

# FIDUCIARY WATCH

## Case Update for Trust & Estate Professionals

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### Whose Privilege Is It Anyway? – Issues Involving Successor Trustees

Two recent California cases highlight issues regarding the applicability of the attorney-client privilege between trustees and their counsel. As an initial matter, there is disagreement among state courts as to whether the attorney-client privilege protects communications between the trustee and its counsel. Some courts have held that communications between the trustee and its counsel are not immune from discovery in litigation with trust beneficiaries. Other courts, such as those in Texas and California, protect confidential communications between trustees and their counsel. But as the recent California cases show, even in states where the attorney-client privilege applies to such communications, important issues about the privilege can arise with the appointment of a successor trustee.

Last month, the California 4th District Court of Appeals, in *Forney v. Forney*, No. E063262, 2017 WL 1833138 (Ct. App. May 8, 2017) (unpublished), held that an attorney-client relationship, and therefore a privilege, existed between a successor trustee and the former trustee's counsel. The lawyer represented the former trustee (who also was a beneficiary of the trust) in litigation brought by another trust beneficiary. As part of a settlement of that litigation, the plaintiff beneficiary became the successor trustee. Later, the same law firm, representing the former trustee, filed a lawsuit against the successor trustee. The successor trustee moved to disqualify the law firm, arguing that an attorney-client relationship existed between the law firm and the successor trustee as a result of the lawyer's representation of the prior trustee. The court disqualified the law firm, holding that the "successor trustee succeeds in his predecessor's shoes with respect to attorney-client privilege," and "the power to assert the attorney-client privilege must pass from the predecessor trustee to the successor." The court noted, however, that the result could have been different if the trust instrument provided that the privilege does not pass to successor trustees. The trust instrument in *Forney* did not contain that provision. Instead, it stated generally that the "successor trustee shall have all the powers given to the originally named trustee."

Shortly before the court's decision in *Forney*, the California 1st District Court of Appeals decided *Fiduciary Trust Int'l of Cal. v. Klein*, 216 Cal.Rptr.3d 619 (Ct. App. 2017). In that case, the lower court removed trustees at the request of a beneficiary. In subsequent litigation involving the former trustee, the successor trustee demanded that the former trustees produce communications between the former trustees and their counsel generated while the former trustees served as trustees. The court first stated that the lawyer's "client" was the "office of trustee rather than the particular trustee," but it recognized the distinction between counsel hired by a trustee in its personal capacity (e.g., out of a concern for possible future charges of breach of fiduciary duty) and counsel hired by the trustee "in its fiduciary capacity" (e.g., for legal advice relating to administration of the trust). The court held that, in the former capacity, a prior trustee can protect confidential communications with counsel, but the trustee must "take certain affirmative steps to preserve the right to rely upon the attorney-client privilege as the basis for withholding . . ." the communications. According to the court, a trustee is required to distinguish, "scrupulously and painstakingly," his own interests from those of the trust beneficiaries when retaining counsel. The court noted that a trustee can withhold confidential communications from successor trustees by paying counsel out of the trustee's personal funds as opposed to the trust's funds. The former trustee's characterization

of the communications with counsel as “defensive” was not enough; the trustee had the burden to prove that counsel was retained to represent the trustee personally, not in its capacity as trustee.

Guidance for trustees:

1. When administering a trust, the trustee should be cognizant of whether the privilege is recognized in the relevant jurisdiction(s) and, even if it is recognized, be aware that its communications with counsel might be disclosed to a successor trustee, particularly if the successor trustee is an adversary in litigation.

2. An institution accepting the role as trustee should consider requesting language in the trust instrument or a separate agreement making it clear that the attorney-client privilege does not pass to successor trustees and that the trustee may withhold privileged communications from a successor trustee.

3. A trustee in litigation should consider privilege issues when entering into a settlement agreement naming a successor trustee. If sensitive communications exist between the trustee and its counsel, the trustee may want to include a provision in the settlement agreement making it clear that the trustee’s privileged communications will not be provided to its successor.

4. When disputes arise between beneficiaries and the trustee requiring the retention of counsel by the trustee, the trustee, depending on the law of the relevant jurisdiction, should consider paying counsel from the trustee’s personal funds, rather than trust funds, to ensure the relationship with counsel is deemed personal and to minimize the possibility of privileged communications being disclosed to a successor trustee. The trustee and its personal attorney can analyze the trust agreement and applicable law to determine whether the trustee may seek reimbursement of those fees from the trust.

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