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Hand Over the File or Else: Does a Successor Fiduciary Control the Attorney-Client Privilege?

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I. Introduction

It is a tale as old as time. A fiduciary and a beneficiary do not get along. Recognizing the potential for difficulty, the fiduciary retains an attorney to advise him. But that is not enough. After several rocky months, the fiduciary decides to move on and resigns.

However, the story does not end there. The trust or estate still needs to be administered, so a successor fiduciary is appointed. In taking over, the successor fiduciary requests all files from the previous fiduciary, including all communications between the previous fiduciary and the attorney. Unsurprisingly, the previous fiduciary does not want to turn over his rather frank emails and letters to his attorney. He understandably is concerned that those communications may form the basis of a later breach of fiduciary duty lawsuit against him. The previous fiduciary comes to you and asks: Does the successor fiduciary really have a right to those seemingly privileged communications?

Or, perhaps it is the successor fiduciary who comes to your law office. She notes that the previous fiduciary does not want to turn over the communications with the attorney that relate to administration of the estate/trust. Shouldn't she have access to them in order to get the fullest picture of what she's walking into? It sounds vaguely right, but is it?

Somewhat surprisingly, Texas law does not have a direct answer. Advising your client depends on (1) examining the indications we have from current case law, (2) considering how other states have addressed the issue, and, of course (3) the best resolution for your client.

II. Analysis

Before diving directly into the caselaw, it is important to take a step back and examine the background of the attorney-client privilege.

The attorney-client privilege allows "unrestrained communication and contact between an attorney and client in all matters in which the attorney's professional advice or services are sought, without fear that these confidential communications will be disclosed by the attorney . . . ." *West v. Solito*, 563 S.W.2d 240, 245 (Tex. 1978). The privilege "promote[s]

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effective legal services" which then "promotes the broader societal interest of the effective administration of justice." *Republic Ins. Co. v. Davis*, 856 S.W.2d 158, 160 (Tex. 1993).

The attorney-client privilege is enshrined in Texas Rules of Evidence 503:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client: between the client . . . and the client's lawyer . . . .

Tex. R. Evid. 503(b)(1).

A wrinkle in applying the attorney-client privilege to the estate and trusts area is that trusts and estates are not entities. *See, e.g., Belt v. Oppenheimer, Blend, Harrison & Tate, Inc.*, 192 S.W.3d 780, 786 (Tex. 2006) (A decedent's estate "is not a legal entity and may not properly sue or be sued as such."). Instead, estates and trusts are relationships to property and only a fiduciary can act on their behalf. *See Price v. Estate of Anderson*, 522 S.W.2d 690, 691 (Tex. 1975). It follows then that as a nonentity, the client in the attorney-client relationship cannot be the estate or trust itself. *Thompson v. Vinson & Elkins*, 859 S.W.2d 617, 623 (Tex. App.—Houston [1st Dist.] 1993, writ denied) (holding "one cannot represent an 'estate.' An estate is not a legal entity that can sue or be sued . . ." and "[n]or do we believe that [the attorney] represents the 'trust.' A trust is not a legal entity."). If estates and trusts cannot be the client, it is the fiduciary, as the person who acts in the name of the estate/trust, that is the client. *Id*.

The Texas Supreme Court also has held that an attorney represents the fiduciary and not the trust. *Huie v. DeShazo*, 922 S.W.2d 920 (Tex. 1996). In *Huie*, a beneficiary sued a trustee for breach of fiduciary duty and sought to depose the trustee's attorney. *Id*. at 922. The trustee's attorney refused to answer questions, citing the attorney-client privilege. *Id*. The beneficiary sought to compel the testimony, arguing (in part) that the trust was the real client. *Id*. at 926. The Court turned aside that argument, noting that a trust is not a separate legal entity. *Id*. Thus, the attorney could not represent the trust as an entity, because it was not an entity. *Id*. Instead, the attorney represented the fiduciary. *Id*. at 623-24 ("the record indicates that [the attorney's] involvement with the trust itself was in representing one of the trustees").

Texas law provides that the attorney does not represent the trust/estate but rather the fiduciary. The real question then is whether the attorney-client relationship is personal to the fiduciary or if the privilege runs with the office of the fiduciary. Unsurprisingly, authority supports both answers. Which authority you rely on depends on if you are advocating for the previous fiduciary or the successor fiduciary.

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A. If You Represent the Previous Fiduciary

If you represent the previous fiduciary, your client does not want to produce his communications. His position is that the attorney-client relationship is personal to the fiduciary. The support for this argument is found in case law, analogizing to established guidance where there are multiple fiduciaries, and the text of the privilege itself.

1. Texas Courts Suggest Attorney-Client Relationship is Personal to the Fiduciary

In *Huie*, one of the beneficiaries' arguments was that since the fiduciary acts for the beneficiaries and the attorney assists the fiduciary, the attorney really represents the beneficiaries. 922 S.W.2d at 924-25. The Texas Supreme Court rejected that argument and used expansive language to describe the nature of the fiduciary-attorney relationship: "While [the trustee] owes fiduciary duties to [the beneficiary] as her trustee, he did not retain [the attorney] to represent [the beneficiary], but to represent *himself* in carrying out his fiduciary duties." *Id*. at 925 (emphasis added).

The Houston court of appeals used similar language in also holding that an attorney represents the fiduciary and not a beneficiary. *Vinson & Elkins v. Moran*, 946 S.W.2d 381 (Tex. App.—Houston [14th Dist.] 1997, writ dism'd by agr.). "Generally, an attorney hired by the executors or trustees to advise them in administering the estate or the trust represents the executors or trustees . . . ." *Id*. at 402. In further explaining its reasoning, the court stated:

Executors are entitled to employ attorneys to assist *them* in the administration of the estate. It is the executors, not the beneficiaries, who are empowered to hire and consult with an attorney and to act on the attorney's advice on behalf of the estate. The executors hire attorneys to represent *themselves*, not the beneficiaries, in carrying out the administration of the estate.

Id. at 408 (citations omitted) (emphasis added).

The language in *Huie* and *Moran* suggests that the attorney is not retained to advise the estate or the trust, but rather to advise that fiduciary. If that is the case, then the relationship should be personal to that fiduciary. This makes intuitive sense. For fiduciaries to be able to have full and frank conversations with THEIR attorneys and therefore obtain the best legal advice, those conversations needed to be protected from the prying eyes and second-guessing of successor fiduciaries.

The understanding that the attorney-client relationship is personal is confirmed by a commentator, who agrees that successor fiduciaries are not entitled to pierce the privilege their predecessor had with an attorney. *See* Sharon B. Gardner, *Project Runway-One Day You're In as the Attorney and the Next Day You're Out!*, 1 Est. Plan. & Community Prop. L.J.

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111, 165-66 (2008) ("[T]he Texas Supreme Court's decision in *Huie v. DeShazo* seems to imply that the attorney only represented ***that*** fiduciary client . . . .") (emphasis added).

2. Attorney-Client Relationship Does Not Extend to Co-Fiduciaries

Further support comes from caselaw addressing situations where there are more than one member in the fiduciary relationship. In this context, Texas courts have held that the attorney only represents the fiduciary who retained the attorney, and not the other. *Lesikar v. Rappeport*, 33 S.W.3d 282, 320 (Tex. App.—Texarkana 2000, pet. denied) (holding that an attorney for one co-executor was not in privity with and therefore did not owe duties to other co-executor); *In re Valero Energy Corp.*, 973 S.W.2d 453, 458-59 (Tex. App.—Houston [14th Dist.] 1998, orig. proceeding) (holding that the attorney for one member of a joint venture did not have to produce attorney-client privileged documents over to the other member of the joint venture).

These holdings support that the attorney-client relationship is personal to the fiduciary. If the relationship is with the office, then the attorney would represent all who hold that office. But because Texas courts have held to the contrary that an attorney's representation does not automatically extend to all fiduciaries and can be limited to just one co-fiduciary, these holdings provide further support for the argument that the attorney-client relationship is personal to the fiduciary.

3. Texas Rules of Evidence 503 Does Not Contain An Exception

In addition to the language of the cases, other indications in Texas law point to the attorney-client relationship being personal to the fiduciary. Once a party establishes the attorney-client privilege, the burden is on the party seeking the information to establish an exception. *See, e.g., In re Gen. Agents Ins. Co. of Am., Inc.*, 224 S.W.3d 806, 819 (Tex. App.—Houston [14th Dist.] 2007, orig. proceeding) ("Once the party resisting discovery establishes that documents are protected by the attorney-client privilege, the party seeking the documents may establish that the crime-fraud exception applies to defeat the privilege."). Assuming the attorney-client privilege attaches, the burden would then be on the successor fiduciary, as the party seeking the privileged information, to establish an exception.

But no existing exception applies. Texas Rule of Evidence 503(d) provides five exceptions to the attorney-client privilege: (A) furtherance of crime or fraud, (B) proceeding between spouses in civil cases, (C) crime against spouse or minor child, (D) commitment or similar proceeding, and (E) proceeding to establish competence. By their terms, none of the exceptions of Rule 503(d) apply to the successor fiduciary relationship, so a judicially created exception would have to be created.

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The Texas Supreme Court has already shown a reluctance to create an exception to the attorney-client privilege in this context. In *Huie*, one of the underpinnings of the Court's holding was that "Rule 503 contains no exception applicable to fiduciaries and their attorneys." 922 S.W.2d at 924-25. The Court then declined to create such an exception: "If the special role of a fiduciary does justify such an exception, it should be instituted as an amendment to Rule 503 through the rulemaking process . . . [rather than] retroactively amending the rule through judicial decision." *Id*. at 925.

As none of the exceptions in Texas Rule of Evidence 503(d) apply to the fiduciary-attorney situation and the Texas Supreme Court declined to create an exception in the fiduciary context, it is yet another indication that the successor fiduciary does not share in the privilege.

B. If You Represent the Successor Fiduciary

But if you represent the successor fiduciary, does that mean you advise your client that she has no right to even request the file? Of course not! After all, Texas courts have never directly considered the issue. Why parse through tangentially related cases and rules of evidence, when one can consult out of state cases that have directly ruled on the issue.

In *Moeller v. Superior Court*, the successor trustee sought discovery of confidential communications between the predecessor trustee and an attorney on matters of trust administration. 947 P.2d 279 (Cal. 1997). The predecessor trustee resisted, asserting the attorney-client privilege. *Id*. The court held that the privilege could not be asserted and the documents had to be produced, because "the power to assert the attorney-client privilege with respect to confidential communications a predecessor trustee has had with its attorney on matters concerning trust administration passes from the predecessor trustee to its successor upon the successor's assumption of the office of trustee." *Id*. at 326.

New Jersey and Arizona are other jurisdictions in accord with the California rule. *In re The Kipnis Section 3.4 Trust*, 329 P.3d 1055, 1064 (Ariz. Ct. App. 2014) ("we hold that a predecessor trustee cannot assert the attorney-client privilege against a successor trustee as to legal advice that the predecessor trustee sought in its fiduciary capacity on matters of trust administration"); *In re Estate of Fedor*, 811 A.2d 970, 972 (N.J. Ch. Div. 2001) (holding that "when the office of trustee passes from one person to another, the power to assert the attorney-client privilege passes as well.").

Citing these cases, a leading commentator has agreed that the privilege passes to the successor trustee. *See* The New Wigmore: Evidentiary Privileges § 6.5.2 (2015) ("[A] successor trustee inherits from a predecessor trustee the power to determine whether to assert the attorney-client privilege. The power automatically passes to the new trustee upon his or her assumption of the office of trustee.").

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This result makes its own intuitive sense. The estate/trust paid for the legal advice. Not the fiduciary. How can the previous fiduciary claim that the relationship is personal to him when he was not the one footing the bill? Shouldn't the work paid for by the estate/trust remain with the person whom it would benefit the most, i.e. the successor fiduciary?

III. Conclusion

While Texas courts have ruled that an attorney does not represent the estate/trust, no Texas court has decided whether the attorney-client relationship runs with the office of the fiduciary or if it is personal to the fiduciary. Thus, it is an open question whether a successor fiduciary steps into the attorney-client relationship established between the predecessor fiduciary and his attorney.

With no clear authority, both the previous fiduciary and the successor fiduciary have grounds for their position. The previous fiduciary will claim that indications from Texas cases, the analogous co-fiduciary scenario, and the Texas Rules of Evidence support his position that the attorney-client relationship is with him personally. But the successor fiduciary will point to cases from other jurisdictions that definitively hold that the attorney-client relationship runs with the office of the fiduciary.

So the answer to your clients is that there is no answer. The best advice to give to the prior fiduciary is to not hand over the communications without a court order. And the best advice to the successor fiduciary is to request the communications, but to be prepared for the previous fiduciary to refuse the request and be forced to go to court to compel them. That is the most likely result until the Texas courts issue a decision resolving the tension.

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