Walking the Line: Navigating Ethical Duties When Working With the Client's Team of Advisors

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In addition to handling high-stakes trust and estate cases, Dave helps corporate and individual fiduciaries and family offices avoid litigation by proactively managing their risk and defusing difficult situations before they reach the courthouse. He is a regular lecturer and panelist on topics relating to fiduciary litigation and managing fiduciary risk.

Chambers High Net Worth Guide, a respected independent rating service, has assigned Dave its highest "Band 1" rating for Private Wealth Disputes in Illinois, noting that respondents describe him as "truly exceptional in his wisdom, skill and responsiveness" and "an exemplary lawyer that excels in all categories."

Dave is a Fellow of the American College of Trust and Estate Counsel (ACTEC) and is an active member of ACTEC's Fiduciary Litigation and Fiduciary Administration Committees. He earned his bachelor's degree from Princeton University and his law degree from Northwestern University School of Law.

KIM KAMIN is a partner at Gresham Partners LLC, an independent wealth management firm currently serving about 125 families nationally as a multifamily office. At Gresham, Ms. Kamin serves as Chief Wealth Strategist, leading Gresham's development and implementation of estate, wealth transfer, philanthropic, educational, and fiduciary planning activities. Previously she was a partner in the Private Clients, Trusts and Estates Group at a large national law firm where for many years her legal practice involved all aspects of trust and estate planning, administration, and dispute resolution; advising families and their privately held businesses on a wide array of wealth preservation, asset protection and succession planning issues; and serving as counsel for the formation and operation of not-for-profit entities.

Ms. Kamin is an adjunct professor at the Northwestern University Pritzker School of Law where she was awarded the William M. Trumbull Lectureship, and has taught Advanced Trusts and Estates, Income Taxation of Trusts and Estates, and Estate Planning. She is also on faculty for the Certified Private Wealth Advisor® (CPWA®) program through the University of Chicago Booth School of Business Executive Education.

Ms. Kamin is a Regent of the American College of Trust and Estate Counsel (ACTEC), is Past President of the Chicago Estate Planning Council, and serves on the Advisory Board, Leaders Council and as Estate Planning & Legal Issues Domain Chair for the UHNW Institute. She also served on the Founders' Committee for the University of Chicago Center of Law and Finance.

Ms. Kamin is on the UHNW Families & Family Offices Committee of the *Trusts & Estates Magazine* Editorial Advisory Board, on the *Investments & Wealth Review* Editorial Advisory Board, and has authored numerous pieces at http://wealthmanagement.com/author/kimkamin. She has published on a wide variety of topics and is also a frequent lecturer in a variety of venues across the country (including, but not limited to, ACTEC, AICPA Engage, ALI-CLE, Family Office Exchange, Great Plains Federal Tax Institute, Heckerling Institute on Estate Planning, Hawaii Tax Institute, Kansas City Estate Planning Symposium, Montana Tax Institute, Notre Dame Tax & Estate Planning Institute, Purposeful Planning Institute, Sacramento Estate Planning Council Technical Forum, Seattle Estate Planning Council, South Dakota Trust Association, Tulane Tax Institute, and UCLA/CEB Estate Planning Institute).

She is co-executive editor and co-author for the Leimberg Library Tools & Techniques book, *Estate Planning for Modern Families* (4th Ed. 2024), and she has been a contributing author for chapters in books, including the recent *Wealth of Wisdom: Top Practices for Wealthy Families and Their Advisors*.

She serves on advisory boards for multiple local philanthropic organizations: the Chicago Community Trust Professional Advisory Council, the Art Institute of Chicago Gift Planning Advisory Committee, the Northwestern Memorial Foundation Professional Council for Philanthropy, the Goodman Theatre Spotlight Advisory Council, the Chicago Foundation for Women Professional Advisory Council, WTTW/WFMT Planned Giving Advisory Committee, PAWS T&E Professional Advisory Board (Chair), and the Executive Committee for the Lurie Children's Legacy Partners. She also serves on the Chicago Stanford Association's Board of Leaders. She is a member of The Economic Club of Chicago, where she has served on several committees.

Ms. Kamin received her B.A., with distinction and departmental honors in Psychology, from Stanford University and her J.D. from the University of Chicago Law School. She is an AEP® (Distinguished) and a 21/64 Certified Advisor.

DOMINGO SUCH serves as the firmwide chair of the Family Office Services practice, a multi-disciplinary practice representing family offices and quasi-family office arrangements comprised of operating companies, boards of directors, fiduciaries, and beneficiaries. He also serves on the Firmwide Partner Compensation Committee and the Firm's Strategic Diversity Committee. Using his MBA education and business acumen, he advises public and private businesses and single and multifamily offices (including trustees and trust companies), serving as general counsel and driving their legal strategy in significant and complex matters. On behalf of family office clients, he participated in obtaining the 2020 year-end SEC ruling favorable to family offices building on the seminal family office exclusion obtained by the firm ten years prior in partnership with the Private Investor Coalition. Recently, he has been a part of the direct investment and monetization of portfolio companies through SPACs and PIPEs. He provides innovative and timely advice on income, gift, estate and generation-skipping transfer tax planning matters, charitable giving and planning for succession of ownership during life and at death through estates and trusts. *Chambers Global High Net Worth Guide* notes that Domingo "understands the family implications and emotional implications of estate plans." His representation of wealthy families and high-net worth individuals is distinctive for its business pragmatism that contributes to transactions coming to fruition and holistic relations-based solutions for family systems and the family members.

Ranked in *Chambers Global High Net Worth Guide* for Private Wealth and Family Offices & Fund Structuring, Domingo is acknowledged as being "extremely conscientious of all issues arising within the trust and estate field. He is financially astute and thinks about next steps and drafting of documents that reflect such expertise. His breadth of knowledge is unbounded." His representation of family offices and its principals is distinctive for its business pragmatism and holistic approach.

As Domingo's clients' often have issues related to tax, business, corporate, litigation, and intellectual property, he leverages the strengths of his firmwide colleagues in these areas to reach optimal solutions for clients. For more than 25 years, Domingo has advised and counseled clients in such areas as transfer tax, income tax, business and succession planning, executive compensation planning for private and public companies, charitable organizations, and organic corporate restructuring transactions. Clients recognize Domingo for providing high-value, strategic solutions and extraordinary client service on the confidential and private matters vital to his clients' interests.

These materials and the presentation to which they relate are intended to provide attendees with general guidance. They do not constitute, and should not be treated as, legal or tax advice, including advice regarding the use of any particular estate planning technique or the tax consequences associated with any such technique. Each participant should independently verify all statements made in the materials and the presentation before applying them to a particular fact situation and should independently determine both the tax and nontax consequences of using any particular estate planning technique before recommending that technique to a client or implementing it on the participant's own behalf. The presenters and their firms do not assume responsibility for any individual's reliance on the written materials or the presentation. Under rules applicable to the professional conduct of attorneys in various jurisdictions, this information may be considered attorney advertising material.

ArentFox Schiff LLP is a leading U.S. law firm with more than 700 attorneys and is a destination firm for estate planning, family office services, and fiduciary litigation. The firm's lawyers are industry leaders: seven of its partners have been elected Fellows of the American College of Trust and Estate Counsel (ACTEC), the most distinguished professional organization in the field, and its estate planning practice is nationally ranked in *Chambers USA*.

Gresham Partners LLC is an independent investment and wealth management firm that serves clients as a multi-family office and an outsourced chief investment officer. Gresham has been serving select families, family offices, foundations and endowments since the firm was established in 1997. Today, we manage or advise on approximately $10 billion for about 125 families located nationally. We are committed to providing superior investment performance by utilizing select, difficult-to-access managers that are located globally in a full range of asset classes and are not affiliated with Gresham. We make these managers available to our clients in a flexible format well suited to achieving a broad spectrum of investor goals. As a multi-family office, we integrate this investment approach with comprehensive wealth planning and management services to address the full range of each client's financial needs, often avoiding the need for them to maintain a family office. Gresham is wholly owned by its senior professionals; client fees are its sole source of compensation; it avoids conflicts of interest that affect many other firms and serves its clients as a fiduciary, dedicated to serving their best interests. Gresham does not provide legal or tax advice.

Perkins Coie LLP is a leading international law firm founded in 1912, known for providing strategic legal counsel across a wide range of industries and practice areas. The firm emphasizes innovation and value protection, offering services in intellectual property, artificial intelligence, aviation, corporate law, litigation, privacy and data security, and emerging technologies. Perkins Coie regularly publishes insights on legal developments, including jurisdictional rulings, tariff regulations, and aviation proposals. It is also recognized for its estate planning expertise, with attorneys frequently recommended for high-net-worth clients.

The authors welcome your questions or comments about these seminar materials. *In addition, kindly inform the authors if you become aware of any errors or omissions within these materials.*

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I. Introduction

A. The book, *Wealth 3.0: The Future of Family Wealth Advising*,[1] and several related articles[2] offers a fresh perspective on advising families about wealth. The perspective is grounded in a historical context.

B. Prior to approximately 1985 and still dominant in many areas of wealth management, the era of "Wealth 1.0" focused mainly on a family's financial assets without much concern for the family's emotional, psychological, governance or long-term developmental needs.

C. The next forty years of "Wealth 2.0" then introduced profound new thinking and interest in the nonfinancial capitals of the family, leading to the modern ecosystem of wealth management. However, Wealth 2.0 also spawned a variety of negative stereotypes, biases and oft-cited "proofs" about the allegedly high failure rate of wealth longevity in families. Recent debunking of these myths[3] has challenged the pessimism and fear-based strategies that influence what wealth creators believe and what wealth advisors offer to protect the family from the money and the money from the family.

D. The proposed new paradigm of "Wealth 3.0" incorporates four building blocks for a robust new profession of family wealth advising. These interrelated elements are designed to move the field of family wealth advising forward with greater rigor, accountability, efficiency and cost-effectiveness.

1. Improved and integrated practice across relevant professional services;
2. Enhanced multidisciplinary training and credentialing of those who advise families;
3. Organization of a unified field to support education and professionalism; and
4. Enhanced rigorous research to support effective practice and reliable understanding of wealth in families.

II. Estate Planning as a Team Sport

A. *Wealth 3.0 The Future of Family Wealth Advising* notes the legal profession has unique challenges in fitting into a more collaborative cross-disciplinary environment.[4]

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* These materials were originally prepared by Kim Kamin and Jonathan Lee of Gresham Partners based on James Grubman and Kim Kamin, *How to Be a Wealth 3.0 Attorney*, Trusts & Estates, Vol. 163, No. 7/8 (July/Aug. 2024). Sections IV-VI of the materials are derived from those originally prepared by David Blickenstaff and Kim Kamin for the National Association of Estate Planning Council (NAEPC) Webinar, *Attorney-Client Privilege in a Team Environment* (July 2019). The authors gratefully acknowledge assistance with these materials from Emma Rademaker of Gresham Partners and Hanna R. Dameron of ArentFox Schiff LLP.

[1] James Grubman, Dennis T. Jaffe & Kristin Keffeler, *Wealth 3.0: The Future of Family Wealth Advising*, Family Wealth Consulting (2023).

[2] James Grubman, Dennis T. Jaffe & Kristin Keffeler, *Wealth 3.0: From Fear to Engagement for Family Wealth Advisors*, Trusts & Estates, (Feb. 2022, at pp. 18-22); James Grubman, Dennis T. Jaffe & Kristin Keffeler, *Wealth 3.0 in Practice*, Trusts & Estates (Feb. 2023, at pp. 16 – 20); Sharilyn Hale, *Philanthropy and Wealth 3.0,* Trusts & Estates (Apr. 2024, at pp. 44-47).

[3] James Grubman, *There is no 70% rule – improving outcome research in family wealth advising*, International Family Offices Journal (June 2022, at pp. 33 – 38).

[4] *Supra* note 1, at p. 98.

B. Understandably, some attorneys have had questions for how the concepts described in *Wealth 3.0* might apply to them, in light of challenges such as the "family as the client" perspective often taken by family governance specialists, philanthropic advisors and family educators. In the growing shift toward developing integrated strategies among multiple providers, the attorney may feel uncomfortable when asked to share information on behalf of the client and their family.

C. Can responsible attorneys participate in a Wealth 3.0 service environment, or must they be absent from the table where other advisors collaborate?

D. Attorneys may have concerns across a range of issues including: (1) their ethical duties under the professional code in order to maintain their law license, (ii) attorney-client privilege or work product protections especially as they relate to working with third parties, and (iii) their common law duties as fiduciaries. Attorneys must weigh these factors comparing the risks of future family conflicts versus the benefits of helping prevent or ameliorate those potential conflicts through helping to provide integrated services.

III. Professional Ethics

A. Overview.

1. Members of the family advisory team need to understand an attorney's distinctive responsibilities to clients. Attorneys are bound by the rules of professional ethics, and they are fiduciaries with corresponding fiduciary duties. Moreover, they must consider the potential benefits of protecting attorney-client privilege and attorney work product in litigation. The potential consequences of being reported and reprimanded for not faithfully following ethical rules require attorneys to carefully consider the ethics of each family engagement and all interactions with other advisors.

2. The American Bar Association (ABA) publishes Model Rules of Professional Conduct (Model Rules),[5] with each state adopting its own version. Because the Model Rules are designed primarily for litigators and transactional attorneys, they do not always clearly apply to estate-planning attorneys.

3. To fill this gap, the American College of Trust and Estate Counsel (ACTEC) further publishes its own commentaries for attorneys practicing in the trusts and estates area.[6]

4. The primary ethical rules implicated in family representations are: (i) competence, (ii) avoiding conflicts of interest with concurrent or former clients, and (iii) confidentiality.[7]

B. Competence.

1. The primary ethical rule is that attorneys must provide competent representation to clients.

[5] The ABA's Model Rules of Professional Conduct were adopted by the ABA House of Delegates in 1983. They serve as models for the ethics rules of most states. California was the final state to bring its rules into quasi-conformity with the format of the ABA Model Rules of Professional Conduct which it did in 2018.

[6] *ACTEC Commentaries on the Model Rules of Professional Conduct*, ACTEC (Sixth Ed., 2023), https://www.actec.org/wp-content/uploads/2023/08/ACTEC_Commentaries_6th_Rev.pdf.

[7] *See* Kim Kamin, *Fiduciary Duties and Ethical Challenges for Trustees: The Evolving Landscape*, Andersen Tax Family Office Roundtable (June 2017) originally prepared for the 40th Annual Notre Dame Tax & Estate Planning Institute (Nov. 2014).

2. Model Rule 1.1 states that "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[8]

3. Attorneys need to remain cognizant of the extent of their own experience and expertise and avoid giving advice beyond the scope of what they can competently cover.

4. With increased specialization, one lawyer can rarely opine and advise on the plethora of legal issues faced by a family, their trusts and their entities. This means an attorney must naturally collaborate with other attorneys and specialists while respecting their own boundaries of competence and expertise.

5. Competence also recognizes that there are jurisdictional differences in the governing law.[9]

C. Simultaneous Representation of Current Clients.

1. Model Rule 1.7(a) creates the presumption that an attorney cannot provide concurrent representation if: (i) the representation of one client will be directly adverse to another client; or (ii) there is a significant risk that the attorney's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer will materially limit the representation of one or more clients.[10]

2. This applies to both concurrent common representation (commonly referred to as "joint representation") or to any separate but concurrent representation.

3. However, this presumption can be overcome, under Model Rule 1.7(b), if:

   a. The attorney reasonably believes that they will be able to provide competent and diligent representation to each affected client;

   b. The representation is not prohibited by law;

   c. The representation does not involve the assertion of a claim by one client against another client represented in the same litigation or other proceeding before a tribunal; and

   d. Each affected client gives informed consent, confirmed in writing.[11]

D. Ethical Duties to Former Clients.

1. Attorneys must also remain cognizant of their duties to former clients to avoid harming their interests in the same or substantially related matters.[12]

2. Model Rule 1.9 prohibits lawyers from representing new clients in the same or substantially related matters where the client's interests are materially adverse to a former client's, unless

[8] Model Rule 1.1.

[9] Rule 5.5: Unauthorized Practice of Law; Multijurisdictional Practice of Law. Rule 5.5(a) provides that: "A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so."

[10] Model Rule 1.7(a).

[11] Model Rule 1.7(b).

[12] Model Rule 1.9: Duties to Former Clients.

the former client gives informed written consent, and bars misuse or disclosure of information from the prior representation.[13]

E. Advance Conflict Waivers.

1. Advance conflict waivers can be effective only when the client agrees from the outset to permit the attorney to represent other clients in the future, even if those representations may involve conflicting interests. As a general rule, advance conflict waivers are neither binding nor enforceable because the nature of the potential conflict is unknown and hard to clearly explain. For the waiver to be binding, it must be in writing and it must be informed –meaning the client must have a clear understanding of what future conflicts might look like.[14]

2. The estate planning and family representation context, however, may be the best exception to this rule. Clients can agree in advance to waive potential conflicts that may arise in the joint or concurrent representation of other family members and family entities as long as there are concrete examples of such a conflict. For example, that an individual estate plan of another family member may not provide for the client who is waiving the conflict. The discussion with the client around the waivers can also explain other types of conflict that can arise and when it might rise to the level where the attorney would have to withdraw. With families, certain types of conflicts can reasonably be anticipated and explained (*e.g*., divorce, intergenerational disputes, sibling disputes, beneficiary/trustee disputes). Such waivers are intended to provide flexibility in managing future representations where overlapping family or financial interests can be common.

F. Confidentiality.

1. Model Rule 1.6 requires lawyers to maintain client confidentiality by making reasonable efforts to safeguard information related to client representation and only disclosing such information with informed consent, when disclosure is impliedly authorized, or under specific exceptions—such as preventing harm, complying with the law, or defending the lawyer.[15]

2. Except in extreme circumstances, an attorney may not reveal client information without informed consent.[16]

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[13] Model Rule 1.9: Duties to Former Clients.

[14] Model Rule 1.7. *See Sheppard, Mullin, Richter & Hampton, LLP v. J-M Manufacturing Co., Inc.,* 425 P.3d 1 (Cal. 2018) (noting that while advance conflict waivers can be permissible, they must be accompanied by full disclosure of known conflicts to be enforceable). *See also* Roy Simon, *Advance Conflict Waivers in New York—Part 2,* NYPRR Archive (originally published Oct. 2006), https://www.newyorklegalethics.com/advance-conflict-waivers-in-new-york-part-2/ (discussing several cases including *New York and Presbyterian Hospital v. New York State Catholic Health Plan*, Index No. 603640-04 (N.Y. Cty. Sup. Ct., May 25, 2006) and stating that ethics opinions have approved of three types of advance conflict waivers: "(1) specific waivers identifying in reasonable detail the kinds of future conflicts, matters, and adversaries covered by the waiver; (2) "blanket" waivers covering all future matters that are not substantially related; and (3) blanket waivers for all future matters, including substantially related matters."

[15] Model Rule 1.6: Confidentiality of Information.

[16] Model Rule 1.6 provides an attorney may reveal information under certain circumstances such as to prevent crime or fraud, comply with another law or court order and to disclose to the Internal Revenue Service.

3. This obligation is not so different than that of other professional advisors such as accountants or therapists. Similarly, consultants who have signed confidentiality agreements and nondisclosure agreements may have obligated themselves legally to maintain client confidentiality.

G. Jurisdictional Considerations.

1. An additional complexity in complying with the professional ethical rules is that attorneys must carefully review the specific rules of the jurisdiction where they practice, as local law can differ significantly from the Model Rules.

2. The multi-jurisdictional aspect of this can be complicated with wealthy families and family enterprises that commonly have residences, businesses and family members across multiple domestic and international jurisdictions.

IV. Attorney Client Privilege[17]

A. The attorney-client privilege is an evidentiary rule that protects information from being disclosed in discovery or at trial. In general, the privilege applies to communications in confidence between an attorney and client to seek or provide legal advice. It extends to documents or testimony reflecting the substance of the communications, not just the communications themselves.

B. Because one element of privilege is that the communication must be confidential, generally, privilege cannot attach to a communication made in the presence of a third party or without regard for who might hear or read it. The privilege is also deemed to have been waived with respect to communications later disclosed to a third party. Accordingly, certain communications made to clients in the presence of or later shared with other advisors can destroy the privilege.

C. As a practical matter when working with families, however, the circumstances in which privilege must be protected can be rather limited, might extend to the client's agents and are often waived. Therefore, concerns about protecting it are often overstated or can otherwise be addressed more precisely within the team environment serving the family.

D. The privilege tends to be narrowly construed because our civil justice system favors broad disclosure, and the privilege stands in the way of disclosure.[18]

E. Basic Elements.

1. Communications Between Attorney and Client.

a. Although the focus of the privilege is communications made during an *existing* attorney-client relationship, it also applies to a *prospective* relationship. So, when a client consults

[17] This section of the materials and the next are derived from those originally prepared by David Blickenstaff and Kim Kamin for the National Association of Estate Planning Council Webinar (NAEPC), *Attorney-Client Privilege in a Team Environment* (July 2019). *See also*, David C. Blickenstaff & Kim Kamin, *Estate Planning as a Team Sport: Attorneys, Accountants and Other Advisors Working Together – Are Your Communications Privileged?* (IICLE 61st Annual Estate Planning Short Course, May 2018).

[18] *See, e.g., Selby v. O'Dea*, 2017 IL App (1st) 151572.

with a lawyer for purposes of determining whether to hire the lawyer, their exchange is protected.[19]

b. Presumably the privilege also extends to communications between a lawyer and a former client to the extent the lawyer is conveying advice the lawyer previously provided the client with. For example, if a former client calls and says, "remind me why we set up my trust that way," the lawyer should be able to explain the advice they gave the client without jeopardizing the privilege (even though they no longer have an attorney-client relationship). Of course, any new advice the lawyer gave would not necessarily be protected.

c. Sometimes it is not clear whether the lawyer represents the client with respect to the issue at hand (or at all). In these circumstances, whether the communication is privileged depends on whether the client reasonably believed that the lawyer represented them.[20]

2. Legal Advice.

a. To be protected by the privilege, a communication must be for the purpose of seeking or providing legal advice. The privilege does not extend to business or personal advice a lawyer might provide—only legal advice.

b. It is not unusual for attorney-client communications to have multiple purposes. For example, a lawyer for a corporation might be involved in discussions about a proposed transaction, or an estate planner might be involved in discussions about a client's investment decisions. In these situations, the communications will generally be privileged if their primary purpose was to give or receive legal advice.[21]

c. Some courts have required only that legal advice be a significant purpose of the communication, rather than its primary purpose.[22]

d. On the other hand, there is some authority for the proposition that the sole purpose of the communication must be to give or receive legal advice.[23]

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[19] *Grand Jury Proceedings Under Seal v. United States*, 947 F.2d 1188, 1190 (4th Cir. 1991) ("Statements made while intending to employ a lawyer are privileged even though the lawyer is not employed."); *Matter of Bevill, Bresler & Schulman Asset Management Corp.*, 805 F.2d 120, 124 n.1 (3d Cir. 1986) ("The attorney-client privilege protects conversations between prospective clients and counsel as well as communications with retained counsel.").

[20] *See* Edna Selan Epstein, *The Attorney-Client Privilege and the Work Product Doctrine* 178-183 (6th ed. 2017); Restatement (Third) of the Law Governing Lawyers § 14 (2000).

[21] *See, e.g.*, *In re Grand Jury*, 23 F.4th 1088 (9th Cir. 2022), *cert. granted* 143 S. Ct. 80 (2022), *dismissing cert. as improvidently granted*, 143 S. Ct. 543 (2023) (holding that communications to attorneys for the dual purpose of providing legal advice and preparing tax returns were not privileged); *Preferred Care Partners Holding Corp. v. Humana, Inc.*, 258 F.R.D. 684, 689 (S.D. Fla. 2009); *General Electric Capital Corp. v. DirectTV, Inc.*, No. 3:97 CV 1901, 1998 WL 849389, at *6 (D. Conn. July 30, 1998).

[22] *See, e.g.*, *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 757-60 (D.C. Cir. 2014) (privilege applied to communications relating to corporation's internal investigation as long as legal advice was "one of the significant purposes" of the investigation).

[23] *Schaeffler v. United States*, 806 F.3d 34, 40 (2d Cir. 2015) ("[T]he purpose of the communications must be solely for the obtaining or providing of legal advice. Communications that are made for purposes of evaluating the commercial wisdom of various options as well as in getting or giving legal advice are not protected.") (citations omitted).

e. One common approach for determining whether the primary purpose of a communication is legal advice is to ask whether the communication would have been made if legal advice was not being sought. If not, it is privileged.[24]

f. Courts may scrutinize the purpose of a communication more closely when in-house lawyers are involved because these lawyers are often called upon to provide business as well as legal advice.[25]

g. By the same token, the privilege does not shield facts or documents simply because they may be the subject of the attorney's advice. In other words, a client cannot protect information or documents from disclosure by providing them to their lawyer.

h. Similarly, communications cannot be "laundered" by sharing them with a lawyer. Simply copying one's lawyer on a communication, or sending a communication to a third party through one's lawyer, does not make it privileged.

i. As a matter of public policy, some communications are not protected by the privilege even if they were made for the purpose of seeking or providing legal advice. For example, advice obtained to further a crime or fraud is not privileged, and some rules of professional conduct permit or affirmatively require the lawyer to disclose otherwise privileged communications to prevent certain conduct, such as bodily harm.[26]

3. Confidentiality and Waiver.

a. Because one element of privilege is that the communication must be confidential, generally privilege does not attach (for example) to a communication that is made in the presence of a third party or without regard for who might hear, and the privilege will be deemed to have been waived with respect to communications that are later disclosed to a third party.

b. Although a waiver must be intentional, intentional does not necessarily mean the client meant to waive the privilege.

c. Ordinarily waiver means the intentional relinquishment of a known right. But that does not mean privilege can be waived only if the client affirmatively decides to do so. Rather, privilege attaches in the first place, and continues to apply, only if the client reasonably guards the confidentiality of the communication.

d. "A privileged person would seldom be found to waive, if his intention not to abandon could alone control the situation. There is always also the objective consideration that when his conduct touches a certain point of disclosure, fairness requires that his privilege

[24] Epstein, *The Attorney-Client Privilege and the Work Product Doctrine* at 426.

[25] David M. Greenwald & Michele L. Slachetka, "*Protecting Confidential Legal Information: A Handbook for Analyzing Issues Under the Attorney-Client Privilege and the Work Product Doctrine*," at 40 (Jenner & Block Practice Series 2023), https://www.jenner.com/a/web/kWjUNH1R2pH413dWnGepTN/2023-protecting-confidential-legal-information.pdf (visited September 2, 2025) (hereinafter *Protecting Confidential Legal Information*).

[26] *See, e.g., In re Chevron Corp.*, 633 F.3d 153, 166 (3d Cir. 2011) (crime-fraud exception); Ill. R. Prof. Conduct 1.6 (lawyer may reveal confidential information in order to prevent a crime or certain kinds of fraud and must reveal such information "to the extent the lawyer reasonably believes necessary to prevent reasonably certain death or substantial bodily harm").

shall cease whether he intended that result or not. He cannot be allowed, after disclosing as much as he pleases, to withhold the remainder."[27]

e. Even though the privilege belongs to the client, it can be waived without the client's knowledge or consent. In particular, it can be waived by agents of the client, including attorneys, as long as doing so is within the scope of the agent's authority. Such authority may be express or implied.

f. An attorney is generally considered to have implied authority to disclose confidential communications, so the attorney's disclosure will typically bind the client.[28]

g. "Since the privilege is most frequently lost through actions taken or not taken by counsel, prudent counsel must be sure that the actions taken do not result in an unintentional waiver of the privilege."[29]

h. In an organizational setting, the power to waive the privilege resides with management.[30] But because organizations act through their employees or other agents, in practice privilege can be waived by representatives other than directors and officers.[31]

i. As one commentator puts it, "the key to the holding as to whether the waiver was authorized is whether the indicia are that the party doing the disclosure was acting in the capacity of an authorized agent of the corporate or other non-individual entity -- partnership, government unit, trust -- and had no personal ax to grind in doing so. However stupid the disclosure may have been, if the answer to both questions is in the affirmative, a waiver will and should result."[32]

j. Failure to assert the privilege when communications are about to be disclosed, or to take prompt corrective steps once disclosure has occurred, constitutes waiver.[33]

k. "Once the client knows or reasonably should know that the communication has been disclosed, the client must take prompt and reasonable steps to recover the communication, to reestablish its confidential nature, and to reassert the privilege. Otherwise, apparent acceptance of the disclosure may reflect indifference to confidentiality. Even if fully successful retrieval is impracticable, the client must nonetheless take feasible steps to prevent further distribution."[34]

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[27] John H. Wigmore, *Evidence* § 2327 (J. McNaughton rev. 1961).

[28] Restatement (Third) of the Law Governing Lawyers § 79 cmt. c (2000); Epstein, The Attorney-Client Privilege and the Work Product Doctrine at 33 ("courts assume that an attorney has the authority and obligation to act on the client's behalf in terms of both asserting or waiving the privilege").

[29] Epstein, The Attorney-Client Privilege and the Work Product Doctrine at 35.

[30] *Commodity Futures Trading Commission v. Weintraub*, 471 U.S. 343, 348-49 & n.5 (1985).

[31] Restatement (Third) of the Law Governing Lawyers § 78 cmt. c (2000) ("The power of an agent, such as an employee of an organization, to waive the privilege is determined under the law of agency.").

[32] Epstein, The Attorney-Client Privilege and the Work Product Doctrine at 44.

[33] *See* Restatement (Third) of the Law Governing Lawyers § 78 cmt. e (2000); *Dalen v. Ozite Corp*., 230 Ill. App. 3d 18, 27-28 (2d Dist. 1992) (waiver of work product protection by conduct inconsistent with intention to maintain confidentiality).

[34] Restatement (Third) of the Law Governing Lawyers § 79 cmt. h (2000).

l. Waiving privilege with respect to a particular communication can be deemed a waiver with respect to all communications dealing with the same subject matter.[35]

m. So even if revealing an individual communication is not harmful on its own, the collateral damage can be significant.

n. "At Issue" Waiver.

(1) One way the privilege can be waived is by placing the attorney-client communications "at issue," meaning the legal advice itself is relevant in the case. For example, a common defense to certain charges of wrongdoing is that the defendant acted on the advice of counsel. A company accused of willfully infringing a patent may rely on its attorney's opinion that it did not infringe, or a fiduciary might rely on its attorney's advice about the proper administration of a trust.[36]

(2) In these circumstances, the privilege is deemed to be waived.[37] As a matter of fairness, a party cannot selectively waive the privilege, using attorney-client communications for its own purposes (as a sword) while invoking the privilege (as a shield) to resist disclosing related communications.

o. Federal Rule of Evidence 502.

(1) FRE 502 was adopted in 2008. It limits the scope of subject matter waiver and softens the impact of inadvertent disclosure.

(2) Note that FRE 502 does not apply in state court proceedings, which is where most trust/estate disputes are litigated, though some states have adopted parallel rules.[38]

p. Disclosure Protected by Another Privilege.

(1) If attorney-client communications are disclosed in a context that is protected by another privilege, the disclosure is not deemed a waiver of the attorney-client privilege. For example, telling your spouse, spiritual advisor, or doctor about your communications with your lawyer will not constitute waiver if applicable law recognizes a spousal, physician-patient, or confessional privilege.[39]

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[35] *See, e.g.*, *In re Consolidated Litigation Concerning International Harvester's Disposition of Wisconsin Steel*, 666 F. Supp. 1148, 1153 (N.D. Ill. 1987) ("The general rule is that voluntary disclosure of privileged attorney-client communication constitutes waiver of the privilege as to all other such communications on the same subject. This rule reflects two general principles: (1) only confidential matters are protected by the attorney-client privilege; and (2) a party should not be allowed to exploit selective disclosures for tactical advantage.") (citation omitted).

[36] *See, e.g*., 760 ILCS 3/807 (providing that if the trustee uses reasonable care, skill, and caution in the selection of an agent, defines the scope and terms of the delegation in accordance with the purposes of the trust and the trust instrument, and periodically reviews the agent's performance, the trustee shall have no responsibility for actions taken by the agent).

[37] *See, e.g., United States v. Mendelsohn*, 896 F.2d 1183, 1188-89 (9th Cir. 1990); Restatement (Third) of the Law Governing Lawyers § 80(1) (2000).

[38] *See, e.g*., Ill. R. Evid. 502.

[39] Epstein, *The Attorney-Client Privilege and the Work Product Doctrine* at 636; *Solomon v. Scientific American, Inc.*, 125 F.R.D. 34, 38 (S.D.N.Y. 1988) (spouse); *Murray v. Board of Education of the City of New York*, 199 F.R.D. 154, 155-56 (S.D.N.Y. 2001) (psychiatrist) ("There is no waiver when the disclosure is made in another communication that is itself privileged. For example, a person does not waive the lawyer-client privilege by telling a psychotherapist in confidence what the person told the lawyer.") (quoting Weinstein's *Federal Evidence* § 511-07).

q. *Burden of Proof*. Consistent with the view that the privilege must be narrowly construed, "[m]ost courts have held that the absence of waiver is an element of the attorney-client privilege, and that the proponent bears the burden of showing the communication has been kept confidential."[40]

r. Alerting Clients About Confidentiality and Waiver.

(1) Lawyers are generally familiar with the basic concepts relating to attorney-client privilege, including the need to maintain confidentiality and avoid waiver. Clients often are not.

(2) Accordingly, consider labeling your e-mails and other communications with your clients "PRIVILEGED AND CONFIDENTIAL." While the privileged nature of a document does not depend on whether it is labeled in any particular way, applying a label reminds clients and others who may receive the document that its contents should be kept confidential. The label also makes it easier for you or others who may later be responding to a discovery request to identify communications that should be withheld on privilege grounds.

(3) Consider advising clients, in writing, about the privilege. A simple message could read as follows: "You'll see that my e-mails often include 'privileged and confidential' at the top. Your communications with us about the substance of our representation will ordinarily be protected by the attorney-client privilege, meaning that neither you nor we will be required to disclose them to anyone. (That's true whether we include the 'privileged and confidential' label or not, but I often include those words as a reminder.) The privilege can be waived if we disclose our communications to a third party, and if that happens [insert names of people client views as adverse], creditors, or someone else could gain access to them if you end up in litigation. So please make sure that you keep our e-mails and other written communications private. The same goes for things we say to each other on the phone."

F. Multiple Clients.

1. In many estate planning engagements, the lawyer represents multiple parties, whether it be spouses, parents and their adult children, or even an entire multi-generational family group.

2. The lawyer should be careful to define at the outset the terms on which information will be shared among the clients involved in the engagement.

3. In a "no secrets" arrangement, the terms of the engagement provide that the lawyer's communications with any of the clients will be available to all.[41]

[40] Protecting Confidential Legal Information at 112.

[41] The American College of Trust and Estate Counsel recommends this approach. *ACTEC Commentaries on the Model Rules of Professional Conduct* at 86 (6th ed. 2023), https://www.actec.org/wp-content/uploads/2023/08/ACTEC_Commentaries_6th_Rev.pdf ("Absent special circumstances, the co-clients should be asked at the outset of the representation to agree that all information can be shared.").

4. In the absence of an agreement about information flow, the default rule in many jurisdictions is a "keep secrets" approach, meaning that the lawyer cannot disclose what one of the commonly represented clients says to the others without the first client's permission.[42]

5. In a "no secrets" situation, the clients cannot assert the privilege against each other if they later have a falling out.[43]

6. Presumably if the clients in a multi-party engagement agree that some secrets will not be shared between or among them, the privilege will apply accordingly, almost as if each client engaged the attorney separately.[44]

7. What if the clients in a "no secrets" engagement communicate among themselves without the lawyer's involvement? Are their communications privileged as to third parties? The answer is almost certainly yes, provided of course that the communication concerns the subject of the representation and relates to the purpose of seeking or receiving legal advice.

G. *Privilege for Organizations*. When the lawyer's client is an organization (such as a corporate fiduciary), determining whether privilege applies is more complicated. Organizations act through people, but not everyone in an organization is positioned so as to be viewed as part of the "client." Courts have adopted several different approaches to identify those who fall within the circle of privilege.

1. *Upjohn* Approach.

a. In *Upjohn Co. v. United States*,[45] the Supreme Court adopted a multi-factor test for deciding whether a particular person should be deemed to speak for the organization:

(1) "the information is necessary to supply the basis for legal advice to the [organization] or was ordered to be communicated by superior officers";

(2) "the information was not available from 'control group' management";

(3) "the communications concerned matters within the scope of the employees' duties";

(4) "the employees were aware that they were being questioned in order for the corporation to secure legal advice"; and

(5) "the communications were considered confidential when made and kept confidential."

b. *Upjohn* applies when federal law determines the scope of the attorney-client privilege. The *Upjohn* rule has also been adopted in many state jurisdictions.

2. Control Group Test.

a. Some states take a narrower view of privilege in the organizational context, following the "control group" test.

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[42] *See generally* Thomas E. Spahn, *Ethics Issues Facing Trust and Estate Lawyers: Hypotheticals and Analyses* at 62-95, American Bar Association (May 9, 2017), http://media.mcguirewoods.com/publications/Ethics-Programs/9990705.pdf (visited Sept. 2, 2025).

[43] Epstein, The Attorney-Client Privilege and the Work Product Doctrine at 370-75.

[44] *Cf. id*. at 375 (the fact that two clients happen separately to engage the same attorney for their respective affairs does not mean that they share a common legal interest or can access each other's privileged communications).

[45] 449 U.S. 383, 394-95 (1981).

b. This approach holds that only upper-level management should count as the "client" for privilege purposes.

c. For example, in *Consolidation Coal Co. v. Bucyrus-Erie Co.*,[46] Illinois rejected *Upjohn* and adopted an "expanded control group" test. Under this test, "there are two tiers of corporate employees whose communications with the corporate attorneys are protected. The first tier consists of the decision-makers, or top management. The second tier consists of those employees who directly advise top management, and upon whose opinions and advice the decision-makers rely."[47]

d. With respect to the second tier, "employees whose 'opinion' forms the basis of a decision are part of the control group," but "'individuals upon whom [top management] may rely for supplying information are not members of the control group.'"[48]

e. In *Upjohn*, the Supreme Court rejected and criticized the control group test, explaining that it "frustrates the very purpose of the privilege by discouraging the communication of relevant information by employees of the client to attorneys seeking to render legal advice to the client corporation. The attorney's advice will also frequently be more significant to non-control group members than to those who officially sanction the advice, and the control group test makes it more difficult to convey full and frank advice to [the people] who put into effect the client corporation's policy."[49]

3. *Other Approaches*. There are other approaches as well. For example, Michigan follows the "subject matter" test, which extends the privilege to communications "between attorneys and all agents or employees of the organization who are authorized to act or speak for the organization in relation to the subject matter of the communication."[50] California follows a test that applies 11 principles.[51]

4. *Bottom Line*. Needless to say, an attorney interacting with an organizational client needs to know which jurisdiction's law applies and which test that jurisdiction recognizes. When in doubt on either point, it is best to err on the side of limiting communications to the narrowest possible group –and making sure the organization does too.[52]

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[46] 432 N.E.2d 250, 256-58 (Ill. 1982).

[47] *Midwesco-Paschen Joint Venture v. Imo Industries Inc.*, 265 Ill. App. 3d 654, 658 (1st Dist. 1994).

[48] *Doe v. Township High School District 211*, 2015 IL App (1st) 140857.

[49] *Upjohn*, 449 U.S. at 392.

[50] *Hubka v. Pennfield Twp.*, 494 N.W.2d 800, 802 (Mich. Ct. App. 1992), *rev'd in part on other grounds*, 504 N.W.2d 183 (Mich. 1993).

[51] *See D.I. Chadbourne, Inc. v. Superior Court*, 60 Cal. 2d 723, 736-38 (1964).

[52] *See, e.g.,* Epstein, *The Attorney-Client Privilege and the Work Product Doctrine* at 639-42 (conveying attorney's advice to other employees does not waive privilege generally does not waive privilege under *Upjohn*, though there may be a "need-to-know" limitation, and in "control group" states like Illinois, such disclosure may constitute waiver).

H. Agents and Other Third Parties.

1. As discussed in more depth later in this outline, the privilege ordinarily extends both to agents of the attorney and/or agents of the client, meaning that sharing communications with such agents does not waive the privilege.[53]

2. For example, Illinois Supreme Court Rule 201, which governs the scope of discovery, specifically contemplates that a party's agent will fall within the circle of privilege. It provides that "[a]ll matters that are privileged against disclosure on the trial, including privileged communications between a party or [their] agent and the attorney for the party, are privileged against disclosure through any discovery procedure."[54]

3. Note that while the privilege ordinarily survives the death of the client, *Swidler & Berlin v. United States*,[55] death terminates the principal-agent relationship.[56] Accordingly, anyone who had been serving as the client's agent no longer has any authority to act for the client, and disclosing attorney-client communications to the former agent presumably waives the privilege.

I. Ethical Obligation To Protect Privileged Communications.

1. A lawyer has an ethical obligation to protect privileged communications from disclosure.

2. One of a lawyer's most fundamental duties is the duty of confidentiality. The scope of that duty varies somewhat by jurisdiction, but is broader than (and encompasses) the obligation not to disclose information protected by the attorney-client privilege.[57]

3. The lawyer also has a duty of competence under ABA Model Rule 1.1.[58] To be competent, the lawyer must know enough about the privilege to be able to protect it.

J. Common Interest Doctrine.

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[53] Restatement (Third) of the Law Governing Lawyers § 70 (2000); *Selby v. O'Dea*, 2017 IL App (1st) 151572, ¶ 53 ("[T]he attorney-client privilege in Illinois … protects statements made by the client to necessary agents of the attorney or client, including certain nontestifying experts and investigators who assist in the preparation of the case."); *Caremark, Inc. v. Affiliated Computer Services, Inc.*, 192 F.R.D. 263 (N.D. Ill. 2000) (applying Illinois law) (control group can include non-employee agents).

[54] Ill. Sup. Ct. R. 201(b)(2) (emphasis added).

[55] 524 U.S. 399, 405-06 (1998). *See also HLC Properties, Ltd. v. Superior Court*, 35 Cal. 4th 54, 65 (2005) (noting that in California, attorney-client privilege survives death, but transfers to the personal representative and ends when there is no one left to claim it or the estate is wound up).

[56] *Adler v. Greenfield*, 2013 IL App (1st) 121066 ("under agency principles, the death of the principal terminates the authority of the agent"). The same goes for former employees of an organization. *See, e.g.*, *Allen v. Burns Fry, Ltd*., No. 83 C 2915, 1987 WL 12199 (N.D. Ill. June 8, 1987) (former officer could not waive privilege for corporation).

[57] For a broader definition of confidential information, *see* ABA Model R. Prof. Conduct 1.6(a) ("A lawyer shall not reveal *information relating to the representation of a client* unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b)."); *see also* Ill. R. Prof. Conduct 1.6 ("A lawyer shall not reveal *information relating to the representation of a client* unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b) or required by paragraph (c).") (emphasis added). For a narrower definition of confidential information, *see* N.Y. R. Prof. Conduct 1.6 ("'Confidential information' consists of *information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential*.") (emphasis added).

[58] *See, e.g.,* ABA Model R. Prof. Conduct 1.1.

1. Definition.

   a. Two or more clients whose interests are aligned often find it beneficial to "share information that would otherwise be privileged under the attorney-client or work-product doctrines."[59] For example, "[a] lawyer may share privileged information from [their] client with the other party's lawyer. One party may speak to the other party's lawyer. One client may speak to the other client, in the presence of the lawyers. When these communications occur, the parties risk waiving privileges because they are disclosing privileged information to third parties -- the other client and the other client's lawyer."[60]

   b. The common interest doctrine prevents this sharing of privileged communications from being deemed a waiver.[61] The Restatement describes the doctrine this way: "If two or more clients with a common interest in a litigated or non-litigated matter are represented by separate lawyers and they agree to exchange information concerning the matter, a communication of any such client that otherwise qualifies as privileged under [the attorney-client privilege] that relates to the matter is privileged as against third persons. Any such client may invoke the privilege, unless it has been waived by the client who made the communication."[62]

   c. The common interest doctrine is widely accepted across the country.[63] The doctrine goes by many names. It has been called "the joint-defense doctrine, joint-defense privilege, joint-prosecutorial privilege, allied-lawyer privilege, common-interest doctrine, common-interest exception, common interest privilege, common-interest rule, common defense doctrine, pooled-information privilege, common-purpose theory, community-of-interest doctrine, joint-client privilege, joint-client doctrine, common-interest exception to waiver, and shared confidentiality privilege."[64]

   d. The doctrine is most accurately viewed as an exception to the waiver rule: when it applies, it allows privileged communications to be shared with a third party without waiving the privilege as to others.[65]

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[59] *Selby v. O'Dea*, 2017 IL App (1st) 151572.

[60] *Id*; *see also Schaeffler v. United States*, 806 F.3d 34, 40 (2d Cir. 2015).

[61] *Selby*, 2017 IL App (1st) 151572.

[62] Restatement (Third) of the Law Governing Lawyers § 76 (2000) (quoted in *Selby*, 2017 IL App (1st) 151572). To the surprise of many practicing lawyers and perhaps even the court itself, the *Selby* court found that the availability of the common interest doctrine was an issue of first impression in Illinois. After reviewing the logic and history of the doctrine as well as authorities from other jurisdictions, the court recognized the doctrine in the litigation context, but left unanswered (i) whether the doctrine applies in the absence of litigation, (ii) whether it applies when lawyers were not involved in the communications in question, and (iii) whether it applies without a written agreement among the parties claiming a common interest. *See Selby*, 2017 IL App (1st) 151572.

[63] *Selby*, 2017 IL App (1st) 151572 ("we are aware of no jurisdiction that has *rejected* the principle when called upon to recognize it") (emphasis in original).

[64] *Id.* n.1 (quotation omitted).

[65] *Id.* ¶ 40.

e. For the common interest doctrine to apply, the parties sharing privileged communications must have a common interest about a legal matter, not just a common economic or business interest.[66]

2. Issues.

a. *Is a written agreement necessary?* Parties often enter into oral common interest agreements or simply assume that the common interest doctrine applies, but it is easier to withstand a claim of waiver if the agreement is in writing.[67]

b. *Can the common interest doctrine apply outside the litigation context*? Although the doctrine is most clearly recognized in the litigation context (perhaps because that is the most likely context for disputes about the application of the privilege to arise), some courts have held that the doctrine extends to non-litigation situations as well.[68]

c. *Can a communication be protected under the common interest doctrine even if no lawyer is involved*? There is some uncertainty on this point. Some courts have held that the doctrine applies to "communications from one client, agent, or attorney to another commonly interested client, agent or attorney."[69] Other courts have refused to extend the doctrine to client-only communications.[70] In Illinois, it is not clear whether counsel must be present for the common interest doctrine to apply. [71]

d. *What happens to the common interest protection when the parties have a falling out*? "[A]ny privileged communications exchanged between them or by one of them with joint

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[66] *United States v. Schwimmer*, 892 F.2d 237, 243 (2d Cir. 1989) ("The need to protect the free flow of information from client to attorney logically exists whenever multiple clients share a common interest *about a legal matter*.") (emphasis added); *Schaeffler*, 806 F.3d at 40-41 ("The dispositive issue is, therefore, whether the Consortium's common interest with appellants *was of a sufficient legal character* to prevent a waiver by the sharing of those communications.") (emphasis added).

[67] For an annotated sample agreement, *see* Jonathan N. Rosen, *Joint Defense and Confidentiality Agreement*, Practical Law (regularly maintained).

[68] *See, e.g., Schaeffler*, 806 F.3d at 40 ("Parties may share a 'common legal interest' even if they are not parties in ongoing litigation. The common-interest-rule serves to 'protect the confidentiality of communications passing from one party to the attorney for another party where a joint defense effort or strategy has been decided upon and undertaken by the parties and their respective counsel.' '[I]t is therefore unnecessary that there be actual litigation in progress for the common interest rule of the attorney-client privilege to apply [.]' However, '[o]nly those communications made in the course of an ongoing common enterprise and intended to further the enterprise are protected.'") (citations omitted).

[69] *Protecting Confidential Legal Information* at 222; *Haines v. Liggett Group Inc.*, 975 F.2d 81, 90 (3d Cir. 1992) (common interest doctrine applied to communications between clients); *Weber v. FujiFilm Medical Systems USA, Inc.*, No. 3:10cv401 (JBA), 2011 WL 677282, at *2 (D. Conn. Jan. 24, 2011) ("communications among corporate employees, although not directly to or from corporate counsel, can be privileged if those communications are made among employees who need to know their content, i.e. who share the common interest, and are made for the purpose of seeking or receiving legal advice").

[70] *See United States v. Gotti*, 771 F. Supp. 535, 545 (E.D.N.Y. 1991) ("The defendants would extend the application of the joint defense privilege to conversations among the defendants themselves even in the absence of any attorney during the course of those conversations. Such an extension is supported neither in law nor in logic and is rejected.").

[71] *See Selby*, 2017 IL App (1st) 151572, 97-106 (holding that communications between clients having a common interest are protected where counsel is present, but declining to decide whether doctrine applies to client-to-client communications made without counsel present). *See also* Restatement (Third) of the Law Governing Lawyers Section 76 cmt. d (2000) ("a communication directly among the clients [with a common interest] is not privileged *unless made for the purpose of communicating with a privileged person*") (emphasis added).

counsel retain[] [their] privileged character in respect to litigation with third parties. But the privilege will not apply in litigation between the parties. Neither can claim privilege against the other in respect to anything either one of them said to their joint counsel."[72]

3. Conflicts.

   a. In a common interest arrangement, it is important to be clear about whom each lawyer represents and the consequences of the arrangement for future representations. Otherwise, there is a risk that a party to the arrangement will later seek to disqualify counsel for another party on the grounds that the lawyer was privy to the party's confidential information.

   b. Accordingly, parties entering into a common interest agreement should make clear at the outset that the lawyer for each party represents only that party and that a lawyer's receipt of confidential or privileged information from a non-client under the common interest agreement will not be used by the non-client in an attempt to disqualify the lawyer in any future proceeding.

K. Privilege in the Trust/Estate Context.

1. This section highlights several nuances of the privilege that are unique (or particularly relevant) to the trust and estate context.

2. Testamentary Exception.

   a. The attorney-client privilege generally survives the client's death, protecting the client's communications with the lawyer no matter how relevant those communications may be to a subsequent proceeding.[73]

   b. There is an exception to this general rule: "[t]he attorney-client privilege does not apply to a communication from or to a decedent relevant to an issue between parties who claim an interest through the same deceased client, either by testate or intestate succession or by an inter vivos transaction."[74]

   c. The Restatement explains: "The exception … is sometimes justified on the ground that the decedent would have wished full disclosure to facilitate carrying out the client's intentions."[75]

   d. Although the testamentary exception arose in the context of will contests, its logic extends to inter vivos instruments (like revocable trusts), not just to testamentary documents.[76]

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[72] Epstein, *The Attorney-Client Privilege and the Work Product Doctrine* at 410.

[73] *See Swidler & Berlin v. United States*, 524 U.S. 399, 404 (1998); *Eizenga v. Unity Christian School of Fulton*, 2016 IL App (3d) 150519, ¶ 24; *but see HLC Properties, Ltd. v. Superior Court*, 105 P.3d 560, 563 (Cal. 2005) (privilege terminates once administration of client's estate is complete).

[74] Restatement (Third) of the Law Governing Lawyers § 81 (2000).

[75] *Id*. cmt. b; *see also Eizenga*, 2016 IL App (3d) 150519, 25-28.

[76] *See, e.g.*, *Eizenga*, 2016 IL App (3d) 150519, (applying testamentary exception to allow discovery of attorney-client communications relevant to claim that revocable trust was product of undue influence).

3. Fiduciary Exception.

   a. The fiduciary exception to the attorney-client privilege holds that the beneficiary of a trust is entitled to access the trustee's communications with its lawyer notwithstanding that those communications would be privileged with respect to anyone else.

   b. The exception is generally grounded in two rationales: (1) the beneficiary is the lawyer's "real client" or (2) the trustee has a duty to disclose information to the beneficiary anyway, and that duty extends to the trustee's communications with its lawyer.

   c. The doctrine applies to trust administration, not adversarial litigation between the trustee and the beneficiary (where the privilege still stands), but even with that limitation it is a scary concept for fiduciaries and their attorneys, who expect that their conversations and e-mails are truly private.

   d. In the United States, the fiduciary exception traces back to *Riggs National Bank v. Zimmer.*[77] *Riggs* identified three factors to consider in determining whether the fiduciary exception applies: (1) the purpose of the legal advice, (2) whether litigation was pending or threatened between the trustee and the beneficiaries at the time the advice was obtained, and (3) whether the trust or the trustee paid for the legal advice.[78]

      State-by-State Variations. Decisions in several states have recognized the fiduciary exception,[79] and there is also some support for the exception in the federal courts.[80] In addition, the Restatement also adopts the exception.[81] However, not all jurisdictions agree. Some states have rejected the exception,[82] while many other states have not yet decided whether the exception applies in the trust/estate context. For example, the

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[77] 355 A.2d 709 (Del. Ch. 1976).

[78] *Id.* at 711-12; *see also Mennen v. Wilmington Trust Co.*, No. C.A. No. 8432–ML, 2013 WL 4083852 at *4-5 (Del. Ch. July 25, 2013) (Master's Report) (applying the *Riggs* test but noting that the third factor usually is not dispositive).

[79] *See, e.g., Riggs, supra; In re Trust Established Under Agreement of Sarah Mellon Scaife*, 2022 PA Super 93, 276 A.3d 776, 779 (Pa. Super. Ct. 2022), *appeal denied*, 291 A.3d 862 (Pa. 2023) ("[W]e conclude a fiduciary exception to the attorney-client privilege is consistent with Pennsylvania law") (citing *In re Estate of McAleer*, 665 Pa. 275, 248 A.3d 416 (Pa. 2021); *Follansbee v. Gerlach*, 56 Pa. D. & C. 4th 483 (Pa. Comm. Pl. 2002)); *In re Kipnis Section 3.4 Trust*, 329 P.3d 1055, 1061 (Ariz. Ct. App. 2014) ("We … adopt the fiduciary exception and hold that a component of a trustee's duty [to inform] is a duty to disclose '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.'"); *Floyd v. Floyd*, 615 S.E.2d 465 (S.C. Ct. App. 2005) (subsequently superseded by statute).

[80] *See, e.g., United States v. Mett*, 178 F.3d 1058, 1062-66 (9th Cir. 1999) (ERISA context); *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 171 & n.3 (2011) (assuming without deciding that the exception exists); *see also Garner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970) (seminal case applying version of fiduciary exception to derivative actions by corporate stockholders and holding that stockholders have qualified right to access privileged materials).

[81] Restatement (Third) of Trusts § 82, cmt. f (2007) ("A trustee is privileged to refrain from disclosing to beneficiaries or co-trustees opinions obtained from, and other communications with, counsel retained for the trustee's personal protection in the course, or in anticipation, of litigation (e.g., for surcharge or removal). This situation is to be distinguished from 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. Communications of this latter type 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.").

[82] *See, e.g., Haviland v. Johnson*, No. X03-CV-23-6186522-S, 2025 WL 384148, at *11 (Conn. Super. Ct. Jan. 30, 2025); *Canarelli v. Eighth Judicial District Court in & for Cnty. of Clark*, 464 P.3d 114 (Nev. 2020); *Murphy v. Gorman*, 271 F.R.D. 296 (D.N.M. 2010) (predicting New Mexico Supreme Court would not adopt fiduciary exception); *Wells Fargo Bank, N.A. v. Superior Court*, 990 P.2d 591 (Cal. 2000); *Huie v. DeShazo*, 922 S.W.2d 920 (Tex. 1996).

Illinois Appellate Court has mentioned the exception on several occasions but has not adopted the exception in Illinois.[83] Notably, the Uniform Trust Code takes no position.[84]

e. *Statutory Regimes*. Some states have enacted statutes addressing the fiduciary exception.[85]

4. Successor Fiduciaries.

a. Although it is certainly possible for a single fiduciary to serve for the entire lifespan of an estate or trust, turnover is not unusual, and in the trust world it is becoming increasingly common, particularly with the adoption of the Uniform Trust Code and other developments such as decanting.

b. *What happens to the privilege when there is a change of fiduciary?* Courts generally hold that the privilege passes to the successor trustee.[86]

c. Even in jurisdictions where the fiduciary exception is recognized, the successor trustee is *not* entitled to receive privileged communications with the predecessor in the predecessor's personal capacity.[87]

d. Determining which communications were made in the predecessor's personal capacity rather than its fiduciary capacity can be a challenge, just as it is in applying the fiduciary exception itself. And there may be an additional complication if the attorney has duties to the trust itself as well as to the trustee.[88]

5. Co-Fiduciaries.

a. Presumably co-fiduciaries sharing the same lawyer would be treated the same way as any other clients who are involved in a multi-party representation, meaning that their communications with counsel about the matter would not be privileged as between or among them, but would be privileged with respect to third parties (subject to the fiduciary exception and the rights of any successor fiduciary).

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[83] *Mueller Industries, Inc. v. Berkman*, 399 Ill. App.3d 456, 468-69 (2010); *Garvy v. Seyfarth Shaw LLP*, 2012 IL App (1st) 110115, 35-36; *MDA City Apartments LLC v. DLA Piper LLP*, 2012 IL App (1st) 111047, 16-19*; see also Fox v. Riverview Realty Partners*, No. 12 C 9350, 2013 WL 12306483, *3 (N.D. Ill. Dec. 10, 2013) ("The Court believes that if faced with the issue, the Illinois Supreme Court would adopt the exception.").

[84] *See* UTC § 813, comments.

[85] *See, e.g.,* Fla. Stat. § 90.5021; N.Y. Evidence Law § 4503(a)2(A); S.C. Code § 62-1-110.

[86] *See, e.g., Moeller v. Superior Court*, 947 P.2d 279, 288 (Cal. 1997); *Estate of Fedor*, 811 A.2d 970, 972 (N.J. Super. Ct. Ch. Div. 2001) ("[T]he power to waive the privilege passes to the new trustee."); *Kipnis Section 3.4 Trust*, 329 P.3d at 1064; *Fiduciary Trust International of California v. Klein*, 9 Cal. App. 5th 1184 (Ct. App. Mar. 21, 2017).

[87] *Kipnis*, 329 P.3d at 1064 ("when a trustee communicates with an attorney in the trustee's personal capacity on matters not of trust administration, disclosure of that communication may not be compelled by a successor trustee"); *Borissoff v. Taylor & Faust*, 33 Cal. 4th 523, 534 (2004) ("A successor fiduciary becomes the holder of the attorney-client privilege only as to those confidential communications that occurred when the predecessor, in [its] fiduciary capacity, sought the attorney's advice for guidance in administering the trust. Conversely, a successor fiduciary does not become the holder of the privilege for confidential communications that occurred when a predecessor fiduciary in [its] personal capacity sought an attorney's advice.") (quotations, emphases, and citations omitted).

[88] *See Kipnis*, 329 P.3d at 1063 n.3 ("We note that in such situations, counsel quickly may be faced with a conflict of interest between the trustee's individual interests and the interests of the trust.").

b. The analysis could be different if the co-fiduciaries had separate counsel. In that case their communications with their respective attorneys might be privileged even with respect to their fellow fiduciaries, though the co-fiduciaries might argue that the representation is of the fiduciary in their official capacity (perhaps funded by the trust or estate) and that the communications should therefore be available to all the fiduciaries.

c. Of course, the separately represented fiduciaries might enter into a common interest agreement, which would require a different analysis.

L. Other Issues with Attorney-Client Privilege.

1. E-mails.

a. *In General*. E-mails, text messages, and other electronic messaging systems are designed to be easy to use, and we tend to approach them the way we would a phone call or spoken conversation rather than treating them as formal written documents. But from an evidentiary standpoint, e-mails and texts are much more like writings than conversations: they are written materials that cannot easily be altered, destroyed, or forgotten, and they live on even after their authors and recipients are gone.

b. *Forwarding, "Replying to All," and Copying*. Clients should be reminded to be careful about forwarding attorney-client communications to people outside the circle of privilege, "replying to all" with a comment that should be reserved only for counsel, or copying third parties on communications with counsel.

c. *Use of Third-Party Servers*. Individual clients regularly use their work e-mail addresses for communications with their lawyers. Doing so may jeopardize any claim of privilege because the client may not have a reasonable expectation of privacy in communications that pass through or are stored on the employer's computer systems.

(1) Under many employers' information technology policies, e-mail accounts and computers provided by the employer may be monitored by company staff, and employees are advised not to expect that their use of the technology will be private.

(2) In these situations, courts have held that employees do not have a reasonable expectation that their communications with their lawyers are confidential, and therefore that the privilege does not attach.[89]

(3) There is a better argument for preserving privilege if the employee uses a work computer to access a password-protected, web-based personal e-mail account.[90]

(4) But the result in any particular situation will depend on the employer's policy and the facts and circumstances surrounding the e-mails or documents in question. Therefore, the safest approach is to limit attorney-client communications to the client's personal e-mail account and personal computer.

2. Invoices.

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[89] *See, e.g., In re Information Management Services, Inc.*, Consol. C.A. No. 8168–VCL, 2013 WL 5426157 (Del. Ch. Sept. 5, 2013); *Holmes v. Petrovich Development Corp*., 119 Cal. Rptr. 3d 878 (Ct. App. 2011). To determine whether an employee had a reasonable expectation of privacy, courts often use the four-factor test set forth in *In re Asia Global Crossing Ltd*, 322 B.R. 247 (S.D.N.Y. 2005).

[90] *See, e.g., Stengart v. Loving Care Agency*, 990 A.2d 650, 663 (N.J. 2010); *National Economic Research Associates, Inc. v. Evans*, No. 04-2618-BLS2, 2006 WL 2440008 (Mass. Super. Ct. Aug. 3, 2006).

a. The amount of time spent on a representation, who worked on it and when, and how much it cost are not privileged, so a lawyer's invoices are generally discoverable.

b. At the same time, a lawyer's time records generally describe (at least in general terms) what work the lawyer did. Depending on the situation and the level of detail, these descriptions may reveal attorney-client communications or work product.

c. In these circumstances, courts sometimes allow invoices to be withheld entirely or (much more likely) allow the privileged portions to be redacted.[91]

d. There is some authority to the effect that if the fiduciary wishes to pay counsel from estate or trust funds, the fiduciary has placed the lawyer's work at issue and must disclose the invoices in full.[92]

M. Conflicts with Joint or Concurrent Representation within Families.

1. Inherent potential conflicts among family members are pervasive. Each family member will likely have their own interests, desires and objectives. For example, there is the potential for conflicting interests between spouses, between or within generations and among branches of a family. In particularly egregious situations in which attorneys were cavalier about ignoring potential conflicts, those attorneys subsequently were sued for favoring one client over another in the actual conflict.[93]

2. However, there is a significant and important difference between the *potential for* conflict and *actual* conflict. We would posit that, more often than not, such conflicts are merely potential conflicts that need not be reified. Joint or concurrent representations within a family and collaboration with an expanded advisory team generally behoove the family to operate as a unit. This also enables attorneys to be much more effective in the design, implementation and administration of the legal work itself.

3. As we will outline below with concrete recommendations, many disputes can be averted with proper advance planning and communications respectful of each family member and their potential interests. The rewards of attorney involvement in the full engagement and affairs of the family vastly outweigh the potential risks, which can be addressed with careful structural planning.

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[91] *See, e.g., Los Angeles County Board of Supervisors v. Superior Court*, 386 P.3d 773, 781 (Cal. 2016); *State ex rel. Dawson v. Bloom-Carroll Local School District*, 959 N.E.2d 524, 530 (Ohio 2011); *Ehrich v. Binghamton City School District*, 210 F.R.D. 17, 20 (N.D.N.Y. 2002); Epstein, *The Attorney-Client Privilege and the Work Product Doctrine* at 157-162.

[92] *See Estate of Blickenstaff*, 2012 IL App (4th) 120480 ("It might well be … that the billing statements come within the attorney-client privilege, but … we hold that the executor has impliedly waived the attorney-client privilege with respect to billing statements he paid with funds from the estate.… By paying the attorney fees out of the estate, the executor voluntarily injected into this case the issue of whether the attorney fees were reasonable and whether they were for services beneficial to the estate.... Fair and truthful resolution of that issue necessitates the production of the unredacted billing statements.") (citations omitted).

[93] *See e.g.,* Liesel Pritzker and Mary Scanlan's separate lawsuits against their family attorneys described in Zach Lowe, "Shopping Mall Heiress Sues Neal Gerber, Alleging Massive Misconduct," *AM LAW Daily* (Aug. 2009), https://www.law.com/article/almID/1202433221355/?slreturn=20250902120625.

V. The Work Product Doctrine.

A. Introduction and Definition.

1. The work product doctrine is often considered alongside the attorney-client privilege, and the same communications and documents are often shielded by both protections. But they are different both conceptually and in application.

2. The work product doctrine traces its roots to the Supreme Court's decision in *Hickman v. Taylor*.[94] In *Hickman*, an attorney representing the owners of a tugboat that sank conducted an investigation that included taking statements from survivors and other witnesses. The plaintiffs sought to obtain copies of any written statements as well as other materials the attorney had generated.

3. The issue went to the Supreme Court, which held that an attorney's mental processes must be protected in order for our adversary system to work properly. In order to protect the client's interests, the attorney must be afforded a "zone of privacy" in which to gather information, analyze it, and determine how to present the case.[95]

4. Unlike the attorney-client privilege, the work product protection is not absolute. The Supreme Court held that discovery is appropriate "[w]here relevant and non-privileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case."[96]

5. *Hickman* has been partially codified (with respect to documents and tangible things) in Federal Rule of Civil Procedure 26(b)(3), which provides that "a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent)" unless "the party shows that is has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means."[97] The rule further provides: "If the court orders discovery of [such] materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation."[98] Note that as the language "or other representative" suggests, work product protection "extends beyond materials prepared by an attorney to include materials prepared by an attorney's agents and consultants."[99]

6. States have also codified the work product doctrine.[100]

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[94] 329 U.S. 495 (1947)

[95] *Hobley v. Burge*, 433 F.3d 946, 949 (7th Cir. 2006) ("The purpose of the qualified privilege for attorney work product … is to establish a zone of privacy in which lawyers can analyze and prepare their client's case free from scrutiny or interference by an adversary. It also prevents a litigant from 'taking a free ride on the research and thinking of his opponent's lawyer.'") (citations omitted).

[96] *Hickman*, 329 U.S. at 511.

[97] Fed. R. Civ. Proc. 26(b)(3).

[98] *Id.*

[99] *In re Cendant Corporation Securities Litigation*, 343 F.3d 658, 662-63 (3d Cir. 2003).

[100] *See, e.g.,* Ill. Sup. Ct. R. 201(b)(2) ("Material prepared by or for a party in preparation for trial is subject to discovery only if it does not contain or disclose the theories, mental impressions, or litigation plans of the party's attorney.").

B. Opinion Work Product vs. Fact Work Product.

1. Opinion or "core" work product reflects the lawyer's impressions, analysis, legal theories, and strategy.

2. Fact or "ordinary" work product reflects the lawyer's factual investigation – *e.g.*, notes from an interview of a witness.

3. Fact work product may be discovered if the party seeking disclosure can establish a substantial need for it, while opinion work product is essentially immune from discovery.

C. Differences Between Work Product Doctrine and Attorney-Client Privilege.

1. There are many similarities between the work product doctrine and the attorney-client privilege, and many of the same concepts apply.

2. But there are significant differences as well. The work product doctrine is both broader and narrower than the attorney-client privilege. It is not limited to attorney-client communications and is less vulnerable to waiver. At the same time, the work product doctrine is limited by the "anticipation of litigation" requirement, and in the case of fact work product, it is subject to the "necessity" exception.

3. While the attorney-client privilege belongs to the client, the work product doctrine can be invoked by either the client or the lawyer. "An attorney has an independent interest in privacy, even when the client has waived its own claim, as long as invoking the [protection] would not harm the client's interests."[101]

4. There is also some authority for the view that the work product protection is not susceptible to the fiduciary exception.[102]

D. Anticipation of Litigation.

1. An important limitation on the work product protection is that it applies only to materials prepared in anticipation of litigation.

2. Although what "anticipation" means (including the imminence of litigation) is to some extent in the eye of the beholder, in general there must be a specific threat; the mere possibility of future litigation is not enough.[103]

The document or information for which protection is sought generally must be prepared in response to the threat of litigation. Some courts have required that the anticipated litigation

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[101] *Hobley*, 433 F.3d at 949.

[102] *See, e.g., Sherman v. Ryan*, 392 Ill. App. 3d 712, 735-36 (1st Dist. 2009). "[O]nce there is sufficient anticipation of litigation to trigger the work product immunity," the "mutuality of interest" that supports the fiduciary exception "is destroyed." *Id.* at 736 (quotations omitted); *Wal-Mart Stores, Inc. v. Indiana Elec. Workers Pension Trust Fund IBEW*, 95 A.3d 1264, 1280 (Del. 2014) ("The … doctrine applies to information protected by the attorney-client privilege, but not to work product."); *Nama Holdings, LLC v. Greenberg Traurig*, *LLP*, 133 A.D.3d 46, 60 & n.13 (N.Y. App. Div. 2015) ("[t]he fiduciary exception does not apply to attorney work product").

[103] *See, e.g., SmithKline Beecham Corp. v. Pentech Pharmaceuticals, Inc*., No. 00 C 2855, 2001 WL 1397876, at *2 (N.D. Ill. Nov. 6, 2001) ("[T]o be subject to work product immunity, documents must have been created in response to 'a substantial and significant threat' of litigation, which can be shown by 'objective facts establishing an identifiable resolve to litigate.' Documents are not work-product simply because 'litigation [is] in the air' or 'there is a remote possibility of some future litigation.' 'The articulable claim likely to lead to litigation must pertain to this particular opposing party, not the world in general.'") (citations omitted).

be the primary motivating factor behind the creation of a document. Others have granted protection as long as the document was prepared "because of" the threat of litigation.[104]

E. Lawyer's Involvement Not Required.

1. Although work product is sometimes called "attorney work product," it can be prepared by a party or the party's agent, not just by a lawyer.[105]

2. Jurisdictions vary as to whether work product must reflect an attorney's theories or thoughts in order to be protected from disclosure.

F. Waiver.

1. Like the attorney-client privilege, the work product doctrine can be waived, though it is more difficult to do so and typically requires disclosure to adverse parties.[106]

2. There is considerable authority for the view that disclosure of work product to third parties does not result in waiver unless the disclosure "substantially increase[s] the opportunity for potential adversaries to obtain the information."[107]

3. In addition, the concept of subject matter waiver does not extend to the work product doctrine.[108]

4. As in the context of attorney-client privilege, it is helpful to label work product as such by adding "WORK PRODUCT" to e-mails or other documents reflecting work product.

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[104] *Protecting Confidential Legal Information* at 239-41. *See also United States v. Textron, Inc.,* 577 F.3d 21, 32 (1st Cir. 2009) (en banc) (adopting an even more stringent test that materials be prepared "for use in litigation"), *cert. denied*, 560 U.S. 924 (2010).

[105] *See, e.g., NL Industries, Inc. v. ACF Industries, LLC*, No. 10CV89W, 2015 WL 4066884, at *6-7 (W.D.N.Y. July 2, 2015) (environmental consulting firm tasked with identifying potentially liable parties); *Pemberton v. Republic Services, Inc.*, 308 F.R.D. 195, 202-03 (E.D. Mo. 2015) (public relations firm hired by defense counsel to manage coverage of lawsuit); *Bahrami v. Maxie Price Chevrolet-Oldsmobile, Inc.*, No. 1:11-CV-4483-SCJ-AJB, 2013 WL 3800093, at *6 (N.D. Ga. July 19, 2013) (records of conversations prepared by non-attorney plaintiff).

[106] *See United States v. Sanmina Corp.*, 968 F.3d 1107 (9th Cir. 2020) (holding that a client corporation waived attorney-client privilege when it provided in-house counsel's memoranda to external counsel to prepare a report for a non-legal purpose, and while that action did not waive work-product privilege as external counsel was not adverse, the client corporation subsequently waived work-product privilege when it provided external counsel's report to the IRS in an audit).

[107] *Id.*; *United States v. Caldwell*, 7 F.4th 191 (4th Cir. 2021) (waiver occurred when defense counsel disclosed a private investigator's notes to the government in a criminal case); *Sherman*, 392 Ill. App. 3d at 737-38 (quoting *United States v. Textron, Inc.*, 507 F. Supp. 2d 138, 152-53 (D.R.I. 2007), *vacated on other grounds*, 577 F.3d 21 (1st Cir. 2009), and citing *Lawrence E. Jaffe Pension Plan v. Household International, Inc.,* 237 F.R.D. 176, 183 (N.D. Ill. 2006)). So materials prepared in anticipation of litigation can be shared outside the "circle of privilege" without waiving the right to invoke the work product doctrine with respect to a litigation adversary (though this should be avoided if possible).

[108] *Sherman v. Ryan*, 392 Ill. App. 3d 712, 736 (1st Dist. 2009) (noting that parties seeking discovery "do not identify any authority for the proposition that the disclosure of documents protected under the work-product privilege to third parties results in a subject-matter waiver"); *Protecting Confidential Legal Information* at 277.

G. Organizational Clients and Work Product.

1. Although there appears to be limited authority on the subject, it seems that work product may be shared within an organization without waiving the protection.[109]

2. This result makes sense given that the work product protection is ordinarily waived only by sharing it under circumstances that make it substantially more likely that an adversary will obtain it.

VI. Working With Third Parties

A. *Overview*. Assisting clients with estate planning matters often requires input from a team comprised of not only an estate planning attorney, but also different types of both professional advisors and personal helpers. Often the more complicated and sophisticated the estate planning, the larger the team that is involved in the process. Who, if anyone, the client may view as the primary trusted advisor may vary and shift over time. But often there is one member of the team who is more involved and essential and who serves the role as organizer or facilitator for the entire team. Sometimes this party refers to themself as the "quarterback." Some of the types of third-party advisors and other helpers involved in the estate planning process may include one or more of the following.

B. Types of Third Parties Involved with Estate Planning.

1. Assisting clients with estate planning matters often requires input from a team comprised of not only an estate planning attorney, but also different types of both professional advisors and personal helpers. Often the more complicated and sophisticated the estate planning, the larger the team that is involved in the process. Who, if anyone, the client may view as the primary trusted advisor may vary and shift over time. But often there is one member of the team who is more involved and essential and who serves the role as organizer or facilitator for the entire team. Sometimes this party refers to themself as the "quarterback." Some of the types of third-party advisors and other helpers involved in the estate planning process may include one or more of the following.

2. *Other Attorneys*. There may be other attorneys who are not estate planning attorneys involved in the process. This could include, for example, the client's outside business counsel, divorce counsel, real estate counsel, or in-house counsel at the client's company or family office.

3. *Accountants*. One essential team-member will be the Certified Public Accountant who prepares the clients income and often gift tax returns. The same or different accountants may also be responsible for preparation of trust, estate, partnership and/or corporate income tax returns (and appropriate K-1's) as well. Accountants who are auditors may also be involved, particularly if there is an operating family business or investment business.

4. *Appraisers*. In addition to tax preparers and auditors, there may be accountants who work for an appraisal firm acting as "qualified appraisers" to value closely held business interests, promissory notes or other assets. Real estate, tangible property, or other valuation specialists may also be members of the client's advisory team working on the estate planning process

[109] *See* Epstein, *The Attorney-Client Privilege and the Work Product Doctrine* at 1321-23; *Menasha Corp. v. Department of Justice*, 707 F.3d 846, 850-52 (7th Cir. 2013).

5. *Financial Advisors*. Often clients will have their assets professionally managed by a firm registered with the SEC as a Registered Investment Advisor (RIA), a bank or brokerage firm, and/or will have a certified financial planner (CFP)® involved who advises them on their financial matters. These financial and investment advisors may be integrally involved in assisting with the structuring of the client's affairs, transfers of the client's assets, and the titling of the client's family accounts.

6. *Wealth Strategists.* Many banks, trust companies, brokerage firms, and RIAs employ formerly practicing estate planning attorneys (or occasionally CFPs) who hold titles such as "Wealth Strategist" or "Wealth Advisor." These professionals often have the role of reviewing estate planning instruments for existing or prospective wealth management clients, suggesting updates, and educating the clients or prospects about advanced wealth transfer planning strategies, including trusts, investment entities, insurance planning, and philanthropic planning.

7. *Insurance Professionals*. Clients will typically have providers of property, casualty and liability insurance. They may also have providers of health, disability, and long-term care coverage. Often, they will have a life insurance agent on the team as well.

8. *Family Office Professionals*. For ultra-high net worth (UHNW) clients, they may be served by a single-family office or multi-family office which might have a variety of in-house professionals assisting the family members with various aspects of their financial and personal lives, including estate and trust matters.

9. *Family Members.* There are often other family members involved, including spouses, children, parents, and siblings. Younger adults and elderly clients are especially likely to rely on input and guidance from a family member who may not also be a client of the attorney providing the advice that is sought to be kept confidential.

C. Introduction of Third Parties.

1. The participation of casual or disinterested third parties in communications with attorneys that clients seek to protect from disclosure could ordinarily serve to demonstrate that a particular communication was not intended to be kept private and confidential, and therefore threatens its privileged status.[110]

2. However, there are some third parties and advisors, like spouses, doctors, therapists, clergy (*e.g.*, priests, ministers, and rabbis), or accountants whose communications with clients may be protected by an independent privilege. In particular, so-called "Accountant Privilege" is worth understanding.

D. Accountant Privilege.

1. There are a couple of different approaches to protecting certain client communications with or work of an accountant, one is federal, and the other is state specific.

2. The Federally Authorized Tax Practitioners Privilege.[111]

   a. Although federal law does not specifically recognize a general "accountant-client" privilege, the tax code does have a provision recognizing a tax practitioner privilege. It

[110] *See McCormick on Evidence* § 91 (7th ed.).
[111] 26 U.S.C. § 7525.

covers tax advice given by a federally authorized tax practitioner as long as the matter is within the scope of the practitioner's authority to practice.

b. The privilege is with regard to the representation of taxpayers before the IRS.

   (1) 5 U.S.C. Section 500(b) and 31 U.S.C. Section 330 authorize attorneys, CPAs and others to represent taxpayers before the IRS.

   (2) To determine whether a return is correct or the liability of a taxpayer, the IRS is permitted to: (a) examine the books, records, and any other data that may be relevant, AND (b) summon individuals to appear to give testimony under oath.[112]

   (3) These IRS powers are broad, but not unlimited. The two primary limitations on the IRS's ability to obtain information under section 7602 are relevancy and privilege.[113]

c. In 1998, Congress amended Title 26 of the United States Code to include section 7525, which "extends the attorney-client protections of confidentiality" to "tax advice" furnished to a client-taxpayer by any "federally authorized tax practitioner" ("FATP").

   (1) The provision does not modify the attorney-client privilege of confidentiality, other than to extend it to other authorized practitioners.

   (2) The privilege established by the provision applies only to the extent the communication would be considered a privileged if it were between a taxpayer and an attorney.

   (3) Therefore, section 7525 does not extend any special privilege to preparation of a taxpayer's federal tax returns.

d. FATP Privilege: Definitions.

   (1) The term "federally authorized tax practitioner" means any individual who is authorized under Federal law to practice before the Internal Revenue Service, if such practice is subject to federal regulation under 31 U.S.C. Section 330.[114] This includes CPAs, enrolled agents and enrolled actuaries.

   (2) The term "tax advice" means advice given by an individual with respect to a matter which is within the scope of the FATP's authority to practice.[115] Thus, the privilege is limited to *federal* tax advice.

e. FATP Privilege: Limitations.

   (1) Pursuant to Section 7525(a)(2), FATP privilege may be asserted only in non-criminal matters and/or proceedings before the IRS or in non-criminal tax proceedings in federal court brought by or against the federal government. Note that according to the Senate Committee Report, this latter provision includes any non-criminal tax proceeding in federal courts where the IRS is a party to the proceeding.

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[112] 26 U.S.C. § 7602.

[113] *See, e.g., United States, et al. v. Euge,* 444 U.S. 707 (1980). Whether information "may be relevant" is almost always decided in the IRS's favor, while claims of privilege continues to be an effective check on the IRS's powers to obtain information, and a powerful tool when representing a client before the IRS.

[114] 26 U.S.C. § 7525(a)(3)(A).

[115] 26 U.S.C. § 7525(a)(3)(B).

(2) The FATP privilege does not apply to any written communication between an FATP and any person; any director, officer, employee, agent, or representative of the person; or any other person holding a capital or profits interest in connection with the promotion of the direct or indirect participation of the person in any tax shelter. When first enacted in 1998, this exception applied only to corporate tax shelters. Congress amended section 7525 in 2004 to expand the exception to all tax shelters.

(3) The privilege may not be asserted to prevent the disclosure of information to any regulatory body other than the IRS.

(4) No state-created privilege has been recognized in federal cases.

3. State law may also provide a privilege for accountants' communications with a client.

a. For example, Illinois has its own protections under common law. In Illinois, four elements are required for the accountant-client privilege: (1) the communication must originate in a confidence that it will not be disclosed; (2) the confidentiality element must be essential to maintaining the relation of the parties involved; (3) the relationship itself must be one that public opinion believes should be protected; and (4) disclosing the communication would insure the relationship between the parties involved more than the underlying litigation would be benefitted by its disclosure.[116] The accountant-client privilege does not extend to communications that are disclosed to third parties unless those parties have a common interest with the disclosing party.[117]

b. Illinois also extends statutory protection to accountants' work product,[118] but unlike the attorney-client privilege or the federal tax practitioners' privilege under Section 7257, the accountant's privilege belongs only to the accountant, not to the client.[119]

c. Generally speaking, in Illinois a licensed or registered CPA cannot be required by a court to divulge information or evidence which has been obtained by the CPA in the CPA's confidential capacity as a licensed or registered CPA.[120]

(1) Effective as of March 11, 2016, the Illinois Department of Financial and Professional Regulation-Division of Professional Regulation has adopted by reference the 2015 AICPA Code of Professional Conduct.[121]

(2) AICPA Code of Professional Conduct, Rule 1.700.001 Confidential Client Information Rule states that "A member in public practice shall not disclose any confidential client information without the specific consent of the client."[122] This does not affect the obligation to comply with valid/enforceable subpoenas or summonses or prohibit the compliance with applicable law/regulations.[123]

d. Ownership of Privilege.

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[116] *Stopka v. American Family Mutual Insurance Co.,* 816 F. Supp. 2d 516, 524 (N.D. Ill. 2011).
[117] *Id.*
[118] 225 ILCS 450/27.
[119] *Brunton v. Kruger*, 2015 IL 117663 ¶ 90.
[120] 225 ILCS 450/27.
[121] Ill. Admin. Code tit. 68, § 1420.200(b).
[122] AICPA Code of Prof'l Conduct § 1.700.001.01.
[123] AICPA Code of Prof'l Conduct § 1.700.001.02

(1) The attorney-client privilege and the section 7257 privilege belong to the client. The client is entitled to make the decision as to whether to disclose privileged information voluntarily.

(2) The Illinois Supreme Court has ruled that in Illinois statutory created privilege by 225 ILCS Section 450/27 is held solely by the accountant, not the client[124] and extends to "accountancy activities," which includes attestation engagements, accounting, management, financial or consulting services, the preparation of tax returns, furnishing tax advice, bookkeeping and representations of taxpayers.[125]

(3) Therefore, an accountant cannot be compelled to comply with a subpoena or summons issued by an Illinois court, except in very specific instances.

(4) Notably, the testamentary exception is not applicable, even though such an exception is available with respect to the attorney-client privilege.

e. Maryland is another example of a state with CPA privilege. In Maryland, Section 9-110(b) of the Courts and Judicial Proceedings Article of the Maryland Code establishes the parameters of the privileges in Maryland. It provides that except as otherwise provided or unless expressly permitted by a client … a licensed certified public accountant or firm may not disclose:

(1) The contents of any communication made to the licensed certified public accountant or firm by a client who employs the licensed certified public accountant or firm to audit, examine, or report on any account, book, record, or statement of the client; or

(2) Any information to any regulatory body other than the IRS that the licensed certified public accountant or firm, in rendering professional services, derives from a client. [126]

E. When Other Advisors Do Not Necessarily Destroy Privilege.

1. Overview.

a. A common question during the estate planning process is how to involve members of the advisory team in communications without the client unintentionally waiving attorney-client privilege protection for confidential communications and documents.

b. This situation often arises in the context of an estate planner's meetings or other communications with clients. Some of those clients may be elderly and request the assistance and advice of family members or friends in addition to the team of other advisors described above. The question is whether the presence of the third party waives the privilege or prevents it from attaching in the first place.

c. Often the communications are not as simple as having everyone on the same room at a meeting together. Communications may take place over several months or even years.

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[124] *Brunton v. Kruger,* 2015 IL 117663 ¶ 90.

[125] 225 ILCS 450/8.05.

[126] *See also Vellone v. First Union Brokerage Services, Inc.*, 203 F.R.D. 231, 233 (D. Md. 2001) (stating that "the privilege may … be said to cover any confidential communication made to a licensed certified public accountant or firm by a client who employs the accountant or firm to audit, examine, or report on any account, book, record, or statement of the client …. [T]he statute protects from disclosure any information that the accountant or firm, in rendering professional services, derives from the client in the course of a confidential communication with the client, or from material of the client given to the accountant in the course of a confidential communication. Necessarily, then, the inquiry becomes fact-specific to the individual case").

Many of the communications will take place via e-mail. Sometimes the e-mail will be with the client and their counsel. Sometimes other advisors will be copied on those e-mails. In other instances, the communications will be between the client and the advisor and later shared with the attorney. There will also be occasions where the advisors will be communicating with the attorney directly on behalf of the client or merely in collaboration with the attorney. Different parties may create documents to memorialize the communications or to illustrate aspects of the planning transaction. Determining what, if anything, can be kept confidential and protected from later disclosure can be complicated depending on the exact circumstances and the party seeking the information and arguing that the privilege was waived.

d. As noted above, communications with some third parties (such as the client's spouse, spiritual advisor, doctor, therapist or accountant) may be protected by independent privileges, and disclosing attorney-client communications or work product in that context should not constitute waiver.

e. For other third parties, the analysis often centers on their role. Being present merely to offer moral support is not likely to suffice, but other types of involvement may survive challenge.[127]

f. For courts that consider the role of a third party, the primary theories that have been found to support protection essentially look at whether that third-party advisor was acting as an: (1) agent, (2) translator, (3) facilitator, and/or (4) consultant.

2. Agent.

a. Under basic agency principles, an agent is a person who acts on behalf of the principal. Communications made by a client's agent to their attorney are privileged when it is established that the agent speaks on behalf of the client. Similarly, in communications between a client and their attorney, the presence of a third party who is an agent either of the client or the attorney is unlikely to operate as a waiver of the attorney-client privilege.

b. For example, in *Adler v. Greenfield*,[128] the court held that the communications between a financial advisor at a bank and the client's attorney about changes to the client's estate planning documents were protected by the attorney-client privilege because the bank acted as the client's agent.[129] In *Adler*, there was no formal agency agreement. However, the court imputed one where the communications indicated that the advisor had been assisting the client with their investments and financial affairs and then communicated with their attorneys about estate planning matters.[130] The court also held that the death

[127] *See generally* Kim Kamin, Terrence M. Franklin, Jon Scuderi, & Michael Simon, "'You're Keepin' Too Many Secrets From Me': Lawyers and Other Advisors Working Together -- Are Your Communications Privileged?," American College of Trust and Estate Counsel National Meeting (Oct. 20, 2017) (hereinafter "*Keepin' Too Many Secrets*").
[128] 2013 IL App (1st) 121066.
[129] *Id.*
[130] *Id.* (citing *Lama v. Preskill*, 353 Ill. App. 3d 300, 306 (2d Dist. 2004) ("When an agent communicates with the principal's attorney, the agent speaks as the client, or principal, and [their] communications are protected to the same extent as though the principal was speaking.").

of the client terminated the authority of the agent, so communications between the attorney and the bank after the client's death were not privileged.[131]

c. In *Lama*, a medical malpractice case, the court found that while the plaintiff was hospitalized following surgery, her husband was acting as her agent when communicating with an attorney. The court ultimately held that the attorney-client privilege had been waived, but the "trial court implicitly found that [husband] was plaintiff's agent."[132]

d. Similarly, in *Sevenson Environmental Services, Inc. v. Sirius American Insurance Co*mpany,[133] the court found that attorney-client privilege extends to communications to "one serving as an agent of either attorney or client," and in that case concluded that a third-party claims administrator can constitute an agent.

e. In *Berens v. Berens*,[134] a wife in a divorce action involved her friend who was an attorney on inactive status in most aspects of her divorce, including communications with counsel and review of draft legal pleadings and other work product. The trial court found there was no "good friend" exception to attorney-client privilege. However, on appeal, the court held that an agency relationship existed. The friends had even executed a written agreement to memorialize the agency relationship and the expectation of confidentiality. The court protected not only the communications, but also the attorney's work product the friend had reviewed.

f. Agents not directly involved with assisting in providing legal advice typically do not have the benefit of this privilege. For instance, in *In re Grand Jury Proceedings*,[135] the Seventh Circuit remanded the case for further proceedings to determine whether an accountant was hired by counsel for the preparation of tax returns or for legal advice. The court discussed that materials used solely in preparation of a tax return were not considered privileged conversations with an agent, but information used for the purpose of seeking legal advice would fall under the agent exception.[136] In a similar case in the Ninth Circuit, the court held that communications to attorneys for the dual purpose of proving legal advice and preparing tax returns were primarily made for a business purpose and not privileged.[137] Similarly, *United States v. Aldman*,[138] held that communications between in-house counsel and an accountant were not privileged agent conversations because the sole purpose was to seek tax advice as opposed to legal counsel. However, in *Segerstrom v. United States*,[139] the court protected communications between an attorney and third-party agents. The Internal Revenue Service requested several privileged communications between the attorney, the client, and third-party accountants. In denying the IRS's request, the court held that because the communications between third parties and the

[131] *Id.*
[132] *Id.*
[133] 883 N.Y.S. 2d 423, 425 (N.Y. App. Div. 2009).
[134] 785 S.E.2d 733, 740 (N.C. Ct. App. 2016).
[135] 220 F.3d 568, 571-72 (7th. Cir. 2000).
[136] *Id.*
[137] *In re Grand Jury*, 23 F.4th 1088 (9th Cir. 2022), *cert. granted*, 143 S. Ct. 80 (2022), *dismissing cert. as improvidently granted*, 143 S. Ct. 543 (2023).
[138] 68 F.3d 1495, 1500 (2d Cir. 1995).
[139] 87 A.F.T.R.2d 2001-1153, 2001 WL 283805 (N.D. Cal. Feb. 6, 2001).

attorneys were rendered at the attorneys' request to assist in providing legal services to the clients, there was no waiver of privilege.[140]

g. Sometimes state statutes can be of use for clarifying the special role of agents in an estate planning relationship. For example, in Florida, under the previously cited statute protecting communications with a fiduciary, an agent is deemed to be the principal's fiduciary and therefore the attorney's client.

(1) Under F.S.A. Section 90.5021(2): "A communication between a lawyer and a client acting as a fiduciary is privileged and protected from disclosure under Section 90.502 to the same extent as if the client were not acting as a fiduciary. In applying Section 90.502 to a communication under this section, only the person or entity acting as a fiduciary is considered a client of the lawyer."[141]

(2) Section 90.5021 provides: "For the purpose of this section, a client acts as a fiduciary when serving as a personal representative or a trustee as defined in ss. 731.201 and 736.0103, an administrator ad litem as described in s. 733.308, a curator as described in s. 733.501, a guardian or guardian ad litem as defined in s. 744.102, a conservator as defined in s. 710.102, *or an attorney in fact as described in chapter 709.*" (emphasis added).

(3) Chapter 709 (in Section 709.2102) contains the following definitions:

(a) "Agent" means a person granted authority to act for a principal under a power of attorney, whether denominated an agent, attorney in fact, or otherwise. The term includes an original agent, co-agent, and successor agent. . . .

(b) "Power of attorney" means a writing that grants authority to an agent to act in the place of the principal, whether or not the term is used in that writing.

(c) "Principal" means an individual who grants authority to an agent in a power of attorney.

h. Courts have long held that a stenographer is afforded the benefit of the attorney-client privilege rules only when acting as an actual agent of the communication. For instance, in *Morton v. Smith*,[142] a stenographer was allowed to testify regarding statements made between the client and their attorney since the privilege "only extends to the attorney and persons who are the media of communication between the client and the attorney."

i. Privileged agents can also be further broken down into communicating or translating agents and agents that help facilitate the legal discourse. Under the Restatement "Privileged persons within the meaning of Section 68 [attorney-client privilege] are the client (including a prospective client), the client's lawyer, agents of either who facilitate communications between them, and agents of the lawyer who facilitate the representation." Comment further defines a client's agent for the purposes of privilege by noting conversations are privileged "if the person's participation is reasonably necessary to facilitate the client's communication with a lawyer or another privileged

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[140] *Id.*

[141] *See also Bivens v. Rogers*, 15 CV 81298, 2016 WL 4702682 (S.D. Fla. Sept. 7, 2016) (Florida statute precludes executor, as representative of deceased ward, from waiving the attorney-client privilege between deceased ward's guardian and guardian's attorney).

[142] 44 S.W. 683, 684 (Tex. Civ. App. 1898).

person and if the client reasonably believes that the person will hold the communication in confidence."[143]

3. Interpreter/Translator.

   a. Another clear example of where the presence of a third party will not defeat the privilege is where the attorney and the client speak different languages. For example, if the client does not speak English fluently, an interpreter may need to be utilized in order to make sure the client is fully engaged in the estate planning process and executes instruments (often both in English and translated into their native language). Courts have held that if an interpreter is necessary for a client to communicate with their attorney, their presence would not defeat the privileged nature of the conversation.[144]

   b. Similarly, privileged communications may extend to situations where a third party is necessary to "translate" or "interpret" complex factual information for the attorney. This principle, established in the seminal case *United States v. Kovel,*[145] can be documented through a *Kovel* letter, which formalizes the third party's role. In *Kovel*, the court analogized an accountant's assistance in understanding intricate financial matters to a linguist interpreting a foreign language, stating:

      > Hence the presence of an accountant, whether hired by the lawyer or by the client, while the client is relating a complicated tax story to the lawyer, ought not destroy the privilege, any more than would that of the linguist in the second or third variations of the foreign language theme discussed above; the presence of the accountant is necessary, or at least highly useful, for the effective consultation between the client and the lawyer which the privilege is designed to permit.[146]

   c. For instance, in *In re Fabermark, Inc.*,[147] the court noted that the presence of committee's financial advisor did not negate protection of attorney-client privilege because the advisor was necessary for the "effective consultation between the client and the lawyer" in interpreting complicated financial information. However, the court noted that communications would not be privileged if their purpose was merely to aid the client in making a business decision.[148]

   d. Another example was in *Farahmand v. Jamshidi*,[149] which noted that there was no waiver of privilege simply because a plaintiff showed a document to his son-in-law, because the son-in-law added value by translating the document for plaintiff to understand.

   e. Protection has also been extended in other contexts where information is being interpreted for a client. In *Jenkins v. Bartlett*,[150] the court found that the presence of a police liaison officer during a meeting between a police officer and his attorney did not

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[143] *Id.*
[144] *See State v. Aquino-Cervantes,* 954 P.2d 767 (Wash. App. Div. 2 1997).
[145] 296 F.2d 918, 922 (2d Cir. 1961).
[146] *Id.*
[147] 330 B.R. 480, 499-500 (Bankr. D. Vt. 2005).
[148] *Id.*
[149] 2005 WL 331601, at *3 (D.D.C. Feb. 11, 2005).
[150] 487 F.3d 482, 491 (7th Cir. 2007).

destroy privilege where the liaison officer helped interpret information from the attorney to the client.

f. On the other hand, *Dahl v. Bain Capital Partners, LLC*,[151] is an example of a court concluding that communications with a third-party financial advisor were not privileged. In *Dahl*, the attorney shared privileged information with a third-party financial advisor for feedback based on the advisor's expertise. Because the purpose of the communication was to render business advice, not legal advice, privilege was waived.[152]

4. Facilitator.

a. There may be other third-party advisors, who are not technically given the authority to act as the client's agent or present to interpret or translate, but who are nonetheless deemed to be sufficiently helpful or necessary in order to facilitate the legal representation and the estate planning process.

b. Courts range significantly in determining whether the third party had to be merely useful, reasonably necessary, or essentially indispensable to avoid waiving the privilege. And in some instances, the courts look not at all to the role of the third party, but merely to whether the client had an expectation of confidentiality that should be preserved.

c. State statutes governing evidence may be helpful in this regard. For example, in California, the Evidence Code states explicitly that "confidential communication between client and lawyer" means information transmitted between a client and their lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted, and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship.[153]

d. Courts in some states (including Illinois, North Carolina and others) have generally taken a liberal approach to third-party advisors for the purpose of attorney-client privileged communications. These courts have allowed financial advisors, accountants, business consultants, and insurance agents to participate in communications without waiving the attorney-client privilege.[154]

e. In a state like Delaware, a broader rule may be employed in evaluating the involvement of different types of facilitators and determining whether a communication is confidential for privilege purposes.[155] Here, the Delaware Chancery Court confirmed that Delaware recognizes the attorney-client privilege is not necessarily waived when a client communicates with its attorneys in the presence of its investment banker, particularly in the context of a pending transaction. The focus in cases like this is less on whether the party was essential and more on whether the client expected confidentiality and protection against disclosure. The court in *3Com Corp* stated: "Whether disclosure of a communication beyond the client and lawyer destroys the basis for the claim of privilege

[151] 714 F. Supp. 2d 225 (D. Mass. 2010).
[152] *Id.* at 229.
[153] Cal. Evid. Code § 912(d) (emphasis added).
[154] *See Keepin' Too Many Secrets* at Franklin-2.
[155] *3Com Corp. v. Diamond II Holdings, Inc.*, CIV.A. 3933-VCN, 2010 WL 2280734, at *4 (Del. Ch. May 31, 2010).

or not inevitably involves a judgment as to whether in the circumstances the person making the disclosure in fact regarded that disclosure as confidential and, if there was an expectation of confidentiality, whether the law will sanction that expectation."[156]

f. In a Texas case, the court held that communications made by an owner of two corporations to his son, who was licensed to practice law, so that the son could seek or receive legal advice from counsel for the corporations, did not waive the corporation's attorney-client privilege even though son was not an employee (*i.e.,* agent) of either corporation.[157]

g. In one New York case, the court held that the communications between plaintiffs' financial advisors were not privileged, yet the conversations between plaintiffs and their son were privileged, as the son functioned as a facilitator.[158] Here, the plaintiffs' financial advisors were not "nearly indispensable" and did not serve "some specialized purpose in facilitating the attorney-client communications."[159] On the other hand, since the plaintiffs did not know how to use e-mail, the only way that timely communications could be sent between the plaintiffs' and their counsel was if the plaintiffs' son was receiving the e-mails on their behalf. Thus, the son's role did not waive privilege.

h. Another New York case went through a similar analysis to determine whether an art broker was a protected facilitator under the facts in that case. There, the court held that communications between an art broker and a buyer were not protected because the art broker was not the exclusive agent of the buyer (since she was also acting on behalf of the seller on the other side of the deal) and the consultations with the broker was "not necessary to facilitate attorney-client communications" between the buyer and its attorneys.[160]

i. An example of a permissible facilitator that has maintained privilege is in the context of union representatives as long as the representative was involved in the communications to render legal assistance. For instance, in *Jenkins v. Bartlett*,[161] heard by Judges Easterbrook, Posner and Ripple, the Court first noted that they do not suggest an independent privilege exists for communications between an individual and his union representative, but here, they found that the union representative was present in order to assist the attorney in rendering legal services to the defendant. On the other hand, in *Boyer v. Rock Township Ambulance District,*[162] the court found that there was no evidence that the union representative was present for the purpose of assisting counsel or rendering legal advice.

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[156] *Id.*

[157] *National Converting & Fulfillment Corp. v. Bankers Trust Corp.,* 134 F. Supp. 2d 804, 806 (N.D. Tex. 2001).

[158] *Green v. Beer*, 2010 WL 3422723, at *4-5 (S.D.N.Y. Aug. 24, 2010).

[159] *Id.*; *see also In re Application Sveaas*, 249 F.R.D. 96, 101–102 (S.D.N.Y. 2008) (holding that an art broker's receipt of communications was not necessary to the furnishing of legal advice).

[160] *In re Applicant Pursuant to 28 U.S.C. § 1782*, 249 F.R.D. 96, 100-01 (S.D.N.Y. 2008).

[161] 487 F.3d 482, 491 (7th Cir. 2007).

[162] No. 10-2344, 2012 WL 1033007, at *4 (E.D. Mo. Mar. 27, 2012).

j. Courts may find waiver of the attorney-client privilege when an accountant, financial advisor, or business consultant is not sufficiently facilitating the rendering of legal services. Pure business advice, such as accounting services, will not be privileged.[163]

k. In *United States v. Richey*, the attorney for the owners of a limited partnership retained an appraiser to provide a valuation report of a conservation easement.[164] The report was intended for submission to the IRS in support of a charitable deduction on the owners' income tax returns.[165] The court found that attorney-appraiser communications related to the preparation of the report were not privileged because they were made for the purpose of determining the value of the easement, not for the purpose of providing legal advice or in anticipation of future litigation.[166]

l. In *Cavallaro*, the IRS issued a summons to an accounting firm for documents it had related to estate tax and corporate merger issues.[167] The IRS suspected that the parties were undervaluing a family owned company to disguise a gift to their children in the form of post-merger stock.[168] The family argued the documents were in the hands of the clients' accountants because the accountants were assisting the attorneys. Citing *Kovel*, the court noted that the accountants must be "necessary, or at least highly useful, for the effective consultation between the client and the lawyer which the privilege is designed to permit."[169] If the client is seeking "not legal advice but only accounting service" then that is insufficient.[170] Here, since the accounting firm was not facilitating the rendering of legal advice, the court ruled the communications not privileged.[171]

m. This approach can be seen in *Cellco Partnership v. Certain Underwriters at Lloyd's London*,[172] where the court stated that "when the third party is a professional, such as an accountant, capable of rendering advice independent of the lawyer's advice to the client, the claimant must show that the third party served some specialized purpose facilitating the attorney-client communications and was essentially indispensable in that regard."

n. While ultimately holding that the plaintiff failed to meet its burden of establishing that an accountant's presence did not waive privilege under a "reasonably necessary" standard under Maryland law, a good summary of Maryland case law can be found in *RCC, Inc. v. Cecchi*.[173]

5. Consultant Under the *Kovel* Doctrine.

a. A consulting expert retained by the attorney or client specifically to assist the attorney in providing legal advice to the client qualifies as a privileged party if consulted for the

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[163] *Kovel*, 296 F.2d at 922. *See also United States v. Richey*, 632 F.3d 559, 562 (9th Cir. 2011); *Cavallaro v. United States,* 284 F.3d 236, 248 (1st Cir. 2002).
[164] *Richey*, 632 F.3d at 563.
[165] *Id.*
[166] *Id*.
[167] 284 F.3d at 248.
[168] *Id.*
[169] *Id.* at 247.
[170] *Id.*
[171] *Id.*
[172] 2006 WL 1320067, at *2 (D.N.J. May 12, 2006).
[173] No. 323447, 2010 WL 5180341 (Md. Cir. Ct. Nov. 2010).

purpose of improving the attorney's comprehension of factual information or the client's comprehension of legal advice provided by the attorney.[174]

b. The *Kovel* doctrine has been adopted or applied by a majority of the circuits.[175]

c. The consultants can be described as "outside experts" who are engaged by the attorney "to assist the attorney in providing legal services to the client."[176] In *Jenkins*, the court stated that the attorney-client privilege exception applies not only to agents of the attorney "such as paralegals, investigators, secretaries and members of the office staff responsible for transmitting messages between the attorney and client," but also to "outside experts . . . such as accountants, interpreters or polygraph examiners." Further, the court stated that "this exception reaches retained experts, other than those hired to testify, where the expert assists the attorney by transmitting or interpreting client communications to the attorney or for formulating opinions for the lawyer based on the client's communications."[177]

d. Privileged communications may occur where the consultant is necessary to "translate" or "interpret" complicated factual information for the attorney.[178]

e. For example, in *Lawrence E. Jaffe Pension Plan v. Household International, Inc.*,[179] an accounting firm was hired by Household's General Counsel's office specifically to assist counsel with an audit and pursuant to an engagement letter that stated the purpose was to assist counsel in providing legal advice regarding pending or anticipated litigation. The court protected the privilege given the "complex quantitative analyses and extensive information-gathering that was beyond…counsel's resources and abilities, but was uniquely within [the accountant's] qualifications".[180] Similarly, in *Heriot v. Byrne*,[181] the court applied *Kovel* to communications between the client and third-party accountants, in finding that material transmitted to accountants may fall under the attorney-client

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[174] *Protecting Confidential Legal Information* at 45. This was the rule articulated by the Second Circuit in the famous 1961 *Kovel* Case. *See Kovel*, 296 F.2d at 922 (accountant hired by tax counsel to assist in interpreting client conversations was considered privileged agent). This rule is illustrated by the Restatement (Third) of the Law Governing Lawyers § 70 cmt. f, illus. 5 (2000).

[175] *Id. See Cavallaro v. United States*, 284 F.3d 236, 247 (1st Cir. 2002*)*; *United States v. Alvarez*, 519 F.2d 1036, 1045-46 (3d Cir. 1975); *United States v. Bornstein*, 977 F.2d 112, 116-17 (4th Cir. 1992); *In re Grand Jury Proceedings*, 220 F.3d 568, 571 (7th Cir. 2000); *Federal Trade Commission v. TRW, Inc.*, 628 F.2d 207, 212 (D.C. Cir. 1980); *United States v. Cote*, 456 F.2d 142, 144 (8th Cir. 1972); *United States v. Judson*, 322 F.2d 460, 462-63 (9th Cir. 1963).

[176] *Jenkins v. Bartlett*, 487 F.3d 482 (7th Cir. 2007) (citing Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence § 183 at 313 (2d ed.1994)).

[177] *Id.* at 491.

[178] *Kovel*, 296 F.2d at 922. *See also United States v. Ackert*, 169 F.3d 136, 139-40 (2d Cir. 1999) (stating that no privilege existed where counsel communicated with accountant to obtain factual information rather than to assist counsel in translating or interpreting information given to counsel by the client); *Walsh v. CSG Partners, LLC*, 544 F. Supp. 3d 389, 392 (S.D.N.Y 2021) (following *Ackert* for a financial advisor for ESOP transactions); *In re Application Sveaas*, 249 F.R.D. 96, 101–02 (S.D.N.Y. 2008) (holding that an art broker's receipt of communications was not necessary to the furnishing of legal advice); *but see Sampedro v. Silver Point Capital, L.P.*, 818 Fed. App'x 14 (2d Cir. 2020), *as amended* (June 5, 2020) (summary opinion) (distinguishing *Ackert* and finding that privilege existed where consultants were essential to interpreting financial and organizational data so that attorneys could tailor legal advice).

[179] 244 F.R.D. 412 (N.D. Ill. 2006).

[180] *Id.* at 420.

[181] 257 F.R.D. 645, 649 (N.D. Ill. 2009).

privilege if the accountant is acting as an agent of an attorney for the purpose of assisting with the provision of legal advice. The court emphasized that in today's marketplace, attorneys need to be able to have confidential communications with accountants in order to render adequate legal advice.[182]

f. Citing language from *Kovel*, courts have recognized the privilege for agents, translators, facilitators, and consultants where the party is "necessary, or at least highly useful for the effective consultation between the client and the lawyer."[183]

(1) Courts differ in how strictly they apply the *Kovel* doctrine when determining whether communications involving third-party consultants are protected by attorney-client privilege. While some courts require the advisor/consultant to merely add value, other courts interpret this language as requiring that the party be "nearly indispensable or serve some specialized purpose in facilitating the attorney-client communications."[184]

(2) For example, in *Ravenell v. Avis Budget Group, Inc.*,[185] the court declined to apply the *Kovel* doctrine when a third-party consultant was hired to make initial classifications that the attorneys could have made themselves.

(3) A similar conclusion was reached in *Ceglia v. Zuckerberg*,[186] where the *Kovel* doctrine did not apply because the consultant did not act as translator or interpreter of communications between client and attorney. Here, the court found that the plaintiff's "consultant" was not intended to "improve the comprehension of the communications between [the consultant] and Plaintiff" since it was not shown that she was employed consistently as a legal assistant or secretary and simply helped type a document.[187]

(4) This can also be seen in *Dahl v. Bain Capital Partners, LLC*,[188] where communications between client's investment bankers and counsel were not privileged where investment bankers acted in business capacity and were not necessary or indispensable for counsel to provide legal advice.

(5) The court in *Flo Pac, LLC v. NuTech, LLC*,[189] adopted a more stringent test stating that the third-party presence must be "nearly indispensable" in facilitating attorney-client communications, not just convenient.

g. As the roles of public relations consultants and crisis managers have become more prominent, several courts have reviewed whether advice shared with or received from these third parties remains privileged, which turns on an intensive fact-based analysis. In the District of Massachusetts alone, federal courts have disallowed privilege for such consultants because “[t]he fact that an attorney’s ability to represent a client is merely

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[182] *Id.* at 666-67.

[183] *Protecting Confidential Legal Information*, at 46; *Cavallaro*, 284 F.3d at 247-48; *Heriot v. Byrne*, 257 F.R.D. 645, 666-67 (N.D. Ill. 2009).

[184] *Cavallaro*, 284 F.3d at 247-48.

[185] No. 08-CV-2113 (SLT), 2012 WL 1150450, at *3 (E.D.N.Y. Apr. 5, 2012).

[186] No. 10-CV-00569, 2012 WL 3527935, at *2 (W.D.N.Y. Aug. 15, 2012).

[187] *Id.*

[188] 714 F. Supp. 2d 225, 229 (D. Mass. 2010).

[189] No. WDQ-09-510, 2010 WL 5125447, at *8-10 (D. Md. Dec. 9, 2010).

improved by the assistance of the third party is not enough to avoid the waiver of privilege,"[190] but also upheld privilege when "media expertise was necessary to assess the risks and liabilities of how to respond publicly–and indeed, whether to respond at all–to an announcement that has implicated [the client] in wrongdoing and opened it up to civil liability and/or government investigation."[191]

h. Lastly, it is important to note that simply because an attorney hires a consultant does not necessarily mean that the conversations the attorney has with that consultant will be privileged. For example, *Wychocki v. Franciscan Sisters of Chicago*,[192] held that a compensation consultant, although engaged by counsel, provided business advice instead of legal advice, so the consultant was not considered an agent of counsel for the purpose of privilege. Although there may be several potential arguments for privilege to apply, communications not necessary for the purposes of obtaining legal advice will generally not be covered by privilege.[193]

F. Putting It All Together.

1. In light of the summary and discussion of the cases above, it becomes clear that when involving third parties (such as wealth strategists and other advisors) in the estate planning process, it is important at the outset to determine whether the individuals involved may have their own privilege to assert or are legitimately participating in the communications as an agent, translator, facilitator, and/or consultant under *Kovel*. Whenever an advisor communicates independently with the client or the client's counsel, communications should be framed as clearly as possible to indicate in what role or roles the advisor is serving if the intention is to later assert that the participation of the advisor does not constitute a waiver of privilege.

2. In some cases, such as with a spouse, an employee, a party who holds a statutory or other durable power of attorney, or a party who is contractually a directed agent for the principal client, the agency will be easier to establish. Some practitioners have posited that for an ultra-high net worth client, those who serve the client through a family office would most likely be viewed as the client's agent even if there were not a clear contract. In some cases, there is a contract setting forth that the family office or multi-family office advisors are authorized to communicate on behalf of the client with attorneys, accountants and other third parties as that client's directed agent. If the client documents are stored in the family office vault or portal and the family office is involved with all aspects of the communications on behalf of and at the bidding of the client, the argument that the office is within the privilege umbrella could be stronger.

3. In situations where formal legal agency may be more difficult to establish, an argument could be made that an advisor who is an estate planning professional such as a licensed attorney, even if currently non-practicing, is acting as a translator between the client and the attorney. The role assumed by a wealth strategist or wealth advisor is often to educate the client about

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[190] *United States ex rel. Wollman v. Massachusetts General Hospital, Inc.*, 475 F. Supp. 3d 45, 66 (D. Mass. 2020) (following *Dahl*, 714 F. Supp. 2d 225 (D. Mass. 2010)).

[191] *Bozorgi v. Cassava Sciences, Inc.*, No. 1:24-mc-91041-AK, 2024 WL 2874636 at *4 (D. Mass. 2024).

[192] 2011 WL 2446426, at *7 (N.D. Ill. June 15, 2011).

[193] *See Monterey Bay Military Housing, LLC v. Ambac Assurance Corp.*, No. 19 Civ. 9193(PGG)(SLC), 2023 WL 315072 (S.D.N.Y. Jan. 19, 2023) (holding that certain communications with advisors were not privileged under common interest doctrine or *Kovel* doctrine).

the law, and then translate the client's wishes using terms of art that the client would not know in order to cut to the chase and potentially help reduce legal fees as it can enable the attorney to work more efficiently. The educational process with clients can often be extremely lengthy and may be best undertaken by members of the advisory team who are not billing by the hour.

4. In other cases where agency or translator roles are not easily established, or to bolster them where they are, it can be helpful to establish the advisor is acting in the role of facilitator. For example, if the insurance advisor is the one who is the "quarterback" for the relationship and the transaction and is working with the client's counsel to help facilitate a planning transaction, then that professional is arguably necessary to facilitate the rendering of the legal services, though this can be a more difficult position to sustain.

5. In an estate planning situation where the desire for future protection of communications in litigation is likely, one suggestion for advisors working with clients on such matters is to encourage the client to involve counsel in the discussions as early as possible and before having communications that the client might later seek to protect. Sometimes the client does not have estate planning counsel during the early stages of such discussions, so the advisor can recommend that counsel be hired by the client before having substantive discussions.

6. If the outside advisor is being brought in as a consultant under the *Kovel* doctrine, it is desirable to have a formal engagement letter in place. These types of letters generally establish that the advisor is being brought in as a consultant to assist the attorney with a particular aspect of serving the client or with a particular project. Generally such letters require the advisor to keep separate files that are the property of the law firm and will be returned to the law firm upon completion of the project or later at the law firm's request.

7. In particular, with regard to the creation of work product that will involve input from one of the client's other advisors, it can be beneficial for the client's attorney to request the produced analysis, illustrations, or summaries and to position their need for the documentation. For example: "In anticipation of [or in connection with the pending] litigation with XYZ, please provide the following . . . ."

8. It is important to remember that the attorney-client privilege, work product doctrine, and other protections against production during litigation or an IRS audit are extremely narrow even with respect to the communications a practicing attorney has with a client.

9. For many advisors whose involvement could compromise a client's ability to later assert protections of the information, the best approach is simply a defensive one.

    a. To the extent possible, avoid being involved in sensitive discussions or receiving documentation about those sensitive discussions.

    b. In cases where agency principles will not or may not apply, it is best for the advisor to seek information directly from the attorney, not from the client, to avoid accidentally receiving attorney-client privileged information. In such situations, the attorney should be careful about what is shared with the advisor.

    c. Similarly, it is helpful for the attorneys on the team to ask the questions of the advisor so that the subsequent communications are a response to the attorney's inquiries.

    d. Sometimes it is best to minimize taking notes and creating documents that could later be misinterpreted or used against a client if discovered. A possible exception may be if the

practice is to take handwritten notes during a meeting or call only in order to prepare and then share with the advisory team any memorializing documentation that could be helpful to establish important elements of intent. Ideally the policy or protocol would then be to shred or otherwise destroy the chicken-scrawl notes once the official documentation has been completed in order to avoid later confusion.

e. If the client forwards an e-mail or other material to the advisor that the advisor does not think they should see, the advisor should not read it. Instead, once the advisor realizes what it is, they should delete it immediately and notify the sender. Recognize that anything electronic may not actually be gone when deleted, and some members of the advisory team may be required by their regulators to retain system copies of all e-mail communications.

f. One must also recognize that in many disputes with the IRS (such as those involving Section 2036 which involves a subjective inquiry into intent), the attorney-client privilege may be waived anyway.

10. Finally, it is important for the attorneys, the client, and all the members of the advisory team to understand and appreciate how limited exceptions to the general rule of disclosure during litigation may be. While the attorney and other members of the team typically have both ethical duties and desires to keep client information confidential, in the context of litigation the protections for those communications may be construed narrowly.[194]

VII. Attorneys as Fiduciaries.[195]

A. The attorney-client relationship is also a fiduciary one, meaning attorneys owe their clients the fiduciary duties of loyalty and prudence. This includes maintaining client confidences and avoiding conflicts of interest with clients.[196] Attorneys can be found to have committed malpractice for breaching their fiduciary duties to clients.[197]

A fiduciary's legal and ethical duties are described, listed and categorized in a wide array of varying formats. The most fundamental legal and ethical obligation owed by a fiduciary is the duty of loyalty.[198] This duty requires the attorney to put a client's interests first and before the attorney's own interests. It can be helpful to think of the duty of loyalty as consisting of three requirements. First, the fiduciary must act in good faith. Second, the fiduciary must not self-deal. Third, the

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[194] *Id.*

[195] Kim Kamin, *Fiduciary Duties and Ethical Challenges For Trustees: The Evolving Landscape,* Anderson Tax Family Office Roundtable (May 31 - June 1, 2017). Some of the material below (including citations) is drawn from Charles A. Redd's "A Primer for the Individual Fiduciary," 48th Annual Southern Federal Tax Institute (Oct. 2013).

[196] Legal Malpractice.com Hofstra Law School Class #5 The Lawyer's Fiduciary Duties, *https://legalmalpractice.com/cle-law-school-course/lawyer-malpractice-class-5-the-lawyers-fiduciary-duties/*. *See* Cornell Law School, Fiduciary Duty, https://www.law.cornell.edu/wex/fiduciary_duty.

[197] *See, e.g.*, Hofstra Law School Class #5 The Lawyer's Fiduciary Duties, *ibid*. This is global, not just in the United States (any legal system based on English system), including Canada. *See, e.g.,* Alice Woolley, "The Lawyer As Fiduciary: Defining Private Law Duties in Public Law Relations," 65 *UTLJ* 4, pp. 285-334 (Fall 2015), *www.jstor.org/stable/24855487* and Western Europe. *See, e.g.*, Martin Gelter & Genevieve Helleringer, Fiduciary Principles in European Civil Law Systems, Oxford Handbook of Fiduciary Law (Mar. 2018), *www.ecgi.global/sites/default/files/working_papers/documents/finalgelterhelleringer_0.pdf*.

[198] *See* 3 ASCHER AND SCOTT, § 17.2. Jesse Dukeminier and Robert H. Sitkoff, *Wills, Trusts and Estates* (9th Ed. 2013) p. 588 ("The most fundamental principle of the fiduciary obligation in trust law is the duty of undivided loyalty to the beneficiary. A trustee must administer the trust solely in the interests of the beneficiary.")

fiduciary should avoid conflicts of interest. In considering these obligations, an attorney should also consider both defenses to and damages for breaching the duty of loyalty.

1. *Good Faith*. Good faith means being honest and having a "sincere intention to deal fairly" with others. Good faith is a comprehensive term that encompasses a "sincere belief or motive without any malice" or the desire to defraud others. It derives from the translation of the Latin term "bona fide" and courts use the two terms interchangeably. *Bona fides* denotes the mental and moral states of honesty and conviction.[199] Good faith must be the governing force behind all exercises of fiduciary discretion.[200]

2. *Self-Dealing.* As a general rule, a fiduciary is not permitted to directly or indirectly have a personal interest in any transaction with a client, regardless of the fairness of the transaction. To be on both sides of a transaction is deemed prohibited self-dealing.

3. *Conflicts of Interest*. Historically, conflict of interest transactions that did not rise to the level of actual self-dealing were not *per se* prohibited. Such conflicts, however, needed to be resolved in a way that was fair. Fiduciaries have a duty to avoid putting themselves into conflict of interest situations.

4. *Stricter Morals*.

    a. With regard to a fiduciary's duty of loyalty, Judge Benjamin Cardozo is often quoted as follows:

> "Many forms of conduct permissible in a workaday world for those acting at arm's length are forbidden to those bound by fiduciary ties. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating

[199] http://legal-dictionary.thefreedictionary.com/good+faith; http://dictionary.law.com/Default.aspx?selected=819; http://en.wikipedia.org/wiki/Good_faith."Provided a trustee acts in good faith and within the limits of the sound execution of the trust placed in him, equity will not substitute its discretion for that of the trustee, or interfere with that discretion without cause." 55A Fla. Jur. 2d, Trusts, § 137. Florida case law goes one step further by providing that a trustee is presumed to act in good faith and within the bounds of sound discretion. *In re Zeigler's Trust*, 157 So 2d at 550 (Fla. 3d D.C.A. 1963).

[200] The Restatement (Third) § 50(1) provides that a trustee's discretionary power is "subject to judicial control only to prevent misinterpretation or abuse of discretion by the trustee." Restatement (Third) § 50(2) adds that whether a trustee's actions constitute an abuse of discretion "depend[s] on the terms of the discretion, including the proper construction of any accompanying standards, and on the settlor's purposes . . . ." Comment b states that "[a] court will not interfere with a Trustee's exercise of a discretionary power when that exercise is reasonable and not based on an improper interpretation of the terms of the trust" and that "[c]ourt intervention may be obtained to rectify abuses resulting from bad faith or improper motive, and to correct errors resulting from mistakes of interpretation." In *Gould v. Starr*, 558 S.W.2d 755 (Mo. App. 1977), the trustees challenged the trial court's holding that they had abused their discretion, using as a defense their grant of absolute power from the settlor. The court replied, "[t]he shortcoming of these arguments lies in the failure on the part of the [trustees] to refute the further significant finding of the trial court that the Trustees' decisions were based upon improper motives, were the products of bad faith, and amounted to a willful and wanton abuse of discretion. No grant of absolute power or discretion can authorize a Trustee to act dishonestly."

erosion' of particular exceptions []. Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd."[201]

b. "Punctilio" refers to "strictness or exactness in the observance of formalities or amenities."[202] So the famous quote mandates that trustee's must strictly observe the formalities when it comes to the question of whether or not to put themselves in a situation where their own interests could cloud their focus on putting a client's interests first.

B. *Duty of Prudence*. Another primary fiduciary duty is prudence. Prudence means possessing and exercising "careful, good judgment" in order to "avoid danger or risks." It is defined as having "sagacity or shrewdness in the management of affairs," "skill and good judgment in the use of resources," and "caution or circumspection as to danger or risk."[203] Often the duty of prudence is described as the trustee's obligation to exercise skill and caution in all decisions made and actions taken as trustee. It is also simply described as the duty of care.

C. *Duty of Impartiality.* A fiduciary also has a duty to deal fairly and impartially with all clients and to act with appropriate regard for their respective interests.

1. *Ethical Challenges of Impartiality*. There are several potential areas where a fiduciary's duty to deal impartially with multiple clients may raise some ethical challenges for the attorney to navigate:

a. *Joint Representation.* Joint representations typically should be structured for the attorney to share information and to withdraw if an actual conflict presents itself.

b. *Concurrent Representation*. A fiduciary with multiple family members as current clients is under a duty to deal impartially with all of them. A fiduciary ordinarily will not be disturbed unless they have acted in bad faith or in an unreasonable manner.[204] Even though there is no clear standard by which to judge reasonableness, courts generally will intervene in such discretionary decisions only where the attorney acts in contravention of their fiduciary duties, (*e.g.*, dishonestly, in bad faith or with intentional disregard of the client's interests).[205] If a fiduciary acts in an unbiased manner their actions are likely to be considered reasonable.[206]

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[201] *Meinhard v. Salmon,* 249 N,Y, 458, 464 (1928) (case in which a partner in a business endeavor was deemed to have fiduciary duties to other partner as a trustee of a constructive trust).

[202] https://www.dictionary.com/browse/punctilio; http://www.merriam-webster.com/dictionary/punctilio.

[203] http://en.wikipedia.org/wiki/Prudence; https://www.dictionary.com/browse/prudence; http://thelawdictionary.org/prudence/; http://www.merriam-webster.com/dictionary/prudence.

[204] *See United States v. O'Shaughnessy*, 517 N.W.2d 574 (Minn. 1994) (where trust gave trustee complete discretion to distribute all, some or none of the trust assets, the beneficiary had a mere expectancy interest until the trustee elected to make payments and the court will not interfere absent showing of bad faith or failure to act reasonably); *Dunkley v. Peoples Bank & Trust Co.*, 728 F. Supp. 547 (W.D. Ark. 1989) (under Florida law, trustee must exercise discretion reasonably and with proper motives in interest of beneficiaries).

[205] *See* 3 ASCHER AND SCOTT § 18.2.6 (5th ed.).

[206] *McNeil v. McNeil,* 798 A.2d 503 (Del. 2002) (trustees had a duty to consider impartially the interests of beneficiaries belonging to multiple family generations and to act reasonably in making distribution decisions); *Estate of Sewell*, 409 A.2d 401 (Pa. 1979) (trustee was deemed to have breached its duty of impartiality by making payments to one beneficiary while having failed to locate and make proper payments to another beneficiary); *see also* U.S. Trust, Practical Drafting, Jan. 2002 at 6699.

c. *Former Clients*. Attorneys can have continuing fiduciary duties to former clients not to take action that would hurt their interests.

D. *Duty of Confidentiality.* Fiduciaries have a duty to keep information confidential to the extent possible and to share information with third parties only on a need-to-know basis. In this age of the internet and prevalent identity theft, this duty is increasingly a challenge and one that modern fiduciaries may need to think about more than they have in the past. Attorneys must take due caution to avoid unintentionally compromising a client's confidential information and security.[207]

VIII. Potential Structural Solutions

A. There can be considerable efficiencies and cost savings when the same attorney or law firm appropriately represents a successful family and its enterprises, building relationships with multiple family members and understanding its byzantine web of trusts and operating businesses. Ultra-high net worth families with family offices will also significantly benefit from having consistency across what are often multiple complex governing instruments.

B. Wealth 3.0 lawyering begins with carefully structuring family representations to comply with the ethical rules, fully disclosing potential risks and conflicts and obtaining informed consent from all parties. Optimizing benefits to each family member, many attorneys and firms secure appropriate conflict waivers and promptly excuse themselves from advocating for one side over another if an actual conflict emerges. In ultra-high net worth situations, the attorneys are often engaged by the family office itself as the client; the work done for family members is derivative of that primary relationship.[208] See attached Addenda A and B.

C. "Sample Engagement Letter Inserts"(Addendum C) provides examples of specific language that can be used in engagement letters to address common family representation scenarios. Well-constructed and well-communicated engagement letters and conflict waivers should clarify who the client is, if any clients have priority over others in the event of a conflict and when information will and will not be shared within the family and with outside advisors. Also of significant value is the ACTEC Engagement Letter Guide for Practitioners.[209]

D. It is also incumbent on an attorney working across family members, trusts and entities as clients to ensure all parties clearly understand the engagement with each client. These conversations require good communication skills to avoid excessive jargon and handle the common questions that arise so explanations are clear. These skills are part of the communication and collaboration skills outlined for a Wealth 3.0 integrated environment. Attorneys can generally play a role in encouraging clients to embrace more transparency and better communication, which can also avoid future conflicts.

E. There will naturally be some circumstances in which one attorney will not be able to serve as sole counsel representing multiple parties on the same project. For example, prospective spouses

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[207] While by no means exhaustive, a research inquiry revealed limited cases in the U.S. in which trustees were sued for breaching their confidentiality to beneficiaries of a private trust. *See, e.g., Holladay v. Fidelity Nat. Bank of Baton Rouge*, 312 So. 2d 883 (La. Ct. App. 1975) (refusing to remove a corporate trustee for (i) providing information to a beneficiary's brother-in-law for preparation of her tax return, and (ii) employees of the corporate trustee discussing the status of the beneficiary's trust account in the office restroom when the beneficiary happened to be present unbeknownst to them).

[208] Martin E. Lybecker, Domingo P. Such & Stephen A. Keen, *Avoid Ethical Pitfalls When Representing Family Offices*, Trusts & Estates (Feb. 2017), at pp. 2-5.

[209] ACTEC Engagement Letter Guide for Practitioners, https://www.actec.org/wp-content/uploads/2023/08/ACTEC_2017_Engagement_Letters.pdf.

negotiating a pre-nuptial agreement or couples suing for divorce will each need separate counsel. Similarly, when there is a ripe intra-family dispute, members of the family whose interests are not aligned should each have separate counsel (although similarly situated or aligned parties can still share counsel in a joint-representation scenario).

F. Numerous scenarios might initially seem ineligible for a collaborative approach. Yet, they could still be compatible with multi-party representation and broader collaboration. These include creating post-nuptial agreements or marital property agreements, intra-family sales and even certain intra-family negotiations or disputes that can involve a common attorney and separate counsel.

G. For example, married clients who are on the same page about what they want with a post-nuptial agreement can have their common attorney draft an agreement that documents their wishes, as long as each of the spouses then hires separate counsel to review with them the agreement and their rights before they execute it. For a transmutation agreement or a marital property agreement clarifying the couple's current understanding of titling and character, depending on the potential for future conflict, the common attorney may be comfortable drafting the document and just having each spouse acknowledge they were advised they could or should consult separate counsel, even if the clients determine they do not want to do so.

H. Similarly, a family office suggesting a transaction can design the transaction, draft template documents and then hire separate counsel to represent the different interests of the family members. Consider the scenario in which the family office recommends that a younger generation take an outright distribution or exercise a power of appointment over trust assets that are not generation-skipping transfer tax-exempt and then use their own exemptions to set up new trusts. The family office can hire counsel to meet individually with each member of that generation to explain the benefits and any disadvantages of the proposed transaction so that each family member can determine whether to participate.

IX. Final Thoughts

A. The reality is that estate planning is a team sport, and astute attorneys can and should be open to a modern collaborative approach to advising families, consistent with a Wealth 3.0 paradigm.

B. Using the skills and knowledge we have outlined, attorneys have an incredibly critical and much valued seat at the table alongside the other professionals a family engages to help manage the complexity of wealth.

C. Successful estate planning for families depends on open, multidisciplinary collaboration among attorneys, accountants, financial advisors, and other specialists. Attorneys should embrace their role as part of a broader advisory team, not as isolated experts.

D. Attorneys must vigilantly uphold their ethical obligations—competence, confidentiality, and avoidance of conflicts—even as they collaborate with other advisors. Understanding and communicating the boundaries of privilege and work product protection is essential.

E. Engagement letters, conflict waivers, and protocols for information sharing should be thoughtfully drafted and updated as appropriate. These documents help clarify who the client is, how information will be shared, and what happens if conflicts arise.

F. Attorneys and advisory teams should be deliberate about when and how confidential information is shared. They should educate clients and team members about the risks of waiving privilege and the importance of maintaining confidentiality, especially in cross-disciplinary settings.

X. Addenda

A. James Grubman and Kim Kamin, "*How to Be a Wealth 3.0 Attorney," Trusts & Estates* (2024)

B. Martin E. Lybecker, Domingo P. Such & Stephen A. Keen, "*Avoid Ethical Pitfalls When Representing Family Offices"*, *Trusts & Estates* (Feb. 2017)

C. Sample Engagement Letter Inserts

ADDENDUM A:

COMMITTEE REPORT:
ULTRA-HIGH-NET-WORTH FAMILIES & FAMILY OFFICES

By **Kim Kamin** & **James Grubman**

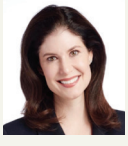
How to Be a Wealth 3.0 Attorney

Practical approaches that foster integrated services

The 2023 book, *Wealth 3.0: The Future of Family Wealth Advising*,[1] and several related articles[2] outline a fresh perspective on advising families about wealth. The perspective is grounded in a historical context in which, prior to approximately 1985 and still dominant in many areas of wealth management, the era of "Wealth 1.0" focused mainly on a family's financial assets without much concern for the family's emotional, psychological, governance or long-term developmental needs.

The next almost four decades of "Wealth 2.0" then introduced profound new thinking and interest in the nonfinancial capitals of the family, leading to the modern ecosystem of wealth management. However, Wealth 2.0 also spawned a variety of negative stereotypes, biases and oft-cited "proofs" about the allegedly high failure rate of wealth longevity in families. Recent debunking of these myths[3] has challenged the pessimism and fear-based strategies that influence what wealth creators believe and what wealth advisors offer *to protect the family from the money* and *the money from the family*.

The proposed new paradigm of Wealth 3.0 incorporates four building blocks for a robust new profession of family wealth advising: (1) improved and integrated practice across relevant professional services; (2) enhanced multidisciplinary training and credentialing of those who advise families; (3) organization of a unified field to support education and professionalism; and (4) enhanced rigorous research to support effective practice and reliable understanding of wealth in families. These interrelated elements are designed to move the field of family wealth advising forward with greater rigor, accountability, efficiency and cost-effectiveness.




Kim Kamin is a principal at Gresham Partners, LLC, and **James Grubman** is an internationally recognized consultant to families of wealth, family businesses and the advisors who serve them

Serving Families Responsibly

Wealth 3.0: The Future of Family Wealth Advising notes the legal profession has unique challenges in fitting into a more collaborative cross-disciplinary environment.[4] Understandably, some attorneys have responded to the concepts described in Wealth 3.0 with questions, given challenges such as sharing the "family as the client" stance often taken by family governance specialists, philanthropic advisors and family educators. In the growing shift toward developing integrated strategies among multiple providers, the attorney may feel uncomfortable when asked to share information on behalf of the client and their family.

Can responsible attorneys participate in a Wealth 3.0 service environment, or must they be absent from the table where other advisors collaborate?

Professional Ethics

Members of the family advisory team need to understand an attorney's distinctive responsibilities to clients. Attorneys[5] are bound by the rules of professional ethics, and they're fiduciaries with corresponding fiduciary duties. Moreover, they must consider the potential benefits of protecting attorney-client privilege and attorney work product in litigation. The potential consequences of being reported and reprimanded for not faithfully following ethical rules require attorneys to carefully consider the ethics of each family engagement and all interactions with other advisors.

The American Bar Association (ABA) publishes Model Rules of Professional Conduct (Model Rules),[6] with each state adopting its own version. Because the Model Rules are designed primarily for litigators and transactional attorneys, they don't always clearly apply to estate-planning attorneys. The American College of Trust and Estate Counsel (ACTEC) further publishes its own commentaries for attorneys practicing in the trusts and estates area.

The primary ethical rules implicated in family representations are: (1) competence,[7] (2) avoiding conflicts of interest with concurrent or former clients, and (3) confidentiality and privilege.[8] Other factors relate to attorneys' fiduciary roles and the perceived risks of family conflict versus the benefits of helping to prevent or ameliorate those conflicts through integrated services. Specifically:

Competence. Attorneys need to remain cognizant of the extent of their own experience and expertise and avoid giving advice beyond the scope of what they can competently cover. With increased specialization, one lawyer can rarely opine and advise on the plethora of legal issues faced by a family, their trusts and their entities. This means an attorney must naturally collaborate with other attorneys and specialists while respecting their own boundaries of competence and expertise.

Simultaneous representation of current clients. The Model Rules create the presumption that an attorney can't provide concurrent common representation if: (1) the representation of one client will be directly adverse to another client; or (2) there's a significant risk that the attorney's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer will materially limit the representation of one or more clients.[9] However, this presumption can be overcome if: (1) the attorney reasonably believes that they'll be able to provide competent and diligent representation to each affected client; (2) the representation isn't prohibited by law; (3) the representation doesn't involve the assertion of a claim by one client against another client represented in the same litigation or other proceeding before a tribunal; and (4) each affected client gives informed consent, confirmed in writing.[10] Attorneys must also remain cognizant of their duties to former clients to avoid harming their interests in the same or substantially related matters.[11]

An additional complexity is that attorneys must carefully review the specific rules of the jurisdiction where they practice, as local law can differ significantly from the Model Rules. This gets complicated with wealthy families and family enterprises that commonly have residences, businesses and family members across multiple domestic and international jurisdictions.

Except in extreme circumstances, an attorney may not reveal client information without informed consent.

Confidentiality and privilege. Except in extreme circumstances, an attorney may not reveal client information without informed consent.[12] This obligation isn't so different than that of other professional advisors such as accountants or therapists. Similarly, consultants who have signed confidentiality agreements and nondisclosure agreements may have obligated themselves legally to maintain client confidentiality.

The attorney-client privilege is an evidentiary rule that protects information from being disclosed in discovery or at trial. In general, the privilege applies to communications in confidence between an attorney and client to seek or provide legal advice. It extends to documents or testimony reflecting the substance of the communications, not just the communications themselves.[13] Because one element of privilege is that the communication must be confidential, generally, privilege can't attach to a communication made in the presence of a third party or without regard for who might hear or read it. The privilege is also deemed to have been waived with respect to communications later disclosed to a third party. Accordingly, certain communications made to clients in the presence of or later shared with other advisors can destroy the privilege.

As a practical matter when working with families, however, the circumstances in which privilege must be protected can be rather limited, might extend to the client's agents and are often waived. Therefore, concerns about protecting it are often overstated or can otherwise be addressed more precisely within the team environment serving the family.

Attorneys as fiduciaries. The attorney-client relationship is also a fiduciary one, meaning attorneys owe their clients the fiduciary duties of loyalty and prudence. This includes maintaining client confidences and avoiding conflicts of interest with clients.[14] Attorneys can be found to have committed malpractice for breaching their fiduciary duties to clients.[15]

Conflicts within families. Inherent potential conflicts among family members are pervasive. Each family member will likely have their own interests, desires and objectives. There's the potential for conflicting interests between spouses, between or within generations and among branches of a family. In particularly egregious situations in which attorneys were cavalier about ignoring potential conflicts, those attorneys subsequently were sued for favoring one client over another in the actual conflict.[16]

However, there's a big difference between the *potential for* conflict and *actual* conflict. We would posit that, more often than not, such conflicts are merely potential conflicts that needn't be reified. Joint or concurrent representations within a family and collaboration with an expanded advisory team generally behoove the family to operate as a unit. This also enables attorneys to be much more effective in the design, implementation and administration of the legal work itself.

As we'll outline below with concrete recommendations, many disputes can be averted with proper advance planning and communications respectful of each family member and their potential interests. The rewards of attorney involvement in the full engagement and affairs of the family vastly outweigh the potential risks, which can be addressed with careful structural planning.

Structural Representations

There can be considerable efficiencies and cost savings when the same attorney or law firm appropriately represents a successful family and its enterprises, building relationships with multiple family members and understanding its byzantine web of trusts and operating businesses. Ultra-high-net-worth (UHNW) families with family offices will also significantly benefit from having consistency across what are often multiple complex governing instruments.

Wealth 3.0 lawyering begins with carefully structuring family representations to comply with the ethical rules, fully disclosing potential risks and conflicts and obtaining informed consent from all parties. Optimizing benefits to each family member, many attorneys and firms secure appropriate conflict waivers and promptly excuse themselves from advocating for one side over another if an actual conflict emerges. In UHNW situations, the attorneys are often engaged by the family office itself as the client; the work done for family members is derivative of that primary relationship.[17]

"Sample Engagement Letter Inserts," p. 70, provides examples of specific language that can be used in engagement letters to address common family representation scenarios. Well-constructed and well-communicated engagement letters and conflict waivers should clarify who the client is, if any clients have priority over others in the event of a conflict and when information will or won't be shared within the family and with outside advisors.

It's also incumbent on an attorney working across family members, trusts and entities as clients to ensure all parties clearly understand the engagement with each client. These conversations require good communication skills to avoid excessive jargon and handle the common questions that arise so explanations are clear. These skills are part of the communication and collaboration skills outlined for a Wealth 3.0 integrated environment. Attorneys can generally play a role in encouraging clients to embrace more transparency and better communication, which can also avoid future conflicts.

Sample Engagement Letter Inserts

Language to address common family representation scenarios

Joint Representation: You have asked us to represent both of you in this matter. Although joint representation of spouses is common and generally results in coordinated and cost-effective planning, some spouses choose to have separate counsel for a variety of reasons, and you are, of course, free to do so. In some situations, separate counsel is necessary because of conflicts between the spouses. Differences of opinion alone do not prevent us from representing both of you, but if they rise to such a high level that they interfere with our ability to provide proper representation, or if other significant conflicts appear, we would have to withdraw from representing one or both of you. We are unaware of any such conflicts and are not expecting any to occur. If we become aware of a conflict, we will promptly advise you of that fact, although it may not be possible to disclose to both of you precisely why we have concluded that we must withdraw. You also should advise us if you become aware of any conflict. Of course, either of you may retain separate counsel at any time. If one of you does so, you agree that we will be free to continue to represent the other of you.

Information Sharing With Joint Representation: One important aspect of our joint representation is that all information relating to the representation that we receive or have already received, including from [either/any] of you, is available to [both/all] of you. We cannot keep any relevant information secret from one of you. By choosing the joint representation described in this letter, each of you authorizes us to disclose to the other[s] all information that may come to our attention at any time, including any requests by one of you that we change only your estate plan.

Information Sharing With Concurrent Representation: Other members of your family or businesses in which you or they have an interest may ask us to represent them in estate planning or other matters. Those other individuals or businesses would be our only clients in such matters. We would not be representing you or protecting any interest you might have with respect to those matters. In such other representations, we may obtain confidential information that could be significant to you in making your estate planning or other personal decisions. Because we will have a duty to the other clients to preserve the confidentiality of their information, however, we will not be able to disclose the information to you without the informed consent of the other clients. Similarly, we would not disclose confidential information about your legal matters to other clients without your informed consent.

Existing Representation of Other Family Members: You have requested our representation, recognizing that we will simultaneously represent [insert relationships and names of all other family members] on other matters. It is important at this juncture to confirm that you understand that they would be our only clients with respect to their estate-planning matters and that we are not representing you in connection with, or otherwise protecting whatever interest you may have in, their assets. You also recognize that, during the course of our representation of your parents and your siblings, we might receive information from them that you would be interested in having, but that we are not permitted to share with you any information from or about them and their estate plan without their consent. Similarly, we will share your personal information with them only to the extent that you have given us your consent to do so. [You have requested that our firm copy [Name of Family Member] on all of our various correspondence.]

Authorization to Speak With Other Advisor(s): In addition, you have authorized us to communicate openly about your matters with [Name or Names (and their colleagues)] of [Firm] until we receive written notice from you to the contrary.

Authorization to Speak With Agent (to Signal Privilege Inclusion): In addition, you have authorized us to communicate openly about your matters with _____ of _____, as your agent, until we receive written notice from you to the contrary.

Representation if Primary Relationship is With One Spouse or Family Member: [Party Name], in light of the existing relationship we have with [Other Party], by signing this letter, you will be agreeing that, in the event of such a dispute, we would cease to represent you and continue to represent [Other Party] (subject to our inability to represent either of you because of the nature of the information we acquired during the course of our joint representation).

— Kim Kamin & James Grubman

Thornier Scenarios

There will naturally be some circumstances in which one attorney won't be able to serve as sole counsel representing multiple parties on the same project. For example, prospective spouses negotiating a pre-nuptial agreement or couples suing for divorce will each need separate counsel. Similarly, when there's a ripe intra-family dispute, members of the family whose interests aren't aligned should each have separate counsel (although similarly situated or aligned parties can still share counsel in a joint representation scenario).

Numerous scenarios might initially seem ineligible for a collaborative approach. Yet, they could still be compatible with multi-party representation and broader collaboration. These include creating post-nuptial agreements or marital property agreements, intra-family sales and even certain intra-family negotiations or disputes that can involve a common attorney and separate counsel.

For example, married clients who are on the same page about what they want with a post-nuptial agreement can have their common attorney draft an agreement that documents their wishes, as long as each spouse then hires separate counsel to review with them the agreement and their rights before they execute it. For a transmutation agreement or a marital property agreement clarifying the couple's current understanding of titling and character, depending on the potential for future conflict, the common attorney may be comfortable drafting the document and just having each spouse acknowledge they were advised they could or should consult separate counsel, even if the clients determine they don't want to do so.

Similarly, a family office suggesting a transaction can design the transaction, draft template documents and then hire separate counsel to represent the different interests of the family members. Consider the scenario in which the family office recommends that a younger generation take an outright distribution or exercise a power of appointment over trust assets that aren't generation-skipping transfer tax-exempt and then use their own exemptions to set up new trusts. The family office can hire counsel to meet individually with each member of that generation to explain the benefits and any disadvantages of the proposed transaction so that each family member can determine whether to participate.

Final Thoughts

The reality is that astute attorneys can and should be open to a modern collaborative approach to advising families, consistent with a Wealth 3.0 paradigm. Using the skills and knowledge we've outlined, attorneys have a valued seat at the table alongside the many other professionals a family needs to manage the complexity of wealth. The legal profession has always adapted to rapidly changing environments of regulation, professional practice and innovative strategies. Wealth 3.0 is simply the next step in the long history of the legal profession as a dynamic, thriving field.

Endnotes

1. James Grubman, Dennis T. Jaffe and Kristin Keffeler, *Wealth 3.0: The Future of Family Wealth Advising*, Family Wealth Consulting (2023).
2. James Grubman, Dennis T. Jaffe and Kristin Keffeler, "Wealth 3.0: From Fear to Engagement for Family Wealth Advisors," *Trusts & Estates* (February 2022), at pp. 18-22; James Grubman, Dennis T. Jaffe and Kristin Keffeler, "Wealth 3.0 in Practice," *Trusts & Estates* (February 2023), at pp. 16-20; Sharilyn Hale, "Philanthropy and Wealth 3.0," *Trusts & Estates* (April 2024), at pp. 44-47.
3. James Grubman, "There is no 70% rule—improving outcome research in family wealth advising," *International Family Offices Journal* (June 2022), at pp. 33-38.
4. *Supra* note 1, at p. 98.
5. Note that a "lawyer" is an individual who has only graduated from law school, while an "attorney" has additionally passed a bar exam and professional responsibility exam and has been granted a license to practice law, that is, they can give legal advice and appear in court. In most states, all attorneys are lawyers but not all lawyers become attorneys. *See, e.g, www.indeed.com/careeradvice/career-development/can-you-take-the-bar-exam-without-going-to-law-school.*
6. The American Bar Association's (ABA) Model Rules of Professional Conduct (Model Rules) were adopted by the ABA House of Delegates in 1983. They serve as models for the ethics rules of most states. California was the final state to bring its rules into quasi-conformity with the format of the ABA Model Rules, which it did in 2018.
7. Model Rule 1.1: Competence. "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." *See also* Model Rule 5.5: Unauthorized Practice of Law; Multijurisdictional Practice of Law. Model Rule 5.5(a) provides that: "A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so."

8. *See* Kim Kamin, "Fiduciary Duties and Ethical Challenges for Trustees: The Evolving Landscape," Andersen Tax Family Office Roundtable (June 2017) originally prepared for the 40th Annual Notre Dame Tax & Estate Planning Institute (November 2014).
9. Model Rule 1.7(a).
10. Model Rule 1.7(b).
11. Model Rule 1.9: Duties to Former Clients.
12. Model Rule 1.6 provides that an attorney may reveal information under certain circumstances such as to prevent crime or fraud, comply with another law or court order and to disclose to the Internal Revenue Service.
13. *See* David C. Blickenstaff and Kim Kamin, "Attorney-Client Privilege in a Team Environment, National Association of Estate Planning Council" Webinar (July 10, 2019); David C. Blickenstaff and Kim Kamin, "Estate Planning as a Team Sport: Attorneys, Accountants and Other Advisors Working Together—Are Your Communications Privileged?" IICLE 61st Annual Estate Planning Short Course (May 2018).
14. Hofstra Law School Class #5 The Lawyer's Fiduciary Duties, *https://legalmalpractice.com/cle-law-school-course/lawyer-malpractice-class-5-the-lawyers-fiduciary-duties/*. *See* Cornell Law School, Fiduciary Duty, *https://www.law.cornell.edu/wex/fiduciary_duty. See also* Berkeley Law Legal Profession Course, Duties Lawyers Owe Clients Casebook Chapter 1, *www.law.berkeley.edu/php-programs/courses/fileDL.php?fID=578.*
15. *See, e.g.*, Hofstra Law School Class #5 The Lawyer's Fiduciary Duties, *ibid*. This is global, not just in the United States (any legal system based on English system), including Canada. *See, e.g.,* Alice Woolley, "The Lawyer As Fiduciary: Defining Private Law Duties in Public Law Relations," 65 *UTLJ* 4, at pp. 285-334 (Fall 2015), *www.jstor.org/stable/24855487*. For Western Europe, *see, e.g.*, Martin Gelter and Genevieve Helleringer, "Fiduciary Principles in European Civil Law Systems," *Oxford Handbook of Fiduciary Law* (March 2018), *www.ecgi.global/sites/default/files/working_papers/documents/finalgelterhelleringer_0.pdf.*
16. *See, e.g.,* Liesel Pritzker and Mary Scanlan's separate law suits against their family attorneys described in Zach Lowe, "Shopping Mall Heiress Sues Neal Gerber, Alleging Massive Misconduct," *AM LAW Daily* (August 2009), *https://amlawdaily.typepad.com/amlawdaily/2009/08/mall-heiress-sues-neal-gerber-alleging-massive-misconduct.html.*
17. Martin E. Lybecker, Domingo P. Such III and Stephen A. Keen, "Avoid Ethical Pitfalls When Representing Family Offices," *Trusts & Estates* (February 2017), at pp. 2-5.

By **Martin E. Lybecker, Domingo P. Such** & **Stephen A. Keen**

Avoid Ethical Pitfalls When Representing Family Offices

Engagement letters may help

Family offices continue to multiply, and the numberof industry professionals who provide services to them continue to grow. The genesis of family offices dates back hundreds of years; wealth management and the deployment of capital in its various forms have evolved with family offices to recognize financial, human, intellectual and spiritual capital management. Today, in addition to a president, a chief financial and investment officer and other executive family-centric officers, many offices employ administrative and support staff, including in-house attorneys. Based on our experience in counseling in-house attorneys for family offices, we believe that such attorneys and the family office executive team should carefully consider ethical issues that may be inherent in their work to successfully serve important family relationships and manage various forms of capital.

Conflicts of Interest

A case from 2007, *Preovolos v. Preovolos*,[1] illustrates some potential ethical pitfalls of representing a family office. The Preovolos Family Limited Partnership held and managed Fofo Preovolos' home. In a familiar structure, Fofo and her son, Peter, were the general partners; her other son, Theodore, was a limited partner, along with Peter and the Preovolos Family Children's Trust.

One of Peter's sons, Thanasi, was a principal in the law firm of Preovolos & Associates, ALC (P & A). Thanasi and his firm had represented, at various times, the partnership, the general partners and Peter in his personal capacity. Thanasi also prepared Theodore's estate plan and provided Theodore a letter explaining his rights and interest in the partnership. Thanasi's letter didn't indicate whom he represented when responding to Theodore's questions.

Theodore and Peter had a dispute over a tax-free, like-kind exchange of the house for a storage facility, which led Theodore to sue the other partners. P & A represented the defendants, but Theodore moved to disqualify the firm. The trial court granted the motion, which was affirmed on appeal. The appellate court found that Theodore was a current client of the firm because Thanasi had sent Theodore and his wife a letter reminding them to update the Schedule of Assets for their estate plan. The court also found Thanasi's letter explaining Theodore's rights and interest in the partnership prima facie evidence of a former representation. This former representation provided an independent ground for disqualification, insofar as it related to the same subject matter as the lawsuit.

The appellate court concluded:

> Disqualification should be no surprise to Thanasi. By performing legal work for both the partnership and at least two of its limited partners, Thanasi knowingly assumed representation of clients with potentially adverse interests. As soon as Theodore began questioning the management of the partnership and urging the sale of the house over Peter's objections, Thanasi was on notice that he represented clients with actual adverse interests. Yet Thanasi responded to Theodore's … inquiry about his rights and interests in the partnership without qualification, and he continued to

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represent Theodore as to his estate plan.[2]

A Difficult Question

"Who's your client?" can be a difficult question for family office attorneys. Although Thanasi wasn't an employee of his family's partnership, his situation should be familiar to an in-house attorney to a family office. Everyone in the Preovolos family felt free to ask Thanasi's firm for legal advice for both personal and business purposes, without giving thought to potential conflicts. Likewise, members of a family office may regard an in-house attorney as their first stop for legal advice. Specifically, an in-house attorney at a family office may be asked to represent:

- the family office itself as a legal organization;
- related family operating entities;
- members of the family in their personal capacity (for example, as donors, beneficiaries or testators);
- members of the family acting as the trustee of trusts;
- investment entities created by the family, that is, investment vehicles and foundations; and/or
- members of the family acting as members of the boards of trustees or directors for those investment vehicles and foundations.

If an outside law firm were engaged to represent the individuals or entities involved in any of those five situations, the law firm would probably treat each situation as a different "client" for purposes of its evaluating potential conflicts of interests, maintaining confidentiality and other ethical issues. The firm would, or should, document each representation with an engagement letter and seek waivers from the other clients when appropriate. The rigor and robustness of that ethical approach is worth examining in the context of an in-house attorney for a family office.

Potential Sources of Conflicts

Preovolos illustrates how family conflicts can translate into ethical conflicts for a family office attorney. Regrettably for these attorneys, conflicts among family members are common. Frequently, the patriarch and matriarch of the single-family office, as well as their descendants, have different financial interests, investment objectives, philosophies of life and a variety of different medical, educational and support needs. It's common knowledge that differences of opinion span the generational family members, and those differences can spawn conflict. It's possible to foresee sincerely held differences of opinion based on different personal circumstances and desires, and not just different views regarding the best use of the family's resources. This may create conflicts of interest when, for example:

> If the engagement letter permits the representation of individual family members in any capacity, then it's recommended that all of the potential clients should sign it.

- Members of the family have different views on how the family office, as an entity, should be run, perhaps involving greater or lesser representation on the board of directors for different generations of the family;
- Family involvement with an operating company, policies and family culture around that involvement evolve over time and typically change with or without conflict, depending on the strength of the family succession plan and its implementation across generations;
- One member of the family is willing to serve as trustee of trusts that exist for the benefit of a different generation of family members, and the trustee and one or more of those beneficiaries disagree on how the trustee should exercise his discretion over the

trust; or

- Some members of the family are willing to serve on the board of directors of a family-operated company, family investment vehicle or the family foundation, and members of the family disagree on whether the members of the family acting in a fiduciary capacity are making decisions that are consistent with their fiduciary duties.

An attorney employed by the family office may be asked to give legal advice in each of these situations. An in-house attorney who provides such advice without considering whom she represents, or without making sure that the family members understand the scope of her representation, can find herself in an ethical quagmire.

> As shown by *Preovolos*, without a prior understanding among the family members, a family conflict may prevent an in-house attorney from representing anyone in a matter, including the family office.

Engagement Letters

Thanasi's letter regarding Theodore's rights and interests in the family partnership illustrates the difficulty of identifying a family office client. Theodore just wanted answers to some legal questions. He probably didn't consider whether he was posing his questions to the partnership's attorney or to his own attorney. If a family member seeking legal advice is unaware of the distinction, how can an in-house family office attorney tell whom she's supposed to represent?

Difficult though it may be, the court's unsympathetic treatment of Thanasi reminds us that the in-house attorney is responsible for making sure that family members understand whose interest the attorney represents in any matter. Although not currently a common practice, we suggest that an in-house attorney consider the approach taken by outside law firms and request that the family office execute an engagement letter with the in-house attorney.[3] An engagement letter would not only document the family's understanding of the scope of the lawyer's engagement, but also would encourage the attorney to consider whom she's being asked to represent before responding to a request.

Unlike a typical engagement letter, a family office letter should also address the extent to which the attorney may represent members of the family and whether such representation would be limited to an official capacity (such as board member or trustee) or extended to personal representation (such as estate planning). If the engagement letter permits the representation of individual family members in any capacity, then it's recommended that all of the potential clients should sign it. Moreover, the letter should address: (1) the terms of joint representations; (2) what would happen if the attorney couldn't properly represent different "clients" under certain circumstances; and (3) when the attorney may seek ethical advice from a third party without necessarily breaching any attorney-client privilege with any client. A standard law firm engagement letter could be used as a model.

Ideally, every family member would execute the engagement letter to document their understanding of whether they are or aren't represented by the attorney, the limitations of any representation and their waiver of certain potential conflicts. If the attorney finds that the scope of the representation is expanding, it would be important to supplement the engagement letter accordingly.

Identifying Your Non-Clients

Working through the engagement letter process may also expose situations in which the attorney should consider documenting a family member's understanding that he's not the attorney's client. This would be a second approach to addressing potential conflicts of interest for the in-house attorney.

A "non-client" letter would identify the specific matter that affects the addressee and ask the addressee to acknowledge that the in-house attorney represents the interest of the family office or another family member exclusively, even though the addressee is also a party to the identified matter. If this isn't practical, it would

still be helpful to refer to the engagement letter in the transmittal letter for the transaction documents and remind the addressee of the limits of the attorney's representation. The court's reference to Thanasi's failure to "qualify" his letter to Theodore suggests that if the letter had stated that Thanasi was acting as the partnership's attorney, it might have been sufficient proof that Theodore wasn't Thanasi's client.

Benefits to Family

As shown by *Preovolos*, without a prior understanding among the family members, a family conflict may prevent an in-house attorney from representing anyone in a matter, including the family office. An engagement letter may thus protect the interests of the family as well as the attorney employed by the family office. Specifically, an engagement letter may:

- Preserve the in-house attorney's ability to perform her primary job of representing the family office and its officers (in their official capacity), thus avoiding the expense and difficulty of retaining outside counsel to represent the family office in the conflicted matter;
- Prevent family members from using a potential conflict of interest as a bargaining chip in negotiations with other members; or
- Document a "material common interest" that would protect the attorney/client privilege when confidential information is shared with family members not represented by the attorney.[4]

Our proposed approach may be at odds with the informal nature of many family offices. However, informal arrangements can be a source of intra-familial conflicts, and those operating a family office may want to consider the general benefits of documenting any services that the office will provide to the family. An additional benefit to the family office as a whole, and not just the in-house attorney, is the intrinsic value of documenting those service arrangements. We've regularly prepared service agreements between the family office and the family members with respect to accounting, investment, tax, insurance and succession planning purposes as part of our "best practices" recommendations. The legal services engagement letter for the in-house attorney we recommend could easily be subsumed into a master service agreement. Indeed, when a family member engages a multi-family office entity for services, the standard practice is for the multi-family office to document each engagement to avoid the informal and unclear understanding that might lead to conflicts and lawsuits.

Document Representation

An in-house attorney's ethical situation working for a family office is similar in many ways to an attorney employed by a small, closely held company. However, an in-house counsel for a closely held company may have the theoretical advantage of only representing the business, rather than personal, interests of the owners. Such a demarcation isn't available to an in-house attorney for a family office, insofar as the business of the family office is to pursue the personal interests of the family members, individually as well as collectively. This confluence of interests is more apparent as the family office industry further researches and documents wealth management concerning financial, as well as human, intellectual and spiritual capital. It's not a stretch to see that the family office attorney is involved with family operating companies, family investment companies, private trust companies and other family entities, being managed side-by-side with the family office. This makes it even more important for an attorney at a family office to determine and document whom she represents. At the very least, it would be prudent for the in-house attorney at a family office to have a frank discussion with the family principals so that appropriate sensitivity can be instilled in all concerned and interested parties.

Endnotes

1. *Preovolos v. Preovolos*, 2007 WL 521362 (Cal. Ct. App. 2007) (unpublished).
2. *Ibid.*, at p. 6.
3. Even if the parties decide not to execute a written engagement letter, it would still be prudent to discuss conflicts of interest, ethical obligations including privilege and joint representations with all family members with whom the lawyer expects to interact, so that there are no unfounded expectations.
4. *See In re Lululemon Athletica Inc.*, 220 Litigation, 2015 WL 1957196 (Del. Ch. Ct. 2015) (inclusion of chief financial officer of family office on emails didn't waive attorney/client privilege).

ADDENDUM C:

SAMPLE ENGAGEMENT LETTER INSERTS

Joint Representation: You have asked us to represent both of you in this matter. Although joint representation of spouses is common and generally results in coordinated and cost-effective planning, some spouses choose to have separate counsel, for a variety of reasons, and you are, of course, free to do so. In some situations, separate counsel is necessary because of conflicts between the spouses. Differences of opinion alone do not prevent us from representing both of you, but if they rise to such a high level that they interfere with our ability to provide proper representation, or if other significant conflicts appear, we would have to withdraw from representing one or both of you. We are not unaware of any such conflicts and are not expecting any to occur. If we become aware of a conflict, we will promptly advise you of that fact, although it may not be possible to disclose to both of you precisely why we have concluded that we must withdraw. You also should advise us if you become aware of any conflict. Of course, either of you may retain separate counsel at any time. If one of you does so, you agree that we will be free to continue to represent the other of you.

Information Sharing with Joint Representation: One important aspect of our joint representation is that all information relating to the representation that we receive or have already received, including from [either/any] of you, is available to [both/all] of you. We cannot keep any relevant information secret from one of you. By choosing the joint representation described in this letter, each of you authorizes us to disclose to the other[s] all information that may come to our attention at any time, including any requests by one of you that we change only your estate plan.

Information Sharing with Concurrent Representation: Other members of your family or businesses in which you or they have an interest may ask us to represent them in estate planning or other matters. Those other individuals or businesses would be our only clients in such matters. We would not be representing you or protecting any interest you might have with respect to those matters. In such other representations, we may obtain confidential information that could be significant to you in making your estate planning or other personal decisions. Because we will have a duty to the other clients to preserve the confidentiality of their information, however, we will not be able to disclose the information to you without the informed consent of the other clients. Similarly, we would not disclose confidential information about your legal matters to other clients without your informed consent.

Existing Representation of Other Family Members: You have requested our representation, recognizing that we will simultaneously represent [insert relationships and names of all other family members] on other matters. It is important at this juncture to confirm that you understand that they would be our only clients with respect to their estate planning matters, and that we are not representing you in connection with, or otherwise protecting whatever interest you may have in, their assets. You also recognize that, during the course of our representation of your parents and your siblings, we might receive information from them that you would be interested in having, but that we are not permitted to share with you any information from or about them and their estate plan without their consent. Similarly, we will share your personal information with them only to the extent that you have given us your consent to do so. [You have requested that our firm copy [Name of Family Member] on all of our various correspondence.]

Authorization to Speak with Other Advisor(s): In addition, you have authorized us to communicate openly about your matters with [Name or Names [(and their colleagues) of [Firm]] until such time as we receive written notice from you to the contrary.

Authorization to Speak with Agent (to Signal Privilege Inclusion): In addition, you have authorized us to communicate openly about your matters with _____ of _____, as your agent, until such time as we receive written notice from you to the contrary.

Representation if Primary Relationship is with One Spouse or Family Member: [Party Name], in light of the existing relationship we have with [Other Party], by signing this letter, you will be agreeing that, in the event of such a dispute, we would cease to represent you and continue to represent [Other Party] (subject to our inability to represent either of you because of the nature of the information we acquired during the course of our joint representation).