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Abrogating *Dueck v. The Clifton Colony Club*: The Attorney-Client Privilege Revisited

By: Wilbert V. Farrell IV, Esq., and Malorie A. Alverson, Esq.

The attorney-client privilege can be confusing, especially in the context of trust and estate law. In addition to its common-law foundation, the attorney-client privilege may be found in O.R.C. 2317.02 and imposed by the Ohio Rules of Professional Conduct. As described by the Supreme Court of the United States, the attorney-client privilege is intended 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." Nevertheless, the courts have recognized various exceptions to the attorney-client privilege, and some State and Federal courts have recognized an exception in the context of fiduciary representation (the "fiduciary exception") to the attorney-client privilege. If the fiduciary exception applies, beneficiaries may obtain communications between an attorney and his or her fiduciary client because the fiduciary cannot assert the attorney-client privilege against the beneficiary. Under the fiduciary exception, which courts have applied in the context of common-law trusts and estates, a fiduciary who obtains legal advice related to the execution of fiduciary obligations is precluded from asserting the attorney-client privilege against the beneficiaries of the trust or estate.

Several years ago, the Ohio General Assembly attempted to make clear that an attorney retained by a fiduciary possessed no duty to any third party to whom the fiduciary owed an obligation. Under that statute, now renumbered as O.R.C. 5815.16, it appeared that attorneys owed duties only to their fiduciary clients, not to the beneficiaries of the trust or estate managed by the fiduciary. Subsequently, rulings in a pair of cases: *Cincinnati Bar Association v. Robertson*, 145 Ohio St. 3d 302, 49 N.E.3d 284, and *Dueck v. The Clifton Club Co., et al.*, 8th Dist. Cuyahoga, Nos. 103868 and 103888, 95 N.E.3d 1032, 2017-Ohio-7161, appeared to conflict with O.R.C. 5815.16 regarding the question of to whom the attorney retained by the fiduciary owes duties.

Effective March 22, 2019, O.R.C. 5815.16 was amended by the Ohio General Assembly to make it crystal clear that a communication between an attorney and his or her fiduciary client is privileged and protected from disclosure to third parties to whom the fiduciary owes fiduciary duties to the same extent as if the client were not acting as a fiduciary, thereby abrogating *Dueck v. The Clifton Colony Club Co., et al.* Consequently, an attorney representing a fiduciary should be mindful of their obligations to their client in the wake of requests for certain information from third parties.