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Testimony from Beyond the Grave — The Gravamen of the Attorney-Client Privilege in Will and Trust Contests

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Many assume or believe that the attorney-client privilege (''Privilege''), once deemed applicable, is without exception and remains inviolate. Often clients and attorneys operate under this common misconception. In the realm of Will and Trust contests the continuing (and post-death un-waivable) nature of the Privilege isn't necessarily true. Perhaps such misunderstanding of the Privilege emanates from the ingrained concept that attorneys have an ethical duty to keep the confidences of their clients.[1] As a result, attorneys are generally precluded from knowingly revealing a confidence or secret of a client unless the client consents after full disclosure. But does this ethical duty extend beyond the grave? In many states the answer is an equivocal ''maybe''! In reality, the answer to this question may be fact dependent or not otherwise well defined. Often the answer will be governed by, or otherwise emanate from, common law as opposed to being premised upon statute. Complicating the analysis can be the question of which state's law will apply to the Privilege and whether it has been waived (in actuality or by implication). [2]

THE ORIGINS AND EVOLUTION OF THE PRIVILEGE

The Privilege is the oldest of *testimonial* privileges protecting confidential communications; it dates back to the reign of Queen Elizabeth I of England.[3] Given its historical significance and age, one might assume that its application in Will and Trust contests would be well defined. However, it appears in many jurisdictions (and under a myriad of circumstances) that the answer to whether and to what extent an attorney can disclose the contents of his file or otherwise testify may require careful analysis.

Initially, the purpose behind the Privilege was to prevent an attorney from being required to take an oath and then testify *against* his client.[4] Originally the Privilege belonged to the attorney;[5] however, today it belongs to the client, with the attorney acting as the ''guardian'' of the Privilege.[6]

In *Cohen v. Jenkentown Cab Co.*,[7] Pennsylvania's appellate court discussed the transition of the Privi-

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[1] *See* Michigan Rules of Professional Conduct (MRPC) 1.6: Confidentiality of Information. *See also* ABA Model Rules of Professional Conduct Rule 1.6: Confidentiality of Information.

[2] It may also be important to note that all countries do not recognize the existence of the Privilege nor do all adopt the concept of comity. *See* Epstein, *The Attorney-Client Privilege and the Work Product Doctrine, 5th Edition, Volume 1*, Section of Litigation, American Bar Association © 2007 at 761 (hereinafter ''Epstein'').

[3] Epstein at 4. Queen Elizabeth I began her rule in 1558 and died in 1603.

[4] Epstein at 4.

[5] *Id.*

[6] Epstein at. 5.

[7] *Cohen v. Jenkentown Cab Co.*, 238 Pa. Super. Ct. 456, 357

lege from its roots of origin to a modern day evidentiary concept. In *Cohen*, the court noted that:

> If one were legislating for a new commonwealth, without history or customs, it might be hard to maintain that a privilege for lawyer-client communications would facilitate more than it would obstruct the administration of justice. But we are not writing on a blank slate.
>
> Indeed, the privileged nature of communications between an attorney and his client is the oldest testimonial privilege known to law. Originally, the reason for the privilege, which extended to all men of honor, who received information under a pledge of secrecy, was that disclosure of the information would constitute a breach of oath and honor. By the end of the eighteenth century, however, the courts had determined that an oath of secrecy and a badge of honor could not stand in the way of the judicial ''search for truth . . . nor was there any moral delinquency or public odium in breaking one's pledge under force of law.''
>
> Despite the fall of the general privilege for conversations under oaths of secrecy, the attorney-client privilege survived because a new justification for its existence was found:
>
> > The object and meaning of the rule is this: That as, by reason of the complexity and difficulty of our law, litigation can only be properly conducted by professional men, it is absolutely necessary that a man, in order to prosecute his rights or to defend himself from an improper claim, should have recourse to the assistance of professional lawyers, and it being so absolutely necessary, it is equally necessary, to use a vulgar phrase, that he should be able to make a clean breast of it to the gentleman whom he consults with a view to the prosecution of his claim, or the substantiating his defence (*sic*) against the claim of others; that he should be able to place unrestricted and unbounded confidence in the professional agent, and that the communications he so makes to him should be kept secret, unless with his consent (for it is his privilege, and not the privilege of the confidential agent), that he should be enabled properly to conduct his litigation. That is the meaning of the rule.
>
> Today, the privilege is firmly entrenched in the law; and, the lawyer's Code of Professional Responsibility, Canon 4, requires that a lawyer preserve the confidences and secrets of a client. The problem we must resolve is whether this rule is dogma; that is to say, whether the privilege is efficacious under all circumstances so that a court may not determine that the interests of justice are so compelling, and the interests of the client in preserving the confidence so insignificant, that the cloak of secrecy may be removed and the confidence disclosed. In Pennsylvania, the law leaves room for just such a judicial inquiry.[8]

CODIFICATION OF THE PRIVILEGE

Currently, in order to gain an understanding of the ethical responsibilities relating to the Privilege, one would generally start the analysis with a review of the applicable state's Rules of Professional Conduct. These rules basically identify that the Privilege is an edifice relating to communications intended to be confidential, between a ''client''[9] and an attorney, with regard to the rendition of legal advice.[10]

Understanding the Privilege's *evidentiary* implications may be far more complex. In analyzing the po-

A.2d 689 (Pa. Super. Ct. 1976).

[8] *Cohen*, 238 Pa. Super. Ct. at 459–461 (internal citations omitted).

[9] The use of quotation marks, is to place emphasis on the importance of the term ''client.'' Often cases regarding the application of the privilege involve an analysis if whether the communication is with the person who is the ''client'' as well as whether the communication related to the rendition of legal advice.

[10] The scope of an attorney's moral or professional obligation to maintain the ''confidences'' of a client may be broader than those provided under the evidentiary confines of the attorney-client privilege. *See* Craig L. Unrath and Melissa N. Schoenbein, *Chapter 7, Privileges, Illinois Civil Trial Evidence*, IICLE©2015, at 7–20, which in pertinent part reflects:

> 3. [7.9] Confidentiality. In addition to the attorney-client privilege, attorneys are also bound under rules of confidentiality, which encompass the attorney-client evidentiary privilege as well as the attorney's fiduciary duty to the client. *Profit Management Development, Inc. v. Jacobson, Brandvik & Anderson, Ltd.*, 309 Ill.App.3d 289, 721 N.E.2d 826, 835, 242 Ill. Dec. 547 (2d Dist. 1999). A lawyer's ethical obligation to guard the confidences and secrets of his or her client is broader than the attorney-client privilege. *In re January 1976 Grand Jury*, 534 F.2d 719, 728 (7th Cir. 1976). Unlike the evidentiary privilege, the ethical precept exists ''without regard to the nature or source of information or the fact that others share the knowledge.'' 534 F.2d at 728 n.8, quoting ABA Model Code of Professional Responsibility, EC 4-4 (1974).

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tential evidentiary implications of the Privilege, one may start with a review of Rule of Evidence 501, but such a review is generally not enough.

> Uniform Rule of Evidence 501 clearly espouses an exception to the privilege as to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by transaction inter vivos.[11]

In addition to the Uniform Rule of Evidence, Rule 502(d) of the Uniform Laws Annotated (2000) provides, in pertinent part, that when there is a dispute between parties claiming a right to the former property of a Testator:

> [t]here is no privilege under this rule: . . . [a]s to a communication relevant to an issue between the parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by transaction inter vivos.[12]

While there are a number of states that have adopted something analogous to Uniform Rule of Evidence 501 or Rule 502(d) of the Uniform Laws Annotated,[13] these ''uniform'' rules have not been universally adopted, leaving many litigants (and estate planning attorneys) largely reliant upon the complexities of the common law. By way of example, and without limitation, Michigan's Rule of Evidence 501 merely provides that: the ''Privilege is governed by the common law, except as modified by statute or court rule.''[14] Federal Rule of Evidence 501 essentially refers a litigant back to the pertinent state's evidentiary rules for issues generally relating to matters (such as Will and Trust contest proceedings) which would otherwise fall within the purview of the state court system.[15] As a consequence, an understanding of the common law, in the applicable jurisdiction (and in the state where the confidential communication occurred), may be extremely important.

WHY IS IT IMPORTANT TO DETERMINE IF A COMMUNICATION IS PRIVILEGED IN THE CONTEXT OF WILL AND TRUST CONTESTS?

Most states recognize the need for liberal discovery, especially when litigation about the validity of a testamentary instrument emanates from a claim of undue influence.[16] In Michigan, the scope of discovery is generally governed by MCR 2.302 (B) (1), which provides that:

> Parties may obtain discovery regarding any matter, **not privileged**, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of another party, including the existence, description, nature, custody, condition, and location of books, documents, or other tangible things, or electronically stored information and the identity and location of persons having knowledge of a discoverable matter. It is not ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.[17]

As a consequence, ''one should view the attorney-client privilege as itself an exception to the general proposition that permits liberal discovery of relevant evidence.''[18]

The testimony and file contents of the estate planning attorney are of key significance to many Will and

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In Illinois, the Privilege appears to have been extended to persons outside the auspices of the lawyer's offices, when they are integrally involved in the estate planning efforts (as agents for the client) including to accountants and other financial advisors. *See Adler v. Greenfield*, 990 N.E.2d 1219 (Ill. App. 1st Dist. 2013), and *Brunton v. Kruger*, 8 N.E.3d 536 (Ill. App. 4th Dist. 2014).

[11] Uniform Rule of Evidence 501(d)(2).

[12] *Morgan v. Pendelton*, 27 Conn. L. Rptr. 39 (Conn. Super. Ct. Apr. 13, 2000).

[13] By way of example, and without limitation, Alaska, Arkansas, Delaware, Maine, Nebraska, New Hampshire, North Dakota, Oklahoma, Oregon, Vermont, and Wisconsin, per *Morgan v. Pendelton*, *id.*

[14] Michigan Rule of Evidence (MRE) 501. While §501 of each state's evidentiary rules may vary, it appears many have not adopted the exception found in Uniform Rule of Evidence 501(d)(2).

[15] Fed. R. Evid. (FRE) 501.

[16] In general, all evidence, both direct and circumstantial, bearing upon the question of undue influence should be admitted. All evidence which tends to prove or disprove that an instrument was procured by undue influence should be admitted. *In re Loree's Estate*, 158 Mich. 372, 379 (Mich. 1909). Evidence of undue influence after the date on which the testator made his or her Will is relevant and admissible as tending to show a continuance of undue influence. *Walts v. Walts*, 127 Mich. 607, 610 (Mich. 1901); *Leffingwell v. Bettinghouse*, 151 Mich. 513, 518 (Mich. 1908). *See In re Vhay's Estate*, 225 Mich. 107, 108 (Mich. 1923). The remoteness in time of the evidence only impacts the weight such evidence should be given, not whether or not such evidence is admissible. *Balk's Estate*, 289 Mich. 703, 706 (Mich. 1939); *see also McPeak v. McPeak*, 233 Mich. App. 483, 496 (Mich. App. 1999), *appeal denied*, 461 Mich. 926 (Mich. 1999). There should be no arbitrary time limit placed upon what might prove relevant, and all material evidence should be produced. *In re Loree's Estate*, 158 Mich. at 376–377.

[17] Michigan Rules of Court (MCR) 2.302(B)(1) (emphasis added). This is not dissimilar from Fed. R. Civ. Pro. 26.

[18] Epstein at 11–12.

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Trust Contests. Therefore, it may be of great importance whether the attorney will be subjected to discovery and/or compelled to testify. The implications of the Privilege and the resulting ''competence'' of the attorney to testify may ultimately depend upon the answers to the following questions:

(i) was the communication privileged when made;

(ii) do any exceptions to the Privilege exist; and

(iii) if privileged and no exception exists, has the Privilege been explicitly or implicitly waived?

WHAT IS A PRIVILEGED COMMUNICATION?

Because the assertion of the Privilege tends to be an impediment to the search for truth, the Privilege is generally narrowly construed.[19] Many confuse the Privilege with the attorney work-product doctrine.[20] The result of an attempt to discover ''privileged'' information as opposed to information falling within the confines of ''attorney work-product'' can vary greatly.[21] However, a review of the work-product doctrine is beyond the scope of this paper.

To be privileged, at its inception, the communication must be communicated in confidence for the purpose of obtaining legal advice.[22] In the context of estate planning, the Privilege will generally apply to communications between ''a client and her attorney regarding the preparation of a will.''[23] Although not recommended, it's not uncommon (especially in Will or Trust contests cases) for a family member to communicate with the attorney or to otherwise be present during a portion of the time when an aged or infirmed family member consults with the attorney with regard to the creation of dispositive instruments. ''Such a presence will constitute a failure to protect the 'confidence' of the communication and make it discoverable.''[24] While some might consider this a ''waiver'' of the Privilege, the family member's presence (who is not an actual party to the representation) may, in fact, preclude the Privilege from ever applying to that particular communication. Further, since that family member is not the ''client'' in regards to the estate planning advice or services sought, that contact and communication won't itself be covered by the Privilege.

But let's assume that the pertinent communications indeed take place in private, what then? In *Zook v. Pesce*,[25] the Maryland court reviewed the Privilege in the context of testamentary dispositions. In *Zook* the court noted that:

> The attorney-client privilege is ''a rule of evidence that prevents the disclosure of a confidential communication made by a client to his attorney for the purpose of obtaining legal advice.'' ''The privilege is based upon the public policy that 'an individual in a free society should be encouraged to consult with his attorney whose function is to counsel and advise him and he should be free from apprehension of compelled disclosures by his legal advisor.'' It has been recognized as

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[19] *See United States v. Goldberger & Dubin, PC*, 935 F.2d 501, 504 (2d Cir. 1991).

[20] Generally, the ''work-product doctrine'' relates to written or oral materials prepared by or for an attorney in the course of legal representation. It is important to note, that unlike the ''Privilege'' this doctrine may be pierced, in the context of litigation, upon a showing of ''substantial need'' and ''undue hardship.'' *See* Fed. R. Civ. Pro. 26(b)(3) and MCR 2.302(3)(a). Even though both Fed. R. Civ. P. 26(b)(3) and MCR 2.302(3)(a) provide for discovery of ''work-product'' upon such showings, each continues to provide protection for mental impressions, conclusions, opinions of legal theories of an attorney or other representative of a party ''concerning the litigation.''

[21] It may also be important to note that in many jurisdictions, the ''work-product doctrine'' may be limited to materials prepared ''in anticipation of litigation.'' *See* Fed. R. Civ. P. 26 (b)(3) and MCR 2.302(3)(a). Whether materials which were not prepared ''in anticipation of litigation'' will otherwise be deemed discoverable is beyond the scope of this paper.

[22] *See United States of America v. Osborn*, 561 F.2d 1334 (9th Cir. 1977). In the ever changing world of electronic storage and communication, whether a communication has a reasonable expectation of confidentiality also continues to change. Clients may choose to digitally upload all or a portion of their estate planning documents to websites for safekeeping. As a consequence, with the proliferation of sites intended to assist clients in the storage of important communications and documents, the potential for waiver of the Privilege (if not preclusion of its application) may be enhanced. Therefore, use of such sites as the Michigan's Peace of Mind Registry (or similar sites) may result in a waiver of the Privilege, at least as to the contents of the documents recorded with the Registry. Transmission of documents and email communications to or from a client's work email may result in an absence of a reasonable expectation of confidentiality or privacy, especially if the employer/business has provided notice that such communications may be monitored or otherwise won't enjoy rights of privacy. Some corporate environs provide notice to the user when he logs on to the system informing the user that the company has reserved the right to review their communications. In such an environment it may be unreasonable to assume that the Privilege will attach to communications emanating from or read on that machine or system.

[23] *Brown v. Edwards*, 640 N.E.2d 401, 404 (Ind. App. 1st Dist. 1994), citing *Briggs v. Clinton County Bank & Trust Co.*, 452 N.E.2d 989, 1012 (Ind. App. 2d Dist. 1983).

[24] Epstein, *Supplement*, Section of Litigation, American Bar Association © 2012 at 66. *See also Snedeker v. Snedeker*, 2011 BL 426676 (S.D. Ind. 2011). An exception to this statement may be when the attorney is jointly engaged by a husband and wife for estate planning purposes, at least as it relates to protecting the confidence of both from others, unless such person is claiming under one of them.

[25] *Zook v. Pesce*, 438 Md. 232, 91 A.3d 1114 (Md. 2014).

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''the oldest of the privileges for confidential communications known to the common law.'' Indeed, for over 150 years, this Court has recognized that ''[n]o rule is better established than 'that communications which a client makes to his legal adviser for the purpose of professional advice or aid shall not be disclosed, unless by the consent of the client for whose protection the rule was established.'' This privilege is reflected in the Maryland Code, as well.

The privilege survives even after the client's death. Invoking the purpose of fostering free communication between attorney and client, the Supreme Court has explained:

> Knowing that communications will remain confidential even after death encourages the client to communicate fully and frankly with counsel. While the fear of disclosure, and the consequent withholding of information from counsel, may be reduced if disclosure is limited to posthumous disclosure in a criminal context, it seems unreasonable to assume that it vanishes altogether. Clients may be concerned about reputation, civil liability, or possible harm to friends or family. Posthumous disclosure of such communications may be as feared as disclosure during the client's lifetime.

Thus, even though the client may be deceased, the communication remains privileged.

Nevertheless, the privilege is not absolute. Only those communications ''pertaining to legal assistance'' and ''made with the intention of confidentiality'' are covered by the privilege. Additionally, this Court has explained that the privilege does not 'extend to communications made for the purpose of getting advice for the commission of a fraud' or a crime.''[26]

Therefore, if the attorney isn't *consulted* for legal advice, but rather merely acts as a scrivener, the communications between the client and the attorney may not be considered to be subject to the Privilege.[27]

Now let's assume that the communication takes place in private and with the intent of obtaining legal advice, is that the end of the inquiry? The short answer is ''no.'' It is equally important to understand that not everything contained within a communication is privileged. Examples of items which might be communicated between a client and the attorney for purposes of obtaining advice, that *might* not fall under the umbrella of the Privilege include (but aren't limited to):

1. The name of the client;[28]
2. Facts contained in a confidential communication;[29]
3. Facts observed by the attorney and not directly conveyed by the client;[30]
4. The client's appearance and handwriting;[31]
5. The subject matter of the communication;[32]
6. Attorney notes;[33]
7. Drafts of documents (even if prepared by the attorney) intended for (eventual) public disclosure;[34]
8. The existence and contents of a written instrument executed by the client which has been actually delivered to a third party;[35]

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[26] *Zook v. Pesce*, 438 Md. at 241–242 (Md. 2014) (internal citations omitted).

[27] *See Novak v. Reeson*, 193 N.W. 348 (Neb. 1923). *See also Lamb v. Lamb*, 124 Ill. App. 3d 68, 74, 64 N.E.2d 873 (Ill. App. 4th Dist. 1984).

[28] *Shatkin Investment Corp. v. Connelly*, 128 Ill.App.3d 518, 470 N.E.2d 1230, 1235, 83 Ill. Dec. 810 (2d Dist. 1984), quoting Annot., 16 A.L.R.3d 1047, 1050 (1967). An exception arises when divulging the identity of an attorney's client would result in substantial prejudice to the client. *People v. Williams*, 97 Ill.2d 252, 454 N.E.2d 220, 241, 73 Ill. Dec. 360 (1983). *Chapter 7, Privileges, Illinois Civil Trial Evidence*, above at 7–17.

[29] *Philadelphia v. Westinghouse Elec. Corp.*, 205 F. Supp. 830, 831 (E.D. Pa. 1962).

[30] Epstein at 68.

[31] *In re Grand Jury Proceedings*, 791 F.2d 663, 665 (8th Cir. 1986).

[32] *J.P. Foley & Co. Inc. v. Vanderbuilt*, 65 F.R.D. 523, 526 (S.D.N.Y. 1974)

[33] But these may be subject to the work-product doctrine. *See* Epstein at 132.

[34] Epstein at 132.

[35] *Schattman v. American Credit Indem. Co.*, 34 A.D. 392, 397–398, 54 N.Y.S. 225 (N.Y. 1898). In this case, the court held that '[a]ny statement or communication by the client to the attorney, or any advice given by the attorney as to the construction, meaning or effect of the instrument, would be incompetent; but a mere statement of the fact that a paper writing was executed and delivered in the presence of the attorney, and the statement of the contents of that instrument was acquired by the attorney by reading, would not involve a communication from the client to his attorney. Thus, the independent fact of the execution of the written instrument, its delivery by one party to the other, or the contents of the instrument, where the knowledge of the contents had been acquired by the attorney in some other way than through a communication from his client, would not be within the prohibition of the statute.'' In *Baxter v. Baxter*, 92 Misc. 567, 156 N.Y. 521, *aff'd*,

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9. Documents transmitted to the attorney which when in the hands of the client wouldn't be subject to the Privilege;[36]

10. Observations and communications made by or to an attorney (and his agents) in their capacity as witnesses;[37]

11. Communications made by a party other than the client to the attorney;[38]

12. Invoices for services rendered;[39] and

13. Communications made in the presence of others.[40]

IMPORTANCE OF ATTORNEY TESTIMONY

The potential import of the scrivener attorney's testimony (and contemporaneous notes) cannot be overstated nor should it be underestimated.[41] In some states, the ''dead-man statute'' may preclude other witnesses from offering competent testimony because they might benefit under the instrument. An analysis of the implications of ''dead man'' statutes is also beyond the scope of this paper. It is, however, important to understand that as a result of such statutes, as well as circumstances attendant to such matters as competency and undue influence, the ability to ''waive'' the Privilege may be of the utmost importance in preserving the Testator's true intent and in the determination of the validity of an instrument.

In cases where the validity of an instrument is challenged for a purported lack of capacity or because it is alleged to be the product of undue influence, the testimony of the scrivener attorney can be of significant importance. The steps the attorney took, communications had with the testator, and the attorney's observations and impressions will generally be important aspects of the proponent's case. Things the attorney may have failed to do may become important aspects of the challenger's case. Under certain circumstances, the testimony of the scrivener attorney may prove to be as important (if not more important) than the testimony of treating professionals and/or other medical experts.[42]

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173 A.D. 998, 159 N.Y.S. 1009 (N.Y. 1915), the court held that since the contents and intent of a deed had been delivered by the client to his wife, even though the deed was never recorded and only a mutilated copy of the deed existed, they weren't privileged once disclosure of the deed and its contents were imparted by the client to his wife. As a result, the attorney was permitted to testify as to the contents of the deed *and* communications associated with its preparation.

[36] Epstein at 342–343. *See also United States of America v. Osborn*, 561 F.2d 1334 (9th Cir. 1977), where the court adopted the analysis of the Supreme Court from the case of *Fisher v. United States*, 425 U.S. 391, 96 S. Ct. 1569, 48 L. Ed.2d 39 (1976), which espoused that pre-existing documents ''transferred by the client to the attorney, are protected by the attorney-client privilege only if such documents (1) could not have been obtained from the client by court process when the documents were still in the client's possession because of some privilege of the client, and (2) had been transferred to the attorney by the client for the purpose of obtaining legal advice.''

[37] *In re Ford Estate*, 206 Mich. App. 705, 708; 522 N.W.2d 729 (Mich. App. 1994).

[38] *See Caro v. Meerbergen*, 2011 Ct. Sup. 8325, 51 Conn. L. Rptr. 650 (Mar. 29, 2011), citing *In re Sean H.*, 24 Conn. App. 135, 142, 143, *cert denied*, 218 Conn. 904 (Conn. 1991).

[39] While some states have held that invoices are, under the right set of circumstances, protected under the Privilege, it appears that many states take a more limited and fact dependent approach to the issue. *See* Mary Gillick, *Attorney-Client Privilege and Invoices*, Trusts & Estates, The WealthManagement.com journal for estate-planning professionals, December 2015, at 40–44. *See also Eizenga v. Unity Christian Sch. of Fulton*, 54 N.E.3d 907, 2016 IL App. (3d) 150519 (Ill. App. 3d May 6, 2016).

[40] *Eicholtz v. Grunerwald*, 331 Mich. 666, 21 N.W.2d 914 (Mich. 1946).

[41] For a broader discussion of such import, see Sandra D. Glazier, Thomas M. Dixon, and Thomas F. Sweeney, *What Every Estate Planner Should Know About Undue Influence: Recognizing It, Insulating/Planning Against It. . . . And Litigating It*, 56 Tax Mgmt. Memo., No. 11, at 185–209 (June 1, 2015), as well as 40 Tax Mgmt. Estates, Gifts and Trusts J., No. 4, at 175–198 (July 9, 2015). *See also* Sharon L. Klein, Sandra D. Glazier, Thomas M. Dixon & Thomas F. Sweeney, *Confronting Undue Influence in Your Practice? Industry Experts Weigh in on How to Take an Increasingly Pervasive Issue*, Trusts & Estates; The Wealth Management.com journal for estate-planning professional, July 2015, at 33–37.

[42] While the use of expert witnesses in undue influence cases can be impactful, it's important to remember that the testimony of the scrivener attorney and witnesses to the execution of pertinent dispositive instruments are also extremely important. Whether the scrivener attorney will be treated as an expert in the field of estate planning or merely a lay fact witness may be subject to debate. One should however remember that MRE 701 permits lay witness opinion testimony when that testimony is rationally based on the perceptions of the witness and is helpful to a clear understanding of the witness' testimony or the determination of a fact in issue. As a consequence, the impressions and opinion of the scrivener attorney and witnesses present at the time of execution, supported by sufficiently detailed factual observations, can prove extremely important. While not every jurisdiction permits testimony on the ultimate issue to be determined by the fact finder, MRE 704 does. As a result, the testimony of the scrivener attorney and witnesses to execution on observations and resulting opinions as to the decedent's capacity at the time of execution and the voluntariness of the decedent's actions in the formulation of the plan will be important to the defense of the instruments. Michigan case law bears this out. In *In re Bednarz Trust*, 2009 Mich. App. LEXIS 1349 (Mich. Ct. App. June 16, 2009), the court recognized the importance of the attorney's testimony regarding his observations and findings at the time the challenged documents were executed. The proponents of the instruments also offered the testimony of a doctor, who explained that some vascular dementia patients experience varying lucidity, comprehension and communication capabilities from day to day and hour to hour. The contestants argued

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When the Privilege is found to be inapplicable (or waived) declarations of the Testator either to support or rebut a presumption of undue influence, leading up to, at the time of and after the creation and execution of the testamentary instrument through the time of death may, in many states, be deemed admissible.[43] But it is important that one not end his analysis with the generalized statements regarding the potential inapplicability of the Privilege, in post-death litigation between persons claiming through the Testator.

What if the attorney is considered a partisan witness? While *Booher v. Brown*[44] had historically been an oft-cited case with regard to ''implied waiver'' of the Privilege, it was later largely overturned.[45] It is, however, noteworthy that when overturned, courts were careful to reflect that one of the reasons cited in *Booher* for preserving the Privilege remained viable and that is when the attorney is called upon to act as a partisan witness to establish collateral claims against the estate.[46]

IMPLIED WAIVER OF THE PRIVILEGE

Common law generally recognizes that confidential communications between a client and his attorney are privileged from inquiry in the absence of a waiver by the client.[47] Clearly, if the client provides an ''expressed'' waiver of the Privilege, disclosure of confidential communications by the attorney may occur.[48]

It is commonly recognized that the Personal Representative or Executor (collectively ''Executor'') essentially stands in the shoes of the decedent and as a consequence may expressly waive the Privilege.[49] In *In re Estate of Colby*,[50] a New York court reflected that ''[t]he other jurisdictions which have considered the issue, however, are unanimous in holding that a Testator's successor in interest may waive the privilege.''[51] The premise for this proposition is

> [s]ince the client could have waived the privilege to protect himself or to promote his interest, it is reasonable to conclude that, after his death, his personal representative stands in his shoes for the same purposes.[52]

In *Mayorga v. Tate*,[53] another New York court further analyzed why an Executor should be permitted to waive the Privilege. In *Mayorga*, the Court concluded that:

> . . . by returning to the basic thesis that it makes no sense to prohibit an executor from waiving the attorney-client privilege of his or her Testator, where such prohibition operates to the detriment of the Testator's estate, and to the benefit of an alleged tortfeasor against whom the estate possesses a cause of action. ''That an executor * * * may exercise authority over all the interests of the estate left by the [Testator], and yet may not incidentally have the right, in the interest of that estate, to waive the [attorney client] privilege * * * would seem too inconsistent to be maintained under any system of law.'' New York should not, in our view, adhere to the proposition condemned by *Wigmore* as ''too inconsistent to be maintained.'' We therefore conclude that, under the terms of CPLR

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that testimony from the decedent's psychiatrist, who opined that the decedent was legally incapacitated, outweighed the attorney's testimony because she was a medical professional who based her opinion upon her observations two weeks before the instruments were executed. However, the Michigan Court of Appeals recognized, ''[t]he opinion of a physician as to mental competency, aside from the question of insanity, is entitled to no greater consideration than that of a layman having equal facilities for observation,'' citing *Bradford v. Vinton*, 59 Mich. 139, 154; 26 NW 401 (Mich. 1886).

[43] *See Saliba v. Saliba*, 202 Ga. 791, 799, 44 S.E.2d 744, 751 (Ga. 1947). Use of the word ''testamentary instrument'' should, however, not be narrowly construed. Recently, in *Eizenga v. Unity Christian School of Fulton*, above the Illinois court held that ''[i]n fact, a closer examination of the exception leads us to the conclusion that it is the rationale behind it that is of paramount importance, rather than the question of whether the situation involves a will contest.'' *Eizenga*, above at ¶25c. In *Eizenga*, the implied waiver concept was deemed to include a myriad of communications between the grantor and his attorney as well as memorandum, notes, records and timesheets maintained by the attorney, where beneficiaries of prior iterations of the trust alleged that the attorney was the perpetrator of undue influence in the modification of beneficiary provisions contained within grantor's revocable inter-vivos trust.

[44] *Booher v. Brown*, 173 Or. 464, 145 P.2d 71 (Or. 1944).

[45] In *Booher*, the attorney was ''partisan'' because he also represented a party who was asserting a breach of contract to make a will claim against the estate.

[46] *See Tanner v. Farmer*, 243 Or. 431, 435, 414 P.2d 340 (Or. 1966). 5 Jones, *Commentaries on Evidence* (2d ed. 1926), at 4108.

[47] *See Stevens v. Thurston,* 112 N.H. 118, 289 A.2d 398, 399 (N.H. 1972).

[48] *See* Epstein at 390. Moreover, the waiver need not even need to be knowingly or voluntarily made. *Id* at 391.

[49] *See Stevens v. Thurston*, 112 N.H. at 118.

[50] *In re Estate of Colby*, 187 Misc. 2d 957, 23 N.Y.S.2d 631, 633 (N.Y. Slip Op. 21174 2001).

[51] Citing 67 A.L.R.2d 1268; *Cain v. Killian,* 156 Neb. 132, 54 N.W.2d 368 (Neb. 1952); Ohio Rev. Code §2317.02[A].

[52] *In re Estate of Colby*, 23 N.Y.S.2d at 634.

[53] *Mayorga v. Tate*, 302 A.D.2d 11, 18–19, 752 N.Y.S. 353, 2002 N.Y. Slip Op. 09415 (2002), relying, in pertinent parts upon 8 *Wigmore, Evidence* §2329 at 639 (McNaugton rev. 1961) and *Spectrum Sys. Intl. Corp. v. Chemical Bank*, 78 N.Y.2d 371, 377, 575 N.Y.S.2d 809, 581 N.E.2d 1055 (N.Y. App. Div. 1991).

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> 4503, just as under the common law, an executor may waive the attorney-client privilege of his or her Testator.[54]

While implied waiver theories (discussed below) may be limited in application (depending upon jurisdiction, facts and circumstances), the importance of the Executor's ability to waive the Privilege may be that it can be extended to additional situations where the Executor believes it to be in the best interest of the estate or helpful in defense of claims made (whether through, under or) against the Testator or by his estate.[55] However, the Executor may not be able to waive the Privilege if waiver will result in dissipation or diminution of the estate.[56] In some states, the latitude given to the Executor with regard to waiver of the Privilege may also be limited if disclosure of the confidential communication would damage the Testator's reputation,[57] or reveal ''scandalous and impertinent matter.''[58]

Where a testamentary instrument is alleged to be the product of undue influence or executed when the Testator lacked the requisite capacity to do so, the Executor may not wish to facilitate discovery because the outcome could be adverse to the Executor's position, authority or personal interests. Under such circumstances, the common law essentially *implies* a waiver of the Privilege, especially when the litigation involves claims by individuals claiming through (as opposed to against) the Testator.[59] In *Steven v. Thurston*,[60] where the claims were considered to be ''through'' the Testator, the court noted:

> If the defendants are successful, they, rather than the plaintiff, will be the representatives of the testator. Here the privilege is being asserted not for the protection of the testator or his estate but for the protection of the claimant to his estate. The authorities uniformly hold that in this situation all reason for assertion of the privilege disappears and that the protection of the testator lies in the admission of all relevant evidence that will aid in the determination of his true will.[61]

Consequently, in cases where the dispute is among parties claiming ''through'' as opposed to ''against'' the Testator, it is *generally* recognized that ''it would be obviously unjust to determine that the privilege should belong to the one claimant rather than to the other.''[62] Hence, under circumstances where neither party to the litigation is a stranger to the estate, and both parties are claiming under the Testator, the Privilege has been found to be inapplicable.[63]

In *Blackburn v. Crawfords*,[64] the U.S. Supreme Court reviewed the importance of the Privilege and why, for policy reasons, it should generally remain ap-

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[54] *Mayorga v. Tate*, 302 A.D.2d at 18–19 (internal citations omitted).

[55] *See Caro v. Meerbergen*, 2011 Ct. Sup. 8325, 51 Conn. L. Rptr. 650 (Conn. Mar. 29, 2011), *distinguishing Gould, Larson, Bennett, Wells & McDonnell, P.C. v. Panico*, 273 Conn. 315, 869 A.2d 653 (Conn. 2005), where the litigants sought to impose the waiver as to unexecuted documents from the situation where the Executor explicitly waived because he believed it to be in the estate's best interest to do so. A consideration beyond the scope of this paper, but which should not be overlooked, might include whether an intentional waiver is contemplated in the context of an audit. Often disclosures are made in the audit or litigation phase of an IRS challenge, once this occurs the door can't be closed to discovery in a Will or Trust contest (and vice versa). Therefore, it may be important to consider whether a tactical or strategic decision to disclose internal memorandum or communications is contemplated. There may be valid (and important) reasons that counsel may wish to disclose internal memorandum and communications with the client in order to demonstrate the business purpose for a transaction or otherwise support a discount taken. Once waived, everything within (and potentially related to) those communications will also be deemed waived in other contexts. *See, e.g., United States v. Brown*, 478 F.2d 1038 (7th Cir. 1973).

[56] *Eicholtz v. Grunerwald*, 313 Mich. 666, 671, 21 N.W.2d 914, 917 (Mich. 1946), citing *McKinney v. Kalamazoo-City Savings Bank*, 244 Mich. 246, 253, 221 N.W. 156, 158 (Mich. 1928).

[57] *See Bruton v. Kruger*, 2014 Il. App. (4th) 130421, 380 Ill. Dec. 366, 375, 8 N.E 3d 536, 545 (Ill. App. Ct. 4th Dist. 2014), *citing* E.S. Stephens, *Waiver of Attorney-Client Privilege by Personal Representative or Heir of Deceased Client or by Guardian of Incompetent*, 67 A.L.R. 2d 1268 §1 (1959). *See also United States v. Yielding*, 657 F.3d 688, 787 (8th Cir. 2011), and *Mayorga v. Tate*, 302 A.D.2d at 11.

[58] *Cohen v. Jenkentown Cab Co.*, 238 Pa. Super. Ct. at 463, citing 8 *Wigmore on Evidence* §2314, §2329 (McNaughton ed. 1961).

[59] *See Stevens v. Thurston*, 112 N.H. 118, 119, 289 A.2d 398, 299 (N.H. 1972). *See also In re Graf's Estate*, 119 N.W.2d 478, 481 (N.D. 1963).

[60] *Stevens v. Thurston*, 112 N.H. 118, 119.

[61] *Stevens v. Thurston*, 112 N.H. at 119 (internal citations omitted).

[62] *Runnels v. Allen's Admr.*, 169 S.W.2d 73, 76 (Mo. Ct. App. 1943). In *In re the Estate of Hebbeler*, 875 S.W.2d 163 (Mo. 1994), the Missouri court applied the very same waiver theory to a dispute between competing parties each of whom claimed rights under inter-vivos documents. As a consequence, both relatives and friends of the Testator were found competent to waive the Privilege, because each was found to be claiming through the Testator by virtue of the disputed inter-vivos instruments.

[63] *In re Loree's Estate*, 158 Mich. 377, 122 N.W. 623 (Mich. 1909); *Warner v. Kerr*, 216 Mich. 139, 145-146, 184 N.W. 425 (Mich. 1921). *See also Lamb v. Lamb*, 124 Ill. App. 3d 687, 464 N.E.2d 873, 80 Ill. Dec. 8 (Ill. 4th Dist. 1984). As recently as May 6, 2016, an Illinois appellate court found the Privilege (as well as the attorney work-product doctrine) to be ineffective shields to discovery sought by prior beneficiaries from the estate planning attorney who was, himself, alleged to have been the perpetrator of undue influence in the formulation and amendment of his client's trust favoring a charity with which the attorney was actively involved. *Eizenga*, above.

[64] *Blackburn v. Crawfords*, 70 U.S. 175, 18 L. Ed. 186, 3 Wall. 175 (1865).

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plicable as to claims *against* the Testator or his estate. Under such circumstances, the court indicated that

> [i]f the privilege did not exist at all, everyone would be thrown upon his own legal resources. Deprived of all professional assistance, a man would not venture to consult any skillful (*sic*) person, or would only dare to tell his counsel half his case.[65]

However, the *Blackburn* Court went on to opine that when there's a contest *between* the heirs at law and a devisee (*claiming through or under* the Testator), the attorney's testimony should be allowed when it will not affect a ''right or interest of the client; and the apprehensions of it can present no impediment to a full statement to the solicitor.''[66]

In the majority opinion, the *Blackburn* Court importantly noted that the protections of the Privilege could be waived and that such a waiver could be either expressed **or** implied. The Court indicated:

> We think it as effectual here by implication as the most explicit language could have made it. It could have been no clearer if the client had expressly enjoined it upon the attorney to give this testimony whenever the trust of his testamentary declaration should be challenged by any of those to whom it related. A different result would involve a perversion of the rule, inconsistent with its object, and in direct conflict with the reasons upon which it is founded.[67]

So while the dissent in *Blackburn*[68] argues against the creation of an implied waiver of the Privilege in contests between heirs and devisees who claim through the Testator, the cases which historically followed almost uniformly adopt the ''implied waiver'' concept under such circumstances.

In *Zook v. Pesce*,[69] the Maryland court explored the underlying rationale for an implied testamentary ''exception'' to the Privilege. Relying in part upon *United Stated v. Osborn*,[70] *Zook* opines, in pertinent part, that:

> confidential communications between attorney and client for the purpose of preparing the client's will . . . are privileged during the testator's lifetime and, also, after the testator's death unless sought to be disclosed in litigation between the testator's heirs, legatees, devisees, or other parties, all of whom claim under the deceased client.
>
> The rationale underlying this exception is that in the context of a contested estate, such disclosure ''helps the court carry out the decedent's estate plan.'' Were a court to exclude such evidence, ''the court administering the will might reach an erroneous conclusion about the decedent's donative intent.'' Thus, some states have elected to allow this exception to the attorney-client privilege based on the idea that ''*the deceased client would presumably want his communications disclosed in litigation between such claimants so that his desires in regard to the disposition of his estate might be correctly ascertained and carried out*.''
>
> Happily for both parties in this case, Maryland recognized the wisdom of the testamentary exception about a century ago.
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> * * *
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> . . . It may be laid down as a general rule of law, gathered from all the authorities, that, unless provided otherwise by statute, communications by a client to the attorney who drafted his will, in respect to that document, and all transactions occurring between them leading up to its execution, are not, after the client's death, within the protection of the rule as to privileged communications, in a suit between the testator's devisees and heirs at law, or other parties who all claim under him.[71]

In further explanation of the ''implied waiver'' theory, the court in *In re Graf's Estate*,[72] indicated:

> [t]he recognition of a privilege does not mean that there are no exceptions to it. One such exception adopted by many of the courts is that such communications lose their confidential character after the death of the client and that such communications can be shown in litigation between parties, all of whom claim under the client. Thus, where

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[65] *Blackburn v. Crawfords*, 18 L. Ed. at 192–193.

[66] *Blackburn v. Crawfords*, 18 L. Ed. at 193.

[67] *Blackburn v. Crawfords*, 18 L. Ed. at 193. But see Justice Clifford's dissent, where he indicates that the testimony of the attorney was properly excluded ''as falling within the rule of privileged communication; and I am also of the opinion that the suggestion of a waiver is utterly without foundation or just pretense.'' 18 L. Ed. at 195.

[68] *Blackburn v. Crawfords*, *id.*

[69] *Zook v. Pesce*, 438 Md. at 242–244.

[70] 561 F.2d 1334, 1340 (9th Cir. 1977).

[71] *Zook v. Pesce*, 438 Md. at 242–243 (emphasis added; internal citations omitted).

[72] 119 N.W.2d 478, 481 (N.D. 1963).

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> the controversy is to determine who shall acquire the property of the deceased, and where all parties claim under him, . . . neither can set up a claim of privilege against the other with respect to the communications of deceased with his attorney.

The courts which adopt this view do so on the theory that, in a controversy not adverse to the estate, between heirs at law, next of kin, devisees, legatees, and personal representatives, the claim that the communication was privileged cannot be heard. In such case, the interest of the deceased as well as that of the estate is that the truth be ascertained.[73]

Arguably, from a policy perspective, permitting the Privilege to preclude the attorney's testimony in cases between persons claiming through (as opposed to against) the Testator, ''would, in effect, allow the shield intended for the client to be misappropriated for the benefit of the very persons against whom the client may have had claims.''[74]

Because of a strong policy bias in favor of upholding a Testator's true intent and purposes, a number of states have via statute, court rule or rule of evidence, codified the waiver of the Privilege relative to communications relevant to an issue between parties all of whom claim though the client, regardless of whether the respective claims are by testate or intestate succession or by inter-vivos transaction.[75]

Once the Privilege is waived relative to the execution of a testamentary instrument, all communications relating to the preparation, execution and subject-matter of the instrument may not be considered privileged.[76] In addition, once the Privilege is waived,

> ''[t]he confidence is not apportionable *(sic)* by a reference to what the testator might have intended had he known or reflected on certain facts which now bear against the will''; indeed, the privilege covering conversations about preparation or execution of the will or its subject property is not apportionable *(sic)* at all.[77]

WHEN THE CLAIM IS AGAINST THE TESTATOR THE IMPLIED WAIVER THEORY GENERALLY WON'T APPLY

Other key elements to the analysis (and potentially critical to the outcome of whether an evidentiary, statutory or implied waiver theory will be applied to negate the impact of the Privilege) may entail the (1) claimant's relationship to the Testator and (2) nature of the claim.

It is well established that:

> [a]lthough the privilege attaches to communications between a testator and the testator's counsel, the privilege may be breached upon the testator's death if litigation ensues between the testator's heirs, legatees, devisees, or any other parties claiming under the deceased client.[78]

But waiver will not generally be implied ''when it is sought to be invaded by parties claiming against the estate.''[79]

Examples of claims ''through'' the Testator, would include claims regarding rights of inheritance which would be established pursuant to an executed inter-vivos instrument or by testate or intestate succession.[80] The fundamental premise as to why such claims should be exempt from application of the Privilege is the

> . . . theory that claimants in privity with the estate claim through the client, not adversely, and the deceased client presumably would want his communications disclosed in litigation between such claimants so that his desires in regard to the disposition of his estate might be correctly ascertained and carried out.[81]

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[73] *In re Graf's Estate*, above at 481 (internal citations omitted), relying in part on *Winters v. Winters*, 102 Iowa 53, 71 N.W. 184 (IA 1897).

[74] *In re Estate of Colby*, 23 N.Y.S.2d at 634.

[75] By way of example, and without limitation, see Kan. Stat. 60-426(b)(2). *See also Godley v. Valley View State Bank*, 2000 WL 33676159 (D. Kan. June 21, 2000).

[76] *See Hanson v. First Nat. Bank of Birmingham*, 217 Ala. 426, 116 So. 127 (Ala. 1928).

[77] *Paley v. Superior Court*, 137 Cal. App. 2d 450, 462, 290 P.2d 617 (Cal. Ct. App. 1955), superseded, in part, on other grounds by implementation of subsequent rules of evidence in the state of California. Therefore, as previously alluded, while the IRS might not be able to force production of truly privileged communications (because it would be likely be considered a third party claiming against the estate), the Executor might elect to waive the Privilege or the Privilege might be waived in the context of Will or Trust litigation that results in the door to discovery being opened for the IRS as an unintended consequence of the Will or Trust contest.

[78] Epstein at 752.

[79] Epstein at 755. *See also Duggan v. Keto*, 554 A.2d 1126 (D.C. 1989). But, the possibility remains that another premise for waiver may exist in such cases, such as the use of the attorney as a subscribing witness (as otherwise discussed in this paper).

[80] *See Fletcher v. Superior Court*, 44 Cal. App. 4th 773, 778 (Cal. App. 1996). *See also Petition of Stompor*, 165 N.H. at 738–739.

[81] *Fletcher*, 44 Cal. App. 4th at 779 (internal citations omitted).

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Citing, in part, the U.S. Supreme Court case of *Glover v. Patten*[82] (and other sources), the court in *Fletcher v. Superior Court*,[83] identified that:

> [a]n exception to the application of the privilege on behalf of a deceased client has long been recognized when the dispute is between various parties claiming 'through' or 'under' the client, as opposed to a dispute between the estate and a 'stranger.' In *Glover v. Patten*, the United States Supreme Court held that 'in a suit between devisees under a will, statements made by the deceased to counsel respecting the execution of the will, or other similar document, are not privileged. While such communications might be privileged, if offered by third persons to establish claims against an estate, they are not within the reason of the rule requiring their exclusion, when the contest is between the heirs or next of kin.' This analysis presupposes that the privilege to which the exception applies is only for communications between the decedent and the decedent's attorney.[84]

As a consequence, the implied waiver exception to the Privilege has been applied to cases involving lost Wills,[85] lack of capacity and/or undue influence,[86] but deemed inapplicable to claims for breach of contract to create mutual Wills, otherwise make a Will or leave a bequest, or for creation of a constructive trust to compensate for services rendered during the Testator's life.[87] This is because the former causes of action have been categorized as those which claim ''through'' the Testator, with the latter being characterized as actions ''against'' the Testator.

Interestingly, when the claim relates to whether the claimant could be an heir at law (despite not having received a bequest under a Will), the Privilege (on at least two occasions) did not preclude inquiry into confidential communications between the client and his attorney as to the nature of the purported heir's familial relationship.[88]

THE USE OF THE ATTORNEY AS WITNESS TO EXECUTION OF THE INSTRUMENT MAY CONSTITUTE AN EXPRESS WAIVER

Importantly, a number of courts have held that where the Privilege might otherwise have precluded the attorney's testimony (because the claim was against as opposed to through the Testator), the use of the attorney as a subscribing witness to the execution of the instrument may nonetheless constitute a waiver of the Privilege by the client.[89] Essentially, the use of the attorney as a subscribing witness takes the analysis outside the confines of an ''implied'' waiver and places it the category of an ''explicit'' waiver. Consequently, even claims ''against'' as opposed to ''through'' the Testator (or adverse to the estate) might be supported by the testimony of the attorney who acted as a subscribing witness.[90]

In *Pence v. Waugh*,[91] the Indiana court reasoned that:

> Clearly, it must be presumed, that the testator meant that his witness should be competent to make proof for the probate of the will, and that he intended by his selection, to waive the privilege in that regard, and it is no less clear that the desire and interest of the testator were as strong to support his will against contest, and that his selection, for that reason, was with like intention.[92]

Consistent with the concept that use of the attorney as a subscribing witness constitutes a waiver, courts have held that whatever the attorney learned in the

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[82] 165 U.S. 394, 406, 17 S. Ct. 411, 416, 41 L. Ed. 760 (1897).

[83] *Fletcher*, 44 Cal. App. 4th at 779.

[84] *Id.* (internal citations omitted).

[85] *See Clark v. Turner*, 183 F.2d 141 (D.C. Cir. 1950).

[86] *See Brunton v. Kruger*, 380 Ill. Dec. 366, 8 N.E.3d 536 (Ill. App. Ct. 4th Dist. 2014); *In re Everett's Will*, 105 Vt. 291, 166 A. 827, 830 (Vt. 1933); *Eicholtz v. Grunerwald*, 313 Mich. 666, 21 N.W.2d 914 (Mich. 1946).

[87] *See Estate of Queener v. Helton*, 119 S.W.3d 682 (Tenn. Ct. App. 2003). *See also DeLoach v. Myers*, 15 Ga 255, 109 S.E. 777 (Ga. 1959).

[88] *See Johnson v. Antry*, 5 S.W.2d 405 (Mo. 1928). In this case, the attorney was permitted to testify as to his client, the Testator's, declarations that the claimant was treated as his adopted child despite a lack of formal adoption proceedings, and that he had done so since the child's minority. *See also Blackburn v. Crawfords*, above where the attorney was permitted to testify that the claimant was not the Testator's wife. *But see In re Marden's Estate*, 355 So. 2d 121 (Fla 3d Dist. 1978), *cert. denied* 361 So. 2d 833 (Fla. 1978), where the testimony of the Testator's estate planning attorney was held not to be subject to the Privilege but the testimony of an attorney who represented the Testator in matters unrelated to the preparation of the Will were precluded under the Privilege with regard to establishing claimant as the Testator's common law spouse.

[89] *See Denver Nat. Bank v. McLagan* 133 Colo. 487, 491, 298 P.2d 386, 66 A.L.R.2d 1297 (Colo. 1956); *Eicholtz v. Grunerwald*, above relying upon *In re Heiler's Estate*, 288 Mich. 49, 284 N.W. 641 (Mich. 1939). *See also Brown v. Edwards*, 640 N.E.2d 401 (Ind. App. 1st Dist. 1994), and *Vaugh v. Vaughn*, 217 Ala. 364, 116 So. 427 (Ala. 1928).

[90] *Brown v. Edwards*, 640 N.E.2d 401, 406 (Ind. Ct. App. 1st Dist. 1994).

[91] *Pence v. Waugh*, 135 Ind. 143, 154, 34 N.E. 860, 863 (Ind. 1893).

[92] *Pence*, 34 N.E. at 864.

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course of witnessing the document is not privileged.[93] As a result, a waiver of the Privilege in a claim ''against'' the Testator has been found to have occurred when the attorney acts as a subscribing witness.

In *Brown v. Edwards*,[94] where the claim was against the estate (as it represented a breach of contract claim relative to the mutuality of Wills), that court held:

> By choosing their attorney and his assistant to witness the wills, Velma and Warren implicitly requested that they defend the 1974 testamentary scheme against attack, regardless of any confidentiality which previously may have attached to the conversations among the four. That is, at the time, Velma and Warren intended that Lake and Ball should be competent to divulge the scope of their testamentary intent with regard to the 1974 wills if the mutual and reciprocal nature of the wills were ever questioned. The trial court properly decided that the testimony was admissible without violation of the attorney-client privilege.[95]

As further explanation for exempting the Privilege's application when the attorney acts as a subscribing witness, the court in *Vaughn v. Vaughn*[96] held that:

> The necessities of the case require that an attorney, who attests the execution of a will, be released from the general rule of privileged communication, to the extent that he is free to perform the duties of the other relation in which he is thus placed by the testatrix; and he may testify to all matters relevant to the issues presented by the attempt to probate the will, its execution and the mental status of the testatrix at the time, etc.[97]

Once the Privilege is deemed ''waived'' (because of the client's use of the attorney as a subscribing witness), the potential for testimony by the attorney as to all matters leading up to the execution, including statements by the Testator, his mental condition, facts relating to undue influence and other matters affecting the validity of the instrument may be found to have been waived.[98]

In the Michigan case *In re Estate of Ford*,[99] the court held that:

> . . . even if he had been testatrix's attorney with respect to some aspects of the will, because witnesses to a will may properly be called upon to prove the will, disclosures made by the testatrix to a person functioning as a witness are necessarily intended to be disclosed to third parties and, therefore, are not confidential communications protected by the attorney-client privilege. Mr. Holland was therefore not precluded by the attorney-client privilege from offering evidence concerning Mrs. Ford's intention and understanding, her soundness of mind, and whether she was operating under the undue influence of any person.[100]

Consequently, once the Privilege has been deemed waived (by virtue of the attorney acting as a subscribing witness) discovery of pertinent but otherwise confidential communications between the client and the attorney may occur, even if such communications occurred post-execution.[101]

While the ''subscribing witness'' waiver of the Privilege emanates from common law, some states have codified the concept. In Oklahoma (as in Kansas), where such codification has occurred, the rationale behind the statute has been explained as follows:

> The reason for the rule is obvious. One who makes a will does so with the knowledge that upon his death it will be published, and that in order to do so the testimony of witnesses as to the facts and circumstances in connection with its preparation and execution may be required in order to establish the fact that it expresses his wishes; that the making thereof was his free and voluntary act, and that he was competent to dispose of his property. He therefore waives the protection of the statute, and impliedly consents that his attorney, who attests the execution

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[93] *Eicholtz v. Grunerwald*, above relying upon *In re Heiler's Estate*, 288 Mich. 49, 284 N.W. 641 (Mich. 1939). *See also Hanson v. First Nat. Bank of Birmingham*, 217 Ala. 426, 116 So. 127 (Ala. 1928); *DeLoach v. Myers*, 215 Ga. 255, 260, 109 S.E.2d 777 (Ga. 1959), which reflected that ''[a]lso a witness to a will although attorney for the testator, is permitted to disclose everything which he knew concerning his attestation and the circumstances surrounding and leading up to it.''

[94] *Brown v. Edwards*, 640 N.E.2d at 406.

[95] *Id.*

[96] *Vaughn v. Vaughn*, 217 Ala. 364, 116 So. 427 (Ala. 1928).

[97] *Id.* at 365–366 (internal citations omitted).

[98] *Denver Nat. Bank v. McLagan*, 133 Colo. 487, 491, 298 P.2d 386, 66 A.L.R.2d 1297 (Colo. 1956).

[99] 206 Mich. App. 705, 522 N.W.2d 729 (Mich. App. 1994).

[100] *Id.* at 708–709 (internal citations omitted).

[101] *See Saliba v. Saliba*, 202 Ga. 791, 44 S.E.2d 744 (Ga. 1947).

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> thereof, may testify. The same rule would apply to the other attesting witnesses, the wife and secretary of the attorney. The trial court did not err in permitting these witnesses to testify.[102]

But what if the contest represents a claim ''against'' as opposed to ''through'' the Testator, and the testimony sought is that of a subscribing witness attorney to a Will that has been revoked? This very situation was explored in *Lennox v. Anderson*.[103] In *Lennox*, the court explored the impact of the attorney acting as a subscribing witness of an instrument that was subsequently revoked. Premised upon the revocation of the instrument the court held that the Privilege remained intact as against the claims of a party adverse to the estate.

> The general rule is: ''Where a testator requests the attorney who drafted the will, and with whom he has consulted in regard thereto, to sign the will as an attesting witness, and the attorney does so, his testimony with reference to the transaction and communications between him and the testator at the time are not inadmissible as privileged.''[104] The reason is that ''The testator, by his act, has in effect consented that, whenever the will shall be offered for probate, the attorney may be called as a witness and testify to any facts within his knowledge necessary to establish the validity of the will.'' By his act, the testator waives the privileged communication. The foregoing rule prevails, ''notwithstanding statutory provisions that an attorney cannot, without the consent of his client, be examined as to any communication made by the client to him.''[105]
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> It will be noted that the foregoing rule applies to a situation distinctly different from that appearing in the instant case. *Here, the conversation had by the attorney and client at the time of the execution of the will and the will itself are offered as corroborating evidence in an action by the beneficiary of the will to establish an oral contract*. In the instant case the will offered in evidence had been revoked by the testator. When a person employs an attorney to have a will drawn and confides in the attorney as to the disposition of his property, it is the client's desire that during his lifetime the will be kept a secret, and a confidential relation exists. The attorney is not privileged to give the will publicity in any form. This confidential communication is temporary. After the testator's death, the attorney is at liberty to disclose all that affects the execution and contents of the will. The privilege has been waived by the testator, especially so when the scrivener of the will is a witness to it.
>
> So, in the instant case, when Charles J. Sanders consulted counsel about the making of a will, he never intended it to be published. He subsequently revoked the will and made a different disposition of the property. The effect of this act is: ''While a testator waives the seal of confidence by requesting his attorney to witness his will, it seems that he may annul such waiver by revoking the will, so that the attorney will not thereafter be permitted to testify as to its execution and instructions given by the testator respecting the will.''[106] The reason for the above rule is that the right of secrecy belongs to the client, not to the lawyer who drafted the will.[107]

The resurrection of the Privilege in *Lennox*[108] emphasizes the disparate treatment in certain jurisdictions which might be afforded to executed documents witnessed by the attorney in the context of a claim ''against'' as opposed to ''through'' a Testator.

WILL THE WAIVER APPLY TO ALL INSTRUMENTS?

Whether the above-referenced theories which ''imply'' a waiver or otherwise deem there to be an ''exception'' to the Privilege will extend to documents which have been revoked, superseded and/or those never executed by the Testator, varies amongst jurisdictions and tends to be fact and claim dependent. In an undue influence case the fact that the Testator met with multiple attorneys and made potentially differing statements of intent may be of significant import.

Hypothetically, a client (long standing or otherwise) discusses creation or modification of an existing

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[102] *In re Wilkins' Estate*, 199 Okla. 249, 250, 185 P.2d 213, 216 (Okla. 1947) (internal citations omitted).

[103] *Lennox v. Anderson*, 140 Neb. 748, 1 N.W.2d 912 (Neb. 1942).

[104] Citing 64 A.L.R. 192.

[105] *Id.*

[106] *Id.*

[107] *Lennox v. Anderson*, 140 Neb. at 754–756 (emphasis added; except where noted, internal citations omitted).

[108] *Id.*

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plan with attorney Mr. Good (''Good''), but Good finds indicia of undue influence or lack of sufficient capacity. Good does what he should and exercises independent judgment. As a result, Good recommends testing and a consultation with a medical professional. Good also attempts to slow the process to see if consistent instructions and rationale for the change in disposition are provided by the client in a confidential setting. Good creates and maintains careful and thorough notes of his observations and communications with the client. However, the influencer, Mr. Bad (''Bad''), sensing that his goals might not be easily attained under the auspices and guidance of Good (because Good is actually exercising professional judgment for the protection of his client), takes the Testator ''on the road'' until Bad is able to find an attorney who (for lack of experience or other reasons) facilitates implementation of what amounts to Bad's testamentary plan and desires. Will discovery of Good's communications and files relating to an incomplete testamentary instrument be discoverable? Unfortunately, the answer (depending upon the jurisdiction and facts) is ''maybe''!

As already indicated above, generally claims of undue influence will result in the Privilege being deemed inapplicable. The general policy is that

> if an heir challenges the will by alleging undue influence, it is in the interest of the estate that the ''validity of [the] will *** be determined in the fullest light of the facts.[109]

This waiver may be implied not only in the context of privileged communications with the Testator's attorney, but also those conducted with the Testator's accountant, for the very same policy reasons enunciated above.[110] Despite the well-established and generally universally accepted policies behind the waiver of the Privilege in litigation between parties claiming through (as opposed to against) the Testator, some jurisdictions apply a narrow waiver approach, while others extend the waiver to even unexecuted documents.

In *In re McCulloch's Will*,[111] as well as in *Ex Parte Hurin*,[112] at least two jurisdictions held that once a subsequent Will is submitted for probate, the Privilege as to communications between the attorney and his client relative to prior Wills, which were thereby superseded, is reinstated. As a consequence, the attorney in the revoked Will was precluded from testifying as to his communications with the decedent. In juxtaposition, in *Green v. McClintock*,[113] an attempt to limit waiver of the Privilege to the last testamentary instruments executed was thwarted. In *Green*, the court recognized that a change in a previously established estate plan could, itself, constitute proof of undue influence. As a consequence, in *Green*, the Maryland court not only permitted testimony from the attorney who drafted the prior estate planning documents with regard to communications during the period leading up to execution, but also permitted his testimony relative to post execution discussions held years later because they were found to help clarify the Testator's donative intent.

In *Gould, Larson, Bennet, Wells and McDonnell, P.C. et al. v. Panico, et al.*,[114] a Connecticut court, relying upon common law in a factual scenario partially akin to the hypothetical outlined above, answered the question, as to whether the Privilege should be pierced when the representation does not result in an executed document, with a resounding ''no.'' In *Gould*, the court concluded that the exception to the Privilege does not apply where the discussions held with the attorney do not result in the culmination of an executed Will. In *Gould*, the law firm had previously prepared a Will for the Testator which was executed. Approximately a decade later, another attorney from the firm met with the Testator about preparation of a new Will or codicil. Within two weeks of that meeting the Testator met with two other attorneys (from different firms), the last of which created a Will which was executed by the Testator. Contestants to the Will ultimately executed by the Testator sought discovery of the communications between the Testator and the associate from the Testator's original estate planning firm. The court recognized that the principal reason behind holding the Privilege inapplicable to communications between the Testator and his attorney (in a suit between parties claiming through the Testator) was because the Privilege was designed for the protection of the Testator. Providing discovery of such communications is generally in the Testator's interest in a controversy between parties claiming under him because it promotes ''a proper fulfillment of his will.''[115] The court further recognized the importance of such testimony in undue influence cases, when it reflected that:

> . . . if the will does not reflect the decedent's actual intention, but rather that of another

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[109] *Brunton v. Kruger*, 380 Ill. Dec. 366, 376, 8 N.E.3d 536, 546 (Ill. App. Ct. 4th Dist. 2014).

[110] *Id.*

[111] 263 N.Y. 408, 189 N.E. 473, 91 A.L.R. 1440 (N.Y. 1934).

[112] 59 Ohio App. 82, 12 Ohio Op. 377, 17 N.E.2d 287 (Ohio 6th Dist. 1938).

[113] 218 Md. App. 336, 97 A.3d 198 (Md. 2014).

[114] 205 Conn. 315, 869 A.2d 653 (Conn. 2005).

[115] *Gould, Larson, Bennet, Wells and McDonnell, P.C.*, 205 Conn. at 324.

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> who induced him by undue influence to make the will, it cannot be said that the decedent would want such a will established as his own. If the law protected the communications, it would foster that which it abhors, namely, deceit and fraud.
>
> Therefore courts have recognized that an attorney who prepared a will can be required to disclose all that he knows concerning the testator's state of mind. ''The attorney may know by whom and to what extent the testator was influenced. Again, he may know that the testator was not influenced at all, and may further know the very reasons that controlled him in doing what he did in making the will. In the first instance, should the person causing the will to be made be protected by the privilege? And in the latter, case, should the one who claims undue influence be permitted to invoke it and thus make certain circumstances to which he points and which may be easily explained to stand as the real truth?
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> * * *
>
> 'It may be laid down as a general rule of law, gathered from all the authorities, that, unless provided otherwise by statute, communications by a client to the attorney who drafted his will, in respect to that document, and all transactions occurring between them leading up to its execution, are not, after the client's death, within the protection of the rule as to privileged communications, in a suit between the testator's devisees and heirs at law, or other parties who all claim under him.' This rule is well settled law in many jurisdictions.[116]

Yet, despite recognizing both the importance and policy reasons behind the *implied waiver* of the Privilege, the court (in *Gould*) refused to apply the waiver of the Privilege to a situation where the communications did not result in the preparation and execution of an instrument. As a consequence, the Connecticut court narrowed the application of the implied waiver theory previously accepted and applied in *Doyle v. Reeves*[117] (another Connecticut decision).

Gast v. Hall,[118] an Indiana decision which cites *Gould, Larson, Bennet, Wells, and McDonnell, P.C.*,[119] represents yet another instance when one might have assumed, in the interest of the pursuit of truth and justice and upholding the Testator's true desires, that attorney testimony would have been permitted, but the opposite occurred. In *Gast*, the Testator was himself embroiled in Will contest litigation. The opposing party who was contesting the Testator's interest in the original Will contest became the ''devisee'' of the Testator's Will. At one point during the pending litigation, the Testator's historically negative view of the devisee inexplicably and drastically changed. The Testator's long-time attorney became so concerned about the change in Testator's perspective that he sought and obtained the appointment of a Guardian *Ad Litem* to protect the Testator's interests in the pending litigation. Within days of the Guardian *Ad Litem's* appointment, the devisee literally found Testator a new estate planning attorney and drove Testator (unbeknownst to the Testator's long-time attorney who was then actively representing the Testator in the original Will contest) to a new attorney, which (while the original Will contest was still pending) resulted in the creation and execution of a new Will for Testator leaving everything to the devisee. The Testator died two months later. The court held that because the testimony sought from the Testator's (long-time estate planning and) litigation attorney related to communications between the attorney and the Testator in the context of the litigation (which included such things as comments made by the Testator during the course of the litigation and difficulties the Testator began to have in understanding the import of key issues relating to the original Will), the communications remained subject to the Privilege because they did not occur in the context of the attorney's preparation of an estate plan for Testator but rather occurred during pending litigation. Therefore, despite the communications being extremely relevant to the claim of undue influence and involved parties claiming ''through'' the Testator, the Privilege was applied to preserve the confidential nature of the communications and preclude the attorney's testimony.

In Oregon, a different result might have occurred. In *Tanner v. Farmer*,[120] the court was faced with a challenge to inter-vivos gifts that took place days before the Testatrix's death. When the Testatrix died, several intended transactions were in the works but had not been completed. One such transaction was the creation of a Will and another was the institution of divorce proceedings. The Testatrix's surviving spouse challenged gifts to the Testatrix's nephew and sought recoupment. Under the circumstances presented, the court held that the Privilege did not apply to commu-

[116] *Gould, Larson, Bennet, Wells and McDonnell, P.C.*, 205 Conn. at. 324–325 (internal citations omitted).

[117] 112 Conn. 521, 12 A. 882 (Conn. 1931).

[118] 858 N.E.2d 154 (Ind. Ct. App. 2006).

[119] *Gould, Larson, Bennet, Wells and McDonnell, P.C.*, above.

[120] 243 Or. 431, 435, 414 P.2d 340 (Or. 1966).

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nications between the Testatrix and her attorney with regard to the planned Will and divorce proceedings, where (as here) all claimants were parties claiming through (as opposed to against) the Testatrix.[121]

In *In re Everett's Will*,[122] where undue influence was alleged to have commenced shortly after the Testator and his second wife met, the court held that discovery of attorney-client communications relating to both executed and unexecuted documents was permissible. In this case, the Vermont Supreme Court recognized the need for liberal discovery rules in undue influence cases. The court indicated that among many factors to be considered in an undue influence case, one is the ''normality'' of the Will's disposition. In this regard the court indicated:

> [f]urthermore, the normality of the will's dispositions, with reference to the natural and uninfluenced desires of the testator, must be investigated. That influence is 'undue,' implies in part that the testamentary disposition in controversy deviates from that which the testator under the influence of his ordinary inclinations would have made. If the tribunal can ascertain his normal tendencies and plans, a standard is found by which to test the dispositions in issue. If these harmonize with this normal standard, the charge of undue influence can have little or no support; if they diverge abnormally, there is then some inducement to examine further into the nature of the influence producing this divergence. Accordingly, to establish this normal tendency or inclination, the testator's condition of mind before and after the time in issue not only may be but must be examined; his state of affection or dislike to specific persons, and his general testamentary attitude towards them, will help to form the standard of his normal dispositions. For this purpose, his utterances indicating the state of his affections and intentions, and in particular his other testamentary acts or expressions, if any, whether prior or subsequent, may all be considered; the evidential principles already noted . . . sufficing equally for this purpose. This use of such evidence is also universally sanctioned.[123]

In *Petition of Stompor*, the New Hampshire court (also citing to decisions from New York and Oregon) found that adoption of a Rule 502(d)(2) exception essentially waived the Privilege with regard to attorney-client communications whether or not they culminated in executed estate planning documents and that this exception is not limited to the last documents executed.[124] Besides the direct implications of a Rule 502(d)(2) adoption, the court reviewed the rationale behind that rule, when (relying in part on the US Supreme Court case of *Swidler & Berlin v. United States*[125]) it stated that:

> . . . all reason for assertion of the privilege disappears'' when the privilege is being asserted not for the protection of the testator or his estate but for the protection of a claimant to his estate. This is so because the best way to protect the client's intent lies in the admission of all relevant evidence that will aid in the determination of his true will. As the United States Supreme Court has noted, ''[t]he general rule with respect to confidential communications is that such communications are privileged during the testator's lifetime and, also, after the testator's death unless sought to be disclosed in litigation between the testator's heirs''; ''[t]he rationale for such disclosure is that it furthers the client's intent.''[126]

Similarly, in *In re Graf's Estate*,[127] where the Testator consulted with an attorney about preparation of a Will, but then executed a Will prepared by an attorney some 300 miles away from Testator's residence (in the community where the proponent of the Will resided), the North Dakota court held the Privilege inapplicable as a bar to the testimony of the attorney who drafted the Will proffered for probate as well as that of the attorney with whom the Testator consulted (but which did not culminate in the preparation of estate planning documents). In this case the court's rationale was essentially summarized as follows:

> . . . the confidential nature of communications between attorney and client is not recognized, and this privilege no longer is applicable, in litigation which occurs after the client's death, which litigation is between parties, all of whom claim under the client. Where the litigation is to determine who shall take the property of the deceased and

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[121] *Id.*, citing Rule 26(2)(b) Uniform Rules of Evidence (1954), *Bergsvik v. Bergsvik*, 205 Or. 670, 685, 291 P.2d 724 (Or. 1955), and McCormick on Evidence (1954), §98 at 199, 200.

[122] 166 A. at 835–836 (Vt. 1933).

[123] *In re Everett's Will*, 166 A. at 830.

[124] *Petition of Stompor*, above.

[125] 524 U.S. 399, 405, 118 S. Ct. 2081, 141 L.Ed.2d 379 (1998).

[126] *Petition of Stompor*, 165 N.H. at 738–739 (internal citations omitted).

[127] 119 N.W.2d 478 (N.D. 1963).

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> all parties claim under the client, neither party to the litigation can claim that such communications are privileged. Between persons claiming under the deceased client and others who are not heirs, next of kin, legatees, or devisees of the testator, the privilege still would survive.

The reason for this exception to the general rule of holding communications between attorney and client as privileged, is sound. In controversies between heirs at law, devisees, legatees, or next of kin of the client, such communications should not be held as privileged because, in such case, the proceedings are not adverse to the estate. The interest of the estate as well as the interest of the deceased client demand that the truth be determined.[128]

IS THE PRIVILEGE SUBSTANTIVE OR PROCEDURAL?

Whether a court deems the Privilege substantive or procedural in nature may well impact whether the Privilege will permit or bar testimony in a given case. If the Privilege is addressed specifically in an instrument, it may be deemed a substantive provision. If one is relying on a rule of evidence, such rules tend to be procedural in nature and may subject the determination to the rule of the jurisdiction where the proceeding takes place.

One treatise on the Privilege recognized that:

> Unfortunately, the reported opinions are substantially inconsistent both in the way they identify factors, and in the way identified factors are employed.
>
> To identify the most interested state, courts generally use some combination of five factors: place where the trial will occur; place of discovery for which a privilege has been asserted; location of the origin of the attorney-client relationship; place of communication; location of events leading to cause of action; and locations of domiciles, places of incorporation, or places where the parties do business.[129]

While another treatise propounds that whether the communication should be treated as retaining the Privilege is primarily impacted by where the communication took place.[130]

If the Privilege is deemed to be procedural in nature, the statutes, court rules, rules of evidence and common law in the jurisdiction where the administration or the litigation takes place may be determinative in how the Privilege is applied. If the Privilege is deemed to be substantive or an otherwise integral part of the representation out of which the Privilege arose, it's possible that the communication will be governed by the laws of the state where the communication took place. Because the answer may not be definitive, the receipt of a subpoena by the estate planning attorney may cause considerable angst.

PRACTICAL SUGGESTIONS AND SOLUTIONS

While a review of the cases reflects some commonality of themes and policies, it is clear that the application and waiver of the Privilege can vary depending upon the parties, claims and jurisdiction(s) involved. Since the estate planner's testimony and/or files are often of key import to rebutting a presumption of undue influence or may otherwise impact the outcome of a challenge based upon claims of lack of capacity or undue influence, preservation of the attorney's ability to testify and/or produce his records may be of great import to fulfilling the Testator's true estate planning desires and intent.[131] In jurisdictions which permit reformation of an instrument (without the need to show an ambiguity within the four corners of the instrument), the attorney's testimony with regard to the Testator's intent may also prove tantamount.[132]

The policies behind the various waiver theories clearly reflect the belief that most Testators would

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[128] *In re Graf's Estate*, 119 N.W.2d at 481.

[129] Paul R. Rice, *Attorney-Client Privilege in the United States*, §12:18, at 1260–1263 (Thompson Reuters 2013) (internal citations and internal footnotes omitted).

[130] Epstein at 761.

[131] As already alluded to in this paper and more particularly discussed in *What Every Estate Planner Should Know About Undue Influence: Recognizing It, Insulating/Planning Against It. . . . And Litigating It* (n. 48), recognizing that the Privilege may be explicitly or impliedly waived, the creation and maintenance of detailed contemporaneous notes regarding the estate planner's observations as well as the decedent's intentions, desires and reasoning may be extremely important.

[132] MCL 700.7415 provides that a court may reform a trust, even if unambiguous, to conform its terms to the intentions of the settlor, if it can be proven by clear and convincing evidence that the settlor's intent and the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement. The Reporter's Comment to MCL 700.7415 relies, in part, on the UTC, when it explains the difference between mistakes in expression and mistakes in inducement, when it states that:

> A mistake of expression occurs when the terms of the trust misstate the settlor's intention, fail to include a term that was intended to be included, or include a term that was not intended to be included. A mistake in the inducement occurs when the terms of the trust

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want their estate planning attorney to be able to testify or otherwise assist in upholding the Testator's expressed estate planning goals and desires. Therefore, given the complexities of applying common law waiver theories with regard to the Privilege, as well as the potential for compounding of issues in regards to choice of law situations, an attorney might wish to consider the following.

Use of an Explicit Contractual Waiver

An estate planning attorney might consider including an explicit waiver in (i) the retention agreement and/or (ii) an agreement with regard to the release of documents following incapacity or death. Use of an explicit written waiver might be beneficial in eliminating ambiguities in the law and resulting concerns about whether an implied waiver will be deemed applicable. Such a provision might reflect a specific statement of the Testator's intent along the following lines:

> *Waiver of the Privilege:* I've engaged the services of EP Lawfirm, PC, to assist me in achieving my estate planning goals. I understand that generally communications with my attorney are considered confidential and protected from disclosure. It is my intention that should an estate plan created by me ever be contested, following my disability or death, whether it relates to the validity of an instrument, transfer or transaction, enforcement or intent, my attorney(s) shall be deemed competent to testify and the attorney-client privilege which might otherwise attach to our communications shall not be deemed a bar to disclosure of communications which relate to a claim by any beneficiary either claiming under an instrument which was executed by me or who would otherwise have been deemed my heir at law. This explicit waiver shall only apply to a claim which would be deemed to be one that emanates through me or my estate as opposed to against me or my estate. In the event that my attorney is called as a witness in such a contest, my attorney shall be entitled to compensation for time expended at his/her then applicable hourly rate.
>
> *Waiver of Conflict:* Further, in the event that I'm determined to be incapacitated and unable to provide direction or a waiver of the Privilege to my attorney, copies of my estate planning documents shall be provided to my Agent, successor or personal representative, as the case may be, and my attorney may discuss my intentions and the administration of such instrument(s) with the same. Further, if I am still alive, but unable to direct the provision of legal services, I waive any conflict in favor of permitting my attorney to thereafter represent and advise my Agent or successor, it being my belief that continuity of services, if so desired by my Agent or successor, will further and facilitate implementation of my estate planning intentions and desires.

Alternatively, if the client has conveyed confidences during the estate planning process that they would not want disclosed post-death, it may be advisable for the estate planning attorney to not act as a subscribing witness and instead use others as witnesses to the execution of dispositive instruments. By using others as witnesses one *might* avoid inadvertently opening confidences relayed to the attorney to examination when related to claims against (as opposed to through) the estate.

Obtaining a Court Order

In the absence of an explicit waiver (either from the Testator or his authorized representative), it might be advisable for the estate planning attorney to seek court authorization via entry of an Order with regard to any proposed deposition or hearing testimony and/or production of documents contained in the estate planning attorney's file which could otherwise be deemed privileged as a confidential communication. Resolution of such issues via a court proceeding, which provides notice to all interested persons, will also provide a forum for any objecting parties to be heard. From a practical perspective, in the absence of an explicit waiver (from the client or his legal representative), obtaining a court order can provide the at-

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accurately reflect what the settlor intended to be included or excluded but this intention was based on a mistake of fact or law. Mistakes of expression are frequently caused by scrivener's errors while mistakes of inducement often trace to errors of the settlor.

Prior to the enactment of MCL 700.7415 testimony regarding a scrivener error in drafting a trust would have been precluded in the absence of an ambiguity or mistake appearing on the face of the instrument. Therefore, as a consequence of MCL 700.7415 (or a similar statute in another jurisdiction), the ability to examine the scrivener attorney as to the settlor's intent may become extremely important in a broader range of proceedings.

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torney with a clearer road map as to what may or may not remain subject to the Privilege.[133]

Other Practical Considerations and Concerns

A General Note on the Scope of Discovery

Many states provide for liberal and broad discovery in the context of claims of undue influence on the premise that all evidence which tends to prove or disprove that an instrument was procured by undue influence is relevant.[134] However, when it comes to seeking discovery of information that would otherwise fall within the Privilege, not every matter handled by the attorney will necessarily be deemed to be subject to one of the waiver theories discussed in this paper — particularly if the services were unrelated to the estate plan. Therefore, care in the crafting of such requests from the estate planning attorney may be advisable.[135] In this regard, the request should demonstrate that the Privileged information sought could be related, in some reasonable fashion, to the challenged disposition.[136]

Electronic Communications

In an age where many communications occur electronically, persons might not think twice about communicating with counsel through their company e-mail account, saving documents on a company file server, or using a company computer to engage in such communications. Unfortunately, the Privilege might not attach to communications directed to or through the client's company e-mail where the company has notified the employee that privacy will not be afforded to such communications. Since not all clients have or use company e-mail addresses or computers, when one suspects that this is occurring, it might be prudent to recommend that documents and communications occur through use of the client's personal (as opposed to business) e-mail account and perhaps even on a personal computer (as opposed to a company provided one). Some language for consideration might reflect as follows:

> Our office values your privacy as well as your desire to control the persons who might be afforded access to your information. Therefore, if you request that we communicate with you via an employer provided e-mail account, it may be important to note that under some circumstances such communications might not be considered privileged. Consequently, you might wish to provide us with a personal e-mail for use in electronic communications, in lieu of a company provided address, and also consider accessing and originating e-mails through the use of a personal computer.

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[133] It may be important to note that whenever a claim of Privilege or attorney-work product is alleged to limit or preclude production of documents requested in discovery, the party making such a claim will generally be required to prepare and produce a sufficiently detailed ''privilege log.''

[134] *See In re Loree's Estate*, 158 Mich. 372, 379, 122 N.W. 623, 626 (Mich. 1909). *See also In re Everett's Will*, 105 Vt. 291, 166 A. 827 (Vt. 1933).

[135] This may be because the attorney-work product doctrine protects more than just privileged communications — it may also protect attorney ''mental impressions, conclusions, opinions, or legal theories'' concerning litigation. *See* Fed.R.Civ.P. 26(b)(3)(A), 26(b)(3)(B). But, it may also be that while the Privilege itself is generally narrowly construed, so are exceptions to the Privilege itself.

[136] *See In re Estate of Meyer*, 747 N.E.2d 1159 (Ind. Ct. App. 2001).

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