

# Preserving the Attorney-Client Privilege: Practical Advice to Shift the Balance in Your Favor

## Article

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The attorney-client privilege is a long-recognized legal principal that, in general terms, serves to protect confidential communications between an attorney and his or her client from disclosure. As exemplified by Delaware case law, it is not always clear whether or how the privilege will be applied with respect to communications between a fiduciary and counsel when the communications relate to a trust. Developments in Delaware's statutory and case law provide insight into how the privilege may be applied and what strategies may be implemented to increase the likelihood that the privilege will be applied in a manner that is consistent with a client's expectations.

## BACKGROUND AND DEVELOPMENT OF DELAWARE LAW

The basic requirements for invoking the attorney-client privilege are set forth in Delaware Rule of Evidence 502(b), which provides that a client can 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 when the communications are between certain categories of people covered by the rule. A court will not honor an otherwise valid assertion of the privilege, however, if one of many well-recognized exceptions apply.<sup>1</sup> This article focuses on the fiduciary exception that, in certain circumstances, allows beneficiaries of a trust to gain access to a fiduciary's communications with counsel.

The fiduciary exception is a common law exception most prominently addressed by the Delaware Court of Chancery in *Riggs Nat'l Bank of Washington, D.C. v. Zimmer*, 355 A. 2d 709 (Del. Ch. 1976). In *Riggs*, the trustees hired counsel to prepare a memorandum addressing legal issues and providing an opinion in connection with a petition for instructions and in anticipation of potential tax litigation on behalf of the trust. When the beneficiaries later filed a claim against the trustee for breach of trust in connection with tax-related matters, the beneficiaries sought the memorandum in discovery.

To determine whether the memorandum was protected from production by the attorney-client privilege, the court conducted a two-step analysis.

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First, the court considered whether the trustees had retained counsel (a) to represent the trust and to provide advice that would advance the interests of the trust and its beneficiaries, or (b) to protect the trustees' own interests in anticipation of litigation in which the trustees would be defendants. *Id.* at 711-12. To answer this question, the court examined the "the purpose for which [the memorandum] was prepared, and the party or parties for whose benefit it was procured, in relation to what litigation was then pending or threatened." *Id.* at 711. The court concluded that the memorandum was prepared for the benefit of the beneficiaries of the trust, as opposed to the trustees' own defense in any litigation against the trustees. That court's analysis focused on the fact that the memorandum had been commissioned in connection with potential tax litigation between the trust and the state rather than claims against the trustee, but also noted that the attorney's fees for the advice had been paid from the property of the trust, which the court found to be "a strong indication of precisely who the real clients were" and a "significant factor" favoring the beneficiaries' access to the memorandum. *Id.* at 711-12.

Second, the court considered whether the beneficiaries should be permitted to inspect documents prepared by an attorney on their behalf at the request of the trustees or whether the privileges asserted were of "such compelling importance" as to allow the documents to be withheld. *Id.* at 712. The court found that the documents should not be shielded from the beneficiaries, in part because the court believed that it was crucial for beneficiaries to be knowledgeable about the trust's administration so that the beneficiaries could hold the trustees accountable with respect to the trustees' exercise of their fiduciary duties. *Id.* The court noted that this result was consistent with leading treatises and long-standing precedent under English common law, from which Delaware's trust law principles derived. *Id.*

In 2007, Delaware enacted Section 3333 of Title 12 of the Delaware Code, which codified a fiduciary's right to retain counsel in connection with any claim that has or might be asserted against the fiduciary and provided that the payment of counsel fees and related expenses from the fiduciary fund would not cause the fiduciary to waive or to be deemed to have waived any right or privilege including, without limitation, the attorney-client privilege. Section 3333 has been modified several times since its enactment, most significantly in 2015, and now provides as follows:

- (a) In the case of a fiduciary that retains counsel in connection with any matter whether or not related to any claim that has been or might be asserted against the fiduciary and pays such counsel's fees and related expenses entirely from such fiduciary's own funds, any communications with such counsel shall be deemed to be within the attorney-client privilege.
- (b) Except as otherwise provided in the governing instrument, a fiduciary may retain counsel in connection with any matter that is or that might reasonably be believed to be 1 that will become the subject of or related to a claim against the fiduciary, and the payment of counsel fees and related

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expenses from the fund with respect to which the fiduciary acts as such shall not cause the fiduciary to waive or to be deemed to have waived any right or privilege including, without limitation, the attorney-client privilege even if the communications with counsel had the effect of guiding the fiduciary in the performance of fiduciary duties. However, in the event that the fiduciary is determined by a court to have breached a fiduciary duty related to such matter, the court may, in its discretion, deny such fiduciary the right to have all or some part of the fiduciary's counsel fees paid from such fund and may require the fiduciary to reimburse any such fees and expenses that have been previously paid.

As a result of the 2015 amendments, Section 3333 was expanded to expressly provide (i) that communications between a fiduciary and counsel who was both retained by the fiduciary and paid out of the fiduciary's funds shall be deemed to be within the attorney-client privilege and (ii) that the payment of attorney's fees from the trust fund does not cause the fiduciary to waive the attorney-client privilege even with respect to communications that have the effect of guiding the fiduciary in the performance of its fiduciary duties. 80 Del. Laws ch. 153 (2015) (amending 12 Del. C. § 3333). The 2015 modifications could reasonably be read to create a bright line rule providing that, if the source of payments for counsel was the trustee's own funds, any confidential communication with such counsel is deemed privileged.

In 2019, the Court of Chancery had an opportunity to reconsider *Riggs* in light of Section 3333. In *J.P. Morgan Trust Company of Delaware v. Fisher*, 2019 WL 6605863 (Del. Ch. Dec. 5, 2019) (Laster, V.C.)<sup>2</sup>, the trustee consulted with counsel regarding several proposed alternatives related to a financial transaction that would significantly affect a valuable trust asset. After deciding upon a course of action, the trustee filed a petition seeking a declaration that the trustee had acted properly in all respects. In discovery, the beneficiaries sought the production of documents from the trustee relating to the transaction. The trustee produced some of the requested documents, but withheld others on the basis of the attorney-client privilege.

In deciding the motion, the court applied the *Riggs* two-step analysis. First, the court concluded that the trustee was obtaining advice in its role as trustee about matters pertaining to the trust and not for its own defense. *Id.* at \*6-7. Next, the court concluded that the production of the requested information was necessary to enable the beneficiaries to evaluate the trustee's actions in the exercise of its fiduciary duties. Thus, the court concluded that production was required under the *Riggs* analysis. *Id.* at \*7.

Turning to the impact of Section 3333, the court concluded that the statute did not supersede *Riggs* or render it inapplicable. Instead, the modifications clarified that the source of payment for counsel's fees for the advice has been "de-emphasized" and is "not dispositive" of the trustee's ability to maintain privilege, and further clarified that a claim against the trustee need not be filed or explicitly

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threatened for the trustee to maintain privilege as long as it was one “that might reasonably be believed to be one that will become the subject of a claim.” *Id.*

Notably, the court specifically addressed and rejected the trustee’s argument that, by modifying Section 3333, the General Assembly adopted a bright line rule that payment of counsel’s fees from the trustee’s own funds causes **any** confidential communications with such counsel to be covered by the attorney-client privilege. Instead, the court found that Section 3333(a) merely codifies a fiduciary’s common law right to retain counsel and invoke the privilege without creating a statutory barrier to the application of an exception to defeat a claim of privilege in such circumstances. Accepting the trustee’s argument would have overruled *Riggs*—the progenitor of “an established line of Delaware authority” and the “leading American case on the fiduciary exception”—and supplanted the myriad other exceptions to the attorney-client privilege that may otherwise be applicable. *Id.* \*10. The court concluded that result was not a reasonable reading of the language or legislative history of Section 3333. *Id.* \*8-10.

In sum, the court in *Fisher* affirmed the continued viability of *Riggs* and interpreted the 2015 amendments to Section 3333 to (i) clarify that communications between a trustee and counsel may be protected by the attorney-client privilege notwithstanding whether counsel’s fees are paid from the trustee’s own funds or the trust fund, but (ii) not alter or address Delaware law providing that the application of exceptions to the attorney-client privilege, such as the fiduciary exception, may defeat an assertion of privilege in either such circumstance.

### PRACTICAL ADVICE

The lesson in *Fisher* is clear: trustees cannot rely on the source of payments to preserve the privilege. Instead, the measure of whether beneficiaries of a trust may gain access to a trustee’s communication with counsel is still based on the recipient of and the nature of the advice. Under Delaware law, a trustee may only withhold from beneficiaries legal advice that the trustee received regarding a claim asserted against the trustee or regarding a matter that might reasonably be believed to be a matter that will lead to such a claim.

If trustees desire to maintain the privilege over such communications with their counsel, they should consider (1) taking steps in advance to establish a foundation that the legal advice is not subject to production under *Riggs*—*i.e.*, that the advice was provided to the trustee to protect the trustee’s own interests against pending or potential claims by the beneficiaries; and (2) taking steps when asserting the privilege to highlight why the communication is protected.

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### 1. ESTABLISH THAT THE RECIPIENT OF THE ADVICE IS THE TRUSTEE (NOT THE TRUST)

#### SEPARATE COUNSEL

One method of demonstrating that the advice relates to the trustee's defense against anticipated, threatened, or asserted claims and not about how to carry out its duties to the trust and its beneficiaries is to retain separate counsel to advise the trustee with an engagement letter that limits the scope of the engagement to issues involving the trustee's potential liability to the beneficiaries.

#### SEPARATE PAYMENTS

Whether counsel's fees are paid using trust funds or using the trustee's own funds is not dispositive, but when considered with other factors, paying for legal advice using the trustee's own funds may weigh in favor of a finding that the advice was provided for the benefit of the trustee and not the trust.

#### SEPARATE COMMUNICATIONS

Assuming that separate counsel is not retained, trustees should consider maintaining separate, readily-identifiable lines of communications with counsel (i) for legal advice about how to carry out its duties to the trust and its beneficiaries; and (ii) for legal advice obtained for the trustee's own defense against anticipated, threatened, or asserted claims. Separate lines of communication will emphasize the separate nature of the advice and may aid in the assertion of the privilege months or years later by (a) making privileged communications easier to identify, distinguish, and redact; (b) simplifying the process of describing the communications on a privilege log; and (c) focusing the Court on privileged communications in the event they are subject to *in camera* review.

### 2. VIEW THE PRIVILEGE LOG AS AN OBJECTIVE OBSERVER

When the trustee's assertion of privilege is tested in litigation by withholding documents from the beneficiaries in discovery, the trustee's counsel will be required to prepare a detailed log of withheld documents that identifies, among other things, "the subject matter of the communication sufficient to show why the privilege applies, [which] *must show sufficient facts as to bring the identified and described document within the narrow confines of the privilege.*" *Klig v. Deloitte LLP*, 2010 WL 3489735, \*5 (Del. Ch. Sept. 7, 2010) (Laster, V.C.) (emphasis added).

To maintain the privilege and avoid production under *Riggs*, it is critical that the descriptions of the subject matter of the withheld communications are sufficient that the opposing party and the court can understand the basis for the claim of privilege and assess its propriety. *Klig*, 2010 WL 3489725, at \*5. In *Fisher*, the Court reinforced the importance of such descriptions in the context of a trustee

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seeking to withhold documents from a beneficiary, finding that the descriptions on the trustee's privilege log "indicate that counsel was performing work on behalf of the trust ..." and supported the conclusion that the legal advice at issue "affected core concerns of the trust and its beneficiaries." *Fisher*, 2019 WL 6605863, at \*3, 7.

Thus, trustees should take care to work with outside counsel to ensure the descriptions of documents conveying legal advice to protect the trustee's own interests against pending or potential claims by the beneficiaries are clearly indicated to a neutral observer working without the document to provide context. Those descriptions should convey that the withheld document (1) conveys legal advice; (2) from the trustee's counsel; (3) regarding a pending or potential claim against the trustee by the beneficiaries.

Compare the following examples:

### EXAMPLE 1.

A third party has approached the trustee with an offer to purchase trust property. The trustee is concerned about its potential liability to the beneficiaries for selling the property and has retained counsel to advise it about such liability. The trustee has asserted privilege over an email from its counsel explaining to the trustee how to conduct the sale in a manner that minimizes its potential liability to the beneficiaries. Consider the following descriptions of the email:

A: Email with legal counsel regarding potential sale of trust property.

B: Confidential chain email communication with counsel to trustee requesting and providing legal advice regarding trustee's potential liability to beneficiaries for selling trust assets.

### EXAMPLE 2.

One of two beneficiaries have approached the trustee about decanting the trust. The trustee is concerned about its potential liability to the non-consenting beneficiary for conducting the decanting and has retained counsel to advise it about such liability. The trustee has asserted privilege over a memorandum from its counsel discussing possible claims that the non-consenting beneficiary could assert against the trustee. Consider the following descriptions of the memorandum:

A: Memorandum from legal counsel regarding decanting.

B: Confidential memorandum from counsel to trustee providing legal advice regarding trustee's potential liability to beneficiary for decanting trust.

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In both examples, description A is accurate, but leaves the opposing party and the Court with questions. Description B, on the other hand, provides the opposing party and the court with the facts necessary to assess whether the withheld communication falls within the *Riggs* exception. There are no guarantees in litigation, but a description that clearly meets the elements of Delaware law for withholding the communication better positions the trustee with opposing counsel and the court if a dispute arises—and may avoid one altogether.

### CONCLUSION

The Court of Chancery has provided trustees with guideposts to determine what communications with counsel must be disclosed to beneficiaries and what communications can be protected as privileged. In short, the recipient of and the nature of the advice is key: legal advice about how a trustee should carry out its duties to the trust and its beneficiaries likely must be produced to the beneficiaries, while legal advice obtained for a trustee's own defense against anticipated, threatened, or asserted claims likely can be withheld. Trustees who desire to obtain legal advice must understand the distinction and take steps at the time the advice is rendered and the time the privilege is asserted to protect their communications with counsel from disclosure.

<sup>1</sup> Delaware Rule of Evidence 502(d) sets forth a non-exhaustive list of six exceptions. Other common law exceptions, like the fiduciary exception, are also recognized.

<sup>2</sup> The matter was resolved by a final judgment and order entered on September 16, 2021. No appeal was filed.

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**PRACTICE AREAS**

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