.2d 920 (1996) (holding that the attorney-client privilege protects communications between a trustee and his or her attorney relating to trust administration from discovery by a trust beneficiary, only the trustee, not the beneficiary, being the client of the trustee's attorney); Spinner v. Nutt, 417 Mass. 549, 631 N.E.2d 542 (1994) (holding trustee owed no duty of reasonable care to beneficiaries if it would conflict with duty owed to fiduciary-client). *See generally*§3.5 of this handbook (trustee's relationship to the trust estate) (suggesting that a trust, unlike a corporation, is not a legal entity).

[21]S.C. Code §62-1-109.

[22]ACTEC Commentary on MRPC 1.2.

> The Law Firm is also a trustee of the QTIP Trust and owes a fiduciary duty to Albert's daughters. Simultaneously, the Law Firm is a trustee of Marian's [revocable] Trust and represents the cotrustees, Marian's sons, in this litigation. Therefore, the Law Firm owes fiduciary duties to its clients, Marian's sons, while also owing fiduciary duties to Albert's daughters. The Law Firm is in the precarious position of advocating in this litigation an advantageous position for its clients, Marian's sons, that, if successful, would operate to the detriment of the beneficiaries to whom it owes a duty of loyalty.[23]

The trustee's personal defense counsel. If counsel has been retained by the trustee as his *personal lawyer* to advise him on matters such as how to defend an action for breach of trust, counsel would have no duties to the beneficiary.[24] The Restatement (Third) of Trusts is generally in accord.[25] The important thing to remember when it comes to legal representation is that the parties at all times must understand who represents whom. Or perhaps more important, who does *not* represent whom.[26] If it is reasonable for a beneficiary to assume that counsel is representing the beneficiary's interests when counsel is not, then, at minimum, counsel has a duty to communicate to the beneficiary that the beneficiary is in fact unrepresented.[27]

The way around all of this is for counsel, at the time he or she is hired by the trustee, to communicate directly with the beneficiaries regarding the nature of the representation. Certainly when storm clouds are gathering on the horizon—when trouble is brewing between the trustee and the beneficiary or between the beneficiary and other beneficiaries—counsel and the trustee have an affirmative duty to advise the beneficiary in a timely fashion that the beneficiary ought to retain his or her own independent counsel. The prudent trustee sees to it that this advice is rendered in writing and that there is a record of its having been received.

The relevancy of who pays trust counsel. Ordinarily the trustee's counsel fees are deductible from the trust estate, unless they relate to matters in which the trustee is personally at fault, *e.g.*, unauthorized acts of self-dealing. On the other hand, even in cases when the trustee is not personally at fault, "…[I]f the trustee employs an attorney for the trustee's own benefit and not for that of the trust, the trustee is personally liable for the attorney's fees and is not entitled to

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[23]In re Estate of Klarner, 2003 WL 22723228.

[24]*See, e.g.*, First Nat'l Bank of Fla. v. Whitener, 715 So. 2d 979, 982 (Fla. 1998) (holding that trustee was the "true client," the trustee having retained counsel after it realized "there were problems, including a perceived conflict of interest" and after the beneficiary had retained counsel). *See also* Wingfield, *Fiduciary Attorney-Client Communications: An Illusory Privilege?*, 8 Prob. & Prop. 60, 62 (1994) (protected communications); §3.5.2.3 of this handbook (right in equity to exoneration and reimbursement, *i.e.*, indemnity; payment of attorneys' fees). *See generally* 3 Scott & Ascher §17.5.

[25]Restatement (Third) of Trusts §82 cmt. f.

[26]*See, e.g.*, Chinello v. Nixon, Hargrave, Devans & Doyle, 788 N.Y.S.2d 750 (2005) (beneficiary who had at one time been represented by the law firm representing the trustee unsuccessfully sued the firm for legal malpractice and breach of fiduciary duty based on the beneficiary's execution of a waiver of citation and consent to accounting). *See generally* Reid, Mureiko, & Mikeska, *Privilege and Confidentiality Issues When a Lawyer Represents a Fiduciary*, 30 Real Prop. Prob. & Tr. J. 541, 556 (1996).

[27]*See* Gadsden, *Ethical Guidelines for the Fiduciary's Lawyer*, 134 Tr. & Est. 8, 17 (Mar. 1995) (citing Butler v. State Bar, 42 Cal. 3d 323, 721 P.2d 585 (1986)).

reimbursement from the trust estate."[28] Thus, absent special facts, fees incurred by a trustee in obtaining a legal opinion as to whether he would be entitled to charge the trust estate a commission for his brokerage services that is over and above his regular fiduciary compensation ordinarily would not be reimbursable, particularly if the trust would not have been disadvantaged had the brokerage business been directed to a third party. They certainly would not be reimbursable if the trust would have been advantaged had the business been directed elsewhere.

The attorney-client privilege. Whom trust counsel does and does not represent implicates the attorney-client privilege, which has the following elements: "Where legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal advisor…"[29] Voluntary disclosure by the privilege-holder to a third party constitutes a waiver of the privilege.

Whether the trustee may assert the privilege against the beneficiary. In a suit by the beneficiary against the trustee, is the trustee entitled to assert the attorney-client privilege *against the beneficiary*?[30] As to communications with trust counsel uttered *after* the onset of hostilities, the answer is an unequivocal "yes."[31] As to communications uttered *before* the onset of hostilities, the answer is a hedged "no."[32] One court in denying a trustee the right to assert the attorney-client privilege against his beneficiary found persuasive the fact that counsel fees had been paid from the trust estate.[33] The Restatement (Third) of Trusts, on the other hand, downplays the significance of "who pays."[34] In any case, the prudent trustee should assume that any preconfrontation communications with counsel are discoverable and act accordingly.[35] And if it is any consolation to the trustee, asserting the attorney-client is not without its risks. One court issued the following warning after having ruled that certain documents in the trustee's file were

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[28]3 Scott & Ascher §18.1.2.4.

[29]United States v. Evans, 113 F.3d 1457, 1461 (7th Cir. 1997) (citing 8 John Henry Wigmore, Evidence in Trials at Common Law §2292 (John T. McNaughton ed., 1961)).

[30]*See generally* 3 Scott & Ascher §17.5 (Duty to Furnish Information).

[31]*See generally* 3 Scott & Ascher §17.5 (Duty to Furnish Information). *See, e.g.*, First Union Nat'l Bank of Fla. v. Whitener, 715 So. 2d 979, 982 (1998) (the court finding no fraud that would abrogate the trustee's right to assert the attorney-client privilege). *See generally* Gibbs & Hanson, *The Fiduciary Exception to a Trustee's Attorney/Client Privilege*, 21 ACTEC Notes 236 (1995).

[32]Gibbs & Hanson, *The Fiduciary Exception to a Trustee's Attorney/Client Privilege*, 21 ACTEC Notes 239; Lewin on Trusts ¶23-08 (England). In New York, a trustee may only invoke the attorney/client privilege for "good cause." *See* Hoopes v. Carota, 142 A.D.2d 906, 531 N.Y.S.2d 407 (App. Div. 1988), *aff'd*, 74 N.Y.2d 716, 543 N.E.2d 73, 544 N.Y.S.2d 808 (1989). *But see* Huie, individually and as executor and trustee, v. the Honorable Nikki DeShazo, Judge, 922 S.W.2d 920 (Tex. 1996) (suggesting there is no "fiduciary exception" to the attorney/client privilege); Wells Fargo, N.A. v. Superior Court, 990 P.2d 591 (Cal. 2000) (denying beneficiary access even to attorney-trustee communications that involved routine trust administration matters).

[33]Floyd v. Floyd, 365 S.C. 56, 87–88, 615 S.E.2d 465, 482 (2005).

[34]Restatement (Third) of Trusts §82 cmt. f, Reporter's Notes thereto. *See also* 3 Scott & Ascher §17.5.

[35]Gibbs & Hanson, *The Fiduciary Exception to a Trustee's Attorney/Client Privilege*, 21 ACTEC Notes, 236, 240 (1995) ("Assuming the inchoate existence of some fiduciary exception rule in your jurisdiction, the question for the attorney is: how do my fiduciary clients and I conduct our communications *prior* to the time a beneficiary asserts a claim…? Alertly, carefully, and clearly is the certain answer."). *See generally* Desmarais, *The Fiduciary, His Counsel and the Attorney-Client Privilege*, 136 Tr. & Est. 29 (No. 6, May 1997).

covered by the privilege: "Nonetheless, the trustee may not use the privilege as a shield, and then, at trial, surprise the movants by using any of the requested documents as a sword."[36]

One court has provided a useful hypothetical to explain how a no-exception approach to the attorney-client privilege arguably squares with the trustee's fiduciary duty to disclose material facts to the beneficiary:

> Assume that a trustee who has misappropriated money from a trust confidentially reveals this fact to his or her attorney for the purpose of obtaining legal advice. The trustee, when asked at trial whether he or she misappropriated the money, cannot claim the attorney-client privilege. The act of misappropriation is a material fact of which the trustee has knowledge independently of the communication. The trustee must therefore disclose the fact (assuming no other privilege applied), even though the trustee confidentially conveyed the fact to the attorney. However, because the attorney's only knowledge of the misappropriation is through the confidential communication, the attorney cannot be called on to reveal this information.[37]

As noted above, the drafters of the Uniform Trust Code decided to leave open for further consideration by the courts the extent to which a trustee may claim attorney-client privilege against a beneficiary seeking discovery of attorney-client communications between the trustee and the trustee's lawyer, the courts now being profoundly split on the question of whom trust counsel represents.[38]

Asserting the privilege against the inquisitive successor trustee. In a suit by a successor trustee against a predecessor trustee, is the predecessor entitled to assert the attorney-client privilege against the successor? Courts have held that when the office of trustee passes from one person to another, the power to assert the attorney-client privilege passes as well.[39] This would include the power to assert the privilege with respect to confidential communications between a predecessor trustee and an attorney on matters of trust administration. Bottom line: The predecessor may not assert the privilege as against the successor. The predecessor, however, would still retain the right to claim the attorney-client privilege as to communications between the predecessor and his, her or its personal attorney.

Asserting the attorney-client privilege against those not party to the trust relationship. Assume the following: (1) counsel renders confidential tax advice to the trustee, which the trustee voluntarily passes on to the beneficiary; (2) the IRS seeks to discover that advice; and (3) the trustee asserts the attorney-client privilege against the IRS. Has the trustee waived the privilege by so informing the beneficiary of that advice? If there is a fiduciary exception to the attorney-client privilege, then the privilege presumably has not been waived, the trustee and the

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[36]Matter of Will of Poster, 884 N.Y.S.2d 838, 842 (Sur. 2009).

[37]Huie v. DeShazo, 39 Tex. Sup. Ct. J. 288, 922 S.W.2d 920, 923 (1996). *See generally*§§5.4.1.1 of this handbook (discussing the beneficiary's right to information) and 6.1.5.1 of this handbook (duty to provide information) (discussing duty of trustee to provide information to the beneficiary).

[38]Uniform Trust Code §813 cmt.

[39]*See, e.g.*, In re Estate of Fedor and Catherine M. Fedor Revocable Trust, 356 N.J. Super. 218, 811 A.2d 970 (2001).

beneficiary being essentially coclients. Now if trust counsel represents the trustee and only the trustee, then the privilege may have been waived *by the trustee* when he communicated the confidential tax advice to the beneficiary, who would essentially have been a third party to the attorney-client relationship. The waiver might even apply to all the other beneficiaries, as well. "In view of the unsettled state of the law in the US regarding the existence of, and basis for, the fiduciary exception to the attorney-client privilege, trustees should carefully consider the potential waiver implications of disclosing privileged legal advice to beneficiaries. Moreover, in appropriate circumstances, trustees may wish to obtain Court directions before disclosing confidential legal advice."[40]

In Section 6.1.5.1 of this handbook, we discuss the trustee's duty to provide information to the beneficiaries of the trust. There is, however, a countervailing duty not to furnish beneficiaries with information if doing so would "not be in the best interests of the beneficiaries as a whole, but…[would] …be prejudicial to the ability of the trustees to discharge their obligations under the trust."[41]

The perverse incentives inherent in Section 1005(c) of the Uniform Trust Code. The Uniform Trust Code, specifically Section 1005(c), provides that under certain circumstances a trust beneficiary has only five years to bring a breach-of-trust action against the trustee even should the beneficiary lacks actual or constructive notice of the breach. Assume four years have run since a breach of trust has occurred. The trustee and the beneficiary remain totally in the dark as to the fact and nature of the breach. One more year and the trustee is off the hook. Trust counsel, on the other hand, becomes aware of the breach. Here is a situation in which counsel may have to respond to two potentially conflicting duties: 1) to represent the trustee in his official capacity, and 2) to protect the trustee personally. If he informs the trustee of the breach and the trustee takes no action to remedy it, the trustee's fraudulent inaction may toll the running of the statute. On the other hand, if counsel keeps quiet the five-year period will expire and the trustee will be personally off the hook. Still the trustee will have breached virtually the entire panoply of fiduciary duties that had been owed to the beneficiary, duties that are the subject of Chapter 6 of this handbook. What is an innocent trust counsel to do in such a situation? One court has proffered the following advice: When a trustee is faced with a personal-fiduciary conflict, "the trustee can mitigate or avoid the problem by retaining and paying out of his own funds separate counsel for legal advice that is personal in nature."[2] But how exactly is trust counsel to get the trustee to retain at his own expense separate personal counsel without causing a fraud-based tolling of the running of the statute and/or without trust counsel, himself, ending up constructively participating in the breach of trust? Might the only way out of the cul-de-sac be the deus ex machina of a repeal of Section 1005(c)? Under default laches doctrine trust counsel would no longer be conflicted in that the trustee would be personally benefited by a full disclosure of the breach to the beneficiary. This is because full disclosure would trigger a start of the running of any statute of limitations that might be applicable to such a breach of fiduciary

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[40]Basil Zirinis, Marina Bezrukova, Richard Corn, & James Gadwood, *Unintended Consequences*, 8(4) Tr. Q. Rev. 15 (2010) [a STEP publication].

[41]David Hayton, Paul Mathews, & Charles Mitchell, *Underhilll and Hayton, Law Relating to Trusts and Trustees* §60.58 (17th ed. 2006).

[2] Stewart v. Kono, 2012 WL 4427096 (Cal.App. 2 Dist.).

duty, or, in the absence of such a statute, a start of the running of the "reasonable" laches period that a fully-informed trust beneficiary would have to bring suit against the trustee for a breach of trust.