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Borrowed Trouble: Common Conflicts and Mistakes to Avoid in Your Estate Planning Practice

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I. INTRODUCTION

No one sets out to create a trust that will be the subject of litigation. Settlors do not relish the idea of the assets they are placing in trust being depleted by attorneys' fees or being weaponized to pursue vendettas against family members. Likewise, no estate planning attorney likes the idea of their carefully crafted trusts being attacked or misused. Yet despite the best of intentions of settlors and planners, if a trust lasts long enough, litigation is not just possible but likely. The very nature of attempting to bind future generations to plans they did not have a hand in creating often sows seeds of discontent. Even the best estate planners can't control for every contingency, but they can make sure that their actions do not increase the chances of a dispute.

This paper will focus on identifying some of the issues that lead to trust disputes and ways that estate planners can minimize the chance that they will inadvertently put the trusts they create at risk. To that end, this article discusses the following issues:

(1) Conflicts of interest that may arise between family members, beneficiaries, and fiduciaries, as well as practical tips to avoid disqualification;

(2) The attorney-client privilege and how estate planning attorneys can protect their clients' confidential information;

(3) The fiduciary duty of full disclosure and its limits; and

(4) The two primary legal theories (incapacity and undue influence) that parties litigate in trust contests, as well as preventive measures and practical tips on what attorneys can do to help their clients avoid trust contests or to protect their clients' interests in the event a dispute arises.

II. THE ATTORNEY-CLIENT PRIVILEGE

The attorney-client privilege protects only communications between attorney and client made for the purpose of facilitating the rendition of legal services. *Apex Mun. Fund v. N-Group Sec.*, 841 F. Supp. 1423, 1425–26 (S.D. Tex. 1993). The purpose of such privilege is to ensure the free flow of information between the attorney and client. *Ford Motor Co. v. Leggat*, 904 S.W.2d 643, 647 (Tex. 1995). This serves the broader societal interest of the effective administration of justice. *Id.* Essentially, the client must feel able to confide in their attorney, knowing that their communications will not be disclosed. *Id.*

For the attorney-client privilege to apply, the client must intend for the communications to be made confidentially. Tex. R. Evid. 503(b). Communications knowingly made in the presence of third parties are not considered confidential. *Ledisco Fin. Servs., Inc. v. Viracola*, 533 S.W.2d 951, 959 (Tex. Civ. App. – Texarkana 1976, no writ). When creating a trust, attorneys may be asked by the client to communicate with multiple people outside the attorney-client relationship.. Be careful when communicating with your client in the presence of these third parties – including spouses, children, or caregivers. The presence of these third parties will likely destroy the privilege as to those communications and open the door to future disclosure. TEX. R. EVID. 503(b)(2); *In re Monsanto Co.*, 998 S.W.2d 917, 931 (Tex. App.—Waco 1999, no pet.). That being said, there are strategies estate planning attorneys can use that will allow communications with, or in the presence of, third parties to stay within the privilege.

A. Client Representatives

One way to avoid destroying the attorney-client privilege when communicating with third parties is to ensure that these third parties are designated as the client's "representative." TEX. R. EVID. 503(b)(1). A "client representative" is defined by the Texas Rules of Evidence as "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 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." TEX. R. EVID. 503(a)(2).

A marital or familial relationship with the client does not in itself bring a third party within the attorney-client privilegre as an agent. *See Wilkinson v. Stevison*, 514 S.W.2d 895, 898 (Tex. 1974). However, the privilege has been held to apply to communications between a friend of the client and the client's attorney, when the friend was acting with the attorney on the client's behalf. *Rosebud v. State*, 98 S.W.858, 859 (1906). More recently, the privilege has been held to protect communications between the client's attorney and the client's witness, when acting with the attorney on the client's behalf. *Burnett v. State*, 642 S.W.2d 765, 770 (Tex. Crim. App. 1983). In the *In re Segner* case, the trustee of a liquidating trust established during bankruptcy retained an individual to work on the trust's behalf. 441 S.W.3d 409, 410 (Tex. App.—Dallas 2013, no pet.). The individual, initially labeled a "trust administrator," was later designated as a testifying expert, and the opposing party sought information from the administrator regarding his capacity in assisting the administration of the trust. *Id.* The trust administrator testified that he was an agent of the trust, and also a representative of the trustee. *Id.* at 411. The trustee confirmed the assertion, indicating that the administrator had the authority to obtain legal services, and act on advice of counsel on the trustee's behalf. *Id.*

The opposing party argued that the trust administrator was not an employee of the trustee's accounting firm, and therefore should not be considered the client's representative. *Id.* The court held that the communications between the trust administrator and trustee's attorney were privileged, as the trust administrator had received confidential communications for the purposes of legal representation of the trust. *Id.* The court additionally indicated the authority given to the trust administrator to obtain and act on legal advice on behalf of the trustee rendered the trust administrator the trustee's and the trust's representative. *Id.*

Though there is case law upholding the privilege without a formal agency designation, and courts are generally protective of the privilege, the best practice is to have the client execute a written designation. It is worth remembering that the appellate cases on this subject took years to litigate at great expense to the parties involved. Properly designating an agent may help avoid such situations. Even close family members and friends should be designated as a "representative" to act on the client's behalf to provide the maximum amount of protection to the communications. *See* 139 A.L.R. 1250. The written designation should closely tracking the language of Texas Rule of Evidence 503. It is best to have this designation in place at the beginning of the representation. However, that may not always be possible. As such, it is worth including a statement in the designation that it is intended to apply retroactively to cover all communications from the inception of the representation.

B. The Spousal Privilege

Estate planners creating trusts should pay particular attention to communications with the spouses of their clients to avoid inadvertently waiving the privilege. Communications between a client, her spouse, and her attorney are not necessarily privileged communications. The spousal communication privilege is construed very narrowly in civil actions, and is limited to those confidential communications

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