Avoiding Litigation: How to Manage Potential Conflicts and Protect Beneficiaries' Confidentiality

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Goal of Presentation: To discuss how to spot and manage potential conflicts with or among clients and protect the confidentiality of those clients- both with respect to the clients as individuals and to the extent they are co-beneficiaries of trusts—with respect to their co-beneficiaries.

I view this as less of a "tax presentation" and more of a practical presentation focused on how to manage client relationships without creating issues that could lead to potential litigation.

Two of the biggest issues that lead to litigation are conflicts of interest and issues surrounding confidentiality. They are certainly not the only issues that lead to litigation- but they are two issues that can, to a certain extent, be managed and controlled.

I have a bit of unique perspective because I am both an estate planner and a fiduciary litigator. As a litigator, I have the ability to see how acts and behaviors are cast or recast by an attorney arguing to a court that a breach should be found. And it is not a defense to say "well, that's just how we have always done it." Courts do not like that type of response.

<u>So first generally speaking—if the goal is to avoid litigation, there are some general principles that should guide the discussion</u>

Avoiding Litigation

- Understand who your clients are – this seems obvious but a lot of what can go on with a long-standing client relationship can have a very informal feel—family members call, email, ask for this or that—need help with a variety of items. Take time occasionally to view these relationships more formally. As I like to say- view them as a judge would trying to resolve a dispute
    - Be clear on the nature of each relationship.
        - Do you represent the person individually or is the person calling a child or other member of the client's family?
        - Do you also represent a trust of which the person is a beneficiary? Do you represent the trustee?
        - Spouses?
        - Children?
        - Are there minors involved—if so, who speaks for them?

        - Do all family members get along—or only sort of get along—or hate each others' guts? This information is critical to being able to anticipate when and between who litigation may result.
    - Focus on the various duties that may be owed to your clients. It is much more clear in the law what duties apply to a trust relationship—where there is an irrevocable trust with a trustee and beneficiaries
    - But there are many types of fiduciary relationships that arise outside of the trustee/beneficiary relationship
- Rules governing how fiduciaries should act are particularly instructive in analyzing duties owed
    - Duty of impartiality – generally applies to trustees
        - Codified under the trust code which has been adopted in 36 states
        - If a trust has two or more beneficiaries, the trustee shall act impartially in investing, managing, and distributing the trust property, giving due regard to the beneficiaries' respective interests
        - Where you represent multiple members of the same family- consider whether you are taking actions that favor one client or family member over another or give the perception of doing so unless it is clear that you are entitled to favor one over another. Classic example—senior member of the family is the one who likes to call the shots and likes to do so even with respect to the other family members
    - Duty of loyalty – generally applies to trustees
        - Codified under the trust code
        - A trustee shall administer the trust solely in the interests of the beneficiaries
        - This duty can be implicated if there is a conflict of interest between the family member clients
    - Duty of confidentiality
        - Some states have this duty codified in statute
            - §700.1212 Michigan statutes: A fiduciary stands in a position of confidence and trust with respect to each heir, devisee, beneficiary, protected individual, or ward for whom the person is a fiduciary.
            - Also, except in response to legal process, in cases expressly required by law, or in the necessary or proper administration of the estate, a

> fiduciary shall not disclose facts or knowledge pertaining to property in the fiduciary's possession or to the affairs of those for whom the fiduciary is acting in any manner without the consent of the heirs, devisees, beneficiaries, protected individuals, or wards.

        - This duty is not only applicable to fiduciaries.
        - A breach of a duty of confidentiality is separate and distinct from a breach of fiduciary duty. *Groob v. KeyBank*, 108 Ohio St. 3d 348, 353. So the duty of confidentiality does not automatically translate into a breach of fiduciary claim- but it could if the bad actor is aware of a special repose or trust.

    - If you operate with these duties as guiding principles, you will be in good stead

- Understand that family members (rightly or wrongly) often rely on the estate planning attorney for everything related to their estate planning, trusts and other fiduciary relationships. And expect that they will always testify in court that they believed you were counseling them and providing advice to them and that they assumed you had nothing but their best interests at heart and that expected you to put their interests ahead of all others.

- Be open and transparent.

- Case *Rollins v. LOR, Inc.*, 345 Ga. App. 832 (2018) involved various interfamilial disputes over the alleged mismanagement of a family business associated with a large estate

    - Gary Rollins's four children are trustees of a marital trust established by him for their mother as part of an estate planning strategy that he had entered into. They sued LOR, Inc., their father Gary and their uncle Randall. Trust is a minority shareholder in LOR, Inc. Alleged breach of fiduciary duty.

    - There had been decades of estate planning and business decisions related to the various Rollins family entities and trusts.

    - They had a family office. The president of the family office was 1 of 3 board members of LOR. Gary and Randall were the other two.

    - There were allegations as part of the litigation that indicated that the younger/second generation was kept in the dark about estate and business planning decisions. (Recall that the second generation – aka Gary's four kids—had been named by Gary as the trustees of the marital trust he created as part of the business/estate planning strategy for the family.)

    - Kids named as Trustees. No one explained to them that (i) they were actually trustees or (ii) what that meant. Marital trust transaction itself was not explained to them.

- It was clear from the allegations that the children believed that family office employees favored Gary and Randall. From time to time over the years, Gary or the Rollins family office would ask the trustees to sign signature pages without giving them the full documents to review.

- Trustees were told that Gary was actually the trustee and that their signatures were needed "for administrative purposes without any explanation of the documents or transactions". One trustee testified that he signed the trust tax returns each year "because he had a relationship of trust and confidence with [his' father and the Rollins family office." He relied on them. *Rollins v. LOR, Inc.*, 345 Ga. App. 832, 836.

- Subsequently the trustees lost confidence in Gary, Randall and the family office and begin to believe Gary and Randall were acting in their own self-interest. Litigation ensued.

- Be careful with salaries paid to family members particularly salaries from charitable entities like a Foundation. If you are recommending numbers, you could be at risk of litigation.

- Follow appropriate formalities. If a decision needs to be made by the Trust—the Trustees need to be consulted with and ultimately be the ones that make the decision. Not the patriarch or the matriarch of the family. And if you don't represent the Trustees, they should be advised to get separate counsel of their own to advise them regarding the appropriate decision to be made.

    - *SEC v. Wyly* cases out of New York on instructive on this point. You may recall these cases in the context of the holding whereby the court ignored asset protection trusts that had been set up in Isle of Man and taxed the income to Mr. Wyly and found him guilty of securities violations. In arguing the trusts were essentially shams, the assets of which should have been reported under the Securities Exchange Act, the court cited to a number of facts:

        - (i) the CFO of the family office was a trust protector of the IOM Trusts and in that capacity conveyed all of the Wyles investment recommendations to the trust management companies administering the IOM trusts (none of which were ever not followed),

        - (ii) the SEC was able to point to instances where the Wylys bypassed the Trustees entirely—one ex: the head of the Wyly family office in June 2000 called Lehmann Brothers and directed it to sell 100,000 shares of Michaels Stores even though the shares were in the IOM trust, and

        - (iii) the family office worked with the Wyly's to assist the Wyly's in what the court referred to as "making misleading statements in SEC filings or not making SEC filings at all" with respect to the trusts in order to maintain the appearance of separation and independence from the foreign trusts.

        - Memo from head of family office was quoted in the opinion: "Our friendly IRS agent is still looming around and although he has verbally agreed not to look further at any foreign entities or trusts, I would not want to give him any fresh ammunition." SEC v. Wyly, 56 F. Supp. 3d 394, 413. US District Court or SDNY (2014)

- Good communication is critical. And a solid paper trail (of non eyebrow raising emails) is extremely helpful later in litigation.

- Understanding who is entitled to information and when is an entirely different analysis—when you represent multiple members of the same family, be careful about blast emails.

- If you are advising a trustee or a family office-- have controls in place so that decisions are cross-checked. Don't let the informal nature of how clients request funds/ask for assistance prevent the trustee or family office from putting a system of checks and balances in place to be sure all transactions are proper and accounted for. Note the following case about the actions of a family office employee:

    - <u>Estate of Carpenter v. Dinneen</u>, 2008 Del. Ch. LEXIS 40, *3 (March 2008)

    - This lawsuit was brought by the Estate of E. Murton DuPont Carpenter to recover funds taken from Mrs. Carpenter, in her later years when she was elderly and frail, by two of her family office employees. Mrs. Carpenter was the third oldest daughter of Eugene and Catherine DuPont. She was a strong willed and active woman. She kept horses, rode in fox hunts. She had a history of providing for staff and employees- covering their medical care, buying hearing aids, dental work, etc. She died at age 89 on March 26, 2006. There were no allegations of dementia or undue influence at the time of her death. However, her doctor did certify that as of July 13, 2005, she could no longer handle her own personal affairs. She also had extremely bad eyesight (20/400 by May 2004). So in the last years of her life, she could not read checks that were presented to her.

    - Mrs. Carpenter's father had established a family office to help with his family's financial and tax affairs. Ms. Hughes was hired in 1974 and Mr. Dinneen was hired in 1973. He was a CPA and was in charge of the family office. She was the office manager. Dinneen handled the taxes for Mrs. C and solved tax and any other financial problems for her. Hughes handled all of the medical benefits, paid bills, collected mail, made deposits, etc.

    - There was at least one other employee of the family office. Sometime in the 80s, D and H developed a romantic relationship.

    - <u>Mrs. C was a very private person and did not discuss her financial affairs. Not even with her family. The only individual she trusted with respect to her finances was Dinneen.</u>

        - She had three bank accounts at Wilmington Trust.

        - Special Account—received her income, paid taxes, and funded the other two accounts.

        - Household account—paid her household bills and employees. Family office had this checkbook.

        - Regular account—Mrs. C had checkbook here. Dinneen made sure there was always enough $ in the account to cover her hecks.

    - Hughes and her daughter had financial problems. So on March 11, 2005. Hughes visited Mrs. C (who was doing crossword puzzles, having a glass of wine and eating goldfish crackers) and had her sign $11,000 checks to her daughter and son-in-law and five checks totaling $33,000 to five of Hughes's separate credit card companies. She did nothing to be sure that Mrs. C could read the checks.

    - Then in April and May 2005—she presented another 9 checks to Mrs. C to sign-for credit card debt.

    - Then in July 2005- she added a 4th account titled in her daughter's name and began transferring money to that account via phone transfers.

    - In September of 2005- the transfers were discovered. The family office was fired. Criminal charges were filed. And the civil suit was instituted.

    - Hughes did not discuss with Dinneen. He got notice that an overdraft had occurred and just transferred funds to clear it. He did later show her the cancelled checks and ask her if she wanted to assist Hughes and she said 'yes" but he didn't read them to her or go over them in detail.

    - Hughes did finally repay $175,500 on September 7, 2006.

    - Court held that Hughes and Dinneen were fiduciaries. They "were charged with the fiduciary duty of handling the financial affairs of Mrs. C as employees of te family office". Thus, they owed duties of loyalty and care.

        - Noted that this doesn't mean Mrs. C. can't give them gifts. But that she can only do so after full disclosure and consent.

        - AND where the fiduciary is also in a close confidential relationship with the principal, such consent requires impartial advice from a competent disinterested third person.

        - Hughes breached her fiduciary duty. Her defense—she didn't know of Mrs. C's ill health. Court agreed that it could not conclude that Mrs C was so infirm that she could not make personal financial decisions. But Hughes still has to overcome the presumption of invalidity because of the fiduciary relationship.

        - Dinneen also breached his fiduciary duty. He had some appreciation of Mrs. C's poor eyesight and diminished capacity. He had a duty to exercise special care in seeking the fully informed consent of Mrs C to the gifts she allegedgly made to Hughes. This even though he never received anything. And he said he showed the checks to Mrs. C.

            - He did nothing to require Hughes to notify him before any further payments were made. (he was aware of the initial set of checks)

            - He failed to implement any reasonable internal controls to monitor the family office records

            - He didn't try to have a meaningful discussion with Mrs. C. about the checks to be sure she understood what she was doing.

            - Also, he managed the office so he bears responsibility for the recordkeeping performed by the office.

    - "I further find Hughes' pre-litigation conduct so egregious and unusually deplorable that the Estate is entitled to recover its attorneys' fees and expenses in connection with its pre-suit investigation and the litigation of this action until Hughes repaid the $ 175,500."

    - And because of their breaches, the court denied them their testamentary gifts in the nature of a pension under Mrs. Carpenter's Will. This because Mrs. Carpenter had good cause to fire them in October 2005.

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How to Manage Potential Conflicts

- Be aware of each of your client's trusted advisors other than you

    - Who are the working with?

    - And for what work?

    - Is the same advisor advising multiple family members? And with respect to what?

    - When you are advising multiple family members, have you documented each relationship correctly? Are you advising family members who are clients with respect to the same transaction where they have different interests?

    - Are all family member clients participating in a transaction being represented in the transaction?

        - This can get tricky—but it can also generate massive litigation if you are not careful.

        - Example: client is creating a trust and naming other family members as trustees. Who is representing the other family members? Is the transaction being explained to them? Is there any fiduciary risk in them being named as trustees? Is the client attempting to retain control over the situation?
        - Are they being told to "just sign here"
        - Who is doing most of the communicating among the parties—is it you? and, if so, are you identifying conflicts and advising each party to consult with their own attorney, or accountant or other third party advisor about the transaction?
    - What if there is a less-than-perfect relationship between parent and child. And child is being told to put estate planning documents in place. Should that child use the same attorney that the parent is using?

- Do not prefer the older generation over the younger generation. Be aware that all of the family members are relying on you and are placing trust in you. Encourage family members to have their own attorney.

- Remember that you as the estate planning attorney often receive and are the depository for all of the family's financial and other sensitive information.
    - How is it kept?
    - Who has access to it?

- How are your fees allocated? legal fees for estate planning and other work done by lawyers/accountants/others for one or more clients in the same family need to be allocated correctly based on the work done?
    - *Cohen v. Minneapolis Jewish Fed'n*, 346 F. Supp. 3d 1274, 1276 (Wisconsin Western District Court 2018). This case involves a dispute between the current trustees and the beneficiary of a charitable trust (the Jewish Federation). One of the issues being litigating was whether the trustee breached her fiduciary duty to the Federation by charging a family office employee's salary to the trust.
        - Cohen was the trustee (and a family member). Kallina was a cotrustee/lawyer. Trust has $70 million in assets.
        - Federation asserted that Cohen overcharged the trust for accounting services provided by Ellenson and that Kallina breached his fiduciary duty to the Federation by improperly billing the trust for legal services.
            - Ellenson runs the Cohen family office. She does accounting work and tax prep for several charitable organizations that the Cohen family has established, including the Cohen Trust, as well as about

19 other family trusts that hold the assets of the Cohen family members. She reports directly to Cohen.

- Cohen allocated a disproportionate share of Ellenson's salary to the Trust to the unfair benefit of the Cohen family's other trusts.

- "Neither Ellenson nor Cohen could provide a sound explanation as to why 90% of Ellenson's salary came from the charitable entities and only 10% came from the family trusts or why 50% of her salary comes from the Cohen Trust in particular.

  - Ellenson testified that she actually had no idea whether the 90/10 split reflected an accurate assessment of the time she spent.

  - Cohen said she never determined whether the allocation was accurate. She just did what her father had always done.

  - Ellenson also didn't keep time records.

- "The evidence at trial shows that the 90/10 split is not a proper allocation. For example, Cohen testified on cross examination that the L.E. Phillips Family Foundation made about 120 individual gifts in the course of a year whereas the Cohen Trust had a single beneficiary and made essentially one gift. Ellenson testified that the charitable trusts generally and the Cohen Trust in particular required more work because of the conservative investments (all in CDs that had to be redeemed and repurchased at intervals). But that explanation is dubious because the L.E. Phillips Family Foundation has more assets than the Cohen Trust."

- Trustees must employ "some reasonably reliable method for determining a proper allocation." AND this was also a conflict of interest for Cohen because she got a benefit because less of the salary was paid from her family trusts. <u>Cohen should have disclosed the conflict to the Foundation and sought its consent.</u>

▪ The Federation also challenged Kallina's fees being charged to the trust on the basis that some of his services were unrelated to the needs of the Cohen Trust and because none of the work performed was properly disclosed and approved. Court side-stepped those issues and held that the engagement of Kallina's law firm was itself a breach of duty and ordered the Cohen Trust reimbursed for all of his legal work. Why?

  - (i) he wasn't licensed to practice law in Wisconsin (yet he was representing a Wisconsin based trust governed by Wisconsin law),

        - (ii) once he became a trustee, he had a conflict of interest, and

        - (iii) from the inception of his representation, one of Kallina's primary tasks was to try to find ways of using the Federation merely as a conduit for the family's charitable giving.

      - "A common theme running through this case is that the Trustees viewed the trust merely as a vehicle for the Cohen family's own charitable interests, and they viewed the Federation as simply the conduit that allowed the Cohen family to make charitable contributions as they chose, while receiving the benefits as a "supporting organization" under federal tax regulations. 26 C.F.R. § 1.509(a)-4. This view manifested itself repeatedly at trial, during which it was clear that neither Cohen nor Kallina appreciated that they owed any duty to the Federation or recognized the conflicts of interests inherent in the way they ran the trust." Id at 1277. <u>Trustees were removed.</u>

      - The Federation's attorney fees were taxed against the Trustees themselves!

- Make sure if you are allocating fees across a variety of clients and/or trusts or other entities associated with those clients that you have a reasonable well-thought out plan in place for how those fees are allocated. That allocation should be explained to and agreed on by all of the participating parties.

- Break out attorney fee bills across trusts/entities

  - It may be necessary to open separate billing numbers for each entity/matter

  - It also may be necessary to refer a client out with respect to a particular matter if using the same attorney could create a conflict of interest

- Attempt to maintain independence

  - It can be difficult to not be under the thumb of the patriarch or matriarch of the family

  - Establish clear bounds with each client

  - And be sure to treat the next generation independently and with full transparency

How to Protect Beneficiaries' Confidentiality

- Be very clear as to the Attorney-Client privilege applicable to each client. Never share information on one client's estate plan with another client without express permission.

- Don't have family meetings where all of this information is discussed unless you have gotten permission from all the participants who are "sharing information" to share it beforehand
- Same with other types of personal information

- Protect Sensitive Information—Financial, Medical
  - Medical information—we aren't subject to HIPAA but is there a duty to keep medical information of a beneficiary private? Yes, absolutely, this relates back to the duty of confidentiality
    - And depending on the motivation for the sharing could implicate other duties as well
  - First—can information be required to be shared? What is the duty owed?
  - *Kaull v. Kaull*, 2014 IL App. (2d) 130175 (December 22, 2014)—action brought by Mary K. Kall as trustee of the Barbara B. Kaull Trust to identify beneficiaries of the trust. One beneficiary refused to submit a DNA sample to determine whether another putative beneficiary was his biological brother and therefore an additional grandson of the grantor of the trust (which would make him a beneficiary of the trust also). A trust was being established for the "children of the grantor's deceased son." At issue was whether the deceased son had 1 child or 2 children.
    - The known grandson argued the trustee had no right to make him take a DNA test because a trustee is not a parent and DNA tests can only be ordered under the Parentage Act in Illinois.
    - Cited Kunkel, 179 Ill. 2d "A person has a reasonable expectation of privacy in his personal characteristics, our constitution does not accord absolute protection against invasions of privacy." At 538
    - "Confidentiality of personal medical information is, without question, at the core of what society regards as a fundamental component of individual privacy." Kunkel v. Walton, 179 Ill. 2d 519, 537 (1997)
      - There is a duty.
      - It must be complied with.
      - However, in this case, the court did conclude that the known biological son could be made to take the DNA test under these facts
    - In re Estate of DuPont, 606 Pa. 567 (2010)—also emphasizes the importance of protecting the rights of individuals with regard to personal information that could be damaging if exposed publicly like private financial, medical and psychiatric records. (related to John E. DuPont who

had established the wrestling team "Team Foxcatcher" in the 90s, acted erractically and ultimately killed David Schultz in January 1996)—you may recall there was a movie about this that came out in 2014 with Steve Carell playing John DuPont (and Mark Ruffalo played David Schultz). Family moved to protect his assets and sought to have him declared incompetent and to have the record of the proceedings sealed to protect the family's privacy regarding matters of duPont's physical and mental health, as well as his financial assets. One of the wrestling team members sought access to the record of the incapacitation proceedings on the basis that he believed a trust had been created for his benefit. The court denied the request citing the sensitivity and personal nature of an incompetency proceeding. And even though years had gone by, the court stated that didn't make the information any less private or sensitive.

- Same protections apply to financial information/tax returns

  - In re McFadden, 2011 Phila. Ct. Com. Pl. LEXIS 320 (2011)—George McFadden died tragically and unexpectedly in a plane crash in mid 2008. At the time of his death he had personal money problems. However, he was the sole income beneficiary of two large trusts-- one created by his grandfather and one by his father. He had been a Trustee of both along with BNY Mellon and his brother, John. He had an adult daughter by a first marriage, Lisa Melas, and two minor children with his current wife Carol. John the brother-Trustee admitted he did not know either of George's two minor children (who became current beneficiaries of both trusts as a result of George's death). Lawsuit was brought for breach of fiduciary duty against the Trustees after the stock market crash of 2008. Court denied the surcharge claim. BUT still removed John and BNY Mellon as trustees.

  - One of the hotly contested items in the McFadden case was the Trustees' request after George's death that the widow/mother of the two minor children produce a budget and provide information about her family finances and needs. Widow believed John (the brother-trustee) would use this information against her.

    - Why did she think this? John had sent a copy of Carol's budget to George's adult daughter, Lisa, as "research" since she would have been familiar with some of the expenses. <u>Court said this was a breach of a trustees' obligation of confidentiality.</u> Also stated that Mellon knew about it.

    - "By revealing Carol's personal family financial information to third parties—and especially to Lisa Melas—the trustees undermined her confidence or trust in them." This led to her refusal to turn over her personal 1040s.

- In contrast to the dearth of direct communication between John and Carol, John communicated frequently with Lisa by e-mail or in actual meetings. In re McFadden, 2011 Phila. Ct. Com. Pl. LEXIS 320, *34. *He would copy Lisa and other nontrustees on letters involving the finances of Carol's family.* He even sent Carol's invoice from her attorney (which had been submitted to the trust for payment) to Lisa. Lisa told him not to pay it. He solicited her advice on a draft letter to be sent to the widow. The trust advisor at Mellon also sent emails to Lisa asking for her input.

- Record also showed that Mellon had many personal meetings with daughter Lisa. But there were no meetings with Carol on behalf of her minor children. This was argued as proof that Lisa was receiving special consideration. An issue was raised about whether Mellon could justify this discrepancy by stating that Carol was represented by counsel and thus Mellon thought it could not contact her directly.

- Removed as Trustees under 706 of the UTC. "Substantial change of circumstances" [needs of children for income] **and** "committing a serious breach of trust"—the trustees "disclosed confidential information exacerbating the strains within the family to the detriment of all the beneficiaries"

- Be careful with whom information is shared
  - Who is copied on emails?
  - Should you send out group emails soliciting a response? Maybe one email to each family member/beneficiary
  - One family member may be extremely sensitive to another family member getting any information about a particular medical condition

- Be careful about who you copy on emails to a client-- does copying a third party on an email waive the attorney client privilege?
  - No, at least not with respect a family office employee copied on emails according to the Delaware Chancery Court
  - See *In re Lululemon Athletica Inc*. 220 Litig., 2015 Del. Ch. LEXIS 127, *32-34 (2015)
  - Case involves a sale of Lululemon stock made by the founder of the Company, Dennis Wilson, just days after his CEO resigned but days before the announcement was made public (and which resulted in the stock losing 22% of its value)

- Wilson had a trading plan pursuant to SEC Rule 10b5-1 to sell up to 5.7 million of his shares of common stock over an 18 month period. His broker at Merrill Lynch had complete discretion to sell (consistent with the trading plan).

- Whenever shares were sold, Merrill Lynch sent an email notice to, among other people, Tina Swinton who was the CFO of Wilson's family office.

- Facts: June 5th- CEO told Wilson she was resigning. She told the Board on June 7th. That same day, Wilson's broker sold over 600k shares of stock. On June 10th, her resignation was made public.

- Plaintiffs Hallandale Beach Police Officers and Firefighters' Personnel Retirement Fund brought suit against Lululemon. They were stockholders of Lululemon.

- As part of the litigation, plaintiffs sought a chain of emails between Wilson and his attorney. They argued that the A/C privilege was waived because Swinton was copied on the emails (as well as Wilson).

- Court held: Because Wilson and lululemon had a common legal interest, any disclosure of the communication to Swinton would not be a waiver of privilege because Swinton was Wilson's representative. By its terms, Delaware Rule of Evidence Rule 502(b) extends the protections of attorney-client privilege to confidential communications made for the purpose of facilitating the rendition of professional legal services to the client that are sent to or from the client's representative.

  - Rather than defining the term "client's representative," the drafters of the Delaware Rules of Evidence instead elected to let the case law develop its definition.
  - Courts have held that a "privileged communication should not lose its protection if an executive relays legal advice to another who shares responsibility for the subject matter underlying the consultation."
  - Here, under the Trading Plan, Swinton received notifications from Merrill Lynch every time there was a trade.
  - Moreover, even though Merrill Lynch apparently had sole discretion to sell Wilson's lululemon stock under the Plan, Swinton, as one of the agents in charge of Wilson's Family Office, had responsibility over matters relating to Wilson's trading activity generally.
  - In that respect, the subject matter of the WSJ Email Chain, Wilson's Trading Plan and whether the sales complied with it, generally falls within Swinton's area of responsibility. As Wilson's agent for the Trading Plan, Swinton received privileged advice regarding the Plan and the particular trades in question that appears to have been

directed toward crafting a coordinated response to the Wall Street Journal inquiry. Thus, I conclude that inclusion of Swinton on the WSJ Email Chain did not waive privilege as to that document

- But query whether the same rule would apply if the matter being litigated was whether with respect to estate planning the AC privilege had been waived – because family office employee was copied??

- And state laws are different on this rule. North Carolina does not have a ROE 502. The federal rule 502(b) reads differently as well.

- Simply put, you cannot reveal client confidences