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Personal Representatives: Waiving The Attorney-Client Privilege After Death

BY ROY SIMON

You were the lawyer for a client who is now deceased. Litigation involving the client's estate has begun and your testimony about your communications with the decedent would be highly relevant to the litigated issues. If you are willing to testify, may you waive the attorney-client privilege on behalf of your deceased client? And if you do not want to testify, may you invoke the privilege and refuse to testify, or does the decedent's executor or other personal representative have the power to waive the privilege and compel you to testify? The answers to these questions have swung back and forth in New York for well over a century, and they changed again in two recent court decisions, *Mayorga v. Tate,* 2001 WL 34053240 (2d Dep't Dec. 16, 2002), and *Estate of Colby*, 723 N.Y.S.2d 631 (N.Y. County Surrogate's Court 2001). This article discusses those two cases and puts them into historical perspective.

Twists and Turns of History

Before 1877, the attorney-client privilege in New York was regulated solely by the common law. Under the common law, an attorney ordinarily could not waive the attorney- client privilege on behalf of a deceased client, but the common law recognized an exception relating to wills - "after the testator's death," according to an early 1900's edition of Professor Wigmore's treatise, "the attorney is at liberty to disclose all that affects the execution and tenor of the will."

In 1877, the New York Legislature enacted CPLR § 835 (the direct forerunner of CPLR § 4503), which essentially codified the common law rule governing the attorney-client privilege. In 1891, however, the Legislature tightened up the statute, making it even more difficult to waive the attorney-client privilege than it had been under the common law. The Legislature veered back toward the common law in 1892, amending § 835 to provide that an attorney would not be disqualified from becoming a witness as to a will's "preparation and execution" upon the probate of a will, if the attorney had been one of the subscribing witnesses to the will.

But in 1899 the Legislature amended CPLR § 835 again, this time providing that the waivers permitted in the statute "must be made in open court, on the trial of the action, or proceeding . . . ." This posed substantial obstacles (to put it mildly) to waivers by the deceased and departed because they could not be present in "open court" to waive the privilege, but the courts were helpless to cure the situation. In *Will of Cunnion*, 201 N.Y. 123, 94 N.E. 648 (1911), the Court of Appeals said that a waiver must be made in accordance with the terms of the statute; "otherwise it cannot be considered by the courts." In other words, "the common-law rule as stated by Wigmore relating to testamentary dispositions is overcome and made of no effect by our statutes." The *Cunnion* Court then summed up the state of the law as it existed in 1911:

> ...As the statute now reads, no act of the client, except a waiver upon the trial, can be treated as a waiver of the prohibition of disclosure; and, except he is an attesting witness to a will, in no case

> is an attorney permitted to make disclosure in respect to the contents of any documents or other information communicated to him in the course of his professional employment by his client.

The Court concluded by inviting the Legislature to amend § 835 again if it wished to revive the common law exception relating to testamentary dispositions after a testator's death.

Legislature Restores Common Law Exception for Will Contests

Eventually, the Legislature took up the *Cunnion* court's invitation by amending the CPLR to restore the common law exception. Today, that amendment is codified at CPLR § 4503(b), which provides as follows:

> (b) Wills. In any action involving the probate, validity or construction of a will, an attorney or his employee shall be required to disclose information as to the preparation, execution or revocation of any will or other relevant instrument, but he shall not be allowed to disclose any communication privileged under subdivision (a) which would tend to disgrace the memory of the decedent.

In effect, § 4503(b) and its statutory predecessors codified the common law exception that arose more than a century ago. The section thus ended the tug of war between the courts and the Legislature with respect to a lawyer 's testimony about the preparation, execution, or revocation of a "will or other relevant instrument." (The courts have narrowly construed the term "other relevant instrument" to mean only an inter vivos trust.) But § 4503(b) left open another major question. Outside the context of an action involving the probate, validity, or construction of a will (or an inter vivos trust), did *anyone* have power to waive the attorney-client privilege on behalf of a deceased client? More specifically, could an executor or other personal representative of a decedent waive a decedent's attorney-client privilege?

In cases outside the context of a will contest, the 1911 decision in *Will of Cunnion* continued to exert considerable influence. For example, in Estate of Trotta, 99 Misc.2d 278, 416 N.Y.S.2d 179 (N.Y. Sur. 1979), where the decedent had consulted an attorney about a will but had never prepared one, the Surrogate said (citing *Cunnion's Will*): "The willingness of the attorney to testify about these communications is immaterial. The privilege is vested in the client and may not be waived by the attorney after the client's death." This outmoded line of reasoning was impeding the search for the truth. It was time for a change.

Estate of Colby

The change came in Surrogate Renee Roth's decision in *Estate of Colby,* 187 Misc.2d 695, 723 N.Y.S.2d 631 (N.Y. County Sur. 2001), *supra,* which the McKinney's Practice Commentary calls "a definitive ruling that has long been lacking in the New York case law." In a scholarly and persuasive opinion, the court squarely held that the fiduciary of an estate has power to waive the decedent's attorney-client privilege on behalf of the estate.

The *Colby* litigation arose after Nat Colby, at the age of 93, sold his majority interest in a prosperous closed corporation. After this sale, he became incompetent and a guardian was appointed for him pursuant to Article 81 of the Mental Hygiene Law. The guardian then brought an action for fraud, alleging that the stock purchaser had taken advantage of Mr. Colby's diminished capacity and induced

him to sell his stock for $48 million less than its fair market value. When Mr. Colby died, the guardian became decedent's executrix, and she continued prosecuting the fraud complaint on behalf of decedent's estate. She soon served a subpoena on the lawyers who had advised the decedent regarding his estate planning and asked them to produce documents reflecting their communications with the decedent concerning the value of his majority interest. The attorneys refused to produce the documents because they contended that only the client, not the executrix, had authority to waive the attorney- client privilege.

In her thorough analysis of this important issue, Surrogate Roth noted that other jurisdictions which had considered the issue were "unanimous in holding that a decedent's successor-in-interest may waive the privilege." No New York decision was squarely on point, however, so the Surrogate turned to the legislative history of CPLR § 4503. She concluded that the Legislature had never intended to narrow the category of persons who, under common law, had the right to waive the privilege when the waiver would clearly benefit the deceased client's interest.

The Surrogate added that the purpose of the privilege - to protect the client - also supported the conclusion that the executor could waive the privilege. The Surrogate then compared the situation after death to the situation before death, saying:

> During his lifetime, decedent not only had the right to prevent disclosure of his communications with his attorney, but also the right to disclose them. In other words, if he himself had brought the lawsuit for which the privileged documents are now sought, he could not have been deprived of their use in the litigation.
>
> Obviously, decedent had spoken to his attorneys in the knowledge that he might later choose to disclose their discussion. It can thus realistically be assumed that decedent would not have limited his confidences if he had also known that, after his death, the privilege could not be waived by his chosen representative in order to advance some of the interests discussed.

All of this led the Surrogate to reach the following conclusion:

> Since 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. Moreover, a contrary conclusion 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. Based upon the foregoing, it is concluded that a personal representative has the right to waive decedent's attorney-client privilege on behalf of his estate.

2001 Legislation Vetoed By Governor Pataki

The same logic and history that persuaded Surrogate Roth in Colby was also convincing to the Legislature. In 2001, after major efforts by the New York State Bar Association's Trusts and Estates Law Section, the Legislature passed a bill (2001 NY Assembly Bill A 1437) creating a new CPLR § 4501 that would have provided, in pertinent part:

After the death of the communicant ...the personal representative shall succeed to all of the communicant's rights and privileges with respect to the privilege. Subject to subdivision six of this section:

> (a) the professional shall not withhold any information or document from the personal representative on the ground of privilege; and
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> (b) the personal representative may waive or decline to waive the privilege to the same extent that the communicant could do so during his or her life or capacity.

Another part of the bill replaced § 4503(b). This part expanded the exception relating to wills by adding language broad enough to cover not only wills but also other documents by which clients dispose of property at death, such as joint bank accounts, insurance policies and pension funds.

Governor Pataki, however, had problems with various parts of the proposed law. In November of 2001, he vetoed the bill. Where did that leave the law of waiver?

Mayorga v. Tate

What Governor Pataki had rejected as legislation, the courts were quick to restore as common law. In *Mayorga v. Tate*, 2001 WL 34053240 (2d Dep't Dec. 16, 2002), supra, a legal malpractice action against the decedent's former lawyer, the court began its opinion as directly as possible: "We hold that, just as the attorney-client privilege itself survives the death of the client for whose benefit the privilege exists, the right to waive that privilege in the interest of the deceased client's estate also survives, and may be exercised by the decedent's personal representative."

The court then explained the facts. Defendant attorney had handled a matrimonial matter for the plaintiff's mother until the mother died in 1993. After the mother's death, the executor assigned a cause of action for legal malpractice to the decedent's daughter, who filed suit. Plaintiff asked defendant for his file in the matrimonial matter, but defendant refused, asserting that the file was protected by the deceased mother's attorney-client privilege.

The Second Department affirmed *per curiam* the Supreme Court's decision that the plaintiff, as the assignee of the executor of the mother's estate, had "effectively waived the attorney-client privilege" and that the defendant attorney could not invoke that privilege to avoid the requested discovery. The appellate court noted that various New York cases, based on a superseded statute (the old CPLR § 835), had stated in dicta that "the power to waive the [attorney-client] privilege end[s] with the death of the client." However, the court stated: "such dicta are not binding as a matter of law, and are unpersuasive as a matter of logic." Instead, the court expressly agreed with the view expressed in Martin, Capra, and Rossi, NEW YORK EVIDENCE HANDBOOK §5.2.8, at 361-362 (Aspen 1999), that "not allowing the personal representative to waive the privilege in an action in which the client would [have done so] if alive does not make much sense."

Turning to the text of CPLR § 4503, the Second Department compared deceased clients to incompetent clients. The court said:

> ...CPLR 4503(a) expressly permits the "client" to waive the privilege. In New York, the rule is clear that when the particular client in question is incompetent, the client's conservator may act as a surrogate for the client, and waive the privilege on the client's behalf. Such a conservator "stands in the shoes of his [or her] conservatee and may waive the attorney-client privilege." It is beyond question, then, that New York recognizes that the privilege may be waived by a surrogate decision maker in the context of an incompetent client. It would seem most incongruous to hold that the rule is to the contrary in the case of a client who is deceased.
>
> It is in light of this logic that the common law has always provided that an executor may, in the interest of the estate, waive the attorney-client privilege of the deceased client....

The court expressly endorsed Surrogate Roth's reasoning in *Matter of Colby, supra,* that no New York statute required a departure from the common-law. In other words, there was "no authority binding on this court that requires us to hold that, under the codification of the common law reflected in CPLR 4503, an executor acting in the interest of the estate has no power to waive the deceased person's attorney-client privilege." Older cases to the contrary "fail to explain what line of reasoning might support the conclusion that a privilege designed to protect the interests of a person may not, after that person's death, be waived by that person's fiduciary in order to advance the interests of that person's heirs." Furthermore, those cases embrace a rule contrary to the common law, and thus contradict the later Court of Appeals decision in *Spectrum Sys. Intl. Corp. v. Chemical Bank,* 78 NY2d 371, 377 (1991), in which the Court of Appeals "expressly held that CPLR 4503 must be regarded as a mere codification of the common law."

The Second Department was aware that Governor Pataki had recently vetoed the proposed legislation to create a new CPLR § 4501(a) that would have explicitly authorized certain types of personal representatives to waive the attorney-client privilege in specified proceedings under defined circumstances. However, the court believed that the vetoed legislation addressed "many issues entirely different from the one presented in this case" and therefore "does not have any bearing on the question of whether the terms of CPLR 4503 as they currently exist permit the attorney-client privilege to be waived by the personal representative, or other surrogate decision-maker for 'the client.'"

Finally, the court returned to its basic thesis:

> [I]t makes no sense to prohibit an executor from waiving the attorney-client privilege of his or her decedent, where such prohibition operates to the detriment of the decedent'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 [decedent], 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."...

The court therefore concluded that, "under the terms of CPLR 4503, just as under the common law, an executor may waive the attorney-client privilege of his or her decedent."

August 2002 amendments to § 4503

Lawyers familiar with these issues may well ask about the effect of the August 2002 amendment to

§4503. That amendment added a new subparagraph, §4503(a)(2), to rein in the so-called "fiduciary exception" to the attorney-client privilege. Does that amendment square with *Mayorga* and *Colby*, or does it clash with those decisions?

The answer is that the decisions in *Mayorga* and *Colby* are consistent with the amendment to §4503. The fiduciary exception is a common law doctrine that arose in context of securities litigation and is embodied in decisions like *Garner v. Wolfinbarger*, 430 F2d 1093 (5th Cir. 1970), and *Hoopes v. Carota,*, 74 N.Y.2d 716, 543 N.E.2d 73, 544 N.Y.S.2d 808 (1989). [For a very recent case applying the fiduciary exception, *see RMED International, Inc. v. Sloan's Supermarkets, Inc.*, S.D.N.Y., NYLJ Jan. 16, 2003]

The fiduciary exception states that in some situations a fiduciary has no attorney-client privilege against an estate's beneficiaries. *See generally* Ronald C. Minkoff, *The Fiduciary Exception to the Attorney-Client Privilege* (N.Y.L.J. May 1, 1990). When the fiduciary exception applies, beneficiaries who satisfy certain criteria can force the fiduciary and his or her attorney to disclose the client's confidential communications. The August 2002 amendment to § 4503 quashes the fiduciary exception in cases involving personal representatives by providing that (i) the beneficiaries of an estate are not clients of the personal representative's attorney unless the personal representative and the attorney agree otherwise, and (ii) the fiduciary relationship between the personal representative and an estate's beneficiary does not, by itself, give rise to any waiver of the attorney-client privilege for confidential communications between the attorney and the personal representative.

The 2002 amendment to § 4503(a) is in many ways the mirror image of the decisions in *Mayorga* and *Colby*. Section 4503(a)(2) negates common law decisions allowing an estate's beneficiary to force a personal represent to waive the attorney-client privilege involuntarily, but at the same time §4503(a)(2) does not diminish the personal representative's right to waive the privilege voluntarily to advance the interests of the estate. Thus, the amendment to § 4503 - which is a topic for another day - is fully consistent with *Mayorga v. Tate* and *Estate of Colby.*

Conclusion

This article has addressed two separate and distinct questions: (1) May a lawyer willingly testify about conversations with a deceased client? and (2) May a decedent's executor (or some other personal representative) compel an unwilling lawyer to testify about conversations with the deceased client? Thanks to the illuminating recent decisions in *Mayorga v. Tate* and *Estate of Colby* and the August 2002 amendments to § 4503, New York now has sound answers to these questions. The gyrations of history never cease, but for the foreseeable future we should be on the smooth part of the roller coaster.

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