Supreme Court Case No. S054624
2d Civil No. B096643

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

ROGER D. MOELLER,

Petitioner,

vs.

LOS ANGELES COUNTY SUPERIOR COURT,

Respondent.

SANWA BANK,

Real Party in Interest.

REPLY BRIEF ON THE MERITS

MITCHELL, SILBERBERG & KNUPP
Hayward J. Kaiser (66365)
Allan B. Cutrow (50353)
Richard B. Sheldon (150092)
11377 West Olympic Boulevard
Los Angeles, California 90064
(310) 312-2000

OFFICE OF GENERAL COUNSEL
SANWA BANK CALIFORNIA
Stephen H. Weiss, General Counsel (60172)
Jill Switzer, Senior Counsel (72878)
Phyllis A. Siegel, Senior Counsel (90383)
601 South Figueroa Street, W4-2
Los Angeles, California 90017-5704
(213) 896-7900

GREINES, MARTIN, STEIN & RICHLAND
Kent L. Richland (51413)
Carolyn Oill (130721)
9601 Wilshire Boulevard, Suite 544
Beverly Hills, California 90210-5215
310/859-7811

Attorneys for Real Party in Interest
SANWA BANK CALIFORNIA

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Other Authorities

INTRODUCTION

Over the last 30 years — since the enactment of the Evidence Code in California — every careful judicial analysis of evidentiary privileges has begun with consideration of the pertinent provisions of the Evidence Code. It is a telling indication of the weaknesses in Moeller's position in this case that not only does he *not* begin with the Evidence Code, but in fact he relegates his discussion of the statutes essentially to a perimeter point — almost an afterthought — and in that discussion attempts to circumvent the statutes altogether.

This reply explains why Moeller's approach does not work. In essence, Moeller relies on policy arguments. He contends that, as both successor trustee and a beneficiary of the trust, he is entitled to discover information Sanwa claims is privileged solely because the information would be valuable to him in each of his roles. But the Legislature presumably took into account *all* the policy considerations, both for and against the privilege, when it enacted the privilege provisions of the Evidence Code. Moreover, as we explain, application of the rules suggested by Moeller would inevitably result in a chilling of communications between the trustee/client and its attorney, with a resulting dilution in the effectiveness of the legal advice provided. Indeed, the experience of respected trust counsel in other jurisdictions that employ Moeller's suggested rules fully supports these conclusions.

First, however, this reply will address Moeller's peripheral, almost half-hearted attempts to demonstrate that the Evidence Code does not clearly provide for or protect the attorney-client privilege of a trustee, regardless of the trustee's status or the subject matter of the communication.

LEGAL DISCUSSION

I.

THE ATTORNEY-CLIENT PRIVILEGE IS HELD BY SANWA AND PROTECTS FROM COMPELLED DISCLOSURE ITS

CONFIDENTIAL COMMUNICATIONS WITH COUNSEL CONSULTED BY SANWA IN CONNECTION WITH SANWA'S ADMINISTRATION OF THE MOELLER TRUST.

As Sanwa explained in its opening brief on the merits, the attorney-client privilege is a creature of statute: No privilege exists unless it is provided for by statute, and no exception to a statutory privilege exists unless it, too, appears in a statute. (§ 911; People v. Gionis (1995) 9 Cal.4th 1196, 1206.)[1/] As Sanwa also previously explained, under the plain language of the Evidence Code, Sanwa enjoys the protection of the attorney-client privilege as to any and all confidential communications with counsel it consulted for legal services or advice while it was acting as trustee of the Moeller trust.

Moeller attacks Sanwa's Evidence Code analysis on three grounds. First, he claims the English common law, not the Evidence Code, governs the privilege as it applies to trustees. Second, he contends the Evidence Code does not apply to trust administrative records. Third, he asserts he is the holder of the privilege by virtue of the fact that Sanwa's privilege *passed* to him when he succeeded Sanwa as trustee.

As we will now explain, none of these contentions has any merit.

. English Common Law Does Not Supplant The Evidence Code.

Relying on the general rule that "[w]here the code is silent, the common law governs" (Rojo v. Kliger (1990) 52 Cal.3d 65, 74), Moeller argues that the English common law, which requires a trustee to disclose to the beneficiaries of the trust legal opinions he receives regarding administration of the trust, is not inconsistent with California's Evidence Code and, therefore, was not supplanted

---

1/ All statutory references are to the Evidence Code unless otherwise noted.

by the code. The chief flaw in this argument lies in the fact that the general rule has no application where, as here, "it appears that the Legislature intended to cover the entire subject or, in other words, to `occupy the field.'" (I. E. Associates v. Safeco Title Ins. Co. (1985) 39 Cal.3d 281, 285.) When an intent to "occupy the field" appears, the statutory scheme *replaces* the common law. (Drennan v. Security Pac. Nat. Bank (1981) 28 Cal.3d 764, 779 ["The common law, which petitioner urges us to apply, is superseded when the Legislature acts"].)

The Legislature's intent to "occupy the field" of evidentiary privileges could not be more clearly spelled out than in section 911, which provides that no privilege, and no exception to any privilege, exists except as set forth in the statutes. (People v. Gionis, supra, 9 Cal.4th at p. 1206.) Thus, when the Evidence Code was enacted in 1965, the English common law, insofar as it might apply to evidentiary privileges, lost any application in California.

Moreover, the statutes are not "silent" as to application of the privilege in this context. It is true the statutes do not specifically refer to trustees, but that does not mean the statutes are "silent." (See Geldermann, Inc. v. Bruner (1992) 10 Cal.App.4th 640, 643 [where statute states only listed costs are recoverable, it is not "silent" as to unlisted costs].) Section 954 provides that *any* person, whether an individual or legal entity, who consults an attorney for legal services or advice enjoys the privilege of keeping confidential communications between himself and his attorney confidential, and there is no exception based on the status of the person seeking advice. (See §§ 950-962.) Since only statutory exceptions to the privilege are effective, the absence of an exception for trustees or fiduciaries necessarily implies that the privilege applies to them. Application of the common law exception for trustee's communications with counsel would, in fact, create an exception that does not appear in the statutes — a result prohibited by the Legislature. (Dickerson v. Superior Court (1982) 135 Cal.App.3d 93, 99 ["the area of privilege `is one of the few instances where the Evidence Code *precludes* the courts from elaborating upon the statutory scheme,'" emphasis added].)

Moeller's assertion that a contrary rule, consistent with the English common law, has been recognized in other jurisdictions (Petitioner's [Moeller's]

Answer Brief on the Merits ["ANS"] 17) is not persuasive. Other jurisdictions are not governed by California's Evidence Code. (See Portillo v. G. T. Price Products, Inc. (1982) 131 Cal.App.3d 285, 288 ["The out-of-state cases are not persuasive because those jurisdictions do not have the particular type of statute as we have in California"]; cf. Holm v. Superior Court (1986) 187 Cal.App.3d 1241, 1248; Geldermann, Inc. v. Bruner, supra, 10 Cal.App.4th at p. 643.)

Similarly, the asserted desirability of a rule different from that prescribed in the statutes does not permit creation of a judicial exception. It appears that Moeller, in his role as both successor trustee and beneficiary, would prefer a rule that would require a former trustee to disclose to him its confidential communications with counsel concerning matters of trust administration. But regardless of how desirable a beneficiary or successor trustee might find such a rule, it is for the Legislature, not the courts, to make that determination. The Legislature has presumably balanced the various policies in favor of and against the common law rule and has determined that the policies favoring the statutory rule (which we discuss later in this brief) should prevail. As currently formulated, the Evidence Code precludes the adoption by this or any other California court of a rule that would abolish a trustee's right to seek confidential legal advice and its concomitant right to the protection of the attorney-client privilege. (Dickerson v. Superior Court, supra, 135 Cal.App.3d at pp. 99-100.)

As explained in the opening brief on the merits, Shannon v. Superior Court (1990) 217 Cal.App.3d 986, which holds that a court-appointed receiver enjoys the protection of the attorney-client privilege, notwithstanding his or her fiduciary duties, fully supports our position. Moeller attempts to distinguish Shannon on the ground that there is a significant difference between the duties of a receiver and the duties of a trustee, so that the same rules should not apply to both. In particular, he contends a receiver is a neutral administrator of the property but, by contrast, a trustee acts for the beneficiaries. (ANS 13-14.) Actually, the main difference between a receiver and a trustee is that the receiver takes ultimate direction from the court while the trustee takes ultimate direction from the settlor through the trust instrument. But both the receiver and the trustee are neutral administrators of the property entrusted to them. And while both are

expected to act for the benefit of named beneficiaries, neither takes direction from the beneficiaries or acts solely according to the beneficiaries' desires. In short, there is no factual or legal basis for distinguishing between a receiver and a trustee for purposes of applying the attorney-client privilege, and no practical basis for Moeller's attempt to distinguish Shannon.

. Trust Administrative Records Are Not Exempt From The Attorney-Client Privilege.

Moeller asserts that trust administrative records are not subject to the attorney-client privilege because such records are not specifically mentioned in the Evidence Code. (ANS 24.) This is essentially the same argument Moeller makes with respect to the purported common law exception for trustees discussed above, only now focusing on the nature of the privileged material rather than on the status of the holder of the privilege. For the same reasons, this argument also fails.

The Evidence Code does not contain any exception based on the type or form or location of the privileged communication. The absence of an exception for trust administration records thus supports Sanwa's position and not Moeller's, since, as explained above, the attorney-client privilege is not subject to non-statutory exceptions.

. Moeller Is Not The Holder of the Privilege.

Admitting that Sanwa possessed an attorney-client privilege while it was trustee of the Moeller trust, Moeller contends Sanwa's privilege “passed” to him (ANS 9), or that Sanwa “must deliver its attorney-client privilege” to him (ANS 14), because he succeeded Sanwa as trustee of the Moeller trust. Relying on section 953, subdivision (d), Moeller contends that as successor trustee, he has become the “holder” of Sanwa's privilege.

In making this argument, Moeller ignores the actual language of subdivision (d) in favor of what he characterizes as the “overriding principle” of

that section — namely, that "the attorney-client privilege must pass to the person who assumes legal responsibility for the predecessor-in-interest's property rights and liabilities." (ANS 9.) However, nothing in the statute supports this conclusion. By its plain language, subdivision (d) applies only where the client is dead, legally unable to assert the privilege (as where he has a conservator or guardian), or, in the case of a client that is not a natural person, where the client *"is no longer in existence."* (§ 953, subd. (d), emphasis added.) Sanwa, of course, still exists as an entity and, therefore, remains the holder of its own privilege.

Moeller appears to confuse the "holder of the privilege" with the agent who exercises control over the privilege when the client is not a natural person, e.g., where the client is a corporation. Indeed, that is the crucial distinction between this case and Commodity Futures Trading Com'n v. Weintraub (1985) 471 U.S. 343, 348 [85 L.Ed.2d 372, 105 S.Ct. 1986] on which Moeller so heavily relies. In Commodity Futures, the Supreme Court explained that "[t]he administration of the attorney-client privilege in the case of corporations . . . presents special problems." (Ibid.) The Court went on to note that because the corporation cannot act except through its agents, the corporation's attorney-client privilege must be exercised and controlled by a person acting on its behalf:

> "As an inanimate entity, a corporation must act through agents. A corporation cannot speak directly to its lawyers. Similarly, it cannot directly waive the privilege when disclosure is in its best interest. Each of these actions must necessarily be undertaken by individuals empowered to act on behalf of the corporation." (Ibid.)

The Court further stated that "the power to waive the corporate attorney-client privilege rests with the corporation's management and is normally exercised by its officers and directors." (Id. at p. 348.) The fact that the officers and directors may change from time to time does not alter the analysis because the *corporation* at all times remains the client and the holder of the privilege. It is only the identity of the person or persons who control the privilege on the corporation's behalf that changes.

The question before the Court in Commodity Futures involved who should control the privilege on the corporation's behalf when the corporation is in bankruptcy. The answer, the Court held, was the trustee in bankruptcy, essentially because he, "exercis[ing] functions analogous to those exercised by management outside of bankruptcy" (id. at p. 354), became the agent for the corporation.[2/]

Commodity Futures has no application to this case because, here, it is Sanwa acting in its capacity as trustee that is the client and holder of the privilege, and there is no issue of any agent with authority to exercise the privilege on behalf of Sanwa. The Legislature might have crafted a different rule if the trust were the client and the trustee's only authority was to exercise the privilege on behalf of the trust. But this concept makes no sense, since as we have explained in our opening brief on the merits, a trust is not a legal entity, it is a relationship. (Brief on the Merits of Real Party in Interest Sanwa Bank, p. 17; see also Amicus Curiae Brief of Halstead, Baker & Olson and Irwin D. Goldring, pp. 7-8.) It is the individual or entity acting as *trustee* that is the client; it is the individual or entity acting as *trustee* that is the holder of the privilege. Consequently, there is no analogy here to the Commodity Futures case. Under section 953, subdivision (d), as long as the client continues to exist, it remains the holder of its privilege.

Here, Sanwa was the client, and also the holder of its privilege, with respect to all confidential communications with counsel regarding the trust. As long as Sanwa continues to exist, its privilege neither "passes" to, nor requires delivery to, a successor trustee or any other entity or individual.

II.

STRONG PRINCIPLES OF PUBLIC POLICY SUPPORT THE STATUTORY PROVISION FOR THE ATTORNEY-CLIENT PRIVILEGE THAT PROTECTS ALL OF A TRUSTEE'S

2/ The Court rejected the notion that the same rule would apply to an individual in bankruptcy. Unlike a corporation, an individual acts for himself; "there is no `management' that controls a solvent individual's attorney-client privilege." (Id. at p. 356.)

CONFIDENTIAL COMMUNICATIONS WITH ITS ATTORNEYS.

As noted above, Moeller's strategy is to attempt to avoid the clear provisions of the Evidence Code and instead to argue policy. Focusing on potential problems that a successor trustee and a beneficiary, respectively, might face when the former trustee asserts its attorney-client privilege as to various specified communications with counsel, Moeller concludes that a successor trustee's or beneficiary's need for the information is greater than the trustee's need to keep it confidential. Of course, these are not new arguments; they have existed for over a century, as Moeller — relying on old English cases — is quick to point out. As noted above, it must be assumed that the Legislature was aware of these concerns and considered them in enacting the Evidence Code, weighing any potential problems against competing policies that favor the privilege. The point is that the Legislature then chose to make confidential communications between attorney and client *absolutely exempt from discovery*, with exceptions expressly noted and not relevant here. Because this weighing process must be left to the Legislature, the courts may not substitute their own (or any party's) notion of a better balance. (See Drennan v. Security Pac. Nat. Bank, supra, 28 Cal.3d at p. 779 ["we would not be free to substitute our own views for those of the Legislature regarding the desirability of the rule"]; In re Kevin F. (1989) 213 Cal.App.3d 178, 185.) Nevertheless, because these policy arguments are at the crux of Moeller's position, we will address them here.

Moeller's articulated concern, both from his position as successor trustee and as a beneficiary of the trust, is that he will not have access to information he needs for general trust administration, as well as information that might help him hold Sanwa liable for breach of fiduciary duties owed to the beneficiaries. However, Moeller's mere assertion that he "must have" the information belies the fact that the information may be available through means other than access to Sanwa's confidential communications with its counsel. For example, Moeller neglects to mention that in response to his informal request for documents, Sanwa turned over more than 400 documents regarding trust administration (Exhibit E to

Exhibit 4 to Petition for Writ of Mandate ["PWM"], p. 3; Exhibit 7 to PWM, pp. 3-5) and that Moeller's review of those documents allegedly enabled him to "pinpoint specific decisions that were imprudent and to lay the groundwork for allegations of dereliction of fiduciary duties" (Exhibit E to Exhibit 4 to PWM, p. 3).

Moreover, Moeller has not explained why he should be permitted to exploit communications protected by the attorney-client privilege when other litigants may not. Surely any party can claim it would benefit from learning his opponent's confidential conversations with counsel. But our laws protect those conversations, and, therefore, the information must be gained (if at all) in some other fashion. Even criminal prosecutors, who serve and protect society as a whole, are not permitted to invade the accused's attorney-client privilege — no matter how useful such information might be — in an effort to keep a dangerous criminal off the streets. If the privilege remains inviolate even under circumstances where the societal "need" for disclosure is so demonstrably strong as in the criminal setting, it is difficult to take seriously a claim of exception based solely upon a beneficiary's or successor trustee's professed "need" of confidential communications.

But Moeller argues that the privilege should apply to trustees in selective fashion. He asserts that if the trustee consults an attorney regarding trust administration, there should be no protection, but if it consults an attorney regarding its own protection against claims by the beneficiaries, the privilege should apply. However, even if this dichotomy found some support in the statutes — and Moeller does not even attempt to make such a showing — upon examination, it becomes clear that the suggested rule presents problems fundamentally incompatible with the purposes of the attorney-client privilege.

First, as explained in Sanwa's opening brief on the merits, the line between the two kinds of communication presents extraordinarily difficult practical problems. A confidential communication involving the trustee's protection may and often does occur during and as an integral part of a consultation regarding trust administration. (Reid, et al., *Privilege and Confidentiality Issues When A Lawyer Represents A Fiduciary* (1996) 30 Real Prop., Prob. & Trust J. 541, 590.)

Who defines which attorney-client communications are for trust administration and which are for the trustee's self-protection? What criteria do they use and when should the determination be made — before or after the communication occurs?

But even more important, a system that protects only *some* of a trustee's communications with its counsel effectively chills *all* such communications, even those devoted solely to issues of trust administration. For when an attorney consulted on an issue of trust administration asks the trustee/client to provide a full history of the legal problem, what will go through the trustee's mind? A prudent trustee who knows that the law permits discovery of communications concerning trust administration will necessarily be cautious. The careful trustee will not disclose any actions it has taken that might later become fodder for a claim of breach of duty; indeed, the attorney may be obligated to inform the trustee not to disclose any such information. And, of course, any sophisticated trustee will err on the side of caution, censoring itself from disclosing any conduct that might somehow be construed as improper by a clever lawyer hired later by the beneficiaries. The effect will necessarily be less than full disclosure to the trustee's attorney, resulting in a lack of solid legal advice and effective representation — a result precisely at odds with the policies that underlie the attorney-client privilege.

That Moeller's suggested rule would have the above effect is not just a matter of speculation. Moeller's own authority establishes that where such a rule is the law, the rule interferes with attorney-client communications precisely as set forth above. The authors of the ACTEC Notes article on which Moeller relies — seasoned New York practitioners in the field of trusts — candidly advise attorneys and their fiduciary clients to adopt a "prophylactic practice" of communicating "in the expectation that all of their communications, oral and written, will be discoverable by the beneficiaries" — a practice the authors admit "can be expected to be cumbersome, clumsy, tedious and trying at times" as both attorney and client censor their communications. (Gibbs and Hanson, *The*

Fiduciary Exception to a Trustee's Attorney/Client Privilege (1995) 21 ACTEC Notes 236, 240, 241.)[3/]

Indeed, as Gibbs and Hanson explain, in the absence of the privilege, a trustee's ambiguous statement to his attorney may be misunderstood by a beneficiary and may be used against the trustee in a subsequent lawsuit, even if in actuality there was no breach:

> "Among the most frequently recurring phenomena in our thirty years of litigating trust and estate controversies are the lack of precision and the limited foresight in communications between fiduciaries and their counsel. *Undisciplined communications have lead to misunderstandings that in turn have evolved into claims against the trustee where there was no actual breach of duty*." (Id. at p. 241, emphasis added.)

These are precisely the concerns that motivated adoption of the attorney-client privilege in its present form in the Evidence Code. Communication between an attorney and his client — regardless of what duties the client might owe to any third party — *must* be open and uncensored if the resulting legal advice is to be effective. (Roberts v. City of Palmdale (1993) 5 Cal.4th 363, 380.) And, of course, effective legal advice inures to the benefit of everyone concerned with trust administration — both trustees *and* beneficiaries.[4/]

3/ ACTEC Notes is a publication of the American College of Trust and Estate Counsel. For the Court's convenience, we have provided a copy of the article under separate cover. (See Appendix of Additional Authorities Cited in Answer Brief on the Merits.)

4/ To support his discussion of potential problems that may arise for successor trustees and beneficiaries if the former trustee is afforded the protection of the attorney-client privilege, Moeller also relies on a document that was apparently distributed as part of a continuing legal education seminar. (See ANS 11 [citing "R. Cleary in *Trustees, Executors, and the Future of the Attorney-Client Privilege* [(1996) Los Angeles County Bar Association]"].) The document has a stated purpose of summarizing existing law, criticizing the opinions in this case and in Wells Fargo Bank, N.A. v. Superior Court (1996) 49 Cal.App.4th 1320 (review granted Jan. 15, 1997 [S057324]), and provoking comment and debate on how the

(continued...)

CONCLUSION

The analysis of the issues before the Court in this case should begin and end with a discussion of the Evidence Code. The law contained in that code is the result of the Legislature's weighing of competing policies, and a clear statement of its determination that the policy of promoting open and frank communication with counsel outweighs the risk that relevant and even important information will be concealed. For this reason, Moeller's attempt to circumvent the statutes by resort to the common law and to the policies previously considered by the Legislature is not persuasive. The plain language of the statutes, as well as the policies underlying them, fully support — and, indeed, compel — the conclusion that trustees do and must enjoy the protection of the attorney-client privilege with respect to confidential communications with counsel, without reserve and without exception.

Dated: January 17, 1997

Respectfully submitted,

MITCHELL, SILBERBERG & KNUPP
Hayward J. Kaiser
Allan B. Cutrow
Richard B. Sheldon

OFFICE OF GENERAL COUNSEL
SANWA BANK CALIFORNIA
Stephen H. Weiss
Jill Switzer
Phyllis A. Siegel

GREINES, MARTIN, STEIN & RICHLAND

4/(...continued)
issues raised in those opinions should be resolved. In light of these goals, the document is often internally inconsistent, and can be read as supporting Sanwa's position as much as Moeller's.

We question the propriety of Moeller's reliance on this unpublished document. However, for the court's edification and convenience, we are providing a copy of the document under separate cover. (See Appendix of Additional Authorities Cited in Answer Brief on the Merits, filed concurrently with this reply brief.)

Kent L. Richland
Carolyn Oill

Attorneys for Real Party in Interest Sanwa Bank