Who Is the Client? Who Has the Privilege?: The Attorney Client Privilege in Trust Relationships in Arkansas*

I. INTRODUCTION

A trustee often encounters complex issues administering a trust. The trustee is presumably retained because of expertise in a particular area or because of confidence the settlor has in the trustee. The role of an attorney for a trust is to assist the trustee in making decisions regarding the trust. The attorney discusses his professional opinions and various options for trust administration with the trustee. The trustee then makes decisions based on that information, coupled with personal experience. Fees are generally paid from the funds of the trust, which exist for the sole benefit of the beneficiaries.[1]

Suppose that subsequent to actions taken by the trustee, the beneficiaries sue the trustee for decisions made relating to the trust. Then, in litigation, the beneficiaries seek to discover communications between the attorney and trustee. Can the attorney-client privilege in Arkansas protect those communications?

Jurisdictions are split on whether a trustee, when selecting and corresponding with an attorney for the trust, is representing himself or the beneficiaries, and therefore, whether the communications between an attorney and trustee are protected by the attorney-client privilege.[2] The Uniform Trust Code has not declared whether a trustee may claim attorney-client privilege in these situations.[3] As

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1. Anthony W. Mommer, *A New Look at the Attorney-Client Privilege in Discovery to Trustees From Beneficiaries*, 44 RES GESTÆ 18, 18 (2000).

2. *See* ALAN NEWMAN ET AL., THE LAW OF TRUSTS AND TRUSTEES § 962 (3d ed. 2010); Rust E. Reid et al., *Privilege and Confidentiality Issues When a Lawyer Represents a Fiduciary*, 30 REAL PROP. PROB. & TR. J. 541, 560 (1996).

3. UNIF. TRUST CODE § 813 (amended 2005), 7C U.L.A. 609-10 (2006).

a result, when litigation ensues, it is difficult in many jurisdictions to determine if the attorney-client privilege protects the communications, and, if so, which communications will be protected.

Although courts in a majority of jurisdictions have adopted a "fiduciary exception" to the rule of attorney-client privilege,[4] Arkansas courts have yet to rule on this issue. Over thirty years ago, the Arkansas Supreme Court held that, in some cases, the trustee and the beneficiaries fall under a "joint-clients" exception to the attorney-client privilege.[5] However, since then, legislation in Arkansas has applied the principle of privity to define the relationship between the attorney, trustee, and beneficiaries, altering the analysis.[6] Moreover, in jurisdictions around the country, there has been a trend toward moving away from the fiduciary exception to the minority rule, under which the attorney-client privilege protects communications between the attorney and trustee.[7]

It is important that there is clear law in Arkansas on this issue because without predictability, the attorney-client privilege is ineffective.[8] The attorney-client privilege is ineffective if the parties do not know in advance who is subject to its protection.[9] Part II of this comment examines the three different approaches courts take concerning the application of the attorney-client privilege in litigation between trustees and beneficiaries. Part III discusses Arkansas law governing trust relationships and the attorney-client privilege. Part IV analyzes the various approaches as compared to current Arkansas law. Part V recommends that Arkansas follow the minority approach and protect communications between trustees and attorneys. Finally, this comment proposes a rule to create predictability and certainty for attorneys and their clients in these situations.

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4. *See* discussion *infra* Part II.A.

5. Estate of Torian v. Smith, 263 Ark. 304, 314-15, 564 S.W.2d 521, 526 (1978), *cert. denied*, 439 U.S. 883 (1978); *see also* ARK. R. EVID. 502(d)(5).

6. *See* ARK. CODE. ANN. § 28-73-813 (Repl. 2012).

7. Murphy v. Gorman, 271 F.R.D. 296, 315, 332 (D.N.M. 2010); Mommer, *supra* note 1, at 19; *see infra* Part II.B.

8. *See* United States v. Jicarilla Apache Nation, 131 S. Ct. 2313, 2328 (2011).

9. *Id.* at 2328-29.

II. DIFFERENT APPROACHES TO THE ATTORNEY CLIENT PRIVILEGE IN TRUST MATTERS

There are three general approaches courts use when applying the attorney-client privilege to trust relationships. First, the majority approach considers the beneficiaries, the sole benefactors of the trust, to be the real clients of the attorney. Therefore, communications between the attorney and the trustee are not privileged and are discoverable by the beneficiaries. Second, the minority approach is that the attorney's client is the trustee, and, thus, the attorney-client privilege protects communications between the attorney and the trustee. Finally, some courts have taken an intermediate approach, finding that communications are protected only when the beneficiaries and the trustee are already in litigation against each other. Communications before or unrelated to that litigation are discoverable, but the communications during litigation are protected by the attorney-client privilege.

A. Majority Approach

A majority of courts have held that when a trustee retains an attorney, the beneficiaries, rather than the trustee, are the attorney's clients.[10] Thus, the communications between the trustee and the attorney are discoverable by the beneficiaries in litigation. This approach is often referred to as the "fiduciary-duty exception" to the attorney-client privilege.[11] The comments to the Restatement (Third) of the Law Governing Lawyers and the Restatement (Second) of Trusts also reflect this approach.[12] Moreover, many leading scholars agree that

10. Rust E. Reid et al., *supra* note 2, at 560 ("[T]he general trend is for courts to permit, at a minimum, discovery [by beneficiaries] of attorney-client communications generated in the ordinary course of administering the trust.").

11. Tina N. Babel, *Attorney for the Trust: Does Attorney-Client Privilege Belong to the Trustee or the Beneficiary?*, 98 ILL. B.J. 524, 525 (2010).

12. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 84 cmt. b (2000) ("[T]he trustee cannot invoke the attorney-client privilege to prevent the beneficiaries from introducing evidence of the trustee's communications with a lawyer retained to advise the trustee in carrying out the trustee's fiduciary duties."); RESTATEMENT (SECOND) OF TRUSTS § 173 (1959) ("The trustee is under a duty to the beneficiary to give him upon his request . . . complete and accurate information as to the nature and amount of trust property . . . .").

the beneficiaries' right to review opinions of counsel and all other documents obtained by trustees for the administration of the trust is absolute.[13]

The Court of Chancery of Delaware's decision in *Riggs National Bank v. Zimmer* is the seminal case taking this approach.[14] In *Riggs*, the trustee obtained a legal memorandum from a law firm concerning potential tax litigation on behalf of the trust.[15] Litigation related to the matter began a year later, and the beneficiaries attempted to obtain the memorandum during discovery.[16] The memorandum was paid for from the assets of the trust.[17] The court emphasized that the fiduciary relationship between trustees and beneficiaries is of the utmost importance, and therefore, the court concluded that the memorandum was discoverable.[18]

The *Riggs* court examined several factors, including: (1) the source of the attorney's compensation (trust funds); (2) the purpose of the trust (to benefit the beneficiaries); (3) and the fiduciary duties that the trustee owed to the beneficiaries.[19] First, the *Riggs* court found that the payment to the trustee from the assets of the trust may be a "significant factor" tending to show that the beneficiaries are the "real clients."[20] The court reasoned that it would not be proper to charge the trust if the interests of the trustee were different from the interests of the beneficiaries.[21] The court held that, because the payment was from the trust, the decisions were made in the interest

13. NEWMAN ET. AL, *supra* note 2, § 962; 2A AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, THE LAW OF TRUSTS § 173 (4th ed. 1987).

14. 355 A.2d 709, 712 (Del. Ch. 1976); Babel, *supra* note 11, at 525.

15. *Riggs*, 355 A.2d at 710.

16. *Id.*

17. *Id.*

18. *Id.* at 711-12; *see also* Babel, *supra* note 11, at 525.

19. *Riggs*, 355 A.2d at 711. The court noted the "[a]ttorney-client privilege is established in Delaware, not by statute but by application of common law principles." *Id.* at 713 (quoting Texaco, Inc. v. Phoenix Steel Corp., 264 A.2d 523, 524 (Del. Ch. 1970)).

20. *Riggs*, 355 A.2d at 711-12; *see also* United States v. Jicarilla Apache Nation, 131 S. Ct. 2313, 2326 (2011).

21. *Riggs*, 355 A.2d at 712; *see also Jicarilla*, 131 S. Ct. at 2328.

of the beneficiaries, and therefore, the privilege should not apply.[22]

Additionally, the court reasoned that because the overall purpose of the trust was to benefit the beneficiaries, the communications should be made available to them.[23] The court determined that there was no purpose for the trustee to communicate with the attorney for any reason other than for the benefit of the beneficiaries.[24] Therefore, the *Riggs* court found that the beneficiaries were the clients, and the attorney-client privilege should not be used to shield documents from them.[25] Specifically, the court found that the facts demonstrated that the documents were prepared for the benefit of the beneficiaries.[26]

Finally, the *Riggs* court concluded that, as a policy matter, the rule should emphasize the fiduciary's responsibility to the beneficiaries rather than the trustee's own protection.[27] Other courts have followed this reasoning.[28] For example, without adopting the fiduciary exception, the Third Circuit Court of Appeals stated in a factually similar situation that "of central importance . . . [i]s the fiduciary's lack of a legitimate personal interest in the legal advice obtained."[29] A rule allowing discovery of all documents promotes this policy by prioritizing the fiduciary relationship above all other justifications.

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22. *Riggs*, 355 A.2d at 712.

23. *Id.*

24. *Id*. at 711.

25. *Id*. at 711-12.

26. *Id*. at 713-14; *see also* Deutsch v. Cogan, 580 A.2d 100, 108 (Del. Ch. 1990) (quoting Valente v. Pepsico, Inc., 68 F.R.D. 361, 369 n.16 (D. Del. 1975) ("The more general and important right of those who look to fiduciaries to safeguard their interests, to be able to determine the proper functioning of the fiduciary, outweighs the need for the privilege and its base of attorney-client confidence.")); *In re* Hoehl's Estate, 193 N.W. 514, 516 (Wis. 1923) (citing C. Aultman & Co. v. Ritter, 51 N.W. 569 (Wis. 1892)).

27. *Riggs*, 355 A.2d at 713-14.

28. *See, e.g.*, Wachtel v. Health Net, Inc., 482 F.3d 225, 230-32 (3d Cir. 2007).

29. *Id*. at 232; *see also* United States v. Evans, 796 F.2d 264, 265-66 (9th Cir. 1986) (holding that the district court was not clearly erroneous when it allowed testimony of the trustee's attorney and ultimately holding that the fiduciary exception did not apply to all fiduciaries under ERISA); Washington-Baltimore Newspaper Guild v. Washington Star Co., 543 F. Supp. 906, 909 (D.D.C. 1982) (noting that the *Riggs* analysis is applied in ERISA contexts).

Other courts have followed this approach, noting the common-law emphasis on the complete discovery of information.[30] These courts reason that full discovery of information ensures the overall effectiveness of the judicial process and that anything that may hinder discovery must be highly scrutinized.[31]

Furthermore, courts have reasoned that application of the attorney-client privilege may facilitate fraud if the trustee has an interest adverse to the beneficiaries.[32] In such circumstances, blocking access to the information that formed the basis of the trustee's decisions would be contrary to the interests of the beneficiaries.[33] If trustees could conceal relevant documents, it would be easier for the trustees to act contrary to the interests of the beneficiaries, who would then have no avenue to discover the fraud.

Therefore, a majority of courts have held that communications between the attorney for a trust and the trustee are not protected by the attorney-client privilege, based on the policy of protecting beneficiaries, the reality that attorneys are frequently paid from trust funds, the need for complete discovery of information, and the hope of limiting fraudulent acts by trustees.

B. Minority Approach

In contrast to the majority approach, a minority of courts have held that a trustee can invoke the attorney-client privilege when beneficiaries seek to discover communications between a trustee and the attorney for the trust. This position is supported by an opinion from the American Bar Association Committee on Ethics and Professional Responsibility, advising that the fiduciary in a trust or estate matter is the attorney's only client.[34]

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30. *See, e.g.*, *Wachtel*, 482 F.3d at 231 (quoting 4 JOHN HENRY WIIGMORE, TREATISE ON EVIDENCE § 2192) (2d ed. 1923)).

31. *Id.*

32. Deutsch v. Cogan, 580 A.2d 100, 107-08 (Del. Ch. 1990).

33. *See id.* at 108.

34. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 380 (1994). *But see* Reid, *supra* note 2, at 568 (noting that the opinion has so many caveats that it is not completely helpful to determine the proper "client").

There are two leading cases advocating this approach,[35] and it has been codified in at least one state.[36] In *Wells Fargo Bank, N.A. v. Superior Court*, the beneficiaries of a trust accused the trustee of misconduct, including failure to deliver requested funds and failure to sell certain property.[37] The beneficiaries requested a number of documents in litigation against the trustee.[38] Although Wells Fargo produced some of the documents, Wells Fargo claimed privilege for documents that represented communications with the trustee.[39]

The Supreme Court of California ultimately held that the communications were protected by attorney-client privilege, regardless of the purpose or subject matter of the documents.[40] The court emphasized the necessity of protecting attorney-client communications and declined to restrict the privilege, which is statutory in California.[41] The court cited four primary justifications for its decision.[42] First, the court reasoned that the fiduciary duty of the trustee did not include the disclosure of communications between the attorney and the trustee.[43] Although California statutes require the trustee to keep beneficiaries reasonably informed, the court concluded that this requirement could be satisfied without disclosing privileged information.[44] The court reasoned that the legislature had not intended to include the privilege as an exception to the requirement that the trustee keep the beneficiaries "reasonably informed" with a report of information.[45]

Second, the court held that it did not have the judicial authority to create exceptions to privileges that were not

35. Wells Fargo Bank, N.A. v. Superior Court, 990 P.2d 591, 594, 598 (Cal. 2000); Huie v. DeShazo, 922 S.W.2d 920, 924-25 (Tex. 1996).

36. *See* S.C. CODE ANN. § 62-1-110 (West 2011).

37. 990 P.2d at 593.

38. *Id*.

39. *Id.*

40. *Id.* at 594, 598.

41. *Id.* at 596 (citing Roberts v. City of Palmdale, 853 P.2d 496 (Cal. 1993)).

42. *Wells Fargo*, 990 P.2d at 594-98.

43. *Id.* at 594.

44. *Id.*

45. *Id.*

enumerated in the evidence code.[46] The court reached this conclusion after distinguishing California's freedom to read in exceptions from that of other jurisdictions.[47] Specifically, the court noted that in New York, attorney-client privilege, "while statutory, is 'not absolute.'"[48] Therefore, as the Supreme Court of California noted, New York courts interpret the statute as one that could be easily altered.[49] The Supreme Court of California distinguished itself based on the idea that when the law in other states evolved on this matter, attorney-client privilege was solely a matter of common law, thus, the focus in those jurisdictions was on full disclosure of information rather than on the necessity of protection.[50] Unlike courts in these other jurisdictions, the Supreme Court of California concluded that it does not "enjoy the freedom to restrict California's statutory attorney-client privilege based on notions of policy or ad hoc justification."[51]

Third, the court rejected the argument that trustees and beneficiaries are "joint clients" under the joint-client exception to California's attorney-client privilege.[52] It concluded that the joint relationship of clients to the trust was insufficient to create a *presumption* of a joint-client relationship, making a factual determination that the lack of communications did not create that relationship in this situation.[53] However, the court noted that under certain circumstances, beneficiaries and trustees may be joint clients.[54] Under California precedent, "[t]he attorney for the trustee of a trust is not, by virtue of this relationship, also the attorney for the beneficiaries of the trust. The attorney represents only the trustee."[55]

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46. *Id.* at 595; *see also* Murphy v. Gorman, 271 F.R.D. 296, 304 (D.N.M. 2010) (citing N.M. R. EVID. 11–501, 11–503(B)).

47. *Wells Fargo*, 990 P.2d at 595-96.

48. *Id.* (quoting Hoopes v. Carota, 531 N.Y.S.2d 407, 409 (App. Div. 1988)). *But see infra* note 174 and accompanying text.

49. *Wells Fargo*, 990 P.2d at 595.

50. *Id*. (citing Riggs Nat'l Bank v. Zimmer, 355 A.2d 709 (Del. Ch. 1976)).

51. *Id.* at 596 (citing Roberts v. City of Palmdale, 853 P.2d 496 (Cal. 1993)).

52. *Id.* at 598.

53. *Id*.

54. *Wells Fargo*, 990 P.2d at 598.

55. *Id.* at 595 (alteration in original) (quoting Fletcher v. Superior Court, 55 Cal. Rptr. 2d 65, 67 (Ct. App. 1996)).

Finally, the California court rejected the argument that the use of trust funds to compensate the attorney creates an attorney-client relationship with the beneficiaries.[56] Because the law authorizes trustees to use trust funds to pay for legal advice, the court held that the beneficiaries no longer had the ability to control the funds, and thus, the funds did not legally belong to the beneficiaries.[57] Therefore, the Supreme Court of California found that the attorney-client privilege protected communications between the attorney and the trustee.[58] The court also noted that the privilege applies "not only to communications made in anticipation of litigation, but also to legal advice when no litigation is threatened."[59]

In *Huie v. DeShazo*, the Supreme Court of Texas reached the same conclusion.[60] In that case, the beneficiary claimed that the trustee had breached fiduciary duties, and the complaint included specific allegations of self-dealing, comingling of assets, conversion of property, and diversion of business opportunities belonging to the trust.[61] The beneficiary found the deposition of the attorney for the trustee, who refused to answer questions on the basis of attorney-client privilege.[62] The attorney was compensated by the trust before the lawsuit but was compensated solely by the trustee after the suit was filed.[63]

The Texas court held that application of the attorney-client privilege was appropriate in this circumstance and

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56. *Id*. at 599; *see also* Barnett Banks Trust Co. v. Compson, 629 So. 2d 849, 851 (Fla. Dist. Ct. App. 1993) (reasoning that the source of payment is irrelevant in determining the real client of the attorney and that the lower court erred in finding that the communications were discoverable based on the payment of attorney's fees).

57. *Wells Fargo*, 990 P.2d at 599. Moreover, the Model Rules of Professional Conduct authorize payment by a third-party to an attorney without creating the attorney-client relationship between them. MODEL RULES OF PROF'L CONDUCT R. 1.8 cmt. 12 (2009).

58. *Wells Fargo*, 990 P.2d at 594, 598.

59. *Id.* at 596 (quoting Roberts v. City of Palmdale, 853 P.2d 496, 500 (Cal. 1993)). Similarly, federal circuits distinguish communications based on the purpose of the communications. *Id*. at 595 (citing United States v. Mett, 178 F.3d 1058 (9th Cir. 1999)).

60. 922 S.W.2d 920, 924-25 (Tex. 1996).

61. *Id.* at 921-22.

62. *Id.* at 922.

63. *Id.*

utilized a number of rationales, many of which were used by the Supreme Court of California in *Wells Fargo*.[64] First, the Supreme Court of Texas found that recognition of the attorney-client privilege did not interfere with the fiduciary duty owed to the beneficiaries.[65] The court reasoned that Texas law only requires trustees to disclose to trust beneficiaries the material facts that can be discovered through means other than protected communications.[66] For example, beneficiaries can ask questions in a trustee's deposition or in interrogatories about actual steps taken regarding the trust property.[67] Litigants can also discover bank statements and other official documents with requests for production.[68] These requests fall outside the definition of "communications," and the attorney-client privilege does not protect them.[69] For that reason, protecting privileged communications does not harm beneficiaries.[70]

Second, the Texas court reasoned that it was outside of the purview of the judiciary to create an implied exception to the statutory attorney-client privilege.[71] It noted that courts in Texas generally are hesitant to insert themselves into the rulemaking process.[72] The court also described the implications of implying an exception not already enumerated.[73] Without an exception clearly articulated in the code, the fiduciary has an expectation that there will be a privilege, and the court did not want to "thwart such legitimate expectations by retroactively amending the rule through judicial decision."[74]

Third, the *Huie* court relied on policy justifications for rejecting an implied fiduciary exception.[75] The court

64. *Huie*, 922 S.W.2d at 925; *see also Wells Fargo*, 990 P.2d at 594-98.
65. *Huie*, 922 S.W.2d at 923-25.
66. *See id.* at 923.
67. *Id*.
68. *Id*. at 924.
69. *Id*.
70. *Huie*, 922 S.W.2d at 925.
71. *Id.* at 925.
72. *Id*.
73. *Id*.
74. *Id.*
75. *Huie*, 922 S.W.2d at 923-25; *see also* Shirvani v. Capital Investing Corp., 112 F.R.D. 389, 391 (D. Conn. 1986) (holding that to create an exception would ignore the need for confidential communication and may result in less open and

recognized that, in order to provide the best legal guidance to the beneficiaries, it is necessary for a trustee to consult freely with an attorney.[76] Without the privilege, trustees might not seek legal advice because beneficiaries could then access communications between the trustee and the attorney and second-guess the trustee's actions.[77] The court ultimately concluded that failing to protect communications could, in fact, adversely affect the trust.[78]

Fourth, the court reasoned that the trustee is the real client, based in part on a Texas statute requiring privity for malpractice suits against attorneys.[79] The court cited prior Texas decisions which held that beneficiaries lack standing to sue the trustee's attorney for malpractice because they are not in privity.[80] Due to the lack of privity between the attorney and beneficiaries, the court in *Huie* found that the real client was the trustee because the attorney had a duty to the trustee rather than to the beneficiaries.[81]

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candid attorney-client communication); Spinner v. Nutt, 631 N.E.2d 542, 544-45 (Mass. 1994) ("[C]onflicting loyalties could impermissibly interfere with the attorney's task of advising the trustee.").

76. *Huie*, 922 S.W.2d at 924; *see also* Durham v. Guest, 171 P.3d 756, 762 (N.M. Ct. App. 2007) ("[A]n attorney has no duty to the nonclient beneficiary of a client fiduciary, even when the attorney represents the client in the client's role as a fiduciary, if such a duty would significantly impair the performance of the attorney's obligations to his or her client."), *rev'd on other grounds*, 204 P.3d 19 (N.M. 2009); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 51 cmt. b (2000) ("Making lawyers liable to nonclients . . . could tend to discourage lawyers from vigorous representation.").

77. *Huie*, 922 S.W.2d at 924.

78. *Id.*; *see also In re* Prudence-Bonds Corp., 76 F. Supp. 643, 647 (E.D.N.Y. 1948) (finding that in protecting attorney-client communications between trustee and attorney, the court was actually protecting the beneficiaries).

79. *Huie*, 922 S.W.2d at 925 (citing Thompson v. Vinson & Elkins, 859 S.W.2d 617, 622 (Tex. App. 1993)); *see also* First Mun. Leasing Corp. v. Blankenship, Potts, Aikman, Hagin & Stewart, 648 S.W.2d 410, 413 (Tex. App. 1983) (finding third-party buyer not in privity with seller's attorney and thus denied recovery); Bell v. Manning, 613 S.W.2d 335, 339 (Tex. Civ. App. 1981) (requiring privity of contract in construction contract).

80. *Huie*, 922 S.W.2d at 925 (citing Thompson v. Vinson & Elkins, 859 S.W.2d 617 (Tex. App. 1993)).

81. *Id*; *see also* Roberts v. Fearey, 986 P.2d 690, 694 (Or. Ct. App. 1999) ("[W]hen an attorney undertakes to represent a fiduciary, he or she represents only the fiduciary . . . ."). In relationship to estates, this argument is supported by the Commentaries to the Model Rules of Professional Conduct, stating, "The beneficiaries of a fiduciary estate are generally not characterized as clients of the lawyer for the fiduciary merely because the lawyer represents the fiduciary generally with regard to the fiduciary estate." AM. COLL. OF TRUST & ESTATE COUNSEL

Finally, the *Huie* court looked at the definition of "client" under Texas law.[82] The Texas Rules of Evidence define a client as a "a person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from that lawyer."[83] Because the attorney had very limited contact with the beneficiary in this case, the court held that "[i]t would strain reality to hold that a trust beneficiary, who has no direct professional relationship with the trustee's attorney, is the real client."[84]

Many jurisdictions are moving closer to this minority approach and away from a sweeping fiduciary exception or, alternatively, are narrowing the exception as applied.[85] Even in Delaware, subsequent opinions have narrowed the broad fiduciary-exception rule from *Riggs*.[86] Delaware courts have held that *Riggs* did not apply broadly to all attorney-trustee communications, and in one case, the court limited the holding to a determination of the real client based on factors which may require a case-by-case determination.[87] A Delaware court also noted that the *Riggs* decision may not apply in cases in which the litigants more closely resemble adverse parties.[88] Moreover, courts have held that neither the rationale in *Riggs* nor the principles of attorney-client privilege and trust law provide any justification for the beneficiaries of a trust to receive documents covered by the attorney-client privilege where those documents were prepared for another reason.[89]

FOUND., COMMENTARIES ON THE MODEL RULES OF PROFESSIONAL CONDUCT 36 (4th ed. 2006).

82. *Huie*, 922 S.W.2d at 925.

83. TEX. R. CIV. EVID. 503(a)(1).

84. *Huie*, 922 S.W.2d at 925.

85. Murphy v. Gorman, 271 F.R.D. 296, 316 (D.N.M. 2010); *see also* Mommer, *supra* note 1, at 18-19.

86. N.K.S. Distribs., Inc. v. Tigani, No. 4640-VCP, 2010 WL 2011603, at *1 (Del. Ch. May 7, 2010).

87. *In re* Estate of Calloway, No. 104901, 1996 WL 361504, at *1-2 (Del. Ch. June 19, 1996) (distinguishing facts from *Riggs*); *see also N.K.S. Distribs.*, *Inc.*, 2010 WL 2011603, at *1.

88. *N.K.S. Distribs.*, *Inc.*, 2010 WL 2011603, at *1.

89. *Murphy*, 271 F.R.D. at 316.

C. Intermediate Approach

Some jurisdictions make a distinction between trustees' communications that are for the purpose of litigation, which are privileged, and those that are for the administration of the trust, which are not privileged.[90] Other courts have not taken a direct approach but have held that the "attorney's allegiance is to the estate when an adversarial relationship arises between the beneficiaries and the . . . trust."[91] For example, in *Estate of Calloway*, the Court of Chancery of Delaware distinguished the facts before it from *Riggs*, where the lawyer's memorandum was prepared for the benefit of the beneficiaries rather than as a defense for litigation where the parties were adversaries.[92] Similarly, in *Parker v. Stone*, a federal district court in Connecticut held that documents relating to the administration of the estate or trust fell within the fiduciary exception and were not entitled to protection.[93] However, documents prepared in connection or anticipation of adversarial proceedings between trustees and beneficiaries were protected.[94]

Even in the Supreme Court of California's *Wells Fargo* decision, the dissenting opinion discussed policy justifications that weighed against absolute attorney-client privilege for all communications between trustees and attorneys.[95] The dissenting justice argued that the privilege should not apply to the subject of trust administration.[96] The majority held that the documents relating to allegations of misconduct were protected,[97] but the dissent argued that if the communications would have concerned trust administration the result may have been different.[98]

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90. Babel, *supra* note 11, at 525.

91. *Id.* at 525-26 (internal quotation marks omitted).

92. No. 104901, 1996 WL 361504, at *1-2 (Del. Ch. June 19, 1996).

93. No. 3:07 cv 00271 (VLB), 2009 WL 1097914, at *5 (D. Conn. Apr. 21, 2009).

94. *Id.*

95. Wells Fargo Bank, N.A. v. Superior Court, 990 P.2d 591, 600, 602-03 (Cal. 2000) (Mosk, J., concurring and dissenting).

96. *Id.* at 600.

97. *Id.* at 596-97 (majority opinion).

98. *Id.* at 600 (Mosk, J., concurring and dissenting).

Other courts have distinguished communications based on whether the attorney was representing the trustee individually or in the trustee's representative capacity.[99] One court, refusing to apply the privilege, noted that the privilege may have applied had the trustee established "that he solicited advice from counsel solely in an individual capacity . . . as a defensive measure regarding potential litigation over his disputes with the trust beneficiaries."[100]

One court, taking the intermediate approach, explained that the privity-fiduciary theory is derived from the parties' reliance on the attorney.[101] The court noted that the purpose of the fiduciary exception to the attorney-client privilege is to limit fraud that would harm the interest of the beneficiaries.[102] Therefore, the parties are sometimes treated as joint clients in order to protect the beneficiaries, even though the lawyer never formally represented that party.[103] However, when the parties become adverse, their joint status ceases.[104]

Similarly, some courts consider the relationship of the parties and their interests when deciding which approach would be the most equitable.[105] Because the fiduciary exception to the attorney-client privilege is based on a commonality or mutuality of interest between the parties, many courts have limited the protection to documents created when those interests are mutual.[106] The fiduciary exception has sometimes been found inapplicable when there is a long-standing adversarial relationship between the parties.[107] Thus, in one case, documents that concerned

99. *See, e.g.*, Hoopes v. Carota, 531 N.Y.S.2d 407, 409-10 (App. Div. 1988), *aff'd*, 543 N.E.2d 73 (N.Y. 1989).

100. *Id.* at 410.

101. Int'l Ins. Co. v. Peabody Int'l Corp., No. 87 C 464, 1988 WL 58611, at *3 (N.D. Ill. June 1, 1988).

102. *Id.* at *1.

103. *Id.*

104. *Id.*

105. *See, e.g.*, Metro. Bank & Trust Co. v. Dovenmuehle Mortg., Inc., No. CIV. A. 18023-NC, 2001 WL 1671445, at *4 (Del. Ch. Dec. 20, 2001).

106. *See id.* at *3.

107. *See, e.g.*, Beck v. Mfrs. Hanover Trust Co., 632 N.Y.S.2d 520, 530 (App. Div. 1995).

the same issues about which the plaintiffs had threatened to litigate were not protected.[108]

III. ARKANSAS'S APPROACH

Arkansas courts have not adopted the fiduciary exception, nor considered whether the privilege protects trustees or beneficiaries. This Part begins by examining the current law in Arkansas concerning attorney-client privilege generally. Then it discusses an Arkansas case that suggests that, in some cases, courts may view the trustee and the beneficiaries as joint clients of the attorney.[109] Next, this Part discusses Arkansas privity statutes. Finally, it outlines the trustee's statutory duties that protect beneficiaries.

A. Attorney Client Privilege

Arkansas law requires an attorney to discharge the duties to a client with fidelity and to observe the utmost good faith toward the client.[110] Generally, an attorney has "a privilege to refuse to disclose . . . confidential communications made for the purpose of facilitating the rendition of professional legal services to the client."[111] Arkansas courts have stressed that it is not the information or the opinion that is privileged, but rather the communications with the attorney in whatever form.[112] Arkansas also protects third parties, requiring an attorney to disclose information in certain instances, such as preventing fraud, securing advice about compliance with ethical standards, or establishing a claim or defense when the lawyer and client are in litigation.[113]

The Arkansas Rules of Evidence define a client as a "person, public officer, or corporation, association, or other

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108. *Id.*

109. Estate of Torian v. Smith, 263 Ark. 304, 314, 564 S.W.2d 521, 526 (1978), *cert. denied*, 439 U.S. 883 (1978); *see also* ARK. R. EVID. 502(d)(5).

110. Swaim v. Martin, 158 Ark. 469, 473, 251 S.W. 26, 27 (1923).

111. ARK. R. EVID. 502.

112. *See* Courteau v. St. Paul Fire & Marine Ins. Co., 307 Ark. 513, 517, 821 S.W.2d 45, 47 (1991) (holding that, while statements made by employees at the request of the attorney could have been included elsewhere, that fact "does not color or taint the communication of similar or even identical information by the client to his or her attorney under the attorney-client privilege").

113. ARK. R. PROF'L. CONDUCT 1.6.

organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from him."[114] In Arkansas, the determination of whether a client-lawyer relationship exists for any specific purpose depends on the circumstances and is a question of fact.[115]

B. *Estate of Torian*

One Arkansas case is particularly relevant to the attorney-client relationship in a trust context. In 1978, two years after the *Riggs* decision, but before any jurisdiction had adopted the minority approach, the Arkansas Supreme Court decided *Estate of Torian v. Smith*.[116] In *Estate of Torian*, the trustee filed a petition to probate the will in the wrong jurisdiction, against the advice of counsel, and, as a result, the beneficiaries incurred a significant estate tax burden.[117] The court used the joint-client exception to the attorney-client privilege in the Arkansas Rules of Evidence, which provides that the privilege does not apply in joint-client situations.[118] The court cited previous Arkansas cases holding that the attorney is responsible for the interests of the beneficiaries when fraud is concerned or when there is a reasonable request, as the Arkansas law requires.[119] The court concluded that, under the facts of *Torian*, the trustee was acting for himself and the beneficiaries as joint clients when consulting a lawyer concerning the administration of an estate; therefore, the joint-client exception applied.[120]

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114. ARK. R. EVID. 502(a)(1).

115. *In re* Ark. Bar Ass'n Petition, No. 03-1049, 2005 Ark. LEXIS 787, at *16-17 (Ark. Mar. 3, 2005).

116. 263 Ark. 304, 564 S.W.2d 521 (1978), *cert. denied*, 439 U.S. 883 (1978).

117. *Id.* at 308-10, 315, 564 S.W.2d at 522-24, 526.

118. *Id*. at 314-15, 564 S.W.2d at 526 (citing ARK. R. EVID. 502(d)(5)).

119. *Id*; *see* Francis v. Turner, 188 Ark. 158, 160-61, 67 S.W.2d 211, 212 (1933) ("[A]n attorney for an estate represents the heirs and distributees and legatees to the extent that it becomes his duty, where the value of the estate is material to those interested in dealing between themselves or others, not only to refrain from making any misrepresentation or concealment, but to also fully disclose the value of the estate and its probable assets so that all interested may exercise an informed judgment."), *overruled on other grounds by* Morris v. Cullipher, 306 Ark. 646, 816 S.W.2d 878 (1991).

120. *Torian*, 263 Ark. at 314-15, 564 S.W.2d at 525-26.

Ultimately, the Arkansas Supreme Court protected the interests of the beneficiaries from the extreme negligence of the trustee by admitting the attorney's testimony.[121]

Although the decision resulted in allowing an attorney's testimony, the issue on appeal was the appropriateness of the executor's fees rather than the discoverability of the documents.[122] Moreover, because the facts and issues in *Torian* were unique and the holding was largely related to the reasonableness of attorney's fees, this decision has not been interpreted as creating a fiduciary exception in Arkansas. Rather, the stated rule in Arkansas for joint-client representation only requires that the clients' interests be either identical or very similar.[123]

C. Trustee Relationship

Almost ten years after the decision in *Torian*, the Arkansas General Assembly passed a statute that precludes plaintiffs not in privity with an attorney from bringing a malpractice claim against that attorney.[124] Based on cases from other jurisdictions, this statute is relevant to the real-client inquiry.[125] Arkansas's statute provides:

> No person licensed to practice law in Arkansas . . . shall be liable to persons not in privity of contract with the person, partnership, or corporation for civil damages resulting from acts, omissions, decisions, or other conduct in connection with professional services performed by the person, partnership, or corporation . . . .[126]

The only two statutory exceptions to the requirement of privity are: (1) if the lawyer is guilty of intentional misconduct or (2) if the lawyer specifically identifies, in

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121. *Id.*

122. *Id.* at 315, 564 S.W.2d at 526.

123. *See* ARK. R. PROF'L CONDUCT 1.7 cmts. 8, 28.

124. Act 661, 1987 Ark. Acts 1475, 1475-78 (codified as amended at ARK. CODE ANN. § 16-22-310 (Supp. 2011)).

125. ARK. CODE ANN. § 16-22-310 (Supp. 2011); *see also* Charles M. Bennett, *Frontiers in Ethics: The Estate Lawyer's Duty of Loyalty and Confidentiality to the Fiduciary Client: Examining the Past to Make Wise Choices Now and in the Future*, 33 OHIO N.U. L. REV. 807, 853-54 (2007) (indicating that Ark. Code Ann. § 16-22-310 has overruled the conclusion relating to attorney-client privilege in *Torian*).

126. ARK. CODE ANN. § 16-22-310(a).

writing, the person who will be relying on the lawyer's services and the lawyer sends that person a copy of the writing.[127] The statute therefore creates a relationship between the attorney and the trustee but not between the attorney and the beneficiaries. In the context of trusts, this statute would prevent beneficiaries from bringing suit against the attorney for the trust when the two are not in privity.

In Arkansas, direct privity is required and is strictly construed.[128] For example, in *Giles*, the trusts were not considered third-party beneficiaries of the trust beneficiaries who were being represented in their individual capacities.[129] The court found that the plaintiffs were not in privity with the law firm because there was no correspondence identifying the plaintiffs as beneficiaries of the contract and the plaintiffs were not otherwise third-party beneficiaries.[130] Therefore, because the attorney did not owe a duty to the plaintiffs, the plaintiffs lacked standing to bring suit against the attorney.[131]

In Arkansas the relationship between a trustee and beneficiary is a fiduciary relationship.[132] Arkansas law assumes that a trustee is acting in good faith.[133] Arkansas, like a majority of other states, protects this fiduciary relationship by statute.[134] In Arkansas, the trustee must keep the beneficiaries "reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests."[135]

IV. ATTORNEY CLIENT RELATIONSHIPS IN TRUST MATTERS IN ARKANSAS

Absent a definitive ruling from the Arkansas Supreme Court or a statute defining the attorney-client privilege in a

127. ARK. CODE ANN. § 16-22-310.

128. *See* Giles v. Harrington, Miller, Neihouse & Krug, 362 Ark. 338, 347, 208 S.W.3d 197, 203 (2005).

129. *Id*. at 348-49, 208 S.W.3d at 204.

130. *Id.* at 349-50, 208 S.W.3d at 204.

131. *Id.* at 349, 208 S.W.3d at 204.

132. Hosey v. Burgess, 319 Ark. 183, 190, 890 S.W.2d 262, 265-66 (1995).

133. Salem v. Lane Processing Trust, 72 Ark. App. 340, 343-44, 37 S.W.3d 664, 667 (2001).

134. ARK. CODE ANN. § 28-73-813 (Repl. 2012).

135. ARK. CODE ANN. § 28-73-813.

trust relationship, Arkansas law is unclear as to who possesses the privilege. Arkansas needs a clear rule stating that the communications between a trustee and the attorney for the trust are protected from discovery. Arkansas should follow the minority approach and the recent trend to protect trust relationships by refraining from creating a sweeping rule that all trustees and beneficiaries have a joint-client relationship with the attorney for the trust.

The minority rule is the most effective approach and is supported by policy considerations and current Arkansas law. First, policy considerations suggest that the privilege between the attorney and trustee should protect all parties, including trust beneficiaries.[136] For example, protecting communications will allow, and indeed encourage, a trustee to consult freely with the attorney in order to obtain the best possible legal guidance to effectively administer the trust.[137] Most likely, the settlor chose the trustee, at least in part, for his experience, expertise, or personal confidence in the trustee. If communications are protected, the trustee will be free to use this expertise and good judgment in the administration of the trust, ultimately promoting the beneficiaries' interests.[138] In contrast, not protecting those communications would allow beneficiaries to later second guess all actions by the trustee.[139] As a result, the trustee may be discouraged from seeking legal advice out of fear that the advice may be different than the trustee's own personal opinion. By protecting the communications, the law will be clear and therefore meaningful; the privilege is meaningless, and its justifications ignored, if the court has to make a ruling on the issue in the midst of litigation.

Second, the Arkansas Rules of Evidence specifically provide that a trustee can assert attorney-client privilege with no indication or exception related to the fiduciary relationship.[140] Furthermore, the definition of "client" in Arkansas is very similar to the definition of "client" in

136. *See* Huie v. DeShazo, 922 S.W.2d 920, 924 (Tex. 1996).
137. *Id*.
138. *See In re* Prudence-Bonds Corp., 76 F. Supp. 643, 646-47 (E.D.N.Y. 1948).
139. *See Huie*, 922 S.W.2d at 924.
140. ARK. R. EVID. 502.

Texas.[141] The Supreme Court of Texas used this definition to support its conclusion that "[i]t would strain reality to hold that a trust beneficiary, who has no direct professional relationship with the trustee's attorney, is the real client."[142]

Third, the privity statute in Arkansas helps define an attorney's relationship with the attorney's "real clients." The statute limits the ability of the beneficiaries who are not in privity to bring suit against attorneys for malpractice, creating a situation in which the attorneys' duties are owed to their clients, the fiduciaries.[143] In many other jurisdictions, courts have interpreted statutory privity requirements to be indicative of the attorney's real client.[144] In a situation in which the attorney has little or no direct interaction with the beneficiaries, it creates a relationship between the attorney and the trustee, but not between the attorney and the beneficiary.[145]

Fourth, trustees in Arkansas can satisfy their duty to furnish information to beneficiaries without disclosing protected communications.[146] As courts in other jurisdictions have made clear, the nature of the attorney-client privilege is that *facts* are discoverable, even if disclosed to an attorney.[147] Likewise, Arkansas law is clear that the attorney-client privilege only protects

141. *Compare* TEX. R. CIV. EVID. 503(A)(1), *with* ARK. R. EVID. 502.

142. *Huie*, 922 S.W.2d at 925.

143. ARK. CODE ANN. § 16-22-310 (Supp. 2011); Wiseman v. Batchelor, 315 Ark. 85, 89, 864 S.W.2d 248, 250 (1993); *see also* Craig v. Carrigo, 340 Ark. 624, 637, 12 S.W.3d 229, 238 (2000) (citing King v. King, 273 Ark. 55, 616 S.W.2d 483 (1981)) (noting that Arkansas allows an attorney to represent the executor of an estate and an heir named in the will absent the showing of specific prejudice).

144. *See, e.g.*, Roberts v. Fearey, 986 P.2d 690, 694 (Or. Ct. App. 1999); Thompson v. Vinson & Elkins, 859 S.W.2d 617, 621 (Tex. App. 1993).

145. There is an argument that this privity limitation would cause additional problems such as fraud. *See supra* notes 32-33 and accompanying text. However, because of Arkansas's statutory protections, such as an explicit exemption for intentional fraud and limitation to claims in connection to the professional services, this argument is without support. *See* ARK. CODE ANN. § 16-22-310 (Supp. 2011), § 16-114-303 (Repl. 2006); *see also* Madden v. Aldrich, 346 Ark. 405, 414, 58 S.W.3d 342, 349 (2001) (indicating that claims must be based on the rendering of professional services by the attorney); *Wiseman*, 315 Ark. at 89-90, 864 S.W.2d at 250 (reasoning that the attorney owed no duty to the opposing party litigant because he was not the attorney's client).

146. ARK. CODE ANN. § 28-73-813 (Repl. 2012).

147. *Huie*, 922 S.W.2d at 923.

communications, not facts.[148] Therefore, the beneficiaries can obtain all facts necessary through discovery during litigation. Discovery could include, for example, requests for production of documents from a bank that demonstrate particular steps the trustee has taken and decisions the trustee has made in the administration of the trust. Furthermore, the beneficiaries could depose the trustee and ask specific questions about the decisions that the trustee made. All of these facts are discoverable as long as they do not relate to the *communications* that the trustee had with the attorney.

The Arkansas General Assembly has protected beneficiaries by requiring trustees to keep beneficiaries "reasonable informed," specifically requiring that trustees respond to requests "for information related to the administration of the trust."[149] This statutory duty does not, however, require absolute disclosure. For example, the trustee is not required to disclose information if doing so would be "unreasonable under the circumstances."[150] The trustee is required to provide the beneficiaries with a copy of the trust instrument, the acceptance of trusteeship, and the trustee's knowledge of creation of the trust.[151] Notably absent from this list of disclosures are any communication made between the trustee and the attorney.[152] These communications are not available upon a reasonable-information request. Furthermore, the Arkansas Trust Code provides ample protection if trust assets are mishandled in a way that amounts to a breach of trust.[153]

148. ARK. R. EVID. 502; Ark. Nat'l Bank v. Cleburne Cnty. Bank, 258 Ark. 329, 332, 525 S.W.2d 82, 84-85 (1975).

149. ARK. CODE ANN. § 28-73-813(a).

150. ARK. CODE ANN. § 28-73-813(a).

151. ARK. CODE ANN. § 28-73-813(b)(1)-(3).

152. ARK. CODE ANN. § 28-73-813.

153. This section reads as follows:

> (a) A violation by a trustee of a duty the trustee owes to a beneficiary is a breach of trust. (b) To remedy a breach of trust that has occurred or may occur, the court may: (1) compel the trustee to perform the trustee's duties; (2) enjoin the trustee from committing a breach of trust; (3) compel the trustee to redress a breach of trust by paying money, restoring property, or other means; (4) order a trustee to account; (5) appoint a special fiduciary to take possession of the trust property and administer the trust; (6) suspend the trustee; (7) remove

Fifth, despite the *Torian* case, Arkansas law has not determined that the joint-client exception would apply in these cases. In *Torian*, the court did not adopt the fiduciary exception to the attorney-client privilege, did not announce any exception to the privilege, nor did it set a precedent to compel the production of documents in discovery in actions between trustees and beneficiaries.[154] Because *Torian* is unique and its holding addresses the narrow question of reasonableness of attorney's fees, it should not be viewed as creating a sweeping fiduciary exception. Moreover, since the adoption of the privity requirement, the portion of the opinion allowing for the disclosure of protected information is likely no longer applicable.[155] *Torian* does not stand for the proposition that trustees and beneficiaries are presumed to be joint clients of the attorney. Rather, based on the specific facts in *Torian*, the court held that, under those circumstances, the attorney-client privilege did not bar the estate's attorney from testifying because the beneficiary and attorney were joint clients.[156]

Therefore, the joint-client exception will likely not be used in trust situations in Arkansas in the future absent the same factual findings. Courts have found that unless there was joint retention, the joint-client doctrine is inapplicable.[157] In a case where the trustee and beneficiary retain and consult the attorney jointly, it is possible that the joint-client exception would apply, as suggested by the Supreme Court of California in *Wells Fargo*.[158]

Several other states have a joint-client exception that applies to situations where the clients really are jointly

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> the trustee as provided in § 28-73-706; (8) reduce or deny compensation to the trustee; (9) subject to § 28-73-1012, void an act of the trustee, impose a lien or a constructive trust on trust property, or trace trust property wrongfully disposed of and recover the property or its proceeds; or (10) order any other appropriate relief.

ARK. CODE ANN. § 28-73-1001 (Repl. 2012).

154. Estate of Torian v. Smith, 263 Ark. 304, 314, 564 S.W.2d 521, 526 (1978), *cert. denied*, 439 U.S. 883 (1978).

155. *See* Bennett, *supra* note 125, at 854.

156. *Torian*, 263 Ark. at 315, 564 S.W.2d at 526.

157. *Id.* at 314-15, 564 S.W.2d at 526; 2 TOD I. ZUCKERMAN & MARK C. RASKOFF, ENVIRONMENTAL INSURANCE LITIGATION: LAW AND PRACTICE § 16:24 (2011).

158. Wells Fargo Bank, N.A. v. Superior Court, 990 P.2d 591, 598 (2000).

consulting an attorney, rather than situations in which a trustee is seeking advice from an attorney.[159] The joint-client exception is vastly different than the fiduciary exception and should be applied in limited circumstances, not as a sweeping exception for fiduciaries. Tellingly, the lower court in the *Huie* case initially relied on the joint-client exception, but later amended its opinion to delete its reference to that exception.[160]

Finally, Arkansas should refuse to adopt the fiduciary exception even if the attorney is compensated from trust funds. The United States Supreme Court recently noted that "it is well settled that who pays for the legal advice, although 'potentially relevant,' 'is not determinative in resolving issues of privilege.'"[161] The Arkansas Trust Code sets compensation at a reasonable level if the trust documents are not specific.[162] The question of dual fees charged when trustees hire their own lawyers has not been specifically answered in Arkansas, but reasonable dual fees may be charged in many states.[163] Trustees can be reimbursed from trust property for authorized expenses or even from unauthorized expenses that benefit the trust, so the trust is not unjustly enriched.[164] Analogous to the California statute at issue in *Wells Fargo*, Arkansas law allows trustees to use trust funds to pay for legal advice, thereby removing those funds from the beneficiaries' control.[165] Although not specifically addressed, Arkansas may allow trustees to hire their own personal lawyers for assistance in matters pertaining to trust administration and

159. *See, e.g.*, *In re* Regents of the Univ. of Cal., 101 F.3d 1386, 1389 (Fed. Cir. 1995); Griffith v. Davis, 161 F.R.D. 687, 693 (C.D. Cal. 1995); Sneider v. Kimberly-Clark Corp., 91 F.R.D. 1, 8 (N.D. Ill. 1980); Zador Corp., N.V. v. Kwan, 37 Cal. Rptr. 2d 754, 759 (Ct. App. 1995); State v. Cascone, 487 A.2d 186, 189 (Conn. 1985); Trupp v. Wolff, 335 A.2d 171, 185 (Md. Ct. Spec. App. 1975); Shove v. Martine, 88 N.W. 254, 255-56 (Minn. 1901); Root v. Wright, 84 N.Y. 72, 76 (1881).

160. Huie v. DeShazo, 922 S.W.2d 920, 922 n.2 (Tex. 1996).

161. United States v. Jicarilla Apache Nation, 131 S. Ct. 2313, 2333 (2011) (quoting RESTATEMENT (THIRD) OF TRUSTS § 82 cmt. f (2005)).

162. Lynn Foster, *The Arkansas Trust Code: Good Law for Arkansas*, 27 U. ARK. LITTLE ROCK L. REV. 191, 246 (2005).

163. *Id*.

164. *Id.*

165. *See* Wells Fargo Bank, N.A. v. Superior Court, 990 P.2d 591, 599 (Cal. 2000); Foster, *supra* note 162, at 246.

still receive compensation from the trust.[166] This rule recognizes the public policy interest of having trustees consult with counsel, which supports the idea that their communications be protected.

V. RECOMMENDATION

The lack of attorney-client privilege guaranteed to the trustee is detrimental to everyone involved in the trust relationship. However, an inconsistent application of rules among courts, or a misunderstanding of what the proper rule is with regard to the privilege, may be even more detrimental. Clarifying this rule is essential.

The Arkansas Supreme Court has the power to promulgate rules of evidence.[167] The Arkansas Supreme Court has enumerated exceptions to the attorney-client privilege in the Arkansas Rules of Evidence, none of which include a fiduciary exception.[168] The court will only defer to the Arkansas General Assembly to the extent that the rule's purpose is not compromised.[169] Otherwise, the rules promulgated by the Arkansas Supreme Court will "remain supreme"[170] in order to ensure uniformity and clarity in the rules of evidence.[171]

The Arkansas Supreme Court, therefore, has the power to and should protect the interests of beneficiaries, trustees, and their attorneys in future litigation by explicitly adopting the minority approach by statute. A useful template is provided by South Carolina's statute, which states:

> Whenever an attorney-client relationship exists between a lawyer and a fiduciary, communications between the lawyer and the fiduciary shall be subject to the attorney-client privilege unless waived by the fiduciary, even though fiduciary funds may be used to compensate the lawyer for legal services rendered to the fiduciary. The existence of a fiduciary relationship

166. Foster, *supra* note 162, at 246.

167. State v. Sypult, 304 Ark. 5, 7, 800 S.W.2d 402, 404 (1990).

168. *See* ARK. R. EVID. 502.

169. *Sypult*, 304 Ark. at 7, 800 S.W.2d at 404.

170. *Id.*

171. George v. State, 306 Ark. 360, 374, 818 S.W.2d 951, 955 (1991) (citing *Sypult*, 304 Ark. at 13, 800 S.W.2d at 407 (Turner, J., concurring)).

> between a fiduciary and a beneficiary does not constitute or give rise to any waiver of the privilege for communications between the lawyer and the fiduciary.[172]

Similarly, New York has enacted a statute providing that the trustee or other fiduciary is the client, absent a contrary agreement:[173]

> (A) For purposes of the attorney-client privilege, if the client is a personal representative and the attorney represents the personal representative in that capacity, in the absence of an agreement between the attorney and the personal representative to the contrary:
>
> (i) No beneficiary of the estate is, or shall be treated as, the client of the attorney solely by reason of his or her status as beneficiary; and
>
> (ii) The existence of a fiduciary relationship between the personal representative and a beneficiary of the estate does not by itself constitute or give rise to any waiver of the privilege for confidential communications made in the course of professional employment between the attorney or his or her employee and the personal representative who is the client.[174]

Arkansas should adopt specific language to avoid inconsistent application and to prevent the *ad hoc* creation of an exception that erodes the protection of trust relationships.[175] In the meantime, attorneys should be cognizant of the fact that there has not been a definitive ruling on this issue in Arkansas. The best way to protect attorneys and their clients is for the attorneys to communicate the clear parameters of their representation and explicitly include in their engagement letters and

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172. S.C. CODE ANN. § 62-1-110 (West 2011).

173. N.Y. C.P.L.R. § 4503(a)(2) (McKinney 2012).

174. N.Y. C.P.L.R. § 4503(a)(2). Though this legislation is a step in the right direction, because of the definitional limitations of the amendment in New York, the comments point out that the legislature only intended to do away with the fiduciary exception in the representation of limited, specific fiduciaries. The fiduciary exception may still work in a relationship between beneficiaries and trustees in an *inter vivos* trust upon a showing of good cause. N.Y. C.P.L.R. § 4503 cmt. (c). Otherwise, courts will just use the *Hoopes* good-cause standard. Hoopes v. Corota, 531 N.Y.S.2d 407, 410 (App. Div. 1988)).

175. *See* Pub. Serv. Co. v. Lyons, 10 P.3d at 166, 173-74 (N.M. Ct. App. 2000).

subsequent communications who the real client of the attorney is for the necessary protection of the attorney-client privilege.

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