

The Application of the Attorney-Client Privilege in Revocable Trust Contests

By Robert M. Harper

With the passage of time, revocable trusts have gained increased prevalence in estate planning and, thus, also have been the subject of more contests. While the application of the attorney-client privilege to communications between the attorney-draftsperson of a testamentary instrument and the testator in will contests is the subject of a statutory exception, there is no statutory guidance governing whether a similar exception applies with respect to communications between the attorney-draftsperson of a revocable trust and the settlor in revocable trust contests. In the absence of such statutory guidance, courts have been left with little authority on which to decide whether—and to what extent—such an exception to the attorney-client privilege should apply in revocable trust contests. This article addresses that issue.

The Attorney-Client Privilege

As codified in Rule 4503 of the New York Civil Practice Law and Rules (CPLR), the attorney-client privilege provides that “an attorney...shall not disclose” confidential communications between the attorney and a client “arising as an incident of the attorney’s professional employment,” absent a waiver of the privilege by the client.¹ The attorney-client privilege—which is the oldest among the common-law evidentiary privileges—facilitates open communication between an attorney and client, ensuring that the client (a) fully confides in his or her attorney; and (b) is secure in the knowledge that the confidences the client shares with his or her attorney during the representation will remain private.²

The privilege survives the death of a client, such that the client’s attorney has a duty to maintain the confidentiality of privileged communications even after the client’s demise.³ Insofar as the fiduciary of a deceased client’s estate stands in the client’s shoes, the fiduciary may waive the attorney-client privilege on behalf of the deceased client’s estate.⁴

Moreover, to the extent that the attorney-client privilege shields relevant information from disclosure, tension exists between the public policies favoring liberal discovery and withholding relevant evidence under the privilege.⁵ This is because the withholding of relevant information under the attorney-client privilege “hampers the truth-finding process,” which “is at the heart of our judicial system.”⁶ Consequently, Surrogate’s Courts have recognized that the attorney-client

privilege “is to be strictly construed in keeping with its purpose.”⁷

Mindful of the foregoing principles, there are exceptions to the attorney-client privilege, which govern in proceedings concerning the validity of testamentary instruments and revocable trusts. The exceptions are discussed below.

The Application of the Attorney-Client Privilege in Proceedings Concerning the Probate, Validity, and Construction of Testamentary Instruments

In addressing the attorney-client privilege, the New York Legislature enacted CPLR 4503(b), which contains a statutory exception to the privilege.⁸ The exception provides that, in a proceeding concerning the probate, validity, or construction of a will, “an attorney...shall be required to disclose information as to the preparation, execution or revocation of any Will or other relevant instrument...”⁹ That is, except to the extent that disclosure of a privileged communication “would tend to disgrace the memory of the decedent.”¹⁰

When the statutory exception applies, an “attorney may testify [and disclose documentation] concerning the preparation of a will or other relevant documents[,] even if the will or documents are not those actually filed for probate and contested.”¹¹ As such, in *Matter of Soluri*, the Surrogate’s Court held that CPLR 4503(b) authorized an attorney—who (a) prepared advance directives, but not a will, for the testator (because the testator told the attorney that she did not want a will); and (b) spoke with the testator in the weeks leading up to the preparation and execution of the propounded will that another attorney drafted—to testify as to the privileged communications the non-drafting attorney had with the testator.¹² The court explained that the non-drafting attorney’s testimony fell within the statutory exception to the attorney-client privilege.¹³

Of course, the statutory exception to the attorney-client privilege is a “narrow one.”¹⁴ It generally does not apply in proceedings other than those that concern the probate, validity, or construction of a testamentary instrument, such as discovery proceedings, kinship proceedings, and proceedings to determine the validity of a claim against a decedent’s estate.¹⁵

The statutory exception also does not authorize a blanket waiver of the attorney-client privilege with respect to any and all confidential communications

between an attorney and a client.¹⁶ For example, in *Matter of Delano*, the objectants in a probate proceeding appealed from a decree admitting a testamentary instrument to probate, claiming that the Surrogate's Court committed reversible error by excluding from evidence—on privilege grounds—the testimony of an attorney who did not draft the propounded instrument, but was prepared to testify as to the intentions the testator expressed to the attorney years after the testator executed the propounded instrument.¹⁷ The objectants asserted that the attorney's testimony fell within the statutory exception set forth in CPLR 4503(b), but neither the Surrogate's Court nor the Appellate Division credited that argument.¹⁸

Nevertheless, even in those circumstances where the statutory exception codified in CPLR 4503(b) does not apply, courts have recognized the following non-statutory exception to the attorney-client privilege: in a probate proceeding, communications between a testator and an attorney who provided estate-planning services to the testator, but which did not concern the instrument offered for probate, should not be shielded from discovery “in controversies between [the testator's] heirs at law, devisees, legatees or next of kin....”¹⁹ The underlying rationale is that the testator “would expect the confidentiality of such communications to be lifted in the interests of resolving disputes over” the testator's estate plan.²⁰ Thus, in *Matter of Bronner*, the Surrogate's Court directed an attorney—who merely consulted with the testator shortly before the testator retained another attorney to prepare her will—to testify as to his privileged communications with the testator, despite that the testimony fell outside of CPLR 4503(b).²¹

While the exceptions to the attorney-client privilege that apply in proceedings concerning the probate, validity, and construction of wills are well settled, the same cannot be said for the application of the attorney-client privilege in contests concerning revocable trusts. The evolving body of case law concerning revocable trusts and its impact on the attorney-client privilege is discussed below.

The Exception to the Attorney-Client Privilege in Revocable Trust Contests

As revocable trusts have become increasingly popular as estate-planning devices, so too have disputes as to the validity of such instruments. With the increased prevalence of revocable trust contests, issues attendant to the attorney-client privilege's application have arisen in such disputes.

In contrast to disputes concerning the probate, validity, or construction of wills, there is no statutory exception to the attorney-client privilege that explicitly applies to revocable trust contests. However, it has

been argued, in at least one case, that the statutory exception to the attorney-client privilege codified in CPLR 4503(b) should be extended to revocable trusts because revocable trusts function as wills and carry with them many of the same rights and remedies as wills do.²² Indeed, much like testamentary instruments, revocable trusts “are ambulatory during the settlor's lifetime, speak at death to determine the disposition of the settlor's property, may be amended or revoked without court intervention and are unilateral in nature.”²³

Describing that argument as “persuasive,” the Surrogate's Court that considered it found that the court need not decide whether the statutory exception to the attorney-client privilege set forth in CPLR 4503(b) governs in revocable trust contests. The court reasoned that the attorney-client privilege “does not apply in a dispute between parties as to an interest in property which [the parties] claim through the same decedent.”²⁴ Consequently, the court directed the attorney-draftsperson of an alleged amendment to a revocable trust to testify as to the privileged communications he purportedly had with the settlor.²⁵

There being no statutory guidance and only one reported case concerning the application of the attorney-client privilege in revocable trust contests, it remains to be seen how the Surrogate's Courts other than the one discussed above will address this issue. However, it is highly unlikely that, in revocable trust contests, the courts would allow attorneys who prepare revocable trusts to shield from discovery the confidential communications they have with settlors concerning the trusts.

Conclusion

The law governing revocable trusts is evolving; and, as it relates to the attorney-client privilege and its application in revocable trust contests, that is equally true. To the extent that disputes concerning the validity of revocable trusts become more common, so too will questions concerning the application of the attorney-client privilege and any exceptions thereto. It will be interesting to see how the Surrogate's Courts resolve these privilege issues.

Endnotes

1. CPLR 4503; *Matter of Colby*, 187 Misc. 2d 695, 696-97, 723 N.Y.S.2d 631 (Sur. Ct., N.Y. Co. 2001).
2. *Matter of Bronner*, 7 Misc. 3d 1023(A), at *2-3, 801 N.Y.S.2d 230 (Sur. Ct., Nassau Co. 2005).
3. *Mayorga v. Tate*, 302 A.D.2d 11, 11-12, 752 N.Y.S.2d 353 (2d Dep't 2002).
4. *See id.*
5. *Colby*, 187 Misc. 3d at 696-97.
6. *See id.*
7. *See id.* at 697.

8. CPLR 4503(b).
9. *See id.*
10. *See id.* With respect to material that is subject to the attorney-client privilege, there is a dearth of reported case law concerning the disclosure of privileged material that would tend to disgrace the testator's memory. *Cf. Matter of Roll*, N.Y.L.J., Apr. 4, 1994, p. 22, col. 1 (Sur. Ct., Bronx Co.) (directing an *in camera* review to determine whether the requested documents would disgrace the testator's memory). However, courts have provided more guidance as to the discovery of material that would tend to disgrace a testator's memory in analyzing CPLR 4504(c), which addresses physician-patient confidentiality and mirrors CPLR 4503(b), as it relates to disgracing the testator's memory. *Cf. Matter of Stern*, N.Y.L.J., Nov. 24, 2014, p. 24 (Sur. Ct., N.Y. Co.) (addressing CPLR 4504).
11. *Matter of Soluri*, 40 Misc. 3d 1207(A), at *1-5, 975 N.Y.S.2d 712 (Sur. Ct., Nassau Co. 2013).
12. *See id.*
13. *See id.*
14. *Matter of Bronner*, 7 Misc. 3d 1023(A), at *3, 801 N.Y.S.2d 230 (Sur. Ct., Nassau Co. 2005).
15. *Matter of Trotta*, 99 Misc. 2d 278, 281, 416 N.Y.S.2d 179 (Sur. Ct., Bronx Co. 1979).
16. *Matter of Trump*, N.Y.L.J., Apr. 7, 2000, p. 30, col 1 (Sur. Ct., Queens Co.).
17. *Matter of Delano*, 38 A.D.2d 769, 327 N.Y.S.2d 908 (3d Dep't 1972).
18. *See id.*
19. *Bronner*, 7 Misc.3d 1023(A), at *3-4.
20. *See id.*
21. *See id.*
22. *Matter of Leddy*, 43 Misc. 3d 1214(A), at *1, 988 N.Y.S.2d 523 (Sur. Ct., Nassau Co. 2014). Based upon *Leddy*, the Trusts and Estates Law Section's Legislation and Governmental Relations Committee has proposed amending CPLR 4503(b) to extend the statutory exception to the attorney-client privilege to proceedings concerning the validity and construction of revocable trust instruments.
23. *Matter of Davidson*, 177 Misc. 2d 928, 930, 677 N.Y.S.2d 729 (Sur. Ct., N.Y. Co. 1998); *Matter of Tisdale*, 171 Misc. 2d 716, 721, 655 N.Y.S.2d 809 (Sur. Ct., N.Y. Co. 1997).
24. *Leddy*, 43 Misc. 3d 1214(A), at *1.
25. *See id.*

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