# AMERICAN BAR ASSOCIATION

## SECTION OF REAL PROPERTY, TRUST & ESTATE LAW

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## Program: Last Beneficiary Standing: Identifying the Proper Parties in Breach of Fiduciary Cases

(Thursday, April 30, 2009,
2:00 p.m. - 3:30 p.m.)


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# STANDING

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## WHO GENERALLY HAS STANDING TO SUE A TRUSTEE FOR BREACHES OF FIDUCIARY DUTY?

### Successor-Trustees

If the trustee commits a breach of trust and is thereafter removed as trustee or otherwise ceases to be trustee and a successor trustee is appointed, the successor trustee can maintain a suit against the predecessor trustee to redress the breach of trust. *Restatement 2d of Trusts* § 200, comment f. (1959). The successor trustee may, moreover, also have a responsibility to take reasonable steps to uncover and redress any breach of duty committed by a predecessor fiduciary, in certain circumstances discussed below. *Restatement 3d of Trusts* § 76, comment d. (2003). See also, *Cal. Probate Code* § 16403(b).

### Co-Trustees

If a trust has more than one trustee, any one of them may sue the others to enforce their fiduciary duties. *Restatement 2d of Trusts* § 200, comment e, and § 224 (1959); see also *Unif. Trust Code* § 1001, comment (2006). See *Cal. Probate Code* § 16420(a), providing that if a trustee commits or threatens to commit a breach of trust, a co-trustee may commence a proceeding against the offending trustee. When suing a predecessor trustee, however, successor co-trustees usually must act by unanimous action, unless the trust provides otherwise. *Cal. Probate Code* § 15620.

### Beneficiaries

Normally any beneficiary whose rights are threatened has standing to sue a *current* trustee. *Restatement 2d of Trusts* §§ 197, 198, 199, 200 (1959); *Unif. Trust Code* § 1001, comment (2006); Cal. Probate Code § 17200(a), (b)(12). The definition of beneficiary, in this context, is surprisingly broad, and includes anyone with a vested or contingent right to present or future distributions, including a reversionary interest. *Restatement 3d of Trusts* § 82 (2007); *Cal. Probate Code* § 24; Edward C. Halbach, Jr., *Standing to Enforce Trusts: Renewing and Expanding Professor Gubatz's 1984 Discussion of Settlor Enforcement*, 62 U. of Miami L. R. 713, 730 (2008). "Beneficiary" includes one who is eligible to receive distributions only at the discretion of the trustee. "Beneficiary" also includes a beneficiary's successor in interest, such as one who has succeeded the beneficiary by inheritance or assignment. A settlor holding a power of revocation and, generally, the donee of a power of appointment are also beneficiaries. *Restatement 3d of Trusts* §§ 48, 49, 74 (2007); *Unif. Trust Code* § 103(3)(B) (2006); Halbach, *supra*, at 728-730. A suit may also be brought by others on behalf of a beneficiary in appropriate circumstances. In the case of an incapacitated beneficiary, for example, suit may be brought by a conservator or guardian, or an agent under a durable

power of attorney. See, e.g., *Unif. Trust Code* § 1001 (2006). A personal representative of a deceased beneficiary can also maintain such a suit. *Restatement 2d of Trusts* § 200, comment g. (1959).

"A more difficult question is whether a beneficiary has standing to sue a *former* trustee, at least when a successor trustee is available to do so." Andrew Zabronsky, *California Trust and Probate Litigation* § 21.46A, CEB (2007). If a trustee in breach of trust is removed or otherwise ceases to be trustee and a successor is appointed, the successor may maintain a suit against the predecessor. "In such a case it would seem that the beneficiaries cannot maintain a suit . . . unless the successor has refused or is unavailable." 4 *Scott on Trusts* (4th ed. 1989) § 294.4, pp. 104-105. Until recently, no case, in California at least, had specifically addressed whether a beneficiary may have standing in such situations. As a practical matter, California courts at the trial level have generally tended to deny a beneficiary's standing to sue predecessor trustees, while the courts of appeal have been notably silent on this issue.

*Estate of Bowles* 169 Cal. App. 4th 684 (2d Dist., Div. 5) (Dec. 22, 2008), however, now offers some guidance. In *Estate of Bowles*, a beneficiary sued the predecessor (deceased) trustee for breach of trust and others for participating in the breach. The defendants demurred on the grounds that the beneficiary lacked standing. They argued that only the successor trustee was the real party in interest with standing, relying in part on *Scott on Trusts, supra*, which had been cited in prior California cases, and their interpretation of several pertinent probate statutes. The court, while acknowledging the general rule that only trustees, and not beneficiaries, have standing to sue on the trust's behalf, disagreed. The court, reasoning that beneficiaries unquestionably have standing to sue current trustees, and that there is nothing in the code or cases to limit that right to current trustees, expressly disagreed with the principles espoused in *Scott on Trusts*, holding that the beneficiary could indeed proceed with his claims against the former trustee for breach of fiduciary duty. The decision in *Estate of Bowles* may not be in accord with the rationale of several prior decisions on beneficiary standing, nor with a conjunctive reading of several controlling statutes, including *Cal. Probate Code* §§ 15643, 16403, 16420, and 17200. The decision is not, moreover, binding on the courts of appeal of the several other districts, nor even the seven other divisions of the same district. The state supreme court has denied a petition for review, possibly to allow the issues to be further developed at the appellate court level.

**Settlors**

It may seem surprising that the settlor, as settlor, generally can not maintain a suit against the trustee to enforce a trust or to enjoin or obtain redress for a breach of trust. Only where the settlor retains an interest in the trust property, can the settlor maintain a suit against the trustee to protect that interest. Thus, if the settlor is also a beneficiary of the trust, or if he has reserved power to revoke the trust, he can maintain a suit against the trustee to protect his interest. *Restatement 2d of Trusts* § 200, comment b. (1959); Halbach, *Standing to Enforce Trusts, supra*, at 730-731.

## RIGHTS AND OBLIGATIONS OF SUCCESSOR FIDUCIARIES AND POTENTIAL LIABILITY FOR FAILURE TO PURSUE CLAIMS

Fiduciaries are often too consumed with discharging their own many duties, to worry very much about whether their predecessors discharged their duties. Indeed, as a general rule, a successor fiduciary is not liable for the malfeasance of his predecessor, and has no particular duty seek an accounting of the predecessor's actions. See *Restatement 2d of Trusts* § 223(1), providing that a successor trustee is not liable to the beneficiary for a breach of trust committed by a predecessor trustee, emulated by the statutes of many states, e.g., *Cal. Probate Code* § 16403(a) (cf. *Cal. Probate Code* § 4203, which similarly says a successor attorney in fact is not liable for the acts of a predecessor), *Ill. Rev. Stat.* ch. 17, para. 1684, *La. Rev. Stat. Ann*. § 9:2204, *N.Y. Surr. Ct. Proc. Act Law* § 1506, *Utah Code Ann*.§ 75-7-306(6). See *Matter of the Wm. M. Kline Rev. Trust*, 196 Misc. 2d 66, 763 N.Y.S.2d 721 (2003), citing *Pfeffer v. Lehmann*, 225 App Div 220, 7 N.Y.S.2d 275 (1938) and *Matter of Ketchem*, 124 N.Y.S.2d 895 (1953), for the proposition that a successor trustee "has no particular duty to seek an accounting from his predecessors."

At the same time, while a successor trustee is not liable merely because his predecessor committed a breach, the successor is liable for his own breach in failing to redress the breaches of his predecessor, in three particular situations. The *Restatement* states the rule as follows:

**Liability of Successor Trustee**

(1) A trustee is not liable to the beneficiary for a breach of trust committed by a predecessor trustee.

(2) A trustee is liable to the beneficiary for breach of trust, if he

> (a) knows or should know of a situation constituting a breach of trust committed by his predecessor and he improperly permits it to continue; or
>
> (b) neglects to take proper steps to compel the predecessor to deliver the trust property to him; or
>
> (c) neglects to take proper steps to redress a breach of trust committed by the predecessor.

*Restatement 2d of Trusts* § 223 (1959). See also, *e.g., Cal. Probate Code* § 16403(b), *Ill. Rev. Stat.* ch. 17, para. 1684, *N.Y. Surr. Ct. Proc. Act Law* § 1506.

In other words, while a successor trustee is not personally liable for the breach of duty by his or her predecessor, the successor may be liable for his own breach in failing to redress the breaches committed by the predecessor. If the successor trustee is aware, or reasonably should have been aware, of a breach of trust by the predecessor trustee, the successor must take steps to redress the breach. *Restatement 2d of Trusts* § 223, comment a. (1959).

This specific duty to enforce claims against a predecessor trustee is consistent with the general duty to take reasonable steps to enforce claims of the trust. See, *Restatement 2d of Trusts* § 177, § 223, comment d. (1959), and *Cal. Probate Code* § 16010. "The trustee is under a duty to the beneficiary to take reasonable steps to enforce any claim which he holds as trustee against predecessor trustees (see § 223), or in the case of a testamentary trust, against the executors of the estate. . . ." *Restatement 2d of Trusts* § 177, comment a. (1959).

Since a trustee is under a duty to the beneficiary to take reasonable steps to enforce claims of the trust, a successor trustee is liable for breach of trust if he neglects to take steps to compel his predecessor to redress a breach committed by the predecessor. He is liable for damages to the extent a loss results from his failure to take such steps. *Id*., comment d. If, for example, the successor fails to move timely against a predecessor, and as a result a claim that was collectable becomes uncollectible, the successor may be liable for the loss suffered by the trust. *Purdy v Johnson*, 174 Cal. 521, 528 (1917). A trustee is also under a duty to take reasonable steps to take control of trust property, and for this additional reason a successor trustee may be liable for breach of trust if he neglects to take proper steps to compel his predecessor to deliver the trust property to him. *Restatement 2d of Trusts* § 177, comment c. (1959)

Thus, a successor trustee who fails to take action against a predecessor for breaches of trust may find himself liable for damages and other remedies, not to mention his own costs of defense. Conversely, a successor trustee who does take action but fails to recover from the predecessor, or fails to recover enough from the predecessor, relative to risk and expense, may find himself funding the trust's litigation out of his own pocket. See *Restatement 2d of Trusts* §§ 205, 206 (1959).

**When a Successor Trustee Need Not Bring an Action**

It is not the duty of the trustee to bring an action to enforce a claim that is a part of the trust property if it is reasonable not to bring such an action, owing to the probable expense involved in the action or to the probability that the action would be unsuccessful or that if successful the claim would be uncollectible owing to the insolvency of the defendant or otherwise. *Restatement 2d of Trusts* § 177, comment c. (1959).

If it reasonably appears to the successor trustee that a claim against a predecessor

is uncollectible, he is not under a duty to incur the expense of bringing a suit to collect it. *Restatement 2d of Trusts* § 177, comment a. (1959).

In exercising discretion about whether a claim against a predecessor should be enforced, the standard is whether a prudent trustee would move to enforce the claim under the circumstances. The successor must evaluate factors such as whether there is a likelihood of success and whether a judgment would be collectible. Zabronsky, *California Trust and Probate Litigation*, supra, §§ 21.22, 21.25.

The reasonableness of the trustee's decision about whether to pursue a claim is determined according to information known to the trustee at the time the decision is made, under the circumstances then prevailing. *Pillsbury v. Karmgard*, 22 Cal.App.4th 743, 763 (1994). Provided the trustee exercises reasonable judgment, and that reasonable steps are taken to evaluate the claim, the successor will not be liable for failing to seek redress of the breach. See, *In re Campbell's Estate*, 382 P.2d 920, 936 (1963) (Supreme Court of Hawaii) in which the court held that the successor trustees were not liable for the predecessors' improper accounting, since while it is duty of successor trustees to pursue all proper means of redress, they are not personally liable unless they have neglected to take proper steps in the premises.

**Practical Considerations**

Occasionally the breach is apparent, such as when the predecessor's final account reveals missing or mishandled assets, in which case there may be little doubt about whether to pursue the predecessor. As a starting point, therefore, the successor trustee should carefully review the predecessor's final account, to determine whether there has been any obvious breach. If questions remain, the successor may conduct a further examination. Zabronsky, *California Trust and Probate Litigation*, supra, §§ 21.24, 21.25.

Frequently the predecessor has resigned or has been removed because of conflict with the beneficiaries. Often, in such cases, the predecessor's departure is related to some allegation of misconduct. On the other hand, the conflict could simply be the result of personal animosity, or unsubstantiated suspicions of malfeasance. Either way, the beneficiaries, or some of the beneficiaries, may be the first to allege wrongdoing, and to ardently press the successor to take action against the predecessor. This can create great difficulty for the successor, who has a duty to conserve trust assets, and must be reasonably convinced of the wisdom of litigation, including the likelihood of recovery, before devoting significant trust resources to the burdensome expense of litigation. *Id*., § 21.25.

The successor trustee therefore has a very legitimate concern, in that the successor risks liability whether he proceeds against the predecessor or not. In some states, a

trustee in this situation may seek direction from the court, and pre-approval of a decision of whether to proceed. In California, for example, a trustee may petition the court for instructions. *Cal. Probate Code* § 17200(b)(6). In New York, in contrast, the court is unlikely to offer guidance concerning possible claims that might lie against predecessors. The decision of whether to pursue a predecessor is within the discretion of the successor fiduciary, who is specifically empowered by statute to make the decision. The process involves the exercise of discretion and judgment of the fiduciary; in such cases, the courts frequently decline requests to give advice and direction, where to do so would merely substitute the court's judgment for that of the fiduciary. *Matter of the Wm. M. Kline Rev. Trust*, supra, at 729, discussing SCPA 2107 and EPTL 1-1.1[b][13], citing Turano and Radigan, *New York Estate Administration* § 12.06 (2003), and acknowledging the successor's "legitimate concern" and that the successor's "dilemma is evident," but declining to offer any guidance to the successor about whether to proceed.

# EXCULPATORY PROVISIONS

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## EXCULPATORY PROVISIONS

Many trusts include a provision that purports to immunize the trustee from liability to the beneficiaries absent something beyond basic breach of fiduciary duty, for example fraud or intentional misconduct.

In the "early days," such clauses were held unenforceable as against public policy. The modern rule (reflected in the Restatement and uniform statutes) provides for enforceability of such clauses, with certain limitations.

### A. Overview.

Key points:

- Generally enforceable.
- Strictly construed.
- Substantive limitations: bad faith, intentional misconduct, reckless indifference.
- Procedural limitation: insertion of the clause itself into the trust instrument was itself a breach of duty.
- Damages limitation: distinction between Restatement and Uniform Trust Code with regard to applicability to trustee profits. Under the Restatement, even if a trustee is excused from liability for a breach of trust under the exculpatory clause, the trustee must still disgorge profits derived from a breach of trust. The Uniform Trust Code version would not require the trustee to disgorge profits if the activity is protected under the exculpatory clause, even if there is a breach of trust.

### B. Practice Tips.

Drafting tips:

- From the trustee's perspective, there is no harm in having an exculpatory clause in the trust. Any exculpatory clause is better than none at all.
- Anticipate beneficiary arguments: the exculpatory clause was allegedly inserted into the trust without the trustor's knowledge (*e.g.*, boilerplate) or as a result of improper influence by the trustee.

Administration tips:

- Anticipate beneficiary arguments: bad faith or reckless disregard. Trustees should have a written record to support significant discretionary decisions.

- Email is discoverable. The beneficiary will be looking for some off-hand remark in the email chatter to try to establish bad faith.

- Know what is a privileged communication. Simply copying in-house counsel on an email does not necessarily make the communication privileged.

Litigation tips:

- The exculpatory clause does not solve all problems: even if the exculpatory clause protects the trustee from liability, the beneficiary will argue that he/she is still entitled to some equitable relief, including forcing the trustee to reimburse/forfeit trustee fees, and/or removal of the trustee.

- For controversial and significant discretionary decisions, the trustee may want to petition the court for advance approval.

- When sued by a beneficiary, raise the defense as both a ground for denial of liability and as an affirmative defense. (There is some debate whether the defense is an affirmative defense. *See, e.g., Siegemund v. Shapland*, 324 F. Supp. 2d 176, 183-185 (D. Me. 2004).)

**C. Restatement (Second) of Trusts § 222.**

§ **222 Exculpatory Provisions**

> **(1) Except as stated in Subsections (2) and (3), the trustee, by provisions in the terms of the trust, can be relieved of liability for breach of trust.**
>
> **(2) A provision in the trust instrument is not effective to relieve the trustee of liability for breach of trust committed in bad faith or intentionally or with reckless indifference to the interest of the beneficiary, or of liability for any profit which the trustee has derived from a breach of trust.**

**(3) To the extent to which a provision relieving the trustee of liability for breaches of trust is inserted in the trust instrument as the result of an abuse by the trustee of a fiduciary or confidential relationship to the settlor, such provision is ineffective.**

**Comment on Subsection (1):**

*a. Exculpatory provisions strictly construed.* The terms of the trust may contain provisions relieving the trustee from liability for breaches of trust. Such provisions are strictly construed, and the trustee is relieved of liability only to the extent to which it is clearly provided that he shall be excused. Thus, if by the terms of the trust it is provided that the trustee shall not be liable "except for his wilful default or gross negligence," although he is not liable for mere negligence, he is liable if he intentionally does or omits to do an act which he knows to be a breach of trust or if he acts or omits to act with reckless indifference as to the interest of the beneficiary.

**Comment on Subsection (2):**

*b. Extent to which exculpatory provisions against public policy.* Notwithstanding any provision in the terms of the trust relieving the trustee from liability for breach of trust, he is liable for breaches of trust committed in bad faith, and for intentional breaches of trust, and for breaches of trust committed with reckless indifference to the interest of the beneficiary. No provision in the terms of the trust is effective to relieve the trustee who derives a profit from a breach of trust from liability to the extent of the profit. Such provisions as these are invalid on the ground that it would be contrary to public policy to give effect to them.

*c. Distinction between exculpatory provisions and those limiting trustee's duties.* If by the terms of the trust it is provided that the trustee shall not be under any duty to do or to refrain from doing an act which but for such provision it would be the duty of the trustee to do or refrain from doing, the trustee does not commit a breach of trust in doing or failing to do the act, unless such provision is ineffective as contrary to public policy. If, however, the trustee is not relieved of such a duty either because there is no provision to that effect in the terms of the trust or because such provision is ineffective as against public

policy, a provision in the terms of the trust that the trustee shall not be liable for breach of trust is against public policy to the extent stated in Comment *b*.

As to the effect of the terms of the trust upon the standard of care and skill required of a trustee, see § 174, Comment *d*.

As to the effect of the terms of the trust upon the extent of discretion given to trustees in the exercise of powers conferred upon them, see § 187.

**Comment on Subsection (3):**

*d. Exculpatory provision improperly inserted.* In determining whether a provision relieving the trustee from liability is ineffective on the ground that it was inserted in the trust instrument as a result of an abuse of a fiduciary or confidential relationship existing between the trustee and the settlor at the time of the creation of the trust, the following factors may be considered: (1) whether the trustee prior to the creation of the trust had been in a fiduciary relationship to the settlor, as where the trustee had been guardian of the settlor; (2) whether the trust instrument was drawn by the trustee or by a person acting wholly or partially on his behalf; (3) whether the settlor has taken independent advice as to the provisions of the trust instrument; (4) whether the settlor is a person of experience and judgment or is a person who is unfamiliar with business affairs or is not a person of much judgment or understanding; (5) whether the insertion of the provision was due to undue influence or other improper conduct on the part of the trustee; (6) the extent and reasonableness of the provision.

The mere fact that the trustee draws the trust instrument and suggests the insertion of a provision relieving the trustee of liability does not necessarily make the provision ineffective. Thus, if a father asks his son, an attorney, to draw a will for the father under which the son is to act as trustee for various relatives of the father and the son inserts a provision relieving him of liability for negligent breaches of trust and the father who is a person of business experience and who appreciates the nature and effect of the provision agrees, the provision is effective.

**D. Restatement (Second) of Trusts § 243.**

**§ 243 Effect of Breach of Trust on Compensation**

> **If the trustee commits a breach of trust, the court may in its discretion deny him all compensation or allow him a reduced compensation or allow him full compensation.**
>
> *** * ***
>
> **g. Exculpatory provisions. A trustee may be denied compensation, wholly or partially, on account of a breach of trust committed by him, even though he does not incur a liability for the breach of trust because of an exculpatory provision in the trust instrument. See § 222.**

**E. Restatement (Third) of Trusts § 96 [DRAFT].**

Section 96 of the Restatement (Third) of Trusts will be the exculpatory clause section. At this point, it is not even published in draft form. It will be included in draft no. 5.

**F. Uniform Trust Code § 1008.**

**§ 1008. Exculpation of Trustee.**

> **(a) A term of a trust relieving a trustee of liability for breach of trust is unenforceable to the extent that it:**
>
> > **(1) relieves the trustee of liability for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries; or**
> >
> > **(2) was inserted as the result of an abuse by the trustee of a fiduciary or confidential relationship to the settlor.**

**(b) An exculpatory term drafted or caused to be drafted by the trustee is invalid as an abuse of a fiduciary or confidential relationship unless the trustee proves that the exculpatory term is fair under the circumstances and that its existence and contents were adequately communicated to the settlor.**

**COMMENT**

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Even if the terms of the trust attempt to completely exculpate a trustee for the trustee's acts, the trustee must always comply with a certain minimum standard. As provided in subsection (a), a trustee must always act in good faith with regard to the purposes of the trust and the interests of the beneficiaries. Subsection (a) is consistent with the standards expressed in Sections 105 and 814(a), which, similar to this section, place limits on the power of a settlor to negate trustee duties. This section is also similar to Section 222 of the Restatement (Second) of Trusts (1959), except that this Code, unlike the Restatement, allows a settlor to exculpate a trustee for a profit that the trustee made from the trust.

Subsection (b) disapproves of cases such as *Marsman v. Nasca*, 573 N.E.2d 1025 (Mass. App. Ct. 1991), which held that an exculpatory clause in a trust instrument drafted by the trustee was valid because the beneficiary could not prove that the clause was inserted as a result of an abuse of a fiduciary relationship. For a later case where sufficient proof of abuse was present, see *Rutanan v. Ballard*, 678 N.E.2d 133 (Mass. 1997). Subsection (b) responds to the danger that the insertion of such a clause by the fiduciary or its agent may have been undisclosed or inadequately understood by the settlor. To overcome the presumption of abuse in subsection (b), the trustee must establish that the clause was fair and that its existence and contents were adequately communicated to the settlor. In determining whether the clause was fair, the court may wish to examine: (1) the extent of the prior relationship between the settlor and trustee; (2) whether the settlor received independent advice; (3) the sophistication of the settlor with respect to business and fiduciary matters; (4) the trustee's reasons for

inserting the clause; and (5) the scope of the particular provision inserted. See Restatement (Second) of Trusts § 222 cmt. d (1959).

The requirements of subsection (b) are satisfied if the settlor was represented by independent counsel. If the settlor was represented by independent counsel, the settlor's attorney is considered the drafter of the instrument even if the attorney used the trustee's form. Because the settlor's attorney is an agent of the settlor, disclosure of an exculpatory term to the settlor's attorney is disclosure to the settlor.

**G. <u>Other</u>.**

1. *Scott and Ascher on Trusts* § 24.27 (2007).

2. Annot., *Provisions of Will or Other Trust Instrument Exempting Trustee From or Limiting His Liability*, 158 A.L.R. 276 (1945).

3. Poor judgment in trust investments is not reckless indifference. *McDonald v. First National Bank of Boston*, 968 F. Supp. 9 (D. Mass. 1997).

# LIMITATION OF ACTION AGAINST TRUSTEE

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## LIMITATION OF ACTION AGAINST TRUSTEE

The law with regard to time limits for a beneficiary to bring an action against a trustee has evolved over time. In the early cases, the courts were pro-beneficiary, rejecting time limit defenses on various grounds, including that the cause of action was not time barred unless and until a certain period of time had elapsed after termination of the trust or resignation of the trustee, or that statutes of limitation were tolled until full disclosure had been made by the trustee. Some courts held that statutes of limitation did not apply at all, on the theory that claims against trustees were equitable claims and therefore only equitable timeliness defenses (*e.g.*, laches) were available to the trustee. The modern rules are more pro-trustee.

### A. Overview.

Key points:

- Restatement: laches.
- Uniform Trust Code: statute of limitations.
- Uniform Probate Code: statute of limitations or final accounting.
- Binding minor, contingent, remainder beneficiaries.
- Preclusion of claims by successor trustee (as distinguished from beneficiaries).

### B. Practice Tips.

Drafting tips:

- For the trustee's benefit, the trust instrument should include a self-executing accounting/release provision: a simple clause would state that the trustee may send periodic accountings to the current beneficiaries, and in that event, the trustee's accounting is deemed approved and the trustee is released from liability for the period of such accounting just as if the court had approved the accounting, unless the receiving beneficiary objects in writing within 90 days of receipt of such accounting.

Administration tips:

- Send periodic accountings to the beneficiaries. The broader the distribution (*e.g.*, current and remainder beneficiaries) and the fuller the disclosure, the better argument later.

- Anticipate beneficiary arguments: the accounting is incomplete; the accounting deliberately withheld or misportrayed information; the accounting did not alert the beneficiary to a potential claim; the beneficiary never received the accounting; the beneficiary was a minor and/or incapacitated.

Litigation tips:

- The trustee may want to initiate the litigation with a petition to the court for approval of the accounting.

- When sued by a beneficiary, raise the affirmative defenses.

**C. <u>Restatement (Second) of Trusts § 219</u>.**

§ **219**. **Laches of the Beneficiary**

**(1) The beneficiary cannot hold the trustee liable for a breach of trust if he fails to sue the trustee for the breach of trust for so long a time and under such circumstances that it would be inequitable to permit him to hold the trustee liable.**

**(2) The beneficiary is not barred merely by lapse of time from enforcing the trust, but if the trustee repudiates the trust to the knowledge of the beneficiary, the beneficiary may be barred by laches from enforcing the trust.**

See Reporter's Note.

**Comment on Subsection (1):**
*a. What constitutes laches*. In most States there is no Statute of Limitations applicable to equitable claims, but equitable claims may be barred by the laches of the claimant.

In determining whether the beneficiary of a trust is precluded by laches from holding the trustee liable for breach of trust, the court will consider among others the following factors: (1) the length of time which has elapsed between the commission of the breach of trust and the bringing of suit; (2) whether the beneficiary knew or had reason to know of the breach of trust; (3) whether the beneficiary was under an incapacity; (4) whether the beneficiary's interest was presently enjoyable or enjoyable only in the future; (5) whether the beneficiary had complained of the breach of trust; (6) the reasons for the delay of the beneficiary in suing; (7) change of position by the trustee, including loss of rights against third persons; (8) the death of witnesses or parties; (9) hardship to the beneficiary if relief is not given; (10) hardship to the trustee if relief is given.

*b. Length of time necessary to bar beneficiary*. The length of time necessary to bar the beneficiary from holding the trustee liable for breach of trust depends upon the circumstances. In the absence of special circumstances the beneficiary is barred if the period of the Statute of Limitations applicable to actions at law in analogous situations has run.

*c. Where beneficiary has no notice of breach of trust*. The beneficiary will not ordinarily be barred by laches from holding the trustee liable for a breach of trust of which the beneficiary did not know and had no reason to know.

*d. Where beneficiary under incapacity*. The beneficiary will not be barred by laches as long as he is under an incapacity. He will ordinarily be guilty of laches, however, if knowing of the breach of trust he does not sue within a reasonable time after the incapacity is removed.

*e. Where beneficiary has future interest*. A beneficiary who has an interest enjoyable only in the future is guilty of laches if knowing of the breach of trust he does not sue within a reasonable time after his interest becomes presently enjoyable. He may be guilty of laches, however, by reason of his failure to sue before his interest becomes presently enjoyable. Thus, if a trust is created to pay the income to one beneficiary for life and on his death to pay

the principal to another beneficiary and during the lifetime of the former beneficiary the trustee commits a breach of trust of which the latter beneficiary has knowledge and he delays suing for many years, he may be barred by laches although he brings suit immediately after the death of the life beneficiary.

If a trust is created for one beneficiary for life and another in remainder, and the life beneficiary but not the remainderman is barred by laches from holding the trustee liable for a loss resulting from a breach of trust, the trustee owes a duty to the remainderman to pay into the trust the amount of the loss, but the trustee is entitled to take the income during the life of the life beneficiary on the amount so repaid. Compare § 216, Comment *g*.

*f. Other factors*. If the beneficiary knowing of the breach of trust makes no complaint, he is ordinarily barred in a less time than that in which he would be barred if he had complained to the trustee of the breach of trust.

If the beneficiary has delayed bringing suit as a result of promises of the trustee to redress the breach of trust, he will not be barred as soon as he would be barred if he had not been induced to delay suit by such promises.

The beneficiary may be barred from suing the trustee if the trustee has changed his position, where he would not otherwise be barred.

If witnesses or parties have died between the time when the breach of trust was committed and the time of suit, the suit may be barred by laches in a less time than it would otherwise be barred, since under such circumstances it may have become difficult as a result of the delay of the beneficiary in suing to ascertain the facts and to do justice.

**Comment on Subsection (2):**

*g. Effect of laches in terminating the trust.* Although the beneficiary may be barred by laches from holding the trustee liable for breach of trust, he does not lose his interest in the trust property merely because of the lapse of time, however great; if, however, the trustee has repudiated the trust to the knowledge of the beneficiary and the

beneficiary fails to bring suit, he may be barred by laches from enforcing the trust. Such repudiation need not be in specific words; it may consist of conduct on the part of the trustee inconsistent with the existence of the trust.

**D. Uniform Trust Code § 1005.**

§ **1005. Limitation of Action Against Trustee.**

**(a) A beneficiary may not commence a proceeding against a trustee for breach of trust more than one year after the date the beneficiary or a representative of the beneficiary was sent a report that adequately disclosed the existence of a potential claim for breach of trust and informed the beneficiary of the time allowed for commencing a proceeding.**

**(b) A report adequately discloses the existence of a potential claim for breach of trust if it provides sufficient information so that the beneficiary or representative knows of the potential claim or should have inquired into its existence.**

**(c) If subsection (a) does not apply, a judicial proceeding by a beneficiary against a trustee for breach of trust must be commenced within five years after the first to occur of:**

**(1) the removal, resignation, or death of the trustee;**

**(2) the termination of the beneficiary's interest in the trust; or**

**(3) the termination of the trust.**

**COMMENT**

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The one-year and five-year limitations periods under this section are not the only means for barring an action by a beneficiary. A beneficiary may be foreclosed by consent, release, or ratification as provided in Section 1009. Claims

may also be barred by principles such as estoppel and laches arising in equity under the common law of trusts. *See* Section 106.

The representative referred to in subsection (a) is the person who may represent and bind a beneficiary as provided in Article 3. During the time that a trust is revocable and the settlor has capacity, the person holding the power to revoke is the one who must receive the report. *See* Section 603(a) (rights of settlor of revocable trust).

This section addresses only the issue of when the clock will start to run for purposes of the statute of limitations. If the trustee wishes to foreclose possible claims immediately, a consent to the report or other information may be obtained pursuant to Section 1009. For the provisions relating to the duty to report to beneficiaries, see Section 813.
Subsection (a) applies only if the trustee has furnished a report. The one-year statute of limitations does not begin to run against a beneficiary who has waived the furnishing of a report as provided in Section 813(d).

Subsection (c) is intended to provide some ultimate repose for actions against a trustee. It applies to cases in which the trustee has failed to report to the beneficiaries or the report did not meet the disclosure requirements of subsection (b). It also applies to beneficiaries who did not receive notice of the report, whether personally or through representation. While the five-year limitations period will normally begin to run on termination of the trust, it can also begin earlier. If a trustee leaves office prior to the termination of the trust, the limitations period for actions against that particular trustee begins to run on the date the trustee leaves office. If a beneficiary receives a final distribution prior to the date the trust terminates, the limitations period for actions by that particular beneficiary begins to run on the date of final distribution.

If a trusteeship terminates by reason of death, a claim against the trustee's estate for breach of fiduciary duty would, like other claims against the trustee's estate, be barred by a probate creditor's claim statute even though the statutory period prescribed by this section has not yet expired.

This section does not specifically provide that the statutes of limitations under this section are tolled for fraud or other misdeeds, the drafters preferring to leave the resolution of this question to other law of the State.

**E. Uniform Probate Code § 7-307.**

**§ 7-307. Limitations on Proceedings Against Trustees After Final Account**

**Unless previously barred by adjudication, consent or limitation, any claim against a trustee for breach of trust is barred as to any beneficiary who has received a final account or other statement fully disclosing the matter and showing termination of the trust relationship between the trustee and the beneficiary unless a proceeding to assert the claim is commenced within [6 months] after receipt of the final account or statement. In any event and notwithstanding lack of full disclosure a trustee who has issued a final account or statement received by the beneficiary and has informed the beneficiary of the location and availability of records for his examination is protected after 3 years. A beneficiary is deemed to have received a final account or statement if, being an adult, it is received by him personally or if, being a minor or disabled person, it is received by his representative as described in Section 1-403(1) and (2).**

**F. Other.**

1. It has been argued that the statute of limitations is tolled until the trust terminates, the trustee repudiates the trust, or the trustee resigns. That argument is generally rejected. *See, e.g., Jones v. United States*, 801 F.2d 1334, 1335-36 (Fed. Cir. 1986), *cert. denied* 481 U.S. 1013, 95 L.Ed.2d 495, 107 S.Ct. 1887 (1987); *Harris Trust Bank of Arizona v. Superior Court of the State of Arizona*, 188 Ariz. 159, 163, 933 P.2d 1227, 1231 (App. 1996).

2. Effect of self-executing accounting/release clause in the trust. Some trust instruments include a provision that purports to release the trustee from liability in increments under the circumstance where the trustee provides interim accountings to certain beneficiaries. The provisions usually provide that the trustee is automatically released from liability for that accounting period unless the beneficiary takes certain action within a

specific time frame, *e.g.*, 60 or 90 days. Such clauses are generally assumed to be enforceable, with the issue being which beneficiaries are bound.

3. Virtual Representation.

   a. Uniform Probate Code § 1-403.

   b. Uniform Trust Code §§ 301-305.

# ATTORNEY-CLIENT PRIVILEGE

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## ATTORNEY-CLIENT PRIVILEGE IN TRUST AND ESTATE DISPUTES -- WHO HOLDS THE PRIVILEGE?

Lawyers often assume that the attorney-client privilege provides absolute protection when it comes to inquiries into communications between lawyer and client. However, in the context of trusts and estates, the privilege may not apply, or may even be lost. Fiduciaries and attorneys representing them must be aware of these privilege issues, as these concepts can be contrary to our general notion of being able to maintain in strict confidence communications with clients.

For example, many states will not apply that privilege with respect to communications between the lawyer and the client regarding estate planning when a will or trust is being contested. Upon execution of a will, a testator may intend for the contents of the will to be kept in confidence with the attorney only during the testator's lifetime. *See, e.g., Balazinski v. Lebid*, 168 A.2d 209 (N.J. Super. App. Div. 1961) (finding conversations with attorney who prepared will admissible). *But see Gould, Larson, Bennett, Wells & McDonnell v. Panico*, 869 A.2d 653 (Conn. 2005) (in will contest, attorney who met with client and discussed estate plan could not be compelled to disclose confidential communications since the attorney did not draft a will for the client).

To generally establish the privilege, the following four factors must exist: the communications must originate in the confidence that they will not be disclosed; the element of confidentiality must be essential to the full and satisfactory maintenance of the relationship between the parties; the relationship must be one which in the opinion of the community ought to be fostered; and the injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation. Sherwin P. Simmons, *Who Is the Client?: Ethical Considerations*, SC06 ALI-ABA 769, 772 (1997) (quoting 8 *Wigmore on Evidence* § 2285, at 527).

### Identify the Client

When representing a fiduciary, the lawyer must initially determine to whom he owes his loyalty. *See, e.g.*, Peter Rice, *Attorney-Client Privilege in the U.S.* § 4:45 (2d ed. Mar. 2003) ("the most common question that has arisen has been who is the client -- the trust entity, the trustees or individuals who act for the entity, or the beneficiaries or individuals for whom the entities were created?); Sherwin P. Simmons et al., *Confidentiality Issues Between Fiduciaries and Their Legal Advisors*, SH059 ALI-ABA 535 (2003) (discussing with respect to attorney-fiduciary privilege, "who is the client?"); Jack A. Falk, Jr., *The Fiduciary's Lawyer-Client Privilege, Does it Protect Communications from Discovery by a Beneficiary?*, 77 Mar. FLA. B.J. 18 (March 2003) (reviewing various jurisdictions' approaches to parties subject to attorney-client

privilege); John T. Rogers, Jr., *Who's the Client? Ethics for Trust and Estate Counsel*, SJ036 ALI-ABA 255 (2003) (discussing ethical implications of representation of fiduciary and purview of attorney client relationship); Steven M. Fast *et al.*, *The Fiduciary Sticky Wicket -- Counseling Fiduciaries on Dealing with Receipts and Releases; Requests for Resignation; Conflicts of Interest with Co-Fiduciaries; and Discharge from Tax Liabilities*, SC84 ALI-ABA 91 (1999) (asking "is it really the trustee that you represent or is it the trust itself or possibly the trust's beneficiaries?"); Peter R. Brown, *Clarifying the Role of the Attorney, Executor, and Trustee in Estate and Trust Administration*, SC85 ALI-ABA 149, 152 (1998) ("threshold issue is always to whom does the lawyer owe his or her loyalty?").

**Define the Scope of Attorney-Client Relationship**

Attorneys may be able to define the attorney-client relationship themselves with a well-tailored retention letter. In *Lerner v. Laufer*, 819 A.2d 471 (N.J. Super. App. Div.), *certif. denied*, 827 A.2d 290 (N.J. 2003), the Appellate Division held that an attorney is ethically permitted under *N.J.R.P.C.* 1.2(c), with the consent of the client after consultation, to limit the scope of his representation with a single, specifically tailored form of a retainer agreement. *See also* Melvin Hirshman, *Tips from Bar Counsel-Agreements with Your Client*, 36-DEC MD. B.J. 58 (Nov./Dec. 2003) (citing *Md. R.P.C.* 2(c) and *Lerner*).

Lawyers who represent fiduciaries may want to consider a number of practical considerations to further define issues of privilege and representation at the outset of the relationship. First, the attorney can inform beneficiaries that he or she is representing the fiduciary, that the fiduciary is the lawyer's client, and that the lawyer does not represent the beneficiaries. The lawyer can also inform the beneficiaries upfront that communications between the fiduciary and the attorney will be privileged, or even have the beneficiaries sign an acknowledgment to this effect. The lawyer for the fiduciary can also suggest that beneficiaries retain their own counsel. *See* Jack A. Falk, Jr., *The Fiduciary's Lawyer-Client Privilege, Does it Protect Communications from Discovery by a Beneficiary?*, 77-MAR Fla. B.J. 18 (March 2003).

Breach of a trustee's duty to the trust beneficiaries is probably not sufficient to justify counsel's breach of the duties of loyalty and confidentiality owed to the fiduciary client in most jurisdictions. Robert F. Phelps, Jr., *Representing Trusts and Trustees - Who Is the Client and Do Notions of Privity Protect the Client Relationship*, 66 Conn. B. J. 211, 221-22 (1992). If counsel decides he can no longer represent a trustee because of the trustee's handling of the trust, counsel may prefer to resign rather than decide whether the action justifies disclosure. *Id.* Moreover, when retained to render personal advice to the trustee, counsel may wish to document the limited representation, noting that he was retained for personal matters and not trust administration and that she was paid with the trustee's personal funds.

**The Majority View: Fiduciary = Client**

"[U]nless the lawyer elects to represent the estate or trust as an entity, and there is a written agreement to this effect with the fiduciary," the majority rule is that "the lawyer's only client is the fiduciary." Brown, *Clarifying the Role of the Attorney, Executor, and Trustee in Estate and Trust Administration*, *supra*, at 152.

**Trusts**

The majority rationale views trust counsel are agents hired by a trustee, so that trust counsel owe their duty of loyalty to the fiduciary -- i.e., the trustee.

In *Huie v. DeShazo*, 922 S.W.2d 920, 925 (Tex. 1996), the Supreme Court of Texas held that under Texas law, a trustee who hires an attorney to assist in administering a trust is the actual client of the lawyer, and the trust beneficiaries are not the clients. The court noted it "would strain reality to hold that a trust beneficiary, who has no direct professional relationship with the trustee's attorney, is the real client." *Id.*

In *Spinner v. Nutt*, 631 N.E.2d 542 (Mass. 1994), the Supreme Judicial Court of Massachusetts refused to impute an attorney-client relationship between the attorneys of trustees, who also happened to be beneficiaries under the trust, and plaintiff-beneficiaries of the testamentary trust. The Court reasoned that "[s]hould we decide that a trustee's attorney owes a duty not only to the trustee but also to the trust beneficiaries, conflicting loyalties could impermissibly interfere with the attorney's task of advising the trustee." *Id.* at 545-46. In so declining to recognize an attorney-client relationship between trust beneficiaries and trustee's counsel, the Court was careful to distinguish between third-party beneficiaries of the contract between the testator and the attorney drafting the will, and the contract between the trustee and the trustee's attorney. In the latter circumstance, the trust beneficiaries are only incidental beneficiaries of the contract. The plaintiff trust beneficiaries failed to cite authority for finding an attorney-client relationship between the trust beneficiaries and the attorney for the trustee of the trust. *Id.*

**Wills**

In *Goldberg v. Frye*, 266 Cal. Rptr. 483, 488 (Cal. Ct. App. 1990), the California Court of Appeals announced that "it is well established that the attorney for the administrator of an estate represents the administrator, and not the estate." Although the attorney performs services that may benefit legatees, the attorney "has no contractual privity with the beneficiaries of the estate." *Id.*

In *Grievance Committee, Wyoming State Bar v. Riner*, 765 P.2d 925, 927 (Wyo. 1988), the Supreme Court of Wyoming disagreed with an attorney's contention that he represented the estate and not the personal representative. The court concluded that the personal representative of the estate and the attorney "entered into an attorney-client

relationship when she engaged [him] to assist her in performing her duties as a personal representative" of the estate.

In *Simon v. Zipperstein*, 512 N.E.2d 636, 638 (Ohio 1987), the court stated: "in absence of fraud, collusion or malice, an attorney may [not] be held liable in a malpractice action by a purported beneficiary of a will where privity is lacking."

In *In re Estate of Wagner*, 386 N.W.2d 448, 450 (Neb. 1986), the court ruled "[w]hen an attorney is employed to render services in securing the probate of a will or settling an estate, he acts as attorney for the personal representative and not for the estate."

**The Minority View: Beneficiary = Client**

The minority view is that, although there is no direct attorney-client relationship, the lawyer may still owe some duties to the beneficiaries. Brown, *supra*, at 152. Some states even treat the beneficiaries of an estate as joint clients of the lawyer for the fiduciary. For instance, the Court of Appeals of Michigan has held that even though the personal representative retains the attorney, the attorney's client is the estate, not the personal representative, a conclusion supported by the fact that the probate court must approve the attorney's fees for services rendered on behalf of the estate and the fees are paid from the estate. *Steinway v. Bolden*, 460 N.W.2d 306, 307 (Mich. Ct. App. 1990). *See Elam v. Hyatt Legal Servs*., 541 N.E.2d 616, 618 (Ohio 1989).

Discovery has also been allowed even where the beneficiary was not characterized as a client. In these minority-view states, the courts reasoned either that the fiduciary was obligated to disclose all information relating to the administration of the trust to the beneficiaries or that the fiduciary client could not reasonably have expected that the lawyer represented him personally. John R. Price, *Duties of Estate Planners to Nonclients: Identifying, Anticipating and Avoiding the Problems*, 37 S. Tex. L. Rev. 1063, 1087 (1996). *See, e.g., Follansbee v. Gerlach*, 56 Pa. D & C.4th 483 (2002) (holding that as to beneficiaries, the attorney-client privilege never applies to communications between trustee and attorney consulted in fiduciary capacity regarding trust administration because trustee has duty to make such documents available to beneficiaries).

As a lawyer-client relationship may be found to have existed based on the reasonable subjective belief of a beneficiary, these states permit beneficiaries to discover communications between the fiduciary and the fiduciary's counsel. Price, *supra*, at 1086-87. *See In re Estate of Torian*, 564 S.W.2d 521, 526 (Ark. 1978), *cert. denied*, 439 U.S. 883 (1978) (applying joint client exception to attorney-client privilege in holding that communication between executor and executor's lawyer was discoverable by beneficiary); *Riggs Nat'l Bank of Wash., D.C. v. Zimmer*, 355 A.2d 709, 714 (Del. Ch. 1976) (trustees "cannot subordinate the fiduciary obligations owed to the beneficiaries to their own private interests under the guise of attorney-client privilege"); *Hoopes v.*

*Carota*, 531 N.Y.S.2d 407, 409 (App. Div. 1988), *aff'd*, 543 N.E.2d 73 (N.Y. 1989) (attorney-client privilege did not protect president's questions about exercise of his duties as a trustee or corporate officer in connection with various proposals for sale or buyout of corporation and transactions between management and corporation).

Where the issue is one of trust administration, "the trustee is not the real client in the sense that he is personally being served." *Id.* at 776. As the Delaware Chancery Court noted in *Riggs*, the intention of the communication is to aid the beneficiaries. "The policy of preserving the full disclosure necessary in the trustee-beneficiary relationship is … more important than the protection of the trustees' confidence in the attorney for the trust." Riggs, 355 A.2d at 714. However, if the trustee can demonstrate that he sought advice for his personal benefit, he may invoke the attorney-client privilege. Factors relevant in determining whether the trustee sought advice for his personal use rather than for the administration of the trust include: whether the trustee used his personal funds or those of the estate to pay for the attorney's services and whether he sought advice relating to a defense in pending litigation.

Regardless of whether a case arises in a majority or minority jurisdiction, an attorney should approach communications with the beneficiaries with care. An attorney should not allow the beneficiaries to believe that he represents their interests. Brown, *supra*, at 154.

**Recent Trends**

The following cases epitomize how the recent trend appears to be leaning toward the erosion of the privilege.

***Moeller v. Superior Court, 947 P.2d 279* (Cal. 1997)**

The Supreme Court of California ruled in this case that a successor trustee is the holder of the attorney-client privilege over communications between a former trustee and his trust administration counsel. This decision also addresses cases in this area around the country.

A corporate fiduciary handled the trust at issue for a number of years, including while litigation and related issues were addressed concerning toxic contamination to real property owned by the trust. One of the beneficiaries, Mr. Moeller, became the successor trustee in place of the corporate fiduciary, and sued his predecessor for various losses, including alleged mishandling of the contaminated property and related litigation. Mr. Moeller sought communications and other documents exchanged between the former trustee and its counsel, but the former trustee refused to produce such documents, claiming the attorney-client privilege.

The Supreme Court of California ruled that Mr. Moeller was entitled to all such communications because the privilege belonged to the "office" of trustee, and not to a particular trustee. The Court ruled that all attorney-client communications regarding any trust administrative matter would not be privileged as against a successor trustee. However, with respect to communications between a trustee and counsel on actual or potential breaches of fiduciary duty, the Court ruled that such communications could be protected from disclosure; the Court seemed to suggest that, to ensure the privilege, the fiduciary should obtain its own counsel and pay for such legal services personally.

***Wells Fargo Bank, N.A. v. Superior Court,* 990 P.2d 591 (Cal. 2000)**

In this sequel to *Moeller*, the California Supreme Court refused to recognize an implied exception that would require trustees to share with trust beneficiary's privileged communications about trust administration. In *Wells Fargo*, William Couch established a trust in 1991. He served as the sole trustee until his death in 1992. Then, his widow and Wells Fargo became co-trustees. The beneficiaries accused the trustees of a variety of misconduct. Wells Fargo filed a court action to settle its account and obtain approval for its resignation as trustee. The beneficiaries filed objections.

The beneficiaries relied on *Moeller* to try to obtain in discovery documents regarding communications between the trustees and their counsel. The California Supreme Court did not allow this reliance, explaining that in *Moeller* "we did not suggest that anyone other than the current holder of the privilege might be entitled to inspect privileged communications. Nor did we create or recognize any exceptions to the privilege. Instead, without questioning that the communications at issue were privileged, we merely identified the current holder of the privilege." *Id*. at 596. The California Supreme Court refused to recognize an implied exception that would require trustees to share privileged communications about trust administration with trust beneficiaries. Even if the trust pays the fees charged by counsel retained by the trustee, the beneficiaries cannot claim to be joint clients along with the trustee. The privilege, however, does not shield non-privileged information that is forwarded to counsel. *Id.*

Thus, in *Moeller*, the California Supreme Court ruled that a successor trustee could obtain otherwise privileged communications, because the privilege moves with the office of the trustee. In *Wells Fargo*, that same court did not extend *Moeller* to rule that beneficiaries are able to obtain such privileged information.

***Estate of Fedor,* 811 A.2d 970 (N.J. Super. Ch. Div. 2001)**

The New Jersey court adopted *Moeller*. The beneficiaries alleged mismanagement and self-dealing by the fiduciaries (who were both executors and trustees). In prior proceedings, the court had suspended the two individual fiduciaries of the subject estate and trust, and appointed an attorney as the temporary fiduciary. The substitute fiduciary and the beneficiaries then sought discovery of prior communications

between the former fiduciaries and the attorneys and accountants for the estate. The former fiduciaries raised the attorney-client privilege.

The court ruled that the substitute fiduciary became the holder of the privilege and therefore was entitled to have access to all records of the estate, including attorney-client advice previously provided to the suspended fiduciaries by the attorneys and the accountants. Likewise, she was entitled to decide whether to waive the privilege as to the beneficiaries, based on the best interests of the estate. The court denied the beneficiaries' motion without prejudice.

However, while the court did note that the beneficiaries did not seek discovery of communications between the former fiduciaries and their "personal" attorney, the opinion does not address those communications.

***Bria v. United States,* 89 A.F.T.R.2d 2002-2141 (D. Conn. 2002)**

In this unreported but still noteworthy opinion, the co-executors of an estate retained counsel. However, the attorneys were terminated while in the process of preparing the United States Tax Form 706.

The IRS investigated whether the co-executors understated the value of the estate on the Form 706 that was eventually filed with the IRS. The IRS issued a summons to the former attorneys for the co-executors. An objection was raised based on the attorney-client privilege, especially since some of the information was not listed on the Form 706 which was filed.

Although the court sustained the objection as to certain points, the court still ordered the attorneys to answer questions and produce documents as to certain areas, including joint bank accounts valued at over $407,000, held by the decedent but not listed on the estate tax return which was filed.

***Eddy v. Fields,* 18 Cal. Rptr.3d 487 (Cal. Ct. App. 2004)**

The court, following *Moeller*, held that a successor trustee was entitled to the files of the lawyer of the predecessor trustees. In *Eddy*, the former trustees resigned and the successor trustee requested that the attorney for the former trustees turn over his files. The attorney petitioned the court for guidance on whether the files should be released. The attorney argued that some of the documents had been prepared by him while representing the former trustees and were protected by the work product privilege. The trial court ordered the attorney to turn the files over to the successor trustee. *Id.* at 490.

The Court of Appeals affirmed, explaining that "a new trustee succeeds to all rights, duties and responsibilities of his or her predecessors, including those related to dealings with an attorney retained to assist the trustee in the management of the trust." *Id.* The court reasoned that the documents within the file, including all correspondence,

pleadings, expert reports, and other items reasonably necessary to the representation belonged to the client. The court also found that the work product privilege had been waived by disclosure. *Id.* at 491.

***Borissoff v. Taylor & Faust,* 93 P.3d 337 (Cal. 2004)**

Again following *Moeller*, the California Supreme Court held that a successor fiduciary of an estate may assert a professional negligence claim against the attorneys retained by a predecessor fiduciary to provide tax assistance for the benefit of the estate. Citing *Moeller*, the Court noted:

> when a fiduciary hires an attorney for guidance in administering a trust, the fiduciary alone, in his or her capacity as fiduciary, is the attorney's client. The trust is not the client, because "a trust is not a person but rather 'a fiduciary relationship with respect to property.'" Neither is the beneficiary the client, because fiduciaries and beneficiaries are separate persons with distinct legal interests.

*Id.* at 340 (citations omitted) (emphasis omitted).

The *Borissoff* court further clarified:

> A successor fiduciary becomes the holder of the attorney-client privilege "only as to those confidential communications that occurred when the predecessor, in [his or her] fiduciary capacity, sought the attorney's advice for guidance in administering the trust." Conversely, a successor fiduciary does not become the holder of the privilege for confidential communications that occurred when a predecessor fiduciary in his or her personal capacity sought an attorney's advice.

*Id.* at 343-44 (citations omitted) (emphasis omitted).

***Jacob v. Barton,* 877 So.2d 935 (Fla. Dist. Ct. App. 2004)**

The Florida District Court of Appeals quashed the lower court's order requiring production of a trust attorney's billing records to a beneficiary. The beneficiary had sued to remove the trustee for mismanagement and for improper payments to the trustee's attorneys. According to the court, when confronted with the issue of privilege, a court must consider whether the attorney represents the interests of the trustee or the beneficiary. The court noted that usually a lawyer retained by a trust represents the trustee, not the beneficiary, and therefore the trustee holds the lawyer-client privilege.

However, the court acknowledged that the beneficiary might hold the privilege if he is the person who ultimately will benefit from the legal work the trustee has instructed the attorney to perform, and in that sense may be the "real client." *Id.* at 937. The court ruled that, to the extent that the lawyer's work concerned the dispute with the beneficiary, the client is the trustee, not the beneficiary. The court remanded with directions to conduct an *in camera* review to determine whether the billing entries would be protected by either the lawyer-client privilege or the work product doctrine.

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