



Caution: Trustee Communications With Attorneys May Not Be Protected From Disclosure

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The attorney-client privilege protects from disclosure communications between attorneys and their clients. This privilege is the oldest privilege in the common law and serves to foster full and meaningful communication between attorneys and their clients. Although often considered sacrosanct, the attorney-client privilege is not absolute, particularly where the attorney is dealing with a trustee.

I. Background of the Fiduciary Exception to the Attorney-Client Privilege

The "fiduciary exception" is a well recognized qualification to both the attorney-client privilege and the work product doctrine rooted in the English common law of trusts. The exception allows beneficiaries to compel production of information related to trust administration that the trustee may have assumed was privileged.

There are two rationales for the exception. Some courts have concluded that the beneficiary's interest in accessing trust information is more important than the attorney-client privilege itself. Others have concluded that the attorney is ultimately working for the beneficiary, not the trustee. Both rationales are grounded in the identity of interest between trustee and beneficiary.

Under either approach, the fiduciary exception is subject to limitations. In general, beneficiaries only may compel discovery of information related to trust administration. The fiduciary exception does not apply when the trustee seeks advice from counsel for protection of his or her own personal interests against trust beneficiaries. But it is important to note that, although clearly defined in theory, the moment at which the trustee's interests actually diverge from the beneficiaries' is often unclear in practice. Moreover, the exception may permit the beneficiary to gain access to communications between the attorney and trustee that occurred prior to the development of a dispute.

Recently, the United States Court of Appeals for the Fourth Circuit adopted the fiduciary exception in *Solis v. Food Employers Labor Relations Association and Commercial Workers Pension Fund*. In *Solis*, the U.S. Department of Labor (DOL) issued two subpoenas duces tecum requesting documents related to administration of two ERISA benefit plans (the "Plans"). Claiming attorney-client and work product privileges, the Plans refused to produce some of the information requested. In an action to enforce the subpoenas, the United States District Court for the District of Maryland ordered the Plans to produce the requested documents based upon application of the fiduciary exception. On appeal, the Fourth Circuit affirmed the District Court's decision and expressly adopted the fiduciary exception, tying its decision to

the common law of trusts:

Rooted in the common law of trusts, the fiduciary exception is based on the rationale that the benefit of any legal advice obtained by a trustee regarding matters of trust administration runs to the beneficiaries. Consequently, trustees. . . cannot subordinate the fiduciary obligations owed to the beneficiaries to their own private interests under the guise of attorney client privilege.

II. Practical Implications for Trustees

The practical implications of *Solis*, and decisions like it, on trustees and their attorneys are significant. Trustees must recognize that even though they may be directing their communications to an attorney, there could come a time where the beneficiary may have a right to copies of those communications. Specifically, in matters of trust administration, trustees should always remain cognizant that the beneficiary will generally be the holder of the attorney-client privilege and should carry out their communication and interaction with trust counsel accordingly. By remaining aware that the trustee is not always the holder of the attorney-client privilege, trustees may avoid the unexpected disclosure of information that they would prefer to keep confidential.

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