# ISSUES INVOLVING THE ATTORNEY-CLIENT PRIVILEGE AND TRUSTEES IN TEXAS

*David F. Johnson*[*]



## I. INTRODUCTION

The law of trusts originated in equity to evade the constraints of common law; it was a part of property law in which one person held legal title to assets and another held equitable title.[1] The person holding legal title

* David F. Johnson is the managing shareholder of Winstead PC's Fort Worth Office and has a fiduciary litigation practice.

1. William Sanders, *Resolving the Conflict Between Fiduciary Duties and Socially Responsible Investing*, 35 PACE L. REV. 535, 546–47 (2014).

held it for the benefit of the equitable title holders.[2] One commentator has discussed the use of trusts in Texas:

> The use of trust instruments in Texas was not widespread until the latter part of the nineteenth century. The rapid growth in the use of trust instruments paralleled the increase in the number of individuals who had accumulated large fortunes. These individuals found that the trust device was an effective and convenient means of disposing of their wealth as opposed to the use of a testamentary will or inter vivos gift.[3]

People started using trusts to assist in retirement planning and to care for individuals who were deemed insufficiently sophisticated to invest and maintain their inheritance.[4] Given this modern development, trustees acquired additional responsibilities, including growing and protecting the trust assets.[5] "The modern-day trustee's job is to actively manage trust assets."[6] "Active management means the contemporary trustee, unlike the ancient trustee, has discretion over those assets."[7]

Oftentimes, however, the trustee does not have the legal or investment expertise to manage the trust on their own.[8] Accordingly, a trustee is responsible for the retention of agents and representatives to perform tasks requiring certain expertise for the trust.[9] For example, trustees often have to retain counsel for any number of legal needs, such as drafting an oil and gas lease or a real estate deed.[10] Such legal needs can also be more litigation or conflict oriented, such as drafting a settlement agreement, filing a lawsuit, or defending a lawsuit.[11]

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2. *See generally Elements and Limits on Creation and Duration of Interests*, L. SHELF EDUC. MEDIA, https://www.lawshelf.com/coursewarecontentview/elements-and-limits-on-creation-and-duration-of-interests (last visited Jan. 27, 2025) (discussing the benefit of an equitable title) [https://perma.cc/423A-LJUZ].

3. 4 TEX. PROB. EST. & TR. ADMIN. § 80.01.

4. Sanders, *supra* note 1.

5. *See generally What Is a Trustee?: Definition, Role, and Duties*, INVESTOPEDIA, https://www.investopedia.com/terms/t/trustee.asp (last updated February 17, 2025) (discussing how to grow assets as a trustee) [perma.cc/8KX6-PNUC].

6. Sanders, *supra* note 1.

7. *Id.*

8. *Id.*

9. *See generally Elements and Limits on Creation and Duration of Interests*, *supra* note 2 (discussing the use of an agent).

10. Author's original thought.

11. *See generally What is the Difference Between a Settlement and a Lawsuit in a Personal Injury Claim?*, INJ. & DISABILITY L. CTR., https://www.idlawcenter.com/blog/the-difference-between-a-settlement-and-a-lawsuit.cfm (last visited Jan. 27, 2025) (explaining the difference between a settlement and lawsuit) [https://perma.cc/9T2V-ZT2L].

When a trustee retains counsel, there are many interesting issues that arise regarding the attorney-client privilege.[12] This Article addresses how Texas approaches some of those issues.[13]

## II. RIGHT TO RETAIN ATTORNEYS

Trustees have the statutory and common law right to retain attorneys for a variety of matters.[14] A trustee should first review the trust document itself to determine their right to retain counsel.[15] "The trustee shall administer the trust in good faith according to its terms" and the Texas Trust Code.[16] "The nature and extent of a trustee's duties and powers are primarily determined by the terms of the trust."[17] If the language of the trust instrument unambiguously expresses the intent of the settlor, the instrument itself confers the trustee's powers, and neither the trustee nor the courts may alter those powers.[18] Moreover, a court may remove a trustee when "the trustee materially violated or attempted to violate the terms of the trust and the violation or attempted violation results in a material financial loss to the trust . . . ."[19]

Normally, trust documents expressly allow trustees to retain counsel.[20] If a trust document explicitly states that a trustee does not have the power to retain attorneys, then a trustee should either: (1) seek to modify or reform the trust to allow that common right or (2) seek to resign because a trustee may not be able to meet many of its duties to manage and protect the trust without retaining attorneys.[21]

To the extent the trust instrument is silent, the provisions of the Trust Code govern.[22] Under the Texas Trust Code, "[a] trustee may employ

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12. Author's original thought.

13. *Id.*

14. David F. Johnson, *Trustees' Ability to Retain and Compensate Attorneys in Texas*, 16 TEX. TECH. EST. PLAN. & COM. PROP. L.J. 98, 98 (2024).

15. TEX. PROP. CODE ANN. §§ 113.001, 113.051; *see* Tolar v. Tolar, No. 12-14-00228-CV, 2015 Tex. App. LEXIS 5119, at *7 (Tex. App.—Tyler May 20, 2015, no pet.) ("The powers conferred upon the trustee in the trust instrument must be strictly followed."); Myrick v. Moody Nat'l Bank, 336 S.W.3d 795, 801 (Tex. App.—Houston [1st Dist.] 2011, no pet.) (explaining that terms of a trust instrument may limit or expand trustee powers supplied by the Trust Code and that a trustee should adhere to the trust document, as its terms dictate); TEX. PROP. CODE ANN. §§ 111.0035(b), 113.001; RESTATEMENT (THIRD) OF TRS. § 76(1) (AM. L. INST. 2007) ("The trustee has a duty to administer the trust . . . in accordance with the terms of the trust. . . ."); RESTATEMENT (SECOND) OF TRS. § 164(a) (AM. L. INST. 1959).

16. TEX. PROP. CODE ANN. § 113.051.

17. RESTATEMENT (THIRD) OF TRS. § 90 cmt. b (AM. L. INST. 2007); *see* Stewart v. Selder, 473 S.W.2d 3, 19–20 (Tex. 1971); *see* Beaty v. Bales, 677 S.W.2d 750, 754 (Tex. App.—San Antonio 1984, writ ref'd n.r.e.).

18. Johnson, *supra* note 14, at 98–99.

19. TEX. PROP. CODE ANN. § 113.082(a)(1).

20. Johnson, *supra* note 14, at 99.

21. *Id.*

22. *Id.*; TEX. PROP. CODE ANN. § 113.001; Conte v. Conte, 56 S.W.3d 830, 832 (Tex. App.—Houston [1st Dist.] 2001, no pet.).

attorneys, accountants, agents, including investment agents, and brokers reasonably necessary in the administration of the trust estate."[23] A trustee has the statutory authority to retain attorneys and other professionals as it deems appropriate.[24] The Texas Trust Code also states: "The powers, duties, and responsibilities under this subtitle do not exclude other implied powers, duties, or responsibilities that are not inconsistent with this subtitle."[25] A trustee generally has any power that is necessary or appropriate to carry out the purposes of the trust.[26]

The Texas Trust Code instructs parties to look to the common law regarding a trustee's duties, which are numerous.[27] "A trustee has the duty to administer the trust with the skill and prudence which an ordinary, capable, and careful person would use in the conduct of their own affairs . . . ."[28] Moreover, "[i]n administering the trust, the trustee's responsibilities include performance of the following functions: . . . collecting and protecting trust property."[29]

The trustee also bears a duty to protect the trust estate, which includes "taking reasonable steps to enforce or realize on other claims held by the trust and to defend actions that may result in a loss to the trust estate."[30] Such "reasonable steps" may include: "taking an appeal to a higher court, compromise or arbitration of claims by or against the trust, or even abandoning a valid claim or not resisting an unenforceable claim if the costs and risk of litigation make such a decision reasonable under all the circumstances."[31] A trustee, however, does not bear any obligation to:

> enforce a claim . . . if it is reasonable not to bring such an action, owing to the probable expense involved in the action or to the probability that the action would be unsuccessful or that if successful the claim would be uncollectible owing to the insolvency of the defendant or otherwise.[32]

So, whether under the trust document, statute, or common law, a trustee normally has the power to retain attorneys to assist in trust-related matters when it deems it a prudent course of action.[33]

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23. TEX. PROP. CODE ANN. § 113.018.
24. Johnson, *supra* note 14, at 99.
25. TEX. PROP. CODE ANN. § 113.024.
26. Johnson, *supra* note 14, at 99.
27. *Id.*
28. *Id.*
29. RESTATEMENT (THIRD) OF TRS. § 76 (AM. L. INST. 2007).
30. *Id.* § 76 cmt. d.
31. *Id.*
32. *Id.* § 177 cmt. c.
33. Johnson, *supra* note 14, at 100.

One specific example of when a trustee has the power to retain counsel is when seeking instructions from a court.[34] The Restatement (Third) of Trusts provides: "A trustee or beneficiary may apply to an appropriate court for instructions regarding the administration or distribution of the trust if there is reasonable doubt about the powers or duties of the trusteeship or about the proper interpretation of the trust provisions."[35] Regarding the payment of fees associated with seeking instructions, the Restatement provides:

> Expenses incurred by a trustee in applying to the court for instructions are payable from the trust estate unless the application for instructions was plainly unwarranted, there being no reasonable uncertainty about the powers or duties of the trustee or about the relevant law or proper interpretation of the trust. In such a case it is normally improper for a trustee to incur the expenses of making the application . . . . Expenses incurred by the trustee as a result of a beneficiary's application for instructions are payable or reimbursable from the trust estate, provided the expenses and the trustee's conduct were reasonable and appropriate to the trustee's fiduciary duties.[36]

The Texas Trust Code and the Uniform Declaratory Judgment Act both have provisions that expressly allow a trustee to seek instructions from a court regarding various trust administration issues.[37] If a trustee has the power to seek court instructions, it has the power to retain an attorney to obtain that relief.[38]

## III. ATTORNEY-CLIENT PRIVILEGE

The substance of communications between counsel and the trustee is very important and entitled to protection from disclosure to opposing parties and even to the trust's own beneficiaries.[39]

### *A. Purpose of Attorney-Client Privilege*

Recognized as "the oldest of the privileges for confidential communications known to the common law," the attorney-client privilege promotes free discourse between attorney and client, which advances the

34. *Id.*; RESTATEMENT (THIRD) OF TRS. § 71 (AM. L. INST. 2007).
35. Johnson, *supra* note 14, at 100 (quoting RESTATEMENT (THIRD) OF TRS. § 71 cmt. a).
36. RESTATEMENT (THIRD) OF TRS. § 71 cmt. e (AM. L. INST. 2007).
37. Johnson, *supra* note 14, at 100.
38. *Id.*
39. *Id.* at 106.

effective administration of justice.[40] In Texas, the attorney-client privilege has been long recognized, characterized as "sacrosanct" and zealously protected in our Anglo-American jurisprudence.[41] This privilege allows "unrestrained communication and contact between an attorney and client in all matters in which the attorney's professional advice or services are sought, without fear that these confidential communications will be disclosed by the attorney, voluntarily or involuntarily, in any legal proceeding."[42] The privilege thus "promote[s] effective legal services," which "in turn promotes the broader societal interest of the effective administration of justice."[43]

### *B. Basis for Privilege*

The attorney-client privilege protects from disclosure of confidential communications between a client and their attorney made for the purpose of "facilitat[ing] the rendition of professional legal services to the client . . . ."[44] Rule 503(b)(1) of the Texas Rules of Evidence provides:

> A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made to facilitate the rendition of professional legal services to the client:
>
> (A) between the client or the client's representative and the client's lawyer or the lawyer's representative;
>
> (B) between the client's lawyer and the lawyer's representative;
>
> (C) by the client, the client's representative, the client's lawyer, or the lawyer's representative to a lawyer representing another party in a pending action or that lawyer's representative, if the communications concern a matter of common interest in the pending action;
>
> (D) between the client's representatives or between the client and the client's representative; or
>
> (E) among lawyers and their representatives representing the same client.[45]

"A 'client' is a person, public officer, or corporation, association, or other organization or entity-whether public or private-that: (A) is rendered professional legal services by a lawyer; or (B) consults a lawyer with a view to obtaining professional legal services from the lawyer."[46] So, a client can be a person or entity, and the privilege applies to not only professional advice

40. United States v. Zolin, 491 U.S. 554, 562 (1989) (citing Upjohn Co. v. United States, 449 U.S. 383, 389 (1981)); Republic Ins. Co. v. Davis, 856 S.W.2d 158, 160 (Tex. 1993) (orig. proceeding).

41. Paxton v. City of Dallas, 509 S.W.3d 247, 249, 266 (Tex. 2017).

42. West v. Solito, 563 S.W.2d 240, 245 (Tex. 1978).

43. *Republic Ins. Co*, 856 S.W.2d at 160.

44. TEX. R. EVID. 503(b); *In re* XL Specialty Ins. Co., 373 S.W.3d 46, 49 (Tex. 2012) (orig. proceeding).

45. TEX. R. EVID. 503(b)(1).

46. *Id.* 503(a)(1).

but also consultations with a view to forming a relationship (initial consultations).[47] A "lawyer" is "a person authorized, or who the client reasonably believes is authorized, to practice law in any state or nation."[48] So, the definitions of client and lawyer are quite broad.[49]

> A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made to facilitate the rendition of professional legal services to the client, including communications:
>
> (A) between the client or the client's representative and the client's lawyer or the lawyer's representative;
>
> (B) between the client's lawyer and the lawyer's representative;
>
> (C) by the client, the client's representative, the client's lawyer, or the lawyer's representative to a lawyer representing another party in a pending action or that lawyer's representative, if the communications concern a matter of common interest in the pending action;
>
> (D) between the client's representatives or between the client and the client's representative; or
>
> (E) among lawyers and their representatives representing the same client.[50]

For the purposes of the preceding paragraph, the term "client's representative" is:

> (A) a person who has authority to obtain professional legal services for the client or to act for the client on the legal advice rendered; or
>
> (B) any other person who, to facilitate the rendition of professional legal services to the client, makes or receives a confidential communication while acting in the scope of employment for the client.
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> . . . .
>
> A "lawyer's representative" is:
>
> (A) one employed by the lawyer to assist in the rendition of professional legal services; or
>
> (B) an accountant who is reasonably necessary for the lawyer's rendition of professional legal services.[51]

The privilege protects confidential communications.[52] "A communication is 'confidential' if [it is] not intended to be disclosed to third persons other than those [persons]: (A) to whom disclosure is made to further the rendition of professional legal services to the client, or (B) [those persons]

47. *See id.*
48. *Id.* 503(a)(3).
49. *Id.* 503(a)(1), (a)(3), (b)(1).
50. *Id.* 503(b)(1).
51. *Id.* 503(a)(4).
52. Johnson, *supra* note 14, at 107.

reasonably necessary to transmit the communication."[53] A party may not avoid the production of documents or facts by forwarding them to an attorney.[54]

> The privilege may be claimed by:
>
> (1) the client;
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> (2) the client's guardian or conservator;
>
> (3) a deceased client's personal representative; or
>
> (4) the successor, trustee, or similar representative of a corporation, association, or other organization or entity-whether or not in existence. The person who was the client's lawyer or the lawyer's representative when the communication was made may claim the privilege on the client's behalf—and is presumed to have authority to do so.[55]

An attorney may not disclose attorney-client communications without the consent of their client because it is the client's privilege.[56]

### *C. Privilege Includes Client's Representatives*

"The attorney client privilege protects confidential communications between a lawyer and a client or their respective representatives made to facilitate the rendition of professional legal services to the client."[57] This privilege is not limited to communications made in anticipation of litigation.[58] Thus, Rule 503(b) of the Texas Rules of Evidence protects not only confidential communications between the lawyer and client but also the discourse among their representatives.[59] Rule 503(a)(2) of the Texas Rules of Evidence defines "client representative" as:

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53. *Id.*; *see, e.g.*, Boring & Tunneling Co. of Am., Inc. v. Salazar, 782 S.W.2d 284, 289–90 (Tex. App.—Houston [1st Dist.] 1989, orig. proceeding) (holding that a letter to adjuster from attorney was clearly made to facilitate rendition of legal services and not intended for disclosure); *see also* Lesikar v. Moon, No. 14-11-01016-CV, 2012 WL 3776365, at *6 (Tex. App.—Houston [14th Dist.] Aug. 30, 2012, pet. denied) (holding that a defendant is not allowed to review privileged material even though the plaintiff is seeking an award of attorney's fees).

54. *See* Huie v. DeShazo, 922 S.W.2d 920, 923 (Tex. 1996) ("[A] person cannot cloak a material fact with the [attorney-client] privilege merely by communicating it to an attorney."); Avary v. Bank of Am., N.A., 72 S.W.3d 779, 801 (Tex. App.—Dallas 2002, pet. denied).

55. TEX. R. EVID. 503(c).

56. *In re* Houseman, 66 S.W.3d 368, 371 (Tex. App.—Beaumont 2001, orig. proceeding); Turner v. Montgomery, 836 S.W.2d 848, 850 (Tex. App.—Houston [1st Dist.] 1992, orig. proceeding) (holding that an attorney can claim privilege only on behalf of client).

57. *In re* Tex. Farmers Ins. Exch., 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, pet. denied).

58. Johnson, *supra* note 14, at 110.

59. TEX. R. EVID. 503(b)(1)(A); *see also In re* Hicks, 252 S.W.3d 790, 794 (Tex. App.—[14th Dist.] 2008, orig. proceeding) ("The [attorney-client] privilege covers not only direct communications between lawyer and client but also communications involving the client's representatives and the lawyer's representatives, so long as they were made for the purpose of facilitating legal services to the client.").

> (A) a person who has authority to obtain professional legal services for the client or to act for the client on the legal advice rendered; or
>
> (B) any other person who, to facilitate the rendition of professional legal services to the client, makes or receives a confidential communication while acting in the scope of employment for the client.[60]

Clients are entitled to hire or otherwise engage third parties to provide professional guidance and to include those professionals in attorney-client communications in which such professionals serve to facilitate the rendition of legal services to the client.[61] Such is common in situations involving complex financial circumstances in which the specialized knowledge of financial professionals aids both the attorney and the client in addressing legal issues.[62]

For example, in *In re Stephens Inc.*, Consert Inc. (Consert) engaged a third party, Stephens Inc. (Stephens), to provide professional guidance in connection with a proposed business transaction involving Consert and a purchaser.[63] In connection with their professional assistance, Stephens was included in communications between Consert and its counsel and had access to confidential attorney-client communications.[64] When litigation with former shareholders of Consert subsequently ensued, the shareholders tried to compel production of these documents, arguing that the presence of Stephens waived privilege.[65]

The court of appeals disagreed and found that Stephens squarely fell within the definition of client representative under Texas Evidence Rule 503(a)(2)(B).[66] Moreover, the court clarified that those communications between Consert and Stephens that transmitted legal advice were also protected "because communications 'between representatives of a client' are protected if they otherwise meet the requirements of the Rule, a lawyer need not be involved as an author or recipient."[67]

For further example, in *In re Segner*, a trustee hired a consultant to assist managing a trust, including supervising employees and assisting with attorneys.[68] In litigation, the trustee designated the consultant as an expert and disclosed his file as well as "'everything that was provided to him, reviewed by, prepared by, or prepared for [him]' in anticipation of his expert

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60. TEX. R. EVID. 503(a)(2)(A), (B).

61. *See, e.g.*, *In re* Stephens, 579 S.W.3d 438, 441 (Tex. App.—San Antonio 2019, orig. proceeding).

62. *Id.*

63. *Id.* at 443; Johnson, *supra* note 14, at 100.

64. *Stephens*, 579 S.W.3d at 441–42.

65. *Id.* at 441.

66. Johnson, *supra* note 14, at 110.

67. *Id.*; *Stephens*, 579 S.W.3d at 441 (quoting *In re* Monsanto Co., 998 S.W.2d 917, 929–30 (Tex. App.—Waco 1999, orig. proceeding)).

68. *In re* Segner, 441 S.W.3d 409, 412 (Tex. App.—Dallas 2013, orig. proceeding).

testimony."[69] The opposing party sought production of much broader information from the consultant, which the trial court granted.[70] The court of appeals granted mandamus relief because the information was protected by the attorney-client privilege.[71] The court focused on the consultant's testimony that he "sent and received confidential communications with the [t]rust's attorneys for purposes of effectuating legal representation for the [t]rust."[72]

Of course, if the third party is not sufficiently proven to be the agent of the client, then a trial court may find that the privilege is waived and order the production of the communications.[73] In *In re Opdycke*, a trial court ordered certain communications between a party and her counsel be produced because she included a financial consultant.[74] The court of appeals affirmed the order requiring the production:

> We also conclude that Nicola has not shown the trial court abused its discretion by finding the emails are not subject to Nicola's attorney-client privilege. In the trial court, the parties presented conflicting evidence on whether West and Bessemer Trust acted as Nicola's *client representative*, given the definition of that term in the rule that governs the attorney-client privilege. *See* Tex. R. Evid. 503(2) (defining *client representative*). On this record, the trial court's resolution of that question was reasonable given the conflicting inferences available from evidence.[75]

*Warning:* A client and their attorney should document early in the case (either in the engagement letter or some separate writing) that the client has representatives for the facilitation of legal services, expressly name those representatives, and have the client and the representative sign the document.[76] Otherwise, there may be challenges to the representatives' capacity and the application of the attorney-client privilege.[77] There has been at least one trust lawsuit in which a co-trustee's attorney-client communications were compelled to be produced when the client's representative had been copied on the communications, and the trial court

69. *Id.* at 410.
70. *Id.*
71. *Id.*
72. *Id.* at 412.
73. *See generally In re* Opdycke, No. 09-21-00250-CV, 2021 Tex. App. LEXIS 8511, at *5 (Tex. App.—Beaumont Oct. 21, 2021, orig. proceeding) (explaining a case in which a third party is not sufficiently proved to be an agent of the client).
74. *Id.*
75. *Id.*
76. Johnson, *supra* note 14, at 111.
77. *Id.*

found that the representative had not expressly agreed to the representative position.[78]

### *D. Exceptions in Rule 503*

Texas Rule of Evidence 503(d) provides a list of exceptions in which the privilege does not apply, allowing parties to obtain discovery into communications between a client and legal counsel.[79] The Rule provides that the privilege does not apply:

> (1) *Furtherance of Crime or Fraud*. If the lawyer's services were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud.
>
> (2) *Claimants Through Same Deceased Client*. If the communication is relevant to an issue between parties claiming through the same deceased client.
>
> (3) *Breach of Duty By a Lawyer or Client*. If the communication is relevant to an issue of breach of duty by a lawyer to the client or by a client to the lawyer.
>
> (4) *Document Attested By a Lawyer*. If the communication is relevant to an issue concerning an attested document to which the lawyer is an attesting witness.
>
> (5) *Joint Clients*. If the communication: (A) is offered in an action between clients who retained or consulted a lawyer in common; (B) was made by any of the clients to the lawyer; and (C) is relevant to a matter of common interest between the clients.[80]

### *E. Crime/Fraud Exception*

The attorney-client privilege cannot be enforced when "the lawyer's services were sought or obtained to enable or aid anyone to commit what the client knew or reasonably should have known to be a crime or fraud."[81] As one court describes:

> The exception applies only when (1) a prima facie case is made of contemplated fraud, and (2) there is a relationship between the document at issue and the prima facie proof offered. A prima facie showing is sufficient if it sets forth evidence that, if believed by a trier of fact, would establish the elements of a fraud or crime that "was ongoing or about to be committed

78. *Id.*; *see also Opdycke*, 2021 Tex. App. LEXIS 8511, at *5 (explaining a case in which a third party is not sufficiently proved to be an agent of the client).

79. TEX. R. EVID. 503(d).

80. *Id.*

81. *Id.* 503(d)(1).

> when the document was prepared." A court may look to the document itself to determine whether a prima facie case has been established.
>
> We begin our analysis by examining the scope of the fraud portion of the crime/fraud exception. The Texas Rules of Evidence do not define what is intended in Rule 503(d)(1) by the phrase "to commit . . . [a] fraud." Black's Law Dictionary defines fraud as: "A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment." The Texas common law tort of fraud also requires proof of misrepresentation, concealment, or non-disclosure. The legal concept of fraud therefore has at its core a misrepresentation or concealment. This definition also dovetails with the apparent reasoning behind inclusion of fraud in the exception: by keeping client communications confidential—pursuant to the attorney-client privilege—the attorney whose client intends to make a misrepresentation or concealment helps prevent the injured party from learning the truth about the misrepresentation or concealment. Thus, in that situation, the attorney's silence affirmatively aids the client in committing the tort. This is not generally true of other torts (not based on misrepresentation or concealment) and explains why the exception is not the crime/*tort* exception.[82]

Moreover, the Texas Court of Criminal Appeals has held that this exception extends to documents otherwise protected by work-product privilege.[83]

There are many criminal statutes that may apply to trust relationships, such as theft.[84] One criminal statute that should be considered is the misapplication of fiduciary property or property of a financial institution, a criminal charge that has been in existence in Texas for over forty years.[85] A person commits the offense of misapplication of fiduciary property by intentionally, knowingly, or recklessly misapplying property they hold as a fiduciary in a manner that involves substantial risk of loss to the owner of the property.[86] The statute defines "fiduciary" to include: "(A) a trustee, guardian, administrator, executor, conservator, and receiver; . . . (D) an officer, manager, employee, or agent carrying on fiduciary functions on behalf of a fiduciary."[87] This criminal charge arises in the context of trustees misapplying trust property.[88] An offense under this statute ranges from a Class C misdemeanor for misapplying property valued less than $100 to a first-degree felony if the property misapplied is worth over $300,000.[89]

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82. *In re* Gen. Agents Ins. Co. of Am., 224 S.W.3d 806, 819 (Tex. App.—Houston [14th Dist.] 2007, orig. proceeding) (citation omitted).

83. Woodruff v. State, 330 S.W.3d 709, 729 (Tex. App.—Texarkana 2010, pet. ref'd).

84. *See* TEX. PENAL CODE ANN. § 32.45.

85. *Id.*

86. *Id.* § 32.45(b).

87. *Id.* § 32.45(a)(1).

88. Bowen v. State, 374 S.W.3d 427, 428 (Tex. Crim. App. 2012); Kaufman v. State, No. 13-06-00653-CR, 2008 Tex. App. LEXIS 3880, at *23 (Tex. App.—Corpus Christi May 29, 2008, pet. dism'd).

89. TEX. PENAL CODE ANN. § 32.45(c).

### *F. Claimants Through Deceased Client*

#### *1. Analysis of Exception*

As stated above, client communications with legal counsel are protected by attorney-client privilege, and the client holds the ability to invoke the privilege.[90] The personal representative of a deceased client accedes to this right to invoke privilege between the deceased client and legal counsel.[91]

Additionally, the privilege does not apply to "parties claiming through the same deceased client" when such communications are relevant to a dispute between the parties.[92] The most common example of the application of this exception involves disputes arising between beneficiaries of a decedent's estate. For example, in the matter of *In re Texas A&M-Corpus Christi Found.*, the Corpus Christi-Edinburg Court of Appeals applied the plain meaning of Texas Evidence Rule 503(d)(2) and concluded that the trial court abused its discretion by denying a motion to compel discovery from estate-planning attorneys related to a client's mental capacity, an issue relevant to the parties' underlying claims.[93]

In the matter of *In re Rittenmeyer*, a decedent's wife sued the decedent's estate related to the validity and enforceability of a pre-nuptial agreement between the decedent and his wife.[94] The wife sought discovery of drafts of wills prepared after the will was admitted to probate, trust documents in which the decedent was a beneficiary, and communications reflecting the decedent's intentions regarding his wife.[95] Over the personal representative's objection, the wife alleged that the documents were exempted from privilege by Texas Rule of Evidence 503(d)(2).[96]

The Dallas Court of Appeals noted that the wife had the burden of establishing that the exception applied and noted the importance of the attorney-client privilege, saying:

> For the exception to apply, the rule first requires that the information is "relevant to an issue between parties." It is well-established that evidence is relevant if: "(a) it has any tendency to make a fact more or less probable than it would be without the evidence, and (b) the fact is of consequence in determining the action." Texas courts have applied the rule 503(d)(2)

90. *In re* Houseman, 66 S.W.3d 368, 371 (Tex. App.—Beaumont 2001, orig. proceeding).

91. TEX. R. EVID. 503(c).

92. *Id.* 503(d)(2).

93. *In re* Texas A&M-Corpus Christi Found., 84 S.W.3d 358, 361 (Tex. App.—Corpus Christi 2002, orig. proceeding); *see also In re* Durbin, No. 03-16-00583-CV, 2017 Tex. App. LEXIS 5515, 2017 WL 2628069, at *4 (Tex. App.—Austin June 16, 2017, orig. proceeding) (mem. op.) (concluding estate-planning documents were relevant to decedent's capacity and were excepted from attorney-client privilege under Rule 503(d)(2)).

94. *In re* Rittenmeyer, 558 S.W.3d 789, 791–92 (Tex. App.—Dallas 2018, no pet.).

95. *Id.*

96. *Id.* at 792.

> exception when a party contends the information is relevant to a claim that a decedent lacked capacity to execute codicils or trust documents or was subject to undue influence.[97]

The wife argued that she believed the mother destroyed a subsequent will that the decedent had executed and that drafts of wills and related communications would be relevant to the topic.[98] The court disagreed and stated:

> Significantly, however, Chris could not have revoked the 2011 Will "except by a subsequent will, codicil, or declaration in writing, executed with like formalities, or by . . . destroying or cancelling the same or causing it to be done in his presence." Documents showing Chris's "present intent to change or revoke a testamentary instrument in the future cannot accomplish revocation of the instrument, nor [are they] evidence of the revocation." Consequently, drafts of wills are not relevant to whether Chris executed a later will. For the same reason, drafts of wills are not relevant to Nicole's claims that Hedy and Ashley destroyed "a later Will" that Chris executed.[99]

The court further ruled that the trust documents sought were not subject to the privilege exception because the decedent's parents, as settlors of the trust(s), held the privilege as to such documents—not the decedent as the beneficiary.[100]

### *2. Deposing a Party's Litigation Counsel*

Another issue is whether an opposing party can require an attorney who actively represents a party to testify in a case.[101] Depositions of litigation counsel are highly disfavored due to the potential for harassment, the disruption of the adversarial process, and the implication of the attorney-client privilege and work-product concerns, among other reasons.[102] As such, a party seeking to depose an opposing counsel must show the information sought is relevant and crucial to the preparation of the party's case, unobtainable through less intrusive means, and not privileged or protected work product.[103]

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97. *Id.* at 793.
98. *Id.* at 794.
99. *Id.* (citation omitted).
100. *Id.* at 796.
101. *In re* Mason & Co. Prop. Mgmt., 172 S.W.3d 308, 310 (Tex. App.—Corpus Christi 2005, orig. proceeding).
102. *Id.* at 313.
103. *In re* Baptist Hosp. of Se. Tex., 172 S.W.3d 136, 145–46 (Tex. App.—Beaumont 2005, orig. proceeding); *In re* Baytown Nissan Inc., 451 S.W.3d 140, 149 (Tex. App.—Houston [1st Dist.] 2014, no pet.).

For example, in *In re Baptist Hospital of Southeast Texas*, the court concluded that "compelling a deposition of the opposing party's attorney of record concerning the subject matter of the litigation is inappropriate under most circumstances."[104] The court reasoned that "[c]alling opposing counsel of record as a witness seriously disrupts the counsel's functioning as an advocate and may create a false impression that the advocate was improperly involved in the underlying issues in the litigation."[105] The court further held that an attorney of record should not be ordered to be deposed on the subject matter of the litigation unless there is a showing that the information sought cannot be obtained through less intrusive discovery methods:

> [A] trial court should not order a deposition of an attorney of record on the subject matter of the litigation without a showing that less intrusive discovery methods are unavailable to obtain the information sought. Written discovery requests may be less intrusive because they do not require an attorney to make an immediate decision on whether a question involves work product or attorney-client privilege, and may not distract the attorney or involve the attorney as personally as a deposition. If, as a last resort, the advocate's oral deposition is to be ordered, the area of questions permitted should be specified and a protective order entered, to protect against the disclosure of core work product and other privileged information.[106]

Similarly, in *In re Mason & Co. Property Management*, the court stated that the tactic of seeking an opposing counsel's deposition is disfavored because of its potential to harass and disrupt the adversarial system, reasoning:

> While there is no blanket immunity that exempts lawyers from being deposed, we recognize that such a practice has the potential to disrupt the adversarial system and to increase the time and costs of litigation. Moreover, allowing the deposition of a party's attorney offers the possibility that such discovery could be used strategically as an opportunity for harassment. Accordingly, the tactic of seeking discovery from opposing counsel should be disfavored, and we take a stringent view toward allowing depositions of opposing counsel.[107]

Likewise, in *In re Baptist Hospital of Southeast Texas*, the court concluded that "[c]ompelling an attorney of record involved in the litigation

104. *Baptist Hosp. of Se. Tex.*, 172 S.W.3d at 145.
105. *Id.*
106. *Id.* at 145–46.
107. *Mason & Co. Prop. Mgmt.*, 172 S.W.3d at 313.

of the case to testify concerning the suit's subject matter generally implicates work product concerns" and "is inappropriate under most circumstances."[108]

Texas courts are not alone in their stringent view of allowing depositions of opposing counsel.[109] Federal courts disfavor the practice and have concluded it "should be employed only in limited circumstances."[110] Because depositions of opposing counsel cause "the standards of the profession to suffer" and "disrupt[] the adversarial nature of our judicial system," the court in *Shelton v. American Motor Corp.* adopted specific requirements that must be met when a party attempts to depose an opposing counsel in a pending lawsuit.[111] Specifically, the *Shelton* court held that a party may only depose an opposing counsel if: (1) no other means exist to obtain the information [sought through the deposition] than to depose opposing counsel, (2) the information sought is relevant and nonprivileged, and (3) the information is crucial to the preparation of the case.[112] The *Shelton* court's reasoning is persuasive:

> Taking the deposition of opposing counsel not only disrupts the adversarial system and lowers the standards of the profession, but it also adds to the already burdensome time and costs of litigation. It is not hard to imagine additional pretrial delays to resolve work-product and attorney-client objections, as well as delays to resolve collateral issues raised by the attorney's testimony. Finally, the practice of deposing opposing counsel detracts from the quality of client representation. Counsel should be free to devote his or her time and efforts to preparing the client's case without fear of being interrogated by his or her opponent. Moreover, the "chilling effect" that such practice will have on the truthful communications from the client to the attorney is obvious.[113]

Based on these numerous authorities, it is clear the tactic of deposing an opposing counsel is highly disfavored, and an attorney of record should only be deposed on the subject matter of the litigation as a last resort.[114] There must be a showing that the information sought cannot be obtained through any other means that are less intrusive.[115] The information sought must be

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108. *Baptist Hosp. of Se. Tex*., 172 S.W.3d at 145; *see also In re* Burroughs, 203 S.W.3d 858, 860 (Tex. App.—Beaumont 2006, no pet.) (holding the trial court abused its discretion in ordering the deposition of the attorney of record for a non-party fact witness to the underlying lawsuit).

109. *See* Theriot v. Par. of Jefferson, 185 F.3d 477, 491 (5th Cir. 1999).

110. *Id.*; *see also* Shelton v. Am. Motors Corp., 805 F.2d 1323, 1327 (8th Cir. 1986) ("The practice of forcing trial counsel to testify as a witness . . . has long been discouraged[.]") (citing Hickman v. Taylor, 329 U.S. 495, 513 (1947)).

111. *Shelton*, 805 F.2d at 1327 (quoting *Hickman*, 329 U.S. at 513).

112. *Id.*

113. *Id.*

114. Author's original thought.

115. *In re* Baptist Hosp. of Se. Tex., 172 S.W.3d 136, 145–46 (Tex. App.—Beaumont 2005, orig. proceeding); *accord Shelton*, 805 F.2d at 1327.

relevant and crucial to the preparation of the plaintiff's case.[116] And, the information sought must not be privileged or protected work product.[117]

### *G. Breach of Duty by Attorney*

As shown above, the attorney-client privilege belongs to the client, not the attorney.[118] "Unless the client waives it, the attorney cannot be compelled to disclose matters that come within that privilege."[119] However, when an attorney is sued by their own client, the attorney is permitted to reveal confidential information so far as necessary to defend themselves.[120]

Texas Rule of Evidence 503(d) states that the following is an exception to the attorney-client privilege: "If the communication is relevant to an issue of breach of duty by a lawyer to the client or by a client to the lawyer."[121] "When the client files suit, he retains control and thus, the scope of any disclosure can be limited by the client's power to drop the suit."[122] Therefore, if a client sues their attorney, the attorney can use attorney-client communications to protect themselves from liability, and a client should be aware of that fact in deciding on whether to sue the attorney.[123]

### *H. Joint-Client Privilege Issues*

Co-trustees can jointly retain counsel and can jointly assert attorney-client privilege.[124] The "joint client" or "co-client" doctrine applies in Texas: "When the same attorney simultaneously represents two or more clients on the same matter."[125] Joint representation is permitted when all clients consent and there is no substantial risk that the lawyer's representation of one client would be materially and adversely affected by the lawyer's duties to the other."[126] "Where [an] attorney acts as counsel for two parties,

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116. *In re* Baytown Nissan Inc., 451 S.W.3d 140, 149 (Tex. App.—Houston [1st Dist.] 2014, no pet.); *accord Shelton*, 805 F.2d at 1327.

117. *Baytown Nissan*, 451 S.W.3d at 149.

118. TEX. R. EVID. 503(b)(1).

119. West v. Solito, 563 S.W.2d 240, 244 n.2 (Tex. 1978).

120. *Id.* at 245 n.3; *see also* TEX. R. EVID. 503(d)(3) (stating no privilege exists as to communication relevant to issue of breach of duty by lawyer to client or by client to lawyer); Apex Mun. Fund v. N-Group Sec., 841 F. Supp. 1423, 1430 (S.D. Tex. 1993) (stating that attorney can waive attorney-client privilege when accused by client of wrongdoing).

121. TEX. R. EVID. 503(d).

122. Vinson & Elkins v. Moran, 946 S.W.2d 381, 394 (Tex. App.—Houston [14th Dist.] 1997, writ dism'd by agr.).

123. *Id.*

124. Johnson, *supra* note 14, at 113.

125. PAUL R. RICE ET AL., ATTORNEY-CLINT PRIVILEGE IN THE UNITED STATES § 4:30 (2022–2023 ed. 2011).

126. *In re* XL Specialty Ins. Co., 373 S.W.3d 46, 50 (Tex. 2012) (citing RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 128 (AM. L. INST. 2000)).

communications made to the attorney for the purpose of facilitating the rendition of legal services to the clients are privileged, except in a controversy between the clients."[127]

When more than one person seeks consultation with an attorney on a matter of common interest, the parties and the attorney may reasonably presume the parties are seeking representation of a common matter.[128] However, just because parties are co-trustees or co-fiduciaries does not mean that an attorney necessarily represents both parties.[129]

So, when co-trustees jointly retain counsel, their communications with their attorney are privileged against third parties, such as beneficiaries.[130] However, if the co-trustees themselves have a dispute, then there is no privilege, and the communication between the attorney and either one of the co-trustees is open to discovery by the other co-trustee.[131] Texas Rule of Evidence 503(d)(5) provides that the following is an exception to the privilege: "If the communication: (A) is offered in an action between clients who retained or consulted a lawyer in common; (B) was made by any of the clients to the lawyer; and (C) is relevant to a matter of common interest between the clients."[132]

For example, in the matter of *In re Alexander*, a beneficiary filed suit against the trustee based on multiple allegations of breach of fiduciary duty, including an allegation that the trustee attempted to transfer the trustee position to successors in violation of the trust's terms.[133] The beneficiary filed a motion to compel trust documents and emails regarding the same issue drafted by an attorney, but which were never executed.[134]

The court stated that the trustee filed affidavits proving that the drafts and communications were prepared in the course of the attorney's representation of the trustees and were for legal advice.[135] The court then discussed the concept of a trustee's communications with its counsel being privileged:

> In *Huie*, the [Texas Supreme Court] considered whether the attorney-client privilege protects communications between a trustee and his or her attorney relating to the administration of a trust from discovery by a trust beneficiary. There, a trust beneficiary sued the trustee, alleging that he had mismanaged

127. *In re* JDN Real Estate-McKinney L.P., 211 S.W.3d 907, 922 (Tex. App.—Dallas 2006, no pet.).

128. Johnson, *supra* note 14, at 113.

129. *Id.*; *In re* Valero Energy Corp., 973 S.W.2d 453, 458–59 (Tex. App.—Houston [14th Dist.] 1998, orig. proceeding) (attorneys for one joint venturer did not represent other joint venturer).

130. Johnson, *supra* note 14, at 114.

131. *Id.*; TEX. R. EVID. 503(d)(5) (noting that communications made by two or more clients to a lawyer retained in common are not privileged "when offered in an action between or among any of the clients.").

132. TEX. R. EVID. 503(d)(5); Johnson, *supra* note 14, 116.

133. *In re* Alexander, 580 S.W.3d 858, 861 (Tex. App.—Houston [14th Dist.] 2019, no pet.).

134. *Id.* at 863.

135. *Id.*

the trust, engaged in self-dealing, diverted business opportunities from the trust, and commingled and converted trust property. The beneficiary noticed the deposition of the trustee's attorney, who appeared but refused to answer questions about the management and business dealings of the trust. After an evidentiary hearing, the trial court held that the attorney-client privilege did not prevent the beneficiary from discovering the attorney's pre-lawsuit communications.

The court in *Huie* observed that trustees "owe beneficiaries 'a fiduciary duty of full disclosure of all material facts known to them that might affect [the beneficiaries'] rights.'" Furthermore, this duty exists independently of the rules of discovery and applies even if no litigious dispute exists between the trustee and beneficiaries. While the attorney-client privilege protects confidential communications between a client and the attorney made for the purpose of facilitating the rendition of professional legal services to the client, a person cannot cloak a material fact with the attorney-client privilege merely by communicating it to an attorney. The *Huie* court illustrated the point with the following hypothetical:

> Assume that a trustee who has misappropriated money from a trust confidentially reveals this fact to his or her attorney for the purpose of obtaining legal advice. The trustee, when asked at trial whether he or she misappropriated money, cannot claim the attorney-client privilege. The act of misappropriation is a material fact of which the trustee has knowledge independently of the communication. The trustee must therefore disclose the fact (assuming no other privilege applies), even though the trustee confidentially conveyed the fact to the attorney. However, because the attorney's only knowledge of the misappropriation is through the confidential communication, the attorney cannot be called on to reveal this information.

Nonetheless, the court flatly rejected the beneficiary's argument that a trustee's duty of disclosure extends to any and every communication between the trustee and his attorney. The court explained that (1) its holding did not affect the trustee's duty to disclose all material facts and to provide a trust accounting to the beneficiary, even as to information conveyed to the attorney; (2) the beneficiary could depose the attorney and question him about his handling of trust property and other factual matters involving the trust; and (3) the attorney-client privilege did not bar the attorney from testifying about factual matters involving the trust, so long as he was not called on to reveal confidential attorney-client communications.

Although a trustee owes a duty to a trust beneficiary, the trustee in *Huie* did not retain the attorney to represent the beneficiary but to represent himself in carrying out his fiduciary duties. Contrary to Preston's point, the *Huie* court recognized that communications between a trustee and the trustee's attorney made confidentially and for the purpose of facilitating legal services remain protected. The hypothetical in *Huie* involved the trustee's misappropriation of trust funds, which he revealed to his attorney for purpose of obtaining legal advice. The trustee's misappropriation was a material fact of which the trustee knew independent of the communication.

> In contrast to the circumstances in *Huie*, and as explained above, HHS and all the Co-Trustees had an attorney-client relationship at the relevant time, and any communications among HHS and their joint clients regarding the contents of the draft documents were made for the purpose of obtaining legal services from HHS, and the Co-Trustees' knowledge of the draft documents was not gained independent of receiving legal advice. Accepting Preston's view of the discoverability of the subject documents would strip the attorney-client privilege and joint-client doctrine of their core purpose and meaning. Therefore, relators had no duty under *Huie* to disclose the draft documents to Preston.[136]

The court also held that the trustee had not waived the privilege by testifying in a deposition about the drafts of the documents because the testimony was not specific enough to constitute a waiver.[137] The court ultimately granted the petition and ordered the trial court to reverse its order compelling production of the documents and communications.[138]

### *I. Allied-Litigant Privilege*

When one co-trustee hires legal counsel, may the trustee produce attorney-client communications to its non-client co-trustee and maintain the privilege?[139] Generally, extreme caution should be applied in this circumstance outside of litigation.[140] Confidential communications to which the attorney-client privilege applies include those "by the client, the client's representative, the client's lawyer, or the lawyer's representative to a lawyer representing another party in a pending action or that lawyer's representative, if the communications concern a matter of common interest in the pending action[.]"[141]

This rule, often referred to as the "common interest" privilege, is an exception to the general rule that no attorney-client privilege attaches to communications that are made in the presence of or disclosed to a third party.[142] The Texas Supreme Court has addressed the "pending action" requirement of the rule and concluded that the common interest privilege is more accurately described as an "allied litigant" privilege.[143] This is because the attorney-client privilege does not extend beyond litigation, and it applies to any party—not just the defendants—to a pending action.[144] Because of the

136. *Id.* at 867–69 (second alteration in the original) (citations omitted).
137. *Id.* at 869–70.
138. *Id.* at 870.
139. Johnson, *supra* note 14, at 116.
140. *Id.*
141. *Id.* (quoting TEX. R. EVID. 503(b)(1)(C)).
142. *Id.*
143. *Id.* at 116–17.
144. *Id.*

pending action requirement, no commonality of interest exists absent actual litigation.[145]

### *J. There is No Fiduciary Exception to the Privilege in Texas*

In some jurisdictions, there is a fiduciary exception to the attorney-client communication privilege.[146] The fiduciary exception has its origins in English trust law, which long ago recognized that the fiduciary nature of the relationship between a trustee and a beneficiary of a trust provides an exception to the attorney-client privilege, with respect to communications between the trustee and the trust's attorney.[147] Under the fiduciary exception, when a trustee seeks legal advice in executing their fiduciary duties, they ultimately act on behalf of the beneficiaries of the trust and, accordingly, cannot cloak their actions from the attorney's "real clients."[148]

> Understood in this fashion, the fiduciary exception is not an "exception" to the attorney-client privilege at all. Rather, it merely reflects the fact that, at least as to advice regarding [trust] administration, a trustee is not "the real client" and thus never enjoyed the privilege in the first place.[149]

In *Riggs National Bank*, the court focused on three factors to identify the beneficiaries as the real clients: (1) the trustees had sought legal advice that would only benefit the trust, not the trustees personally; (2) the trustees had paid for that advice with trust funds, not the trustees' personal funds; and (3) there was no adversarial proceeding pending against the trustees, which presumably meant that there was no need for the trustees to seek advice in a personal capacity.[150] Another rationale implicit within the fiduciary exception is the trustee's duty to furnish information about the trust to its beneficiaries, including the trustee's attorney-client communications.[151] "Viewed in this light, the fiduciary exception can be understood as an instance of the attorney-client privilege giving way in the face of a competing legal principle."[152] However, the rationales underlying the fiduciary exception are not present when a trustee seeks legal advice in a personal

145. *Id.*
146. *Id.* at 108.
147. *Id.*
148. *Id.*
149. United States v. Mett, 178 F.3d 1058, 1063 (9th Cir. 1999).
150. Johnson, *supra* note 14, at 108 (discussing Riggs Natl. Bank of Wash., D.C. v Zimmer, 355 A.2d 709, 712 (Del. Ch. 1976)).
151. *Id.*; RESTATEMENT (THIRD) OF TRS. § 82 cmt. f (AM. L. INST. 2007) ("[L]egal consultations and advice obtained in the trustee's fiduciary capacity concerning decisions or actions to be taken in the course of administering the trust . . . 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.").
152. *Mett*, 178 F.3d at 1063.

capacity on matters not of trust administration, as opposed to in a fiduciary capacity on matters of trust administration.[153]

Texas does not have a fiduciary exception and allows a trustee to retain counsel and maintain attorney-client privilege against the trust's beneficiaries.[154] This privilege allows "unrestrained communication and contact between an attorney and client in all matters in which the attorney's professional advice or services are sought, without fear that these confidential communications will be disclosed by the attorney, voluntarily or involuntarily, in any legal proceeding."[155] The privilege, thus, "promote[s] effective legal services," which "in turn promotes the broader societal interest of the effective administration of justice."[156]

The trustee has no duty to disclose attorney-client communications to beneficiaries.[157] In *DeShazo*, a beneficiary argued that communications between the trustee and his counsel should be disclosed to the beneficiaries because the trustee had a general duty to disclose.[158] The Texas Supreme Court disagreed:

> The *communications* between Ringer and Huie made confidentially and for the purpose of facilitating legal services are protected. The attorney-client privilege serves the same important purpose in the trustee-attorney relationship as it does in other attorney-client relationships. A trustee must be able to consult freely with his or her attorney to obtain the best possible legal guidance. Without the privilege, trustees might be inclined to forsake legal advice, thus adversely affecting the trust, as disappointed beneficiaries could later pore over the attorney-client communications in second-guessing the trustee's actions. Alternatively, trustees might feel compelled to blindly follow counsel's advice, ignoring their own judgment and experience.[159]

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153. *See id.* ("On either rationale, however, it is clear that the fiduciary exception has its limits — by agreeing to serve as a fiduciary, an ERISA trustee is not completely debilitated from enjoying a confidential attorney-client relationship."); *see also* RESTATEMENT (THIRD) OF TRS. § 82, cmt. f ("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).").

154. Johnson, *supra* note 14, at 109.

155. West v. Solito, 563 S.W.2d 240, 245 (Tex. 1978).

156. Republic Ins. v. Davis, 856 S.W.2d 158, 160 (Tex. 1993).

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

158. *Id.* at 921–22.

159. *Id.* at 923–24; *see also* Poth v. Small, Craig & Werkenthin, L.L.P., 967 S.W.2d 511, 515 (Tex. App.—Austin 1998, pet. denied); Vinson v. Moran, 946 S.W.2d 381, 408 (Tex. App.—Houston [14th Dist.] 1997, writ dism'd by agr.) ("Executors are entitled to employ attorneys to assist them in the administration of the estate. It is the executors, not the beneficiaries, who are empowered to hire and consult with an attorney and to act on the attorney's advice on behalf of the estate.") (emphasis in the original).

Rule 503(b) protects not only confidential communications between the lawyer and client but also the discourse among their representatives.[160]

### *K. Successor Trustee's Ownership of Attorney-Client Privilege*

Attorneys that represent trustees should be aware that a successor trustee may also succeed to the privilege and be able to access communications between the attorney and a previous trustee.[161] For example, in *Moeller v. Superior Court*, the Supreme Court of California held that "the power to assert the attorney-client privilege with respect to confidential communications a predecessor trustee has had with its attorney on matters concerning trust administration passes from the predecessor trustee to its successor upon the successor's assumption of the office of trustee."[162] The *Moeller* court reasoned that because a successor trustee succeeds to all the rights, duties, and responsibilities of the predecessor trustee, the trustee's powers must be inherent in the office of the trustee rather than be personal to any particular trustee.[163] The court justified its holding by focusing on the practicalities of a trustee's affairs:

> It is likely, then, that in performing their day-to-day duties, trustees regularly have confidential communications with their attorneys about trust business (e.g., potential acquisitions and dispositions of property, lawsuits involving trust property). At any given time, therefore, many privileged communications that involve pending trust transactions are in existence. To allow for effective continuous administration of a trust, the right of access to these communications and the privilege to prevent their disclosure must belong to the person presently acting as trustee, because that person has the duty to conduct all pending trust business. Therefore, for a trust to continue to operate smoothly when a change in trustee occurs, the power to assert the attorney-client privilege must pass from the predecessor trustee to the successor.[164]

The court also reasoned that a successor trustee must have access to a predecessor trustee's legal files to avoid liability and harm to the beneficiaries; though, it recognized that the trust instrument may exculpate the successor trustee from liability for a predecessor trustee's breach of

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160. Johnson, *supra* note 14, at 109.

161. *Id.*; *See* EDWARD J. IMWINKELRIED, THE NEW WIGMORE: EVIDENTIARY PRIVILEGES § 6.5.2 (2d. Ed. 2009) ("[A] successor trustee inherits from a predecessor trustee the power to determine whether to assert the attorney-client privilege. The power automatically passes to the new trustee upon his or her assumption of the office of trustee.").

162. Moeller v. Superior Court, 947 P.2d 279, 288 (Cal. 1997); *see also In re* 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.").

163. *Moeller*, 947 P.2d at 283.

164. *Id.* at 284.

trust.[165] However, 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.[166]

Texas Rule of Evidence 503 does not provide any real clarity on this issue.[167] The rule defines a client as "a person, public officer, or corporation, association, or other organization or entity—whether public or private—that: (A) is rendered professional legal services by a lawyer; or (B) consults a lawyer with a view to obtaining professional legal services from the lawyer."[168] This does not expressly state that a client includes successors, but it does not exclude that possibility either.[169]

The rule also states who may claim the privilege, provides that "[t]he privilege may be claimed by: (1) the client; (2) the client's guardian or conservator; (3) a deceased client's personal representative; or (4) the successor, trustee, or similar representative of a corporation, association, or other organization or entity—whether or not in existence."[170] This provision does state that an estate representative can assert the privilege and presumably have access to those communications.[171] It also states that the successor or trustee of an organization or entity can have access to privileged communications.[172] The rule does not state, however, that a successor trustee has the right to claim the privilege.[173] A trustee is different from an estate representative and from an entity.[174] However, a Texas court may consider the roles sufficiently similar to allow a successor trustee to claim the previous trustee's privilege and access those communications.[175] Further, the rule lists exceptions to the privilege but does not state that successors are allowed an exception.[176]

Texas has not directly addressed whether a successor trustee is entitled to view its predecessor's privileged communications with attorneys (no matter the scope).[177] The Texas Supreme Court has held that the fiduciary exception does not apply such that a beneficiary is entitled to access privileged communications.[178] In Texas, a trust is not an entity and cannot be

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165. *Id.* at 287–88, 291.

166. Borissoff v. Taylor & Faust, 93 P.3d 337, 343–44 (Cal. 2004) ("[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.") (emphases omitted) (quoting *Moeller*, 947 P.2d at 285).

167. Johnson, *supra* note 14, at 113; *See* Tex. R. Evid. 503(a)(1).

168. TEX. R. EVID. 503(a)(1).

169. Johnson, *supra* note 14, at 113.

170. TEX. R. EVID. 503(c).

171. Johnson, *supra* note 14, at 113.

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. Huie v. DeShazo, 922 S.W.2d 920, 927 (Tex. 1996).

the client, rather, the trustee (in its capacity as trustee) is the party that is the client.[179] Therefore, there are arguments on both sides of whether a successor trustee should have access to a previous trustee's communications.[180]

In Texas, although not couched in terms of confidential communications, there is precedent that a successor fiduciary does not step into the shoes of the former fiduciary regarding privity and the ability to sue the attorney on behalf of the former fiduciary.[181] This authority shows that the relationship is personal to that fiduciary and does not shift to a successor, which would support the position that a successor trustee is not allowed access to a prior trustee's communications with their attorneys.[182]

### *L. Advice of Counsel Defense and Impact on Privilege*

A trustee can use advice of counsel as a defense, and when raised, it constitutes a factor in evaluating a trustee's prudence.[183] The Restatement (Third) of Trusts contemplates the advice of counsel defense in two sections: Section 77 and Section 93, the sections dealing with the duty of prudence and claims for breach of trust, respectively.[184] Comment b(2) to Subsections 1 and 2 of Section 77 addresses the effect of advice of counsel:

> The work of trusteeship, from interpreting the terms of the trust to decision making in various aspects of administration, can raise questions of legal complexity. Taking the advice of legal counsel on such matters evidences prudence on the part of the trustee. Reliance on advice of counsel, however, is not a complete defense to an alleged breach of trust, because that would reward a trustee who shopped for legal advice that would support the trustee's desired course of conduct or who otherwise acted unreasonably in procuring or following legal advice. In seeking and considering advice of counsel, the trustee has a duty to act with prudence. Thus, if a trustee has selected trust counsel prudently and in good faith, and has relied on

179. Johnson, *supra* note 14, at 113.

180. *Id.*

181. *See generally* Hodge v. Joyce W. Lindauer Att'y, No. 06-21-00008-CV, 2021 Tex. App. LEXIS 8076, at *8–9 (Tex. App.—Texarkana Oct. 5, 2021, no pet.) (discussing the privity barrier bars to successor administrator and successor trustee from asserting legal malpractice claim against attorney who represented previous administrator and trustee); *see* Messner v. Boon, 466 S.W.3d 191, 203–11 (Tex. App.—Texarkana 2015, pet. granted, judgment vacated w.r.m.) (ruling that successor personal representative lacks standing to assert a legal malpractice claim against an attorney retained by the prior personal representative); *see also* Nye v. Eastman & Smith, Ltd., No. L-13-1034, 2013-Ohio-4742 6th Dist., at *4–6 (Ohio Ct. App. 2013) (holding that successor trustee was not in privity with attorney for previous trustee).

182. *Messner*, 466 S.W.3d at 205.

183. RESTATEMENT (THIRD) OF TRS. § 77 cmt. b(2), c (AM. L. INST. 2007); *In re* Estate of Boylan, No. 02-14-00170-CV, 2015 Tex. App. LEXIS 1427, at *10 (Tex. App.—Fort Worth Feb. 12, 2015, no pet.).

184. RESTATEMENT (THIRD) OF TRS. §§ 77, 93.

> plausible advice on a matter within counsel's expertise, the trustee's conduct is significantly probative of prudence.[185]

Comment c to Section 93 limits the advice of counsel defense:

> Traditionally, a quite different view has been taken of breach-of-trust questions involving mistakes as to the nature and extent of the trustee's duties and powers. . . . Mistakes of this type occur not only in regard to statutory or common-law rules, but also when a trustee interprets trust provisions as permitting certain action or inaction that a court later determines to be improper. A breach of trust may be found even though the trustee acted reasonably and in good faith, perhaps even in reliance on advice of counsel. Trustees can ordinarily be protected from this risk by obtaining instructions (§71) concerning uncertainties of law or interpretation. . . .[186]

The cases addressing the advice of counsel defense in Texas hold that advice of counsel is available as a defense.[187]

In *DeRouen*, a beneficiary challenged a trustee's decision to not pursue litigation on behalf of the trust.[188] Mary Sue Bryan established a trust (the Bryan Trust) for her grandchildren, one of whom was DeRouen.[189] Mary's son Bryan was named sole trustee of the Bryan Trust.[190] Bryan, as trustee, made three distributions from DeRouen's portion of the trust's funds to DeRouen's wife, Angela.[191]

DeRouen contended that the distributions were improper because Angela was not a beneficiary under the Bryan Trust.[192] DeRouen contended that Angela was making false requests for distributions to Bryan, and DeRouen ultimately sued Bryan for breach of fiduciary duties for: (i) making distributions to a non-beneficiary and (ii) refusing to take legal action to recover the wrongly distributed trust funds.[193] Bryan ultimately won summary judgment on issues unrelated to the advice of counsel defense.[194]

The court of appeals commented on Bryan's decision not to pursue litigation.[195] The court noted: "Thus, under the Texas Trust Code and the

185. *Id.* § 77 cmt. b(2).
186. *Id.* § 93 cmt. c.
187. DeRouen v. Bryan, No. 03-11-00421-CV, 2012 Tex. App. LEXIS 8635, at *1 (Tex. App.—Austin Oct. 12, 2012, no pet.); *see, e.g.*, *In re* Estate of Bryant, No. 07-18-00429-CV, 2020 Tex. App. LEXIS 2131, at *1 (Tex. App.—Amarillo Mar. 11, 2020, no pet.); *In re* Estate of Boylan, No. 02-14-00170-CV, 2015 Tex. App. LEXIS 1427, at *1 (Tex. App.—Fort Worth Feb. 12, 2015, no pet.).
188. *DeRouen*, 2012 Tex. App. LEXIS 8635, at *1.
189. *Id.*
190. *Id.*
191. *Id.* at *2.
192. *Id.*
193. *Id.* at *3.
194. *Id.* at *14.
195. *Id.* at *13–14.

terms of the Bryan Trust, Bryan was authorized, but not required, to pursue litigation against Angela."[196] "Absent bad faith or an abuse of discretion, Bryan [cannot] be held liable for his refusing to do so."[197] In its analysis of Bryan's alleged bad faith, his reliance on advice of counsel in choosing not to pursue litigation against Angela was considered evidence of good faith because "Bryan made the decision not to pursue litigation against Angela after considering the advice of counsel, his discussions with the trustor, and the potential cost of litigation."[198] "Because there is no evidence that Bryan acted in bad faith or abused his discretion, the trial court did not err . . . ."[199] The court's discussion of advice of counsel as a factor supporting good faith shows that the defense is available in Texas.[200]

But, if a trustee raises an advice of counsel defense, then the trustee will likely waive its attorney-client communication privilege.[201] If a party introduces any significant part of an otherwise privileged matter, that party waives the privilege.[202] If a defendant voluntarily introduces its communications with counsel as a defense to claims, it cannot also seek to keep other aspects of the communications privileged.[203]

A Delaware court reviewed a similar fact pattern and found that the privilege was waived.[204] In *Mennen*, a trustee was sued for breach of fiduciary duty.[205] One of the trustee's defenses was that he received bad legal advice from counsel.[206] The trustee attempted to block production of the alleged bad advice from counsel, citing attorney-client privilege.[207] The court was unpersuaded by the trustee's invocation of privilege, stating that "[a] party's decision to rely on advice of counsel as a defense in litigation is a conscious decision to inject privileged communications into the litigation."[208]

In *Glenmede Trust Company v. Thompson*, the trustee fought the production of communications after invoking the defense, and the court disagreed and ordered production:

> The party opposing the defense of reliance on advice of counsel must be able to test what information had been conveyed by the client to counsel and vice-versa regarding that advice—whether counsel was provided with

196. *Id.* at *12.
197. *Id.*
198. *Id.* at *13–14.
199. *Id.*
200. *Id.* at *12–13.
201. Johnson, *supra* note 14, at 117.
202. *Id.*
203. *Id.*
204. *Id.* (discussing Mennen v. Wilmington Tr. Co., No. 8432-ML, 2013 WL 5288900, at *1–2 (Del. Ch. Sept. 18, 2013)).
205. *Id.*
206. *Id.*
207. *Id.*
208. *Id.* (quoting *Mennen*, 2013 WL 5288900, at *5).

> all material facts in rendering their advice, whether counsel gave a well-informed opinion and whether that advice was heeded by the client.[209]

Even when the defense is not expressly pled, when the party impliedly invokes the advice of counsel defense, they waive the privilege.[210]

The Texas Rules of Evidence and courts nationwide agree that when privileged communications are voluntarily introduced in litigation, they are no longer privileged.[211] Texas Rule of Evidence 511 provides:

> (a) A person upon whom these rules confer a privilege against disclosure waives the privilege if: (1) the person or a predecessor of the person while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the privileged matter unless such disclosure itself is privileged; or (2) the person or a representative of the person calls a person to whom privileged communications have been made to testify as to the person's character or character trait insofar as such communications are relevant to such character or character trait.[212]

Regarding this rule, one Texas commentator states:

> Advice of counsel. Take, for instance, cases in which a privilege holder asserts that she acted in reliance on advice of counsel, but then seeks to assert the attorney-client privilege to prevent an opponent from inquiring about attorney-client communications. Invoking the offensive use doctrine, courts usually hold that there is an implied waiver of the privilege. But these cases are much better explained as waivers under the express terms of Rule 511(a)(1). A party who testifies that she acted in reliance on counsel's advice is implicitly disclosing that counsel advised her that her proposed course of action was legal. By disclosing (implicitly) this privileged communication, the party has waived the privilege under Rule 511(a)(1). The only real question is the breadth of the waiver; that is, how much of the party's communications with her lawyer must now be disclosed. This is a tricky question, and it is discussed in a later section. At this point, suffice it to say that referring to this as an implied waiver does not further the analysis.[213]

The Texas Supreme Court has declared that a party cannot use a privilege as a sword to promote or protect its own affirmative claims or

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209. Glenmede Tr. Co. v. Thompson, 56 F.3d 476, 478 (3d Cir. 1995); *see also* United States v. Doe (*In re* Grand Jury Proceedings), 219 F.3d 175, 182 (2d Cir. 2000); Rhone-Poulenc Rorer v. Home Indem. Co., 32 F.3d 851, 863 (3d. Cir. 1994).

210. *In re* Valeant Pharm. Int'l, Inc., No. 3:15-cv-07658-MAS-LHG, 2021 U.S. Dist. LEXIS 215618, at *20 (D.N.J. 2021); Barbini v. First Niagara Bank, 331 F.R.D. 454, 457 (S.D.N.Y. 2019).

211. TEX. R. EVID. 511(a).

212. *Id.*

213. 1 STEVEN GOODE ET AL., TEXAS PRACTICE SERIES: GUIDE TO THE TEXAS RULES OF EVIDENCE § 511.3 (4th ed.).

further the relief it seeks.[214] In fact, the Supreme Court would later expand upon the "offensive use" doctrine and acknowledge that a party has waived the assertion of a privilege if the court determines that:

> (1) the party asserting the privilege is seeking affirmative relief; (2) the privileged information sought is such that, if believed by the fact finder, in all probability it would be outcome determinative of the cause of action asserted; and (3) disclosure of the confidential information is the only means by which the aggrieved party may obtain the evidence.[215]

The Supreme Court has explained that, with regard to the second prong, "[t]he confidential communication must go to the very heart of the affirmative relief sought."[216] "When a party uses a privilege as a sword rather than a shield, she waives the privilege."[217] Accordingly, a trustee should be careful and weigh the risk and reward of injecting attorney-client communications into a dispute.[218]

### *M. Inadvertent Attorney-Client Relationships*

A trustee and its counsel should be careful to appropriately communicate with the beneficiary so that the beneficiary does not believe that they are a client of the trustee's attorney.[219] Certainly, an attorney can represent more than one party; in fact, that is very common.[220] For example, a law firm may represent both spouses in the sale of real property, the leasing of minerals, or in estate planning.[221] So, a reasonably prudent attorney should identify who they represent and clarify that they do not represent a party when the attorney first communicates with a party regarding a legal matter.[222] Though not dispositive, a "trier of fact may consider the construction of a relevant rule of professional conduct that is designed for the protection of persons in the claimant's position as evidence of the standard of care and breach of the standard."[223]

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214. Johnson, *supra* note 14, at 118; *see also* Ginsberg v. Fifth Ct. of App.*,* 686 S.W.2d 105, 107 (Tex. 1985) (orig. proceeding); Trans Am. Nat'l Gas Corp. v. Flores, 870 S.W.2d 10, 11–12 (Tex. 1994) (orig. proceeding); Republic Ins. v. Davis, 856 S.W.2d 158, 163 (Tex. 1993) (orig. proceeding); Alford v. Bryant, 137 S.W.3d, 916, 921 (Tex. App.—Dallas 2004, pet. denied).

215. Johnson, *supra* note 14, at 118 (quoting *Trans Am, Nat'l Gas Corp.*, 870 S.W.2d at 11–12).

216. *Id.* (quoting *Republic*, 856 S.W.2d at 163).

217. *Id.* (quoting *Alford*, 137 S.W.3d at 921).

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

223. WILLIAM V. DORSANEO III, TEXAS LITIGATION GUIDE § 322.02 (Matthew Bender Elite Products eds., 1977) (citing RESTATEMENT (THIRD) OF L. GOVERNING LAWS. § 52, cmt. f).

The downside of this issue for the attorney is that the attorney may inadvertently create an attorney-client relationship and be held to fiduciary duties that are not anticipated.[224] To have an attorney-client relationship, there does not have to be a formal agreement.[225] "While it is generally a relationship created by contract, an attorney-client relationship can be implied based on the conduct of the parties."[226] "The attorney-client relationship may be implied if the parties by their conduct manifest an intent to create such a relationship."[227] For the relationship to be established, "the parties must explicitly or by their conduct manifest an intention to create it."[228] To establish whether the parties had a meeting of the minds, the courts "use an objective standard examining what the parties said and did and do not look at their subjective states of mind."[229] "More specifically, an attorney-client relationship can be implied from the attorney's gratuitous rendition of professional services."[230]

It should also be noted that an attorney may be liable for not informing a party that they do not represent them.[231] In the matter of *Querner v. Rindfuss*, the San Antonio Court of Appeals stated:

> Although an attorney hired by an executor generally represents the executor and not the beneficiary, an attorney for an executor may undertake to perform legal services as attorney for one or more beneficiaries. An attorney-client relationship may develop between the attorney retained by the executor and the beneficiaries either expressly or impliedly. Even absent an attorney-client relationship, an attorney may be held negligent for failing to advise a party that he is not representing the party. "If circumstances lead a party to believe that they are represented by an attorney," the attorney may be held liable for such a failure to advise.[232]

So, to help clarify, the attorney should always draft a written engagement letter that (1) expressly identifies the client or clients, (2) states

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224. Johnson, *supra* note 14, at 118.

225. *Id.*

226. Sotello v. Stewart, 281 S.W.3d 76, 80 (Tex. App.—El Paso 2008, pet. denied) (citing Suttin v. Estate of McCormick, 47 S.W.3d 179, 182 (Tex. App.—Corpus Christi–Edinburg 2001, no pet.); accord Mellon Serv. Co. v. Touche Ross & Co., 17 S.W.3d 432, 437 (Tex. App.—Houston [1st Dist.] 2000, no pet.)

227. Daves v. Comm'n for Law. Discipline, 952 S.W.2d 573, 577 (Tex. App.—Amarillo 1997, pet. denied).

228. Roberts v. Healey, 991 S.W.2d 873, 880 (Tex. App.—Houston [14th Dist.] 1999, pet. denied).

229. *Id.*

230. Sotello, 281 S.W.3d at 80–81 (citing Perez v. Kirk & Carrigan, 822 S.W.2d 261, 265 (Tex. App.—Corpus Christi–Edinburg 1991, writ denied)).

231. Querner v. Rindfuss, 966 S.W.2d 661, 667–68 (Tex. App.—San Antonio 1998, writ denied) (recognizing that an attorney's advice may give rise to an informal fiduciary duty even when no formal attorney-client relationship is formed).

232. *Id.*; *see also* Vinson v. Moran, 946 S.W.2d 381, 402 (Tex. App.—Houston [14th Dist.] 1997, pet. denied); Burnap v. Linnartz, 914 S.W.2d 142, 148 (Tex. App.—San Antonio 1995, writ denied).

that the attorney is not representing any other party not expressly mentioned, (3) identifies the scope of the engagement, and (4) notes when the engagement will be terminated.[233] Further, if appropriate, the attorney should follow up and orally tell those they do not represent but with whom the attorney often communicates, that the attorney does not represent them and only represents the client(s).[234] Additionally, individuals should also seek clarification and ask who the attorney represents and whether the individual should retain their own, separate attorney.[235] Everyone should strive to be on the same page regarding who is the attorney and who is the client.[236]

## IV. CO-TRUSTEES MANAGING TRUSTS

Retaining attorneys can be more complicated when a trust is administered by co-trustees.[237] Co-trustees each owe fiduciary duties, but they should exercise their duties jointly as a unit.[238] One co-trustee should not take any action without the consent of the other co-trustees.[239] For example, if a trust calls for two co-trustees, it cannot operate with just one.[240]

At common law, the co-trustees had to act with unanimity: "The traditional rule, in the case of private trusts, was that if there were two or more trustees, all had to concur in the exercise of their powers."[241] However, the Texas Property Code provides that, in the absence of trust direction, co-trustees generally act by majority decision.[242] So, the Texas Property Code establishes the general rule that if the trust names two co-trustees, they must act jointly to bind the trust, and one cannot act on behalf of the trust without the consent of the other, unless the trust agreement specifically authorizes unilateral action.[243]

For example, in *Conte v. Conte*, the Court of Appeals affirmed a trial court's order denying a co-trustee's request for reimbursement for attorney's fees expended in connection with a declaratory judgment action brought by another co-trustee.[244] The court noted that the trust expressly provided that "any decision acted upon shall require unanimous support by all

233. Johnson, *supra* note 14, at 119.
234. *Id.*
235. *Id.*
236. *Id.* at 170.
237. *Id.*
238. *Id.*
239. *Id.*
240. *Id.*
241. AUSTIN W. SCOTT ET AL., SCOTT & ASCHER ON TRUSTS § 18.3 (5th ed. 2006); *see*, e.g., Brown v. Donald, 216 S.W.2d 679, 683 (Tex. App.—Fort Worth 1949, no writ); Hart v. First State Bank of Seminole, 24 S.W.2d 480, 482 (Tex. App.—El Paso 1930, writ ref'd); Dodge v. Lacey, 216 S.W. 400, 402 (Tex. App.—Fort Worth 1919, writ dism'd w.o.j.).
242. Johnson, *supra* note 14, at 120.
243. *Id.*
244. Conte v. Conte, 56 S.W.3d 830, 835 (Tex. App.—Houston [1st Dist.] 2001, no pet.).

[c]o-[t]rustees then serving," and "[c]learly, Joseph Jr.'s decision to employ counsel to defend against [the] co-trustee's declaratory judgment action was not the subject of unanimous support by all co-trustees."[245] Thus, [he] was not entitled to reimbursement from the trust for his attorneys' fees, despite the trust's provision that "[e]very trustee shall be reimbursed from the trust for the reasonable costs and expenses incurred in connection with such [t]rustee's duties."[246] In a footnote, the court also noted that the other co-trustee had paid for her attorneys from the trust without the consent of the other co-trustee and noted that this was an issue that the successor trustee or beneficiary could raise in a later proceeding.[247]

Accordingly, if the trust document does not require unanimous action, a majority of co-trustees can vote to retain counsel and pay same from the trust.[248] Conversely, a co-trustee in the minority may not retain separate counsel and pay same from the trust.[249] For example, in *Berry v. Berry*, one co-trustee sued his other three co-trustees regarding the administration of trust.[250]

The court in *Berry* held that the minority co-trustee had no authority to sue the other co-trustees for damages:

> Kenneth first contends that, as a trustee, he can bring claims on behalf of the Trust against third parties. Kenneth is correct that a "trustee" is generally an "interested person" who may "bring an action under Section 115.001." But the claims at issue seek to vindicate the rights of the Trust, and the Trust has four co-trustees, three of whom oppose Kenneth's desire to assert the Trust's rights as he has. The question, then, is how to determine who may bring claims on behalf of a trust when co-trustees disagree. The Legislature has provided an unsurprising default rule: "Co-trustees may act by majority decision."
>
> Naturally, the other trustee brothers do not want the claims asserted by Kenneth on behalf of the Trust to proceed. In fact, the Consent Agreement they signed after the lawsuit was filed released any such claims and stated that the other trustees believe it is not in the best interests of the Trust for such claims to proceed. Faced with what amounts to a 3-1 vote of the trustees against him, Kenneth has no unilateral power to act for the Trust in court against the wishes of a majority of the trustees.
>
> Kenneth argues that trustees in his situation must have some recourse when, as alleged here, the other trustees have conspired with the non-trustee defendants to injure the Trust. But Kenneth does have recourse. He can seek removal of the other trustees, as he did in this suit. The defendants do not contest his authority to seek such relief. Further, the defendants do not

245. *Id.* at 834.
246. *Id.*
247. *Id.* at n. 5.
248. Johnson, *supra* note 14, at 120–21.
249. *Id.*
250. *Id.*

> dispute that Kenneth was permitted as a beneficiary to sue his brothers for breach of fiduciary duty. They oppose that claim on limitations grounds, not on the theory that Kenneth lacks the authority to bring it.[251]

However, the minority co-trustee can individually retain and pay for counsel from its own funds and later seek reimbursement in litigation concerning removing the majority co-trustees.[252]

## V. CO-TRUSTEE ACCESS TO COMMUNICATIONS

Co-trustees can jointly retain counsel.[253] When they do not, can one co-trustee gain access to their co-trustee's privileged communications?[254] Texas courts have held that the attorney only represents the fiduciary who retained the attorney, and not others.[255] In *Lesikar,* the court held that a co-executor is not in privity with the other co-executor's attorney:

> She argues for an extension of the law under the facts of this case because of the symmetry between each co-executrix's duties and responsibilities. Privity arises, she contends, because in prosecuting a claim for the estate, the attorney has the same duty he would have if employed by the other co-executrix to recover what is owed to the estate. She contends that, in the absence of this privity, one co-executrix cannot protect herself from the fraud of the other.
>
> In making this argument, however, Jenny blurs the respective roles of an executrix and her attorney. The executrix's duty is to prosecute claims on behalf of the estate; the attorney's duty is to give the executrix candid legal advice. The executrix is liable for breach of fiduciary duties to the beneficiaries; the attorney is liable for breach of fiduciary duties to the executrix.
>
> Co-executrixes may have the same duties, but their opinions may differ about how best to fulfill those duties. Candid advice from an attorney is invaluable in weighing those competing options. We see no reason to risk diluting the value of that advice by requiring the attorney of one co-executrix to effectively represent the other co-executrix. Each co-executrix can protect herself adequately by entering into a joint representation arrangement with a single attorney where appropriate, or by employing her own attorney. We conclude that the trial court properly granted summary judgment for Werley.[256]

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251. Berry v. Berry, 646 S.W.3d 516, 530 (Tex. 2022).

252. Johnson, *supra* note 14, at 122.

253. *See* TEX. PROP. CODE ANN. § 113.018.

254. Author's original thought.

255. Lesikar v. Rappeport, 33 S.W.3d 282, 320 (Tex. App.—Texarkana 2000, pet. denied) (holding that an attorney for one co-executor was not in privity with and therefore did not owe duties to other co-executor); *see* also Huie v. DeShazo, 922 S.W.2d 920, 921 (Tex. 1996) (holding that the trustee and not the trust beneficiary is the client of the trustee's attorney).

256. *Lesikar*, 33 S.W.3d at 320.

Because Texas does not follow the fiduciary exception to the attorney-client privilege and because a co-fiduciary does not have an attorney-client relationship with their co-fiduciary's attorney, there is no basis to allow a fiduciary to view communications between their co-fiduciary and their attorney.[257]

## VI. EVIDENCE OF ATTORNEY'S FEES TO COURT

Trustees and executors often have to provide evidence of their attorney's fees to a court.[258] Whether for litigation or routine management issues, trustees and executors may submit attorney's fees statements.[259] To protect the attorney-client communications and work product exempted information, the trustees or executors may redact certain privileged or exempted information from the attorney's fees statements.[260] Opposing parties have attempted to force this information to be unredacted but so far to no avail.[261] In one case, the party argued that information reviewed by the attorney and research should be produced because the proponent waived any privilege by seeking fees.[262] The court rejected that argument.[263]

In another case, the opposing party argued that the rule of optional completeness essentially trumped the privilege.[264] The court disagreed:

> We are not convinced the rule of optional completeness applies to this case. The probate court concluded the redacted portions of the statements were privileged and protected by the attorney–client privilege. Walker does not attack the applicability of attorney–client privilege, but contends that the rule of optional completeness trumps the attorney–client privilege. . . . Further, Walker directs us to no case applying the rule of optional completeness to defeat a valid claim of privilege, nor can we find one, and we are not inclined to so easily dispose of an important privilege. The attorney–client privilege promotes the free flow of information between attorney and client, and promotes the rendition of effective legal services. The rule of optional completeness is neither an exception to the attorney–client privilege nor does it mandate a waiver of the privilege.[265]

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257. *Huie*, 922 S.W2d at 921 (Tex. 1996).

258. *See* 24 WILLIAM V. DORSANEO III, TEXAS LITIGATION GUIDE § 400.08 (2024).

259. *See id.*

260. *See In re* City of Georgetown, 53 S.W.3d 328, 334 (Tex. 2001).

261. Id.

262. Lesikar v. Moon, No. 14-11-01016-CV, 2012 WL 3776365, at *6 (Tex. App.—Houston [14th Dist.] Aug. 30, 2012, pet. denied) (holding that a defendant is not allowed to review privileged material even though the plaintiff is seeking an award of attorney's fees).

263. *Id.*

264. *In re* Estate of Johnson, No. 04-11-00467-CV, 2012 WL 1940656, at *6–7 (Tex. App.—San Antonio May 30, 2012, no pet.) (mem op).

265. *Id.*

Accordingly, redacting attorney's fees statements to protect attorney-client communications is valid.[266] Over-redaction, however, also has issues attached to it.[267] It is certainly up to the court to determine whether the redacted information is sufficient to support an award of fees.[268]

## VII. CHOICE OF LAW ISSUES

One issue that may arise in litigation is what law should apply to determine whether the attorney-client privilege applies.[269] As shown, the law of privilege may vary from state to state regarding issues such as the fiduciary exception or the successor trustee standing.[270] "The purpose of the privilege is to ensure the free flow of information between attorney and client, ultimately serving the broader societal interest of effective administration of justice," and similarly to ensure a client's ability "to confide in an attorney secure that the communication will not be disclosed."[271]

Due to "the nature and purpose of the attorney-client privilege," it is "governed by the law of the state with the most significant relationship to the communication."[272] Generally speaking, "the state where the communication took place . . . is the state of most significant relationship."[273] For written statements, the state with the most significant relationship will typically be the state where the statement was received.[274]

For example, in *In re Levien*, trustees sought to invalidate the adult adoptions of certain defendants.[275] The trustees sought the production of

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266. Gordon K. Wright, *Application of the Attorney Client and Work Product Privileges When a Party Seeks Recovery of Attorney's Fees*, COOPER & SCULLY P.C. (Nov. 15, 2013), https://www.cooperscully.com/news-and-resources/articles/application-of-the-attorney-client-and-work-product-privileges-when-a-party-seeks-recovery-of-attorneys-fees-#:~:text=TEXAS%20RULE%20OF%20EVIDENCE%20503,privileges%20from%20the%20producing%20parties [https://perma.cc/36DV-7HP2].

267. *Don't Redact Fee Statements Too Much*, 600 COMMERCE (Jan. 19, 2022), https://600commerce.com/dont-redact-fee-statements-too-much/ [perma.cc/Y8L6-UCVV].

268. *Id.*

269. *Global Attorney-Client Privilege Guide: Type of Privilege*, BAKER MCKENZIE, https://resourcehub.bakermckenzie.com/en/resources/global-attorney-client-privilege-guide/north-america/united-states/topics/02---type-of-privilege#:~:text=To%20be%20recognized%20in%20legal%20proceedings%2C%unications%20occurred%20in%20the%20non%2DUS,apply%20the%20privilege%20law%20of%20that%20jurisdiction (last visited Feb. 10, 2025) [perma.cc/WU6Y-DP5U].

270. *See* discussion *supra* Sections III.J–K.

271. Ford Motor Co. v. Leggat, 904 S.W.2d 643, 647 (Tex. 1995) (orig. proceeding); *see also* SIS, LLC v. Orion Grp. Holdings, No. 4:22-CV-981, 2023 WL 8703419, at *1 n.1 (S.D. Tex. Dec. 15, 2023) (applying the Texas attorney–client privilege rules in a diversity jurisdiction action).

272. *Leggat,* 904 S.W.2d at 647; *see In re* Arterial Vascular Eng'g, Inc., No. 05-99-01753-CV, 2000 WL 1726287, at *12 (Tex. App.—Dallas Nov. 21, 2000) (orig. proceeding).

273. *Leggat*, 904 S.W.2d at 647.

274. *Arterial Vascular Eng'g*, 2000 WL 1726287, at *12.

275. *In re* Levien, No. 03-18-000798-CV, 2018 Tex. App. LEXIS 3329, at *7–8 (Tex. App.—Austin May 11, 2018) (orig. proceeding) (mem. op).

emails between the defendants and certain attorneys in New York.[276] The court of appeals held that New York law applied to the privilege:

> According to the record presented to this Court, at the time of the email exchange, Breed was practicing law in New York, and Ives was living in New York. Moreover, Breed was in New York when he received an email from Ives, and nothing in the record indicates that the parties had a relationship prior to the day that the email exchange was initiated or that Breed had ties to Texas. For these reasons, we must conclude that New York had the most significant relationship to the communications and that New York law must be applied when determining whether attorney-client privilege bars disclosure of the email exchange.[277]

## VIII. CONCLUSION

Trustees have reason to retain counsel from time to time during the administration of a trust.[278] This relationship implicates the attorney-client privilege.[279] There are many issues that arise concerning the attorney-client privilege in the context of a trustee retaining counsel.[280] This Article intends to provide guidance on the attorney-client privilege in Texas.[281]

276. *Id.*
277. *Id.* at *14–15.
278. *See* discussion *supra* Section III.J.
279. *See* discussion *supra* Section III.M.
280. *See* discussion *supra* Part III.
281. *See* discussion *supra* Part I.