Common Privilege Issues Faced by Estates Practitioners

By Justin de Vries and Angela Casey[1]

Can privileged documents be disclosed once the client is dead?

Privilege survives death. However, there are exceptions by which otherwise privileged documents will be produced after the death of the client.

The estate trustee (or ETDL) may waive privilege on behalf of the deceased. In *Hicks Estate* v. *Hicks*, the Court held that an estate trustee steps into the shoes of the deceased and that privilege may be waived by the estate trustee. Accordingly, the estate trustee may call for disclosure of any material that the client, if living, would have been entitled to from his solicitors. The *Hicks* case is therefore a handy resource for an estate trustee seeking disclosure of otherwise privileged or confidential documents.

However, many solicitors and other professionals who owe duties of confidentiality to the deceased may ultimately seek the comfort of a court order before disclosing documents protected by solicitor and client privilege. For this reason, language is frequently built into an order giving directions or an order appointing an ETDL to make it clear that the solicitor(s) and/or other professional(s) are relieved of their duties of confidentiality and that solicitor and client privilege is waived. Suggested language for such an order is attached as an appendix to this paper.

In the event of a dispute among the estate trustees as to whether to waive privilege (and where the will does not provide a dispute resolution mechanism), the estate trustee seeking disclosure may apply, pursuant to section 9 of the *Estates Act*, for an order that documents be disclosed.

When a solicitor is advising on estate administration, who does the solicitor and client privilege belong to?

Estates do not have lawyers; estate trustees have lawyers.

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Although lawyers commonly refer to themselves as the "lawyer for the estate", the solicitor is in fact the solicitor for the estate trustee. In *Coppel* v. *Coppel Estate*, [2001] O.J. No. 5246 (Ont. S.C.J.), the estate trustee paid its own legal fees out of the estate to defend an action against him by the beneficiaries for negligent fulfilment of his duties as estate trustee. Justice Quinn held that without the benefit of a court order or consent of the beneficiaries, the estate trustee could not pay his legal fees out of the estate. Justice Quinn held:

> I think the source of the problem is the misconception by ...[the law firm] that they are solicitors for the estate. Instead, they are solicitors for the Estate Trustee: Estates cannot hire lawyers.[i]

If there is more than one estate trustee, a lawyer should make it clear from the outset whether or not his retainer is a joint one. If the solicitor has been retained by only one of the estate trustees, and a dispute later arises as between the estate trustees, it may be possible for one estate trustee to assert solicitor and client privilege against the other.

Can a trustee assert solicitor and client privilege against beneficiaries?

The decision of Justice Lederman in *Ontario (Attorney-General) v. Ballard Estate*[ii] is often cited for the proposition that beneficiaries are entitled to production of all legal advice rendered to trustees. After all, the logic goes, since trustees must act unfailingly in the interests of the beneficiaries, then the lawyer's advice to the trustee must always be producible to the beneficiaries. A closer look at Justice Lederman's decision, however, reveals that it is not quite so simple.

The rationale behind Justice Lederman's decision requiring disclosure in *Ballard* was that the trustee and the beneficiaries had a "joint" or "common" interest in the advice at issue. In a case where two individuals have a joint or common interest in the advice, no privilege attaches.[iii]

In *Ballard*, the Plaintiffs brought a motion for an order requiring production by the executors of all communications regarding the management of the estate, including all communications from the executors' solicitors relating to the matters at issue in the action. The executors resisted, and asserted solicitor and client privilege.

In *Ballard*, the decision in Lord Wrenbury in *O'Rourke v. Darbshire*[iv] was cited for the proposition that communications passing between an executor and solicitor are not privileged as against the beneficiaries claiming under the will or trust. Lord Wrenbury used a propriety analysis in deciding that the beneficiaries were entitled to see documents containing professional advice taken by the executors as trustees. Lord Wrenbury stated simply, "The proprietary right [of beneficiaries] is a right to access to documents which are your own. No question of professional privilege arises in such a case."[v]

For that reason, counsel in *Ballard* focused their arguments on whether or not the claimants were truly "beneficiaries". The trustees argued that the claimants had only a contingent or residual interest in the estate, and as such, had no right to access privileged documents until their status as a beneficiary was first determined. In the end, Justice Lederman found that "a property right analysis unfortunately leads one astray"[vi] and that the proper approach was "to bear in mind the rationale of the solicitor and client privilege and whether it has any applicability to this kind of situation."[vii]

He went on to consider the Supreme Court's decision in *Goodman v. Geffen*[viii], in which the court clarified that there are situations where solicitor and client privilege does not even arise because the interests of the party seeking the information are the same as those of the deceased client who retained the solicitor. This is the reason Courts will receive evidence of instructions to solicitors in order to determine the testator's true intentions. In *Goodman v. Geffen*, the Supreme Court found that:

> In my view, the considerations which support the admissibility of communications between solicitor and client in the wills context apply with equal force to the present case. The general policy which supports privileging such communications is not violated. The interests of the now deceased client are furthered in the sense that the purpose of allowing the evidence to be admitted is precisely to ascertain what her true intentions were.[ix]

In *Ballard*, the Court found that because the beneficiaries (even contingent beneficiaries) had a joint or common interest in the advice rendered to the trustee, they were entitled to production of the legal advice.

However, it is quite possible to envision a situation where the interests of the trustee and the interests of the beneficiaries conflict. Take, for example, the case of beneficiary who also has a potential claim

against the estate for dependant's relief. As Schnurr explains, the duty of the estate trustee in such a scenario is to maximize the value of the estate, and to defend claims against the estate.[x] Surely that beneficiary is not entitled to production of a legal opinion rendered to an estate trustee regarding the strength of the beneficiaries' claim.

Beneficiaries may argue that because the estate paid for the lawyer's advice, the beneficiary is entitled to see it. I would suggest that there could be circumstances in which the advice is properly paid for out of the estate (as where permitted by the trust deed, will or by order) and yet a beneficiary of the estate is not entitled to see it on the basis that his interests are in conflict with the estate trustee.

The critical issue is whether the trustee and the beneficiary have a joint or common interest in the advice. If they do, then it is not privileged as against the beneficiary. As set out by the Court of Appeal in *Stewart v. Walker*[xi]

> The reason on which the rule is founded is the safeguarding of the interests of the client, or those claiming under him when they are in conflict with the claims of third persons not claiming or assuming to claim under him. And that is not this case, where the question is as to what testamentary disposition, if any, were made by the client.[xii]

Applying this analysis, solicitor and client privilege should protect communications between the estate trustee and his solicitor where the interests of the beneficiaries and the interests of the trustee are in conflict or have the potential to conflict, the obvious example being a contested passing of accounts. In such cases, the common law rule prohibiting privileged communications against disclosure should entitle a trustee to privileged communications with his lawyer without fear that such communications could be disclosed to the beneficiaries.

However, there is a troubling decision in *Royal Trust Corp of Canada v. Lepofsky*[xiii] in which Justice Pitt reached the opposite conclusion and required a trustee to disclose its privileged communications with its counsel regarding the contested proceedings with the beneficiaries. This decision serves as a reminder to solicitors to exercise extreme care in their communications with trustees. If the solicitor is advising on a number of issues involving the estate, only one of which involves a conflict or potential conflict, it would be prudent to maintain a separate file for the matter where privilege may later have to be asserted against a beneficiary.

Can parties who are on the same side protect privileged communications which are shared among their respective lawyers?

In some cases, parties may be represented by different lawyers, but have a common interest with respect to a particular issue. Take, for example, the situation in which a group of estate trustees sued for breach of trust by the beneficiaries are separately represented because they ultimately seek contribution and indemnity against each other. They nevertheless have a joint interest in claiming over against the solicitor who gave them advice leading to the breach of trust. The solicitor for one of the estate trustees has done a memorandum of law which he proposes to share with the lawyers for the other estate trustees. If the memorandum were to be circulated to a stranger to the solicitor and client relationship (i.e. counsel for the other estate trustees), the estate trustee would risk a finding that he has waived solicitor and client privilege. However, the law allows parties with a common interest to share privileged material among themselves without waiving any privilege that would otherwise attach.

Common interest privilege is not itself a separate category of privilege, but operates to protect privilege from waiver in situations where documents are shared among or between parties. In *Barclays Bank PLC* v. *Devonshire Trust*[xiv], Justice Newbould reviewed the law of common interest privilege and found that parties with a common interest could share otherwise privileged material with each other without having waived the privilege. This was so even though the same parties could ultimately be adverse in interest at some future point.

Another context where this issue may arise for the estate practitioner is on the death of a person who was the subject of a capacity fight. Say, by way of example, that Child A seeks guardianship over Mom. Child B and Mom both take the position that Mom is capable. Child B and Mom are separately represented but their lawyers share information and strategy on the basis of their common interest in a finding of capacity. Mom dies. Child A, who is the executor of Mom's will (and consequently otherwise entitled to waive privilege) seeks to compel Mom's lawyer to produce privileged documents provided to him by Child B's lawyer.

This scenario underscores why it is important, when proceeding on the basis of a common interest privilege, to document the arrangement. The parties with a joint interest might consider signing an agreement setting out the basis of their common interest and their agreement to maintain

confidentiality as against third parties. A sample of such agreement is set out at Appendix "B". They should also consider marking their communications with each other "subject to common interest privilege" so that they can be easily identified and protected.

In what circumstances will settlement privilege be waived?

A motion in the case of *Hallman v. Pure Spousal Trust (Trustee of)*[xv] illustrates the care that must be taken to protect settlement privilege in "without prejudice" communications from being impliedly waived.

In *Hallman*, the trustees made a without prejudice offer to settle in the context of an application by Ms. Hallman for, among other things, the removal of the trustees. Ms. Hallman alleged that the trustees improperly exercised their discretion whether to provide her with income. She then disclosed the contents of the without prejudice offer on the basis that the trustees had impliedly waived privilege by referring to it in their meeting minutes. Justice Brown ultimately disagreed with Ms. Hallman. The decision contains a helpful summary of the law of settlement privilege and when it may be waived. By way of summary:

- Settlement privilege belongs to both parties to the communication and neither can unilaterally waive it.
- The onus of establishing a waiver of privilege rests with the party asserting the waiver.
- It will be waived if the possessor of the privilege knew of the existence of the privilege and demonstrated a clear intention to forego it.
- However, it may be waived even if there was no intention to waive it.
- It may be waived if the party uses a privileged communication as the basis of its claim or defence.
- It may be waived expressly or by implication.
- If a party discloses a portion of a privileged communication, fairness dictates that the remainder be disclosed.

Can a mediator ever be compellable as a witness?

In *Rudd v. Trosasacs Investments Inc.*[xvi], the Divisional Court considered the issue of whether a mediator could be called as a witness.

In *Rudd,* the parties entered into a settlement agreement following mandatory mediation. A dispute arose as to whether a particular party was a party to the settlement agreement. A motion was then brought to enforce the settlement and an interim order was sought to compel the mediator to testify about communications at the mediation.

The motions judge ordered that the mediator could be examined as a witness, concluding that while settlement discussions are privileged, once a settlement had been reached and its interpretation was in question, it might be necessary to disclose mediation discussions to achieve "substantive justice".

Not surprisingly, the decision was appealed to the Divisional Court, which ultimately allowed the appeal. The Divisional Court found that the motions judged erred in dealing only with "without prejudice" settlement privilege and failing to consider whether there was a general mediation privilege based on the Wigmore principles. The court applied the Wigmore principles, namely,

1. that the communications must originate in a confidence that they will not be disclosed,

2. that the element of confidentiality must be essential to the maintenance of the relationship in which the communications arose,

3. that the relationship must be one which, in the opinion of the community , ought to be "sedulously fostered", and

4. that the injury caused to the relationship by disclosure of the communications must be greater than the benefit gained for the correct disposal of the litigation.

The Divisional Court affirmed that the communications between a mediator and settling parties should be protected by privilege, given the very important public interest in maintaining the confidentiality of the mediation process.

[i] *Coppel v. Coppel Estate*, [2001] O.J. No. 5246 (Ont. S.C.J.) at paragraphs 8 and 9.
[ii] 1994 CanLII 7513 (Ont. S.C.) (*Ballard)*
[iii] See, for example, *Pryden v. Swiss Reinsurance Co*. 2010 C.E.B. & P.G.R. 8416, 86 C.C.P.B. 272 (
[iv] [1920] A.C. 581 (H.L.)
[v] *Ibid,* at pp. 626-627.
[vi] *Ballard,* at para. 15.
[vii] *Ibid*, at para. 7.
[viii] (1991), 81 D.L.R. (4th) 211, [1991] 2 S.C.R. 353, 42 E.R.R. 97
[ix] *Ibid,* at p. 235
[x] Schnurr, Brian, "Estate Litigation" 2nd ed. ch. 21-13.
[xi] (1903), 6 O.L.R. 495 (C.A.)
[xii] *Ibid.* at pp. 497-8
[xiii] 1998 CarswellOnt 1492 Docket 11263/64
[xiv] 2010 ONC 5519, 98 CP.C. (6th) 394 (Ont. SCJ – Commercial List)
[xv] 51 E.T.R. (3d) 153, 83 C.P.C. (6th) 55 ("*Hallman*")
[xvi] (2006), 79 O.R. (3d) 687 ("*Rudd")*