

Check Your Privilege

By: Mia Shirley

April 25, 2017



"We recognize that, under the rule we adopt, a trustee must take into account the possibility that its confidential communications with an attorney about trust administration may someday be disclosed to a successor trustee. This is, however, not unfair in light of the nature of a trust and the trustee's duties." *Moeller v. Superior Court*, 16 Cal. 4th 1125 (1997).

In *Moeller*, the California Supreme Court held that a predecessor trustee cannot assert the attorney-client privilege to prevent disclosure of documents to the successor trustee. The attorney-client privilege, in essence, travels with the office of the trustee and upon taking the office, all of the powers of the trustee, including the power to assert the attorney-client privilege, are assumed by the successor trustee. The Court focused on the unique and important role of a trustee finding that the right of access to attorney-client communications must belong to the successor trustee in order to allow for the effective and continuous administration of trusts. *Moeller* at 1133.

This invasion into the sanctity of the attorney-client privilege was discouraging to many trustees and attorneys alike. However, The Court left open an option for wary trustees: "If a predecessor trustee seeks legal advice in its personal capacity out of genuine concern for possible future charges of breach of fiduciary duty, the predecessor may be able to avoid disclosing the advice to a successor trustee by hiring a separate lawyer and paying for the advice out of its personal funds." *Moeller*, at 1134. Since *Moeller*, the prevailing opinion among attorneys has been that a trustee concerned about being removed and having his privileged communications go to his successor can protect that privilege by paying for the attorney with personal funds instead of trust funds.

In the 2017 decision, *Fiduciary Trust International of California v. Klein*, the Court of Appeals for the 1st Appellate District addressed the attorney-client privilege protection for a trustee then in office who is later removed. In *Klein*, the predecessor trustee claimed attorney-client privilege to certain communications that occurred prior to removal. Citing *Moeller*, the trustee took the position that communications sought by the trustee in connection with personal matters and personal liability are privileged from disclosure, whereas communications related to the administration of the trust are not privileged. The probate court permitted the trustee to withhold some documents.

The Court of Appeals considered how to distinguish between confidential communications occurring when the trustee seeks legal advice or guidance on matters of trust administration, and those occurring when the trustee seeks legal advice or guidance in its personal capacity out of genuine concern for possible future charges of breach of fiduciary duty.

In *Klein*, the Court held, "actual steps must be taken to identify a communication as privileged when the communication is 'sought' from the trustee's personal counsel." Thus, labeling a document as defensive after the fact does not satisfy the criteria described in *Moeller*.

The decision in *Klein* is useful guidance for attorneys and trustees alike in evaluating how to proceed with the attorney-client relationship when in the shadows of a potential removal action. While the rule may be imperfect, especially for prudent trustees who, faced with disgruntled beneficiaries, are forced to pay out-of-pocket for their attorney, *Klein* puts forth a more understandable standard for those circumstances when separate counsel may be needed.

Another outstanding issue from *Moeller* that remains to be tested is the statement in the decision that "a trust instrument may limit a trustee's statutory powers." *Moeller* at 1131. Estate planning attorneys might add language to address the powers of the trustee and either strengthen or undermine the attorney-client privilege between trustee and attorney.