

Solicitor Client Privilege in Estate Litigation

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In one of the leading cases in the area of solicitor client privilege the Supreme Court of Canada in *Solosky v. The Queen*² adopts with approval the following from Wigmore on evidence.

“Where legal advice of any kind is sought from a professional legal advisor in his capacity as such the communications relating to the purpose made in confidence by the client are at his instance permanently protected from disclosures by himself or by the legal advisor except the protection be waived.”

Justice Dickson goes on to state “the right to communicate in confidence with one’s legal advisors is a fundamental civil and legal right”.³ This fundamental civil and legal right does not end once the client passes away. It has been said that solicitor client communication “once privileged” and is “always privileged”. Even if the lawyer has been disbarred or the client changes lawyers, the privilege remains in place.

It is a privilege that belongs to the client not to the lawyer. It is the client who may waive that privilege. There are a number of cases that discuss when and how the privilege may be waived. This privilege is so important that if the Court sees the privilege is about to be broken inadvertently or improperly, the Court will intervene to prevent the disclosure from taking place.⁴

A distinction must be drawn between the ethical duty which is inherent in the lawyer/client relationship to keep matters discussed between lawyer and client confidential and the substantive concept and/or evidentiary rule of privilege. The ethical

¹ I would like to thank Celia Fergusson, Iain McDonald and Mark Tallon along with other members of the Wills and Estate Practice Group at the firm of Fillmore Riley for their help in researching this paper.

² 1979 Can LII 22 (SCC), (1980) 1 SCR 821

³ Page 11

⁴ See *Geffen v. Goodman Estate*, 1991 CanLII 69 (1991 2 SCR 353 p. 19) 1991 Carswell ALTA 91

duty a lawyer has prohibits the voluntary disclosure of information about his or her clients without the clients express consent.⁵

Often, lawyers are faced with the task of determining who exactly his or her client was long after the retainer has expired. So long as the client remains alive and has capacity and so long as the lawyer can identify who the client is then arguably, the only real complicating features of the relationship may arise when the need to disclose confidential information is required in the litigation process. Most of the reported cases seem to focus on situations where privilege has been waived inadvertently⁶. The purpose of this paper is not to explore in any detail the issue of waiver of privilege or the body of case law relating to the issue of privilege outside the estate litigation context. That is not to say that the body of case law that exists cannot be of some assistance when confronted with concerns of privilege within the estate litigation context.

The Wills Exception

As noted above, the privilege does not die with the client. The rationale for maintaining privilege after death both in the criminal and civil context has been explained as follows:

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 maybe 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 reputations, civil liability or possible harm to friends or family. Posthumous disclosure of such

⁵ See Law Society of Manitoba *Code of Professional Conduct* 2.03, See also Law Society of Manitoba Code Professional Conduct 2.02(10) *Clients with Diminished Capacity*. It should also be noted that the Code of Professional Conduct with respect to accountants and the Standards of Professional Responsibility with respect to certified financial planners have ethical/confidentiality provisions in their Codes of Conduct that prohibit the sharing of personal or confidential client information in the absence of client consent or unless justified as a result of court order or part of the regulatory process. See Section 208 Confidentiality of Information re: Code of Professional Conduct ICAM and Principle 6, Rule of Conduct 21, Standards of Professional Responsibility, Certified Financial Planners.

⁶ *York v. Gilligan and Gilligan*, 1996 BCJ 193 (Master Barber), *Schwartz Estate v. Kwinter*, 2008 ABQB 123 affirmed by Alberta Court of Appeal.

communications maybe as feared as disclosure during the client's lifetime⁷.

Specifically within the context of a will

It was Wigmore's belief that a client's discussions with his or her solicitor with respect to the drafting of a will, were intended to be only temporarily confidential during the lifetime of the testator and that after the clients death, the solicitor was free to disclose all those facts that related to the execution and contents of the will⁸.

In an older Ontario Court of Appeal decision, *Stewart v. Walker*⁹, it was thought that the deceased had passed away without leaving a will. A document appearing to be a copy of the deceased's will was produced. The Attorney General for the Province of Ontario had a financial interest in the case and took the position that the deceased died intestate and sought to call the deceased's lawyer as a witness at trial to give evidence with respect to communications that passed between the deceased and the solicitor. It is interesting to note that the lawyer, in fact, did not draft the document that purported to be the will.

The Ontario Court of Appeal concluded:

- (a) Solicitor/client privilege does not necessarily die with the "testator" but passes on to his or her heirs or next-of-kin; and
- (b) the question of privilege, however, does not necessarily arise in this particular case as the issue is whether or not there was a will.

The nature of the case precludes the question of privilege from arising. The reason on which the rule is founded is a 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

⁷ See Sopinka & Lederman & Bryant-The Law of Evidence in Canada, Third Edition, 2009, pp. 952-953

⁸ Supra p. 953

⁹ 1903 6 OL 495 ONTCA

question is as to what testamentary dispositions if any were made by the client”¹⁰.

The development of the so called “wills exception” under Canadian law finds its foundation in the *Stewart v. Walker* decision. The rationale behind the rule of permitting the lawyer who took instructions to testify as to what the deceased told him or her is founded on the rationale that to permit such testimony permits the lawyer to “protect” the client’s interests. The court recognises that it is important, wherever possible, to ensure that the testator’s intentions are implemented. Where there is an allegation of undue influence, testamentary capacity or there is ambiguity with respect to a bequest, the courts have recognised that perhaps the person best equipped to assist the court in determining whether the testator had capacity or was unduly influenced, was in fact the lawyer who took instructions from the deceased.¹¹

In her article ‘Solicitor-Client Privilege To Disclose Or Not To Disclose Remains The Questions Even After Death’¹², Heather Laidlaw writes:

The restricted operation of the “wills exception” is not generally appreciated in practice. Indeed, from a small sampling of the Ontario Bar Survey during the preparation of this article the author found that many lawyers never turned their minds to the questions of privilege when called upon to produce wills, drafts and other evidence of the deceased client’s testamentary communications. It is either assumed that the privilege does not operate in the circumstances or that it has otherwise been validly and effectively waived in order to permit disclosure.¹³

That is not to say that in every case where a challenge has been advanced concerning the contents of a will that the lawyer will necessarily be called upon to testify. In *Royal Trust Corp. of Can v. Mahadeo*¹⁴ an application was brought to construe the provisions

¹⁰ *Supra*, pp. 497-498

¹¹ See *Re Ott* (1972) 2 OR 5 (Surr.Ct.) Note: this case involved the question as to whether the deceased destroyed a will believing that its destruction revived a previous will or whether he truly intended to revoke the will.

¹² 1995, Vol. 15, *Estates and Trust Journal*, p. 56

¹³ Page 57

¹⁴ 1989 CarwellOnt 1981 Ontario Supreme Court (High Court of Justice)

of a will. The particular clause in questions called for the executor to purchase an annuity for the deceased's ex-wife to satisfy the deceased's support obligations to her. The court was "urged" to interpret "my spousal support obligation" more broadly. Affidavits were filed by the deceased's children and an affidavit from the solicitor who drew the will. In regards to the lawyer's affidavit, Justice Austin writes:

I regard this as an extraordinary document and said so to counsel on the motion. The affidavit purports to summarize the discussions between the solicitor and client and to set out the intentions of the testator. This latter is of course is what the will supposed to do. Why the solicitor felt compelled to make the affidavit and how he reconciled it with solicitor/client privilege were not explained.

In certain circumstances, the need for extrinsic evidence, especially in the context of testamentary intention or to contradict or add to the plain and fair reading of the words in the will, is simply not admissible or acceptable.

Each set of circumstances will have to be examined closely to determine what if any role the lawyer who drafted the will should play in any litigation touching upon the testamentary disposition.

*Goodman Estate v. Geffen*¹⁵

The *Geffen* decision is often cited as one of, if not the most important, recent pronouncements from the Supreme Court of Canada in regard to the issue of solicitor/client privilege in the context of estate litigation. It is submitted that upon close reading of the case the Supreme Courts focus was not primarily on the evidentiary issue of solicitor/client privilege but rather giving better "direction" in regards to the issue of undue influence. Often when *Geffen* is cited, the facts of the case are over looked. I think they are important to understand the context in which the decision to "expand" the concept of solicitor/client privilege to *inter vivos* trusts was made.

¹⁵ 1991 CanLII 69 (1991) 2 FCR 353.

Annie Sanofsky had four children. Her three sons Sam, Ted and Jack were successful businessmen. Her daughter Tzina had some mental health issues. Annie made two wills but in her second will, she left everything to her daughter Tzina, including a house in Calgary.

Sam, Ted and Jack, Tzina's brothers, were quite concerned. Tzina, they had concluded was incapable of managing her own affairs and would likely squander what their mother had left her. Something had to be put in place to protect Tzina. Sam, Ted, Jack and Tzina consulted with a Calgary lawyer, Mr. Pearce. A number of options were discussed, it was suggested that Tzina transfer the house to her brother's children, take a life estate and be permitted to dispose of the house as she saw fit upon her passing. No agreement was arrived at. The brothers paid for the consultation.

Subsequent to the initial meetings with Mr. Pearce, Tzina returned to seek his advice independent of her brothers on several occasions. Tzina agreed eventually that the house would be put into a trust, her brothers named as trustees and she would maintain a life interest. Upon her passing, the trust property (the house) would be divided equally amongst her surviving children, nephews and nieces i.e. all of Annie Sanofsky's grandchildren.

There was evidence to suggest that after the deed was signed, Tzina did not understand its full effect and tried to sell the property on two occasions. She passed away and in her will, left her entire estate to her children only, i.e. not all the grandchildren of Annie Sanofsky.

Tzina's daughter issued a claim seeking a declaration that the trust was void due to undue influence.

The question arose as to whether or not Mr. Pearce could testify in regard to the instructions he has received from Tzina and the circumstances surrounding those instructions.

At trial the court admitted the lawyer's evidence holding in essence that a case involving *inter vivos* gift or trust was analogous to the wills context and the wills exception could be applied.

In the Supreme Court, the respondents took the position that the trial judge erred in drawing this analogy and that Mr. Pearce, as the deceased solicitor, should not have been permitted to testify and that the court had an obligation to put a stop to his evidence but did not do so. A further argument was advanced that Tzina's heirs and her executor were the only ones who could have waived the privilege.

Madam Justice Wilson describes the "wills exception" in regards to admissibility of otherwise privileged communications as follows:

An exception has, however, developed to permit a solicitor to give evidence in wills cases and a variety of explanations for this exception to the general rule concerning solicitor/client privilege have been advanced by commentators in the courts alike.¹⁶

Madam Justice Wilson then goes on to review the historical development of the law of privilege in the context of estate litigation. She concludes:

In the present case the respondents argue that no analogy can be drawn between these wills cases and the situation here. I disagree, it is implicit in their argument that the common law has yet only recognized an "exception" to the general rule of the privileged nature of communications between solicitor and client when dealing with the execution, tenor or validity of wills and wills alone. Their argument is reminiscent of earlier days when the "pigeon hole" approach to rules of evidence prevails. Such, in my opinion is no longer the case. The trend towards a more principled approach to admissibility questions has been embraced both here and abroad...a trend which I believe should be encouraged.¹⁷

¹⁶ Paragraph 59

¹⁷ Paragraph 64

The court goes on to state that the interests of the deceased clients are furthered in the sense that the purpose of allowing the evidence to be admitted is precisely to ascertain what their true intentions were. The principle of extending the privilege to the heirs or successors to the deceased is promoted by focusing the inquiry on which those heirs or successors properly are. It is in the interest of justice to admit such evidence.

Finally, with respect to issue of waiver, the court concluded that no privilege can be waived until the true intentions of the settler are ascertained. Unless the testimony of the solicitor who received instructions is heard, the true intentions can not be determined. In other words, until the issue of undue influence had been determined neither Tzina's next of kin, her executor or heirs was in a position to waive privilege.¹⁸

Powers of Attorney

The question as to whether or not the wills exception re: solicitor/client privilege will extend to the context of powers of attorney in light of the *Geffen* decision seems almost rhetorical. If a donor becomes incapacitated and the question arises as to whether he or she had the capacity to provide instructions to counsel to draft a power of attorney then I think there is little doubt a court will not prevent testimony being accepted from counsel who drafted the power of attorney based on solicitor/client privilege.¹⁹

There is some case law that discusses the role of the committee when information is required from the incapacitated individual's counsel.

¹⁸ See also *R v. Jack*, 1992, 1992 CanLII 2764 (MBCA) discussed the *Geffen* decision in the context of a criminal prosecution. The accused was on trial for the murder of his wife. Shortly before her disappearance, the wife consulted with a lawyer with respect to the domestic difficulties she and the accused were having. The court permitted the lawyer to testify on the grounds that it was in the interest of both the deceased and the administration of justice that those communications in question be admitted into evidence.

¹⁹ In two fairly recent Manitoba decisions, *Dubois v. Wilcosh* 2007 MBQB 20 CanLII and *EB v. SB & BK* 2010 MBQB 15 CanLII, the role of the lawyer as "witness" was reviewed by the court in the context of a Power of Attorney dispute. It is of some note the court was not called upon in either case to consider the issue of solicitor/client privilege. In both cases, the testimony of the lawyer who drafted the Power of Attorney was required in order for the court to determine whether the donor had capacity at the time the document was executed. The cases illustrate that more often than not the lawyer is called upon to testify with the consent of all the parties including the court.

In *Re Zuriff*²⁰, the court ordered the production of the incapacitated individual's legal files in order to assist the committee in administering the individual's estate.

Upon receiving requests from either an attorney or a committee, counsel should be nonetheless cognizant of his or her responsibilities to protect privileged communications. Not every file or every communication should be disclosed simply because the request has been made from an "authorized" individual. This problem is illustrated in a recent British Columbia Supreme Court case *Re Palamarek*²¹. In that case, a dispute arose between the two children of a disabled mother as to who should be appointed committee. The mother had made statements to her lawyer in the presence of a "senior's advocate" and the question arose as to whether or not the recording of those statements was admissible. Questions arose as to whether or not the mother's instructions provided, in the presence of a third party, was an indication of implicit waiver of the solicitor/client privilege. A question also arose as to whether the son who had been appointed interim committee, have capacity to waive privilege.

The court made the following observations²²

Mr. Jamison submits that Committeeship does not carry with it the right to exercise the full panoply of the powers of the patient without qualification. He says that there are limits to the exercise of the patient's powers; that there is no general or unqualified transfer of the control of privilege to a committee; and hence the committee does not necessarily have a right to waive the privilege. There are, he acknowledges, very limited exceptions with the protection of solicitor/client privilege, but, in his submission the facts before me do not fall within the principle exemplified by the case of Geffen. More over, control of privilege is not found within *The Patients Property Act* in a manner that was suggested by Mr. Duhaime.

²⁰ *Zurif* 1983 46 BCL R 175

²¹ 2010 BCSC 1894.

²² Paragraph 30-31.

The court concluded that in British Columbia neither the common-law nor *The Patients Property Act* gave the committee power over solicitor/client privilege. The court states:

The committee does not have an untrammelled right in all circumstances to deal with the privilege of the patient. The risk of prejudice of such a conclusion is real and would potentially defeat the principle of solicitor-client privilege.

The best interests of the mother were at stake and the hearing of the audio recording, the court concluded, might assist in understanding the views of the mother. The statements were made in the circumstances where there was an ongoing committee application and were material and relevant. The court concluded that it would review that audio tape and the solicitor's file and disclose only what was necessary in the circumstances.

While there are no Manitoba cases on point section 81(1)(g) and (h) of *The Mental Health Act* of Manitoba may provide some guidance in regards to the issue of privilege in the context of a committee.

Powers of committees specifically conferred by court.

81(1), the court may on application by a committee of property authorize a committee to do any or all the following respect of the property of an incapable person under his or her committee;

(g) exercise a power or give a consent required for the exercise of a power invested in the incapable person; and

(h) exercise a right or obligation to elect belonging to or imposed on the incapable person.

The provisions of both *The Powers Of Attorney Act* and The Court of Queen's Bench Rules, permit the court, upon an application, to provide advice or directions on any matter respecting the management of an estate which would include the determination as to whether or not the lawyer who prepared the Power of Attorney ought to produce

his or her file or provide information to the parties and the court concerning instructions and other communication received from the donor.

Arguably, the application to court for a ruling with respect to the production of a solicitor's files is the simple and perhaps unavoidable outcome in many contentious estate matters. It protects the interests of all parties, including counsel, the deceased or incapacitated individual, and the heirs, beneficiaries, etc. Some might argue that "going to court" is the simple and expensive remedy that perhaps cannot be justified in every circumstance.

Some writers have suggested that more guidance should be provided to lawyers to assist them in navigating through requests to review their files and obtaining information.

Given that the duty to invoke the privilege is one of professional responsibility, not dependent on the clients request that it be asserted, the profession should be given further direction concerning the circumstances in which disclosure is proper. Without that direction, a lawyer should obtain a court order before making disclosure on uncharted waters unless he or she is content to accept the risk associated with what may be found at a later date to be an improper disclosure".²³

The Application of Geffen, Some Illustrations

In *Fawcett Estate v. Steiner*²⁴, the testatrix left her estate in equal shares to her children but transferred real property and chattels before passing away. It was argued that the transfers were made under duress or undue influence and the plaintiff applied for an order compelling the testatrix's lawyer to produce all documents pertaining to the will.

Justice Chamberlist refused to order the disclosure of the lawyer's file. It had been suggested that the *Geffen* case had opened the door somewhat wider in regards to the

²³ Heather Laidlaw's paper, pp.63-64.

²⁴ 1998, 21 ETR (2nd) 271 (VCSC)

disclosure and production of the “lawyer’s file” in cases where allegations of undue influence outside the context of the will are made.

Justice Chamberlist disagreed. He summarizes the law as follows:

1. Once the lawyer/client relationship arises, privilege becomes permanent unless the client waives it;
2. It is the solicitors duty to claim the privilege for former or deceased clients;
3. The deceased’s instructions concerning a will, which were privileged during his or her lifetime, may be disclosed in limited circumstances
4. Geffen has extended the law re: disclosure to *inter vivos* trusts;
5. Privilege can be waived but it is the client’s privilege not the lawyers. Unless the client waives the privilege, the lawyer owes a duty to assert it.
6. An executor may waive privilege on behalf of a deceased client if the purpose for seeking disclosure of confidential/privileged communication between lawyer and client is to further an attempt to defeat the testators true intention as apposed to the determining the true intentions then the application for the solicitor’s file ought to be dismissed.

In *Makan v. McCawley*²⁵, the deceased gave instructions to her lawyer to file for divorce and concurrently drafted a will leaving her estate to her children. The testatrix passed away before the will could be executed and as a consequence her property passed to her husband by survivorship on intestacy. The deceased’s children brought an action for damages against the testator’s solicitor on the ground that the solicitor owed them a duty of care as intended beneficiaries and sought the production of the lawyers files. The husband, who was administrator of the estate, objected to the production of the lawyer’s file claiming privilege.

²⁵ 1998, 158 DLR (4th) 164(ONT CJGD) 1998 CarswellOnt 1178

Justice Lax, after reviewing *Geffen*, concluded that this was an appropriate case for the wills exception. He writes, in part:

The interest 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 where. And the principle of extending the privilege to heirs or successors in title of the deceased is promoted by focussing the inquiry on who those heirs and successors properly are.²⁶

The *Geffen* decision was considered in a Manitoba case of *Daily v. Daily Estate*.²⁷

The deceased executed a will which directed his executrix to pay certain debts owed by one of his sons. Two years later he sought to change his will and provided instructions through his accountant to his solicitor to draft a new will. The new will was prepared but before the testator could sign it he passed away. The new will did not provide for payment of the debt. It provided for the division of the bulk of the estate among several charities. In addition to an application under *The Dependents Relief Act*, the son also claimed that his father promised him one half of a farm and that the instructions to the lawyer to prepare a will leaving him half the farm would be supported upon disclosure of the lawyer's files.

Associate Chief Justice Oliphant (as he then was) dismissed the application for disclosure. After reviewing the *Geffen* decision Justice Oliphant concluded that the issue before him had nothing to do with ascertaining the true intentions of testator.

There is, in my view, a difference albeit subtle, between the intention of a testator and the reasons for expressing the intention as manifested in the testamentary document.²⁸

If the rationale for requiring disclosure of otherwise privileged communication is to advance the interest of the client (deceased) as the case may be, then one can

²⁶ Paragraph 13

²⁷ 1997, 2WWR 712 (MANQB) 1996 CarswellMan 581

²⁸ Paragraph 30

rationalize the requiring of such disclosures if the purpose of so doing is to ascertain the intention of the testator.

He concludes that *The Dependants Relief Act* has nothing to do with ascertaining the intentions of the deceased client but everything to do with frustrating those intentions. The interest of justice would not be served by requiring disclosure.²⁹

Waiver

Solicitor/client privilege may be waived in certain circumstances. For example, if one of the parties put the issue of legal advice between himself and his lawyer in issue, the court may conclude that it would be unfair to permit the party to maintain privilege on the one hand but rely upon discussions had with counsel and introduce those discussions into evidence on the other hand.

In the *Albionex (Over Seas) Ltd et al v. Conagra Ltd et al*³⁰, the defendant sought to withdraw admissions made in its amended Statement of Defence and in support of its Motion, filed an affidavit that made reference to information exchanged between the defendant and his legal representation.

The plaintiff sought further production of documents including the lawyer's notes and the defendant objected to same on the basis of solicitor/client privilege. The court ordered the production of the privileged materials. With respect to the issue of waiver and in particular "selective disclosure" Justice Duval cites J. Sapinka and S.N. Lederman and A.W. Bryant in the Law of Evidence in Canada 2nd Edition (Buttersworth Canada Ltd 1999, page 758) where the authors refer to the following statement by Wigmore:

Judicial decision gives no clear answer to this question. In deciding it, regard must be had to the double elements that are predicated in every waiver i.e. not only the element of implied intention but also the element of fairness and consistency. A privileged person would seldom be found to waive, if his intention not to abandon could alone control the situation. There is always also the objective

²⁹ Paragraph 36 and 39. See also *Belvedere v. Brittain Estate* 205 CarswellOnt 6897

³⁰ 2007 MBQB 301 (CanLII) (This is the lower court decision, the matter was appealed to the Manitoba Court of Appeal and the decision at trial upheld)

consideration that when his conduct touches a certain point of disclosure, fairness requires that his privilege shall cease whether he intended that result or not. He can not be allowed, after disclosing as much as he pleases, to withhold the remainder. He may also elect to withhold or to disclose, but after a certain point his election must remain final.³¹

In other words, where it is considered important that the lawyer testify, depending on the circumstances, fairness and consistency may lead the court to conclude that greater disclosure/waiver of otherwise privileged communications must be shared with the court.

As noted in *Geffen*, the court from time to time may be called upon to “protect” solicitor/client privileged when the parties have failed to appreciate the need for such protection. This is illustrated in the Manitoba Court of Appeal decision *Simcoff v. Simcoff*³².

In *Simcoff*, the applicant and respondent were mother and son respectively. The mother had transferred title and property into her name and her son’s name as joint tenants. A dispute arose a number of years later and the mother sought a declaration that she was the sole owner of the property.

The lower court concluded that the mother intended to gift the property to her son and in doing so, the applications judge relied on an affidavit from the mother’s former counsel. In that affidavit, the lawyer deposed to the fact that he provided the mother with legal advice relating to the transfer and its consequences.

Madam Justice Steel writes:

I was surprised to find such an affidavit filed. So was the application judge apparently since it was he who raised the question of whether solicitor/client was the matter that needed to be addressed.

³¹ Paragraph 6

³² 2009, MBCA 280 CanLII

However, ultimately, that applications judge held the following:

At the matter of the hearing, I raised the question of whether solicitor/client privilege was a matter that needed to be addresses. Counsel for the application asserted that it was but acknowledged that he failed to file any materials raising the point and that he had not filed any material from the applicant asserts confidentiality with her discussions with the lawyer at the time. He asked that the affidavit be expunged nonetheless or no weight be given to it.

Solicitor-client privilege extends to those conversations between a client and her solicitor which are intended to be held in confidence and not to be made public. There is some evidence to suggest that such was not the case insofar as the applicant's conversation with Mr. Trusewych was concerned. It would appear that the respondent was a party to some of these conversations. It is incumbent upon the party claiming solicitor/client privilege to establish to the satisfaction of the court that solicitor/client privilege attaches before an affidavit of this nature can be excluded. Accordingly, the affidavit of Mr. Trusewych will be considered as any other affidavit.³³

The Court of Appeal concluded that the application judge erred in allowing the affidavit into evidence.

Madam Justice Steel concludes:

In summary, the former solicitor of the mother should never have made the disclosure set out in his affidavit. On the other hand, the solicitor for the son should never have attempted to obtain the affidavit of having obtained to make any use of it. And finally, in my view, the applications judge erred when he received it into evidence.

³³ Paragraph 14

Some Practical Problems

The first question the lawyer must answer when he receives a request (usually over the phone) to discuss the deceased's will or other estate planning issues, is addressing the issue as to "who is my client"?

If the request for information is being sought by the executor, does that necessarily "open the door" to producing any and all files that might relate to your previous retainer? What if the will in question is not being challenged? What if the wording of the will is clear? Are previous wills or the instructions relating to previous wills confidential and ought not to be disclosed to the executor? Are other files open for the executor's review?

The practical response to such a request is to err on the side of "privilege is paramount". The party requesting disclosure has the onus of establishing that the interest of justice compels the waiving of privilege in particular circumstances. The Supreme Court has made it clear that privilege is more than an evidentiary rule but a substantive right and any challenge/request for the disclosure of confidential information should initially be cautiously considered.

As a result, even if a request for disclosure is made by the executor or personal representative, the lawyer, if it is submitted, should protect the privilege unless compelling reasons are advanced for such disclosure.

It is neither complicated nor expensive for the executor to obtain advice and direction from the court in cases where a dispute arises concerning the disclosure of privileged materials.

In the context of a power of attorney, the fact that the client has become incapacitated is usually communicated to you by his wife or one of his children. You are contacted and requested to provide your file or notes as some dispute has arisen between members of the family concerning the management of your former client's affairs.

The Canadian Bar Association gives the following direction on its website³⁴

Your duties of loyalty and confidentiality to your client remain the same regardless of the legal competence of your client. You cannot share confidential information with anyone including family members without explicit or implicit authorization of your client or a court order or other legal authorization. As well, the duty of confidentiality survives the end of the retainer continues indefinitely even after the death of the client.

Should you believe that your client has developed reduced or questionable mental confidence, you still have a duty to maintain a normal lawyer and client relationship as far as reasonably possibly. Lawyers for clients with reduced competency have an ethical obligation to ensure that their client's interests are not abandoned and that their confidential relationship is not compromised by unauthorized disclosure.

When you reasonably believe that your client's impairment may have eroded the legal capacity to give instructions or enter into binding legal agreements, you should take steps to have a lawfully authorized representative appointed such as a guardian, litigation guardian or guardian *ad litem*. This representative may be a family member. If these steps are necessary, you must not disclose more information than is required.

Arguably, the same problem that may arise in a wills scenario will occur in a context of a power of attorney. The attorney, like an executor, has to some extent become the "client". Arguably, the attorney can waive privilege but that does not necessarily mean the lawyer's files are "open for inspection". There must be purpose behind the request before any disclosure ought to be provided, even to the "authorized" party.

Once more the opportunity to obtain a court ruling is available pursuant to section 24 of *The Power Of Attorney Act*.

It is submitted that perhaps any uncertainty as to what, if any, information may be disclosed to family members or third parties could be dispensed with by simply exploring with the client, the issue of confidentiality and privilege at the time of the will or power of attorney is prepared. The lawyer taking instructions to prepare a will or power

³⁴ www.cba.org/cba/activities/code/privilege.aspx

of attorney should explain fully any complications that could reasonably anticipated after the client passes away or becomes incapacitated in regards to the administration of their estates that might compel the lawyer to provide other wise privileged documents or information to members of the deceased family or other interested parties.

The Lawyer as Witness

In an older Court of Appeal decision, *Larke and Another v. Nugus and Another*³⁵, the court discussed the protocol adopted at that time in England, in regards to the disclosure of otherwise privileged communications in the context of a wills dispute. In that case, the will was challenged on the basis of undue influence. At that time, there appeared to be a Law Society recommendation directed towards solicitors in cases where their knowledge of the circumstances surrounding the execution of the will made them a material witness. Brandon L.J. writes:

The principle to be applied was that in litigation over a will, every effort should be made by executors to avoid costly litigation and that where there were suspicious circumstances surrounding the making of a will, it was right that full information should be given to those attacking the will as to how the will was made and in the present case, where suspicious circumstances was attached to persons who had only recently come to live with the testatrix and took a substantial interest under the will then the circumstances in which instructions were given were more important than information as to the formalities of the attestation.

It is clear that in most cases where suspicious circumstances arise, the lawyer who took instructions to draft the will, will be called upon to share his or her notes and other documentation he or she has preserved on file with the parties to the dispute. Whether the lawyer is called upon to testify will to a large measure depend on the quality of his or her note taking.

The fact that the lawyer who drafted the will may be called upon to dedicate many hours of his or her time, not practicing law but rather acting as a witness will no doubt prove to

³⁵ 1979 Vol. 123, the Solicitor's Journal, p 337

be a costly exercise. The question is whether or not the lawyer/witness can or should be compensated for the time spent preparing for and attending to testify whether pursuant to a Rule 39 Subpoena or in open court at trial.

Generally speaking, aside from the payment of experts who are called upon to testify in court, the payment of a fee to a witness above the Tariff set out in the Court of Queen's Bench Rules is, in my view, to be inappropriate. A witness should never be compensated or appear to be compensated for his or her testimony.

However, the question that needs to be addressed is whether or not this is fair. If a lawyer is called upon to testify at trial, where the issue of undue influence or testamentary capacity is at issue and the lawyers evidence proves to be invaluable in assisting the court in arriving at its conclusion, then arguably someone whether it is the estate or the challenging party ought to be called upon to compensate the lawyer for his or her time. I have been unable to locate any cases in Manitoba that have commented on this issue.

In *Verch et al v. Weckwerth et al*³⁶ testamentary capacity and undue influence were raised and the challenging parties sought an order from the court to examine two lawyers with whom the deceased had consulted over the years. After reviewing the circumstances surrounding the preparation of the will, the court determined that neither lawyer had been engaged or consulted with respect to the preparation of the will or trust indenture signed by the deceased.

It was noted that both lawyers were represented by counsel, which is something that should also be considered when one considers the expense associated with being a witness in these circumstances. The Court ordered that the two lawyers not called upon to testify should be reimbursed for their legal fees.

³⁶ 2010 ONSC 1234 (CanLII)

With respect to the lawyer who was called upon to testify, the court wrote:

On the issue of costs in relation to the requested examination of Mr. O'Brien, it is my view that he should be entitled to attend the examination with counsel if he chooses and that the time spent preparing and attending the examination by both Mr. O'Brien and his counsel, ought to be paid by the estate on a full indemnity basis, subject to full recovery of these costs by Dianne Verch from the moving parties and the cause.³⁷

Conclusion

I do not think it is an unfair statement to say that sometimes we as lawyers take solicitor/client privilege for granted or perhaps treat it too simplistically.³⁸ We understand it is important to keep what we are told by our clients "secret". However, in the context of estate litigation the "absolute" rule of privilege breaks down as conflicting interests of family members compel us to re-examine, if otherwise privileged information can or ought to be shared and with whom?

³⁷ Paragraph 11

³⁸ For an interesting discussion of solicitor /client privileged and conflict of laws, see an article by Brandon Kaine, 2001, Vol. 90, Canadian Bar Review No. 2 at page 34