



PROBATE PERSPECTIVE

No “Fiduciary Exception” to the Attorney-Client Privilege in Nevada

“[T]he attorney-client privilege is, perhaps, the most sacred of all legally recognized privileges, and its preservation is essential to the just and orderly operation of our legal system.”¹ It “is the oldest of the privileges for confidential communications known to the common law.... Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy ... depends upon the lawyer’s being fully informed by the client.”²

The Nevada Legislature codified the attorney-client privilege in Nevada Revised Statute (“NRS”) 49.095, which states

A client has a privilege to refuse to disclose, and to prevent any other person from disclosing, confidential communications:

1. Between the client or the client’s representative and the client’s lawyer or the representative of the client’s lawyer.

...

3. Made for the purpose of facilitating the rendition of professional legal services to the client, by the client or the client’s lawyer to a lawyer representing another in a matter of common interest.

Under NRS 49.015, the only privileges recognized in Nevada are those “required by the Constitution of the United States or of the State of Nevada” or by specific statute. NRS 49.115 lists five exceptions to the attorney-client privilege. The exception most frequently applicable in probate and trust litigation is that a communication is not privileged when it

is “relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction.”³ Under this exception, a decedent’s estate planning files are discoverable.

In a May 2020 ruling, the Nevada Supreme Court addressed the fiduciary exception to the attorney-client privilege, as a matter of first impression, in *Canarelli v. Eighth Judicial Dist. Court in & for City of Clark*, 136 Nev. Adv. Op. 29, 464 P.3d 114, 117 (2020). The underlying trust dispute involved two groups of notes by a former trustee – one relating to a phone call with counsel, and the second taken during a meeting with other trustees, counsel, an opposing party and an appraiser. The disputed documents were inadvertently disclosed in discovery and the former trustee later attempted to claw them back. The discovery commissioner ruled that a “fiduciary exception” to the attorney-client privilege applied to part of the notes, with the district court generally adopting the discovery commissioner’s findings. The former trustees petitioned the Nevada Supreme Court for writ relief.

“The fiduciary exception, as adopted in other states, ‘provides that a fiduciary, such as a trustee of a trust, is disabled from asserting the attorney-client privilege against beneficiaries on matters of trust administration’” (citing *Murphy v. Gorman*, 271 F.R.D. 296, 305 (D.N.M. 2010)). Citing cases in California, Oregon and Texas, the Nevada Supreme Court noted that “[j]urisdictions with statutory attorney-client privileges like Nevada have overwhelmingly refused to adopt a fiduciary exception by judicial decree.” The court refused to recognize

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the fiduciary exception, concluding “[b]ecause the Legislature adopted five specifically defined exceptions to the attorney-client privilege in NRS 49.115, we decline to create a sixth by judicial fiat.” The court granted writ of prohibition prohibiting the district court from compelling or allowing the production of the disputed documents.

In the same case, the court, also as a matter of first impression, held that physical delivery of an individual’s notes to an attorney is not required for the notes to constitute “communications” that can be protected by the privilege. “[S]o long as the content of the notes was previously or is subsequently communicated between a client and counsel, the notes constitute communications subject to the attorney-client privilege. Holding otherwise would discourage a client from diligently preparing for a conversation with counsel and undermine a client’s ability to confidently memorialize any legal advice received.” Post-Canarelli and absent the Nevada legislature codifying the fiduciary exception, fiduciaries in Nevada probate and trust matters remain able to assert the attorney-client privilege against heirs and beneficiaries on matters of estate and trust administration. **B**



Kendal Weisenmiller is an associate attorney at JEFFREY BURR. Kendal is a seasoned trust and probate litigation attorney with nearly 10 years of experience representing executors, administrators, beneficiaries, heirs, creditors, and fiduciaries in trusts and estates of all sizes. She has worked on matters with varying complexity, successfully representing clients in all forms of trust and probate litigation in Nevada. Kendal has been recognized by Legal Elite, Nevada Business Magazine, 2014, 2016-2020, and Rising Stars, Mountain States Super Lawyer, 2017-2020 for her work in trust and estate administration as well as litigation. Kendal has a Martindale-Hubbell AV Preeminent rating, the highest peer rating standard.

If you or your clients are in need of a seasoned, established probate and trust litigator, please give Kendal a call.

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At the Law Firm of JEFFREY BURR, our firm’s experienced probate attorneys have been guiding families through the difficult probate process for nearly 40 years. Our experience and knowledge of Nevada probate law allows us to effectively guide you through probate administration without unnecessary delay or expense. Whether you live in Nevada or out of state, our compassionate and highly experienced probate attorneys can guide you through the probate process.



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¹ United States v. Bauer, 132 F.3d 504, 510 (9th Cir. 1997).

² Upjohn Co. v. United States, 449 U.S. 383, 389, 101 S. Ct. 677, 682 (1981).

³ NRS 49.115(2) (2019).