The Testamentary Exception to the Attorney-Client and Doctor-Patient Privileges

by Herb E. Tucker, Spencer J. Crona, and Clara L. Brown

This article reviews the testamentary exception, as it exists in Colorado law, to the rule that the attorney-client and doctor-patient privileges survive the death of the client and patient. The article also analyzes the considerations underlying the growing national trend to codify the testamentary exception in an effort to expedite discovery in will contests.

The Colorado Probate Code prescribes identification and effectuation of decedent intent for distribution of his or her property as one of the overriding purposes of the Code.[1] Case law in Colorado and throughout the country demonstrate that the testator's estate planning attorney and treating doctor can provide insight as to the testator's intent and cognitive function underlying his or her will. However, the attorney-client and physician-patient privileges can silence these witnesses or result in litigation to compel their testimony. This article provides an overview of the testamentary exception to the rule that the attorney-client and doctor-patient privileges survive death of the client and patient, and discusses the national trend toward codification of this exception.

Will Contest Litigation

In will contest litigation, counsel for the personal representative frequently asserts the attorney-client and doctor-patient privileges in response to the contestant's request for production of the decedent's estate planning and medical records. Pretrial discovery disputes regarding the decedent's records may result.

Where lack of testamentary capacity or undue influence are timely alleged, the central issue is identifying the true intent of the testator. The idea that the estate planning attorney's file is privileged in such circumstances may make it difficult to determine the intent of the testator. Relying on case law from the U.S. Supreme Court[2] and Colorado Supreme Court,[3] judges often deny the motion for protective order and grant the motion to compel production.

The Testamentary Exception to Attorney-Client Privilege

Since 1905, the Colorado Supreme Court has recognized the testamentary exception to the attorney-client privilege. In *In re Shapter's Estate*,[4] the Court rejected the argument that an attorney could not testify about client communications related to the decedent's will, stating:

> after [the client's] death and when the will is presented for probate, we see no reason why . . . the attorney should not be allowed to testify as to directions given to him by the testator so that it may appear when the instrument presented for probate is or is not a will of the alleged testator. . . .

Fifty years later, the Colorado Supreme Court, in *Denver National Bank v. McLagan*,[5] again held that the testamentary exception permits an attorney who writes a will to testify after the testator's death as to attorney-client communications related to the execution and validity of the will.

In the 2001 decision of *Wesp v. Everson*,[6] the Colorado Supreme Court recognized that the testamentary exception to the attorney-client privilege allows an attorney who drafted the will of a deceased client to disclose privileged communications concerning the preparation and execution of the will. Under Colorado case law, the testamentary exception to the attorney-client privilege applies only where the nature of the dispute constitutes a will contest or a claim by succession. For example, the exception would not apply in a case involving a creditor's claim against a decedent's estate.[7]

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The Testamentary Exception to Doctor-Patient Privilege

Because will contests often place the decedent's physical and mental condition at issue, the doctrine of implied or constructive waiver of privilege applies to circumstances of controversy over the decedent's testamentary intent. On a timely filing of the contestant's petition, which commences a formal testacy proceeding pursuant to CRS §§ 15-12-401 *et seq*., the "sound mind" of the deceased is placed in controversy.[8] Just as the commencement of a will contest based on lack of testamentary capacity and extraordinary susceptibility to undue influence effectuates an implied or constructive waiver of the attorney-client privilege, so does the same implied or constructive waiver of privilege exist in regard to the physician-patient privilege. Indeed, in cases on this issue, one constructive waiver often is cited as the rationale for the other.[9]

As a practical matter, production of the decedent's medical records often is automatic, because the issue of sound mind inevitably implicates the specific condition of the decedent's physical and mental health.[10] Such condition consistently becomes an issue of fact in will contests. Indeed, some significant health conditions might affect testamentary capacity, and others do not.[11] Therefore, evidence as to the decedent's condition of health—particularly as it pertains to cognitive function—typically is discoverable in will contests where lack of testamentary capacity has been alleged.[12]

Health-condition evidence also can be relevant to the issue of undue influence where a condition of health rendered the testator vulnerable to exploitation and fraud. As a result of such considerations, the personal representative of the estate subject to a will contest likely will be called on to voluntarily provide access to medical records in the course of initial, informal discovery. Relevancy of health-condition evidence in the will contest also will depend on the proximity of the condition to the times of preparation and execution of the will.[13]

Colorado Case Law

In *Shapter*, the Colorado Supreme Court relied on Missouri law, which expressly recognized the testamentary exception to the doctor-patient privilege.[14] In *Melton v. VanCamp*,[15] the Missouri Supreme Court, relying on *Thompson v. Ish*,[16] (which involved the doctor-patient privilege) held that such waiver was the basis for implied or constructive waiver of the attorney-client privilege. Likewise, the *Shapter* court cited *Thompson* in its analysis for the testamentary exception.[17] In *Shapter*, the Court applied the same analysis as for the testamentary exception to rule admissible the testimony of the decedent's treating doctors. Colorado common law thus recognizes a testamentary exception to the doctor-patient privilege.

Exception to Hearsay

In will contest litigation, the decedent's statements regarding his or her intent to make or revoke a will may be offered to prove the truth of the matter asserted. Although such statements are hearsay, they fall under a recognized exception to the hearsay rule.

Rule 803(3) of the Colorado Rules of Evidence sets out the "state-of-mind" exception as follows:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> (3) Then existing mental, emotional, or physical condition. A statement of declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or

believed unless it relates to *the execution, revocation, identification, or terms of the declarant's will*. (Emphasis added.)

In *Murphy v. Glenn*,[18] the Colorado Court of Appeals upheld the trial court's admission of testimony from the decedent's accountant regarding his conversation with the wife that she and her husband had wills drawn at the same time, the terms of the wills, and her understanding of the implications of the wills. The beneficiaries under mutual wills created by the wife and husband brought an action to impose a constructive trust against the beneficiaries of the wife's *inter vivos* trust by which she transferred, in contravention of a marital agreement, a substantial portion of the estate. During trial, the accountant was asked to describe his conversation with the wife in which she stated she would never change her husband's will, that her will was the same as her husband's will, and that she would never go against her husband's wishes. The accountant also testified that the wife told him that she and her husband had drawn their wills at the same time, and that the wills were similar. Both wills provided that if one spouse predeceased the other, the remaining spouse would receive all property; on the surviving spouse's death, the property would be distributed to both sets of relatives.[19]

Summary Judgment and Motions to Dismiss

As a general rule, testamentary capacity and undue influence are issues of fact in formal testacy proceedings that would preclude motions to dismiss and summary judgment.[20] The contestant might argue that absent discovery, the personal representative's motion to dismiss or for summary judgment are premature.[21] When the privilege has been asserted, the court must accept the contestant's (plaintiff's) pleadings as true, unless the depositions and admission on file, together with affidavits, clearly disclose that there is no genuine issue of material fact, with any doubts being resolved in the contestant's (plaintiff's) favor.[22] The nonmoving party is entitled to the benefit of all reasonable inferences that reasonably may be drawn from the undisputed facts, and all doubts must be resolved against the moving party.[23] Where the record is not fully developed on a material factual issue, summary judgment is not proper.[24]

Allegations of decedent's lack of testamentary capacity and extraordinary susceptibility to undue influence often are matters for expert review and opinion. Where such allegations have been timely made based on facts elicited from reasonable inquiry, it is an abuse of discretion to deny the contestant a fair opportunity to use the discovery procedures provided by the Rules of Civil Procedure.[25] A timely allegation of undue influence typically presents disputed issues of material fact, because undue influence is characteristically subtle and evidence of it often is circumstantial.[26]

The Uniform Rules of Evidence Act

On the national scene, the testamentary exception has received attention in the context of general concepts of admissibility of evidence. The National Conference of Commissioners on Uniform State Laws has drafted the Uniform Rules of Evidence Act,[27] which includes testamentary exceptions to the attorney-client privilege and the doctor-patient privilege. Although the Uniform Rules of Evidence Act is not binding, it provides direction for state legislatures. Thirty-eight states have adopted all or part of the Uniform Rules of Evidence. (*See* accompanying sidebar chart listing the states that have codified the testamentary exception to the attorney-client privilege or the doctor-patient privilege.)

State Codification of the Testamentary Exception to the Attorney-Client and Doctor-Patient Privileges

Alabama		Montana	
Alaska	Both	Nebraska	Both
Arizona		Nevada	Attorney-Client
Arkansas	Both	New Hampshire	Attorney-Client
California		New Jersey	Both
Colorado		New Mexico	Both
Connecticut		New York	
Delaware	Both	North Carolina	
Florida	Both	North Dakota	Doctor-Patient
Georgia		Ohio	Both
Hawaii	Both	Oklahoma	Both
Idaho	Both	Oregon	Both
Illinois		Pennsylvania	
Indiana		Rhode Island	
Iowa		South Carolina	
Kansas		South Dakota	Both
Kentucky	Both	Tennessee	
Louisiana	Doctor-Patient	Texas	
Maine	Both	Utah	Both
Maryland		Vermont	Both
Massachusetts		Virginia	
Michigan	Doctor-Patient	Washington	
Minnesota		West Virginia	
Mississippi	Attorney-Client	Wisconsin	Both
Missouri		Wyoming	

Attorney-Client Privilege

The Uniform Rules of Evidence provide there is no attorney-client privilege under the rules:

> 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.

Twenty-one states have codified the testamentary exception to the attorney-client privilege. These states are: Alaska, Arkansas, Delaware, Florida, Hawaii, Idaho, Kentucky, Maine, Mississippi, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, Ohio, Oklahoma, Oregon, South Dakota, Utah, Vermont, and Wisconsin.[28] Many other states, including Colorado, have case law providing for the exception at common law, but have not codified the exception.

Doctor-Patient Privilege

The Uniform Rules of Evidence provide there is no doctor-patient privilege when the communication is:

> relevant to an issue of the [physical,] mental[,] or emotional condition of the patient in any proceeding in which the patient relies upon the condition as an element of the patient's claim or defense or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of the party's claim or defense.

Twenty-one states have codified the testamentary exception to the doctor-patient privilege. These states are: Alaska, Arkansas, Delaware, Florida, Hawaii, Idaho, Kentucky, Louisiana, Maine, Michigan, Nebraska, New Jersey, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Utah, Vermont, and Wisconsin.[29] As with the attorney-client exception, other states have case law providing for the testamentary exception to the doctor-patient privilege but have not codified it.

Conclusion

Colorado case law fully recognizes a testamentary exception to the attorney-client privilege and the doctor-patient privilege. Although Colorado has not codified these exceptions, there is a national trend toward codifying the exceptions to the legal and medical privileges. Proponents of a testamentary exception to the legal and medical privileges argue that disclosure of otherwise privileged information is the best way to accurately and efficiently settle decedent's estates consistent with the purposes of the Probate Code. As *Romero* indicates, the decedent's estate planning lawyer and treating doctor likely will be the most significant witnesses in any will contest. Those who are critical of the testamentary exceptions to the legal and medical privileges argue that lawyers and doctors will no longer be able to represent to their clients and patients that their conversations will be kept confidential after death. As the trend to codify the testamentary exception to the legal and medical privilege grows, state lawmakers inevitably will be faced with weighing the benefits and disadvantages in deciding what is best for Colorado.

Notes

1. CRS § 15-10-102(2)(b).

2. *Swidler & Berlin and James Hamilton v. United States*, 524 U.S. 399 (1998) (acknowledging testamentary exception to rule that attorney-client privilege survives death of client).

3. *Wesp v. Everson*, 33 P.3d 191 (Colo. 2001).

4. *In re Shapter's Estate*, 85 P. 688, 691 (Colo. 1905).

5. *Denver Nat'l Bank v. McLagan*, 298 P.2d 386, 388 (Colo. 1956).

6. *Wesp, supra* note 3.

7. *See* American College of Trust and Estate Counsel, *Commentaries on Model Rules of Professional Conduct* (Fourth Ed., 2006); Ethics Opinions, Model Rules of Professional Conduct 1.6 at 81-83.

8. *See People v. Sisneros*, 55 P.3d 797 (Colo. 2002); *Johnson v. Trujillo*, 977 P.2d 152 (Colo. 1999); *Clark v. District Court*, 668 P.2d 38 (Colo. 1983).

9. *Thompson v. Ish*, 12 S.W. 510 (Mo. 1889); *Shapter, supra* note 4.

10. C.R.C.P. 35(a) (by analogy). *See also Breeden v. Stone*, 992 P.2d 1167 (Colo. 2000); *Estate of Romero*, 126 P.3d 228 (Colo.App. 2005), *cert. denied* Jan. 9, 2006.

11. *Hanks v. McNeil Coal Corp.*, 168 P.2d 256 (Colo. 1946).

12. *Breeden, supra* note 10; *Romero, supra* note 10; *Shapter, supra* note 4.

13. *Estate of Southwick v. First Nat'l Bank of Colorado Springs*, 515 P.2d 484 (Colo.App. 1973).

14. *Shapter, supra* note 4.

15. *Melton v. VanCamp*, 283 S.W.2d 593 (Mo. 1955).

16. *Thompson, supra* note 9.

17. *See Shapter, supra* note 4 at 691.

18. *Murphy v. Glenn*, 964 P.2d 581 (Colo.App. 1998).

19. *See* Tucker and Mieras "Dead Men Don't Lie: Applicability of the State of Mind Hearsay Exception in Probate Litigation," Colorado Bar Association Trust and Estate Section, *Council Notes* (March 2007).

20. *Scott v. Leonard*, 184 P.2d 138 (Colo. 1947).

21. *See Miller v. First Nat'l Bank of Englewood*, 399 P.2d 99 (Colo. 1965).

22. *Norton v. Leadville Corp.*, 610 P.2d 1348 (Colo.App. 1979).

23. *Clement v. Nationwide Mut. Fire Ins.*, 16 P.3d 223 (Colo. 2000).

24. *Mt. Emmons Mining Co. v. Town of Crested Butte*, 690 P.2d 231 (Colo. 1984). *But see* CRS §§ 15-12-412 and -413.

25. *Miller, supra* note 21.

26. *Blackman v. Edsall*, 68 P. 790 (Colo.App. 1902).

27. The Uniform Rules of Evidence Act can be viewed at http://www.law.upenn.edu/bll/archives/ulc/ure/evid1200.htm.

28. Ala. R. Evid. 503 (1979); Ark. R. Evid. 502 (West 2007); Del. R. Evid.502 (West 2006); Fla. Stat. § 90.502 (2000); Haw. R. Evid. 503 (1992); Idaho R. Evid. 502 (2002); Ky. R. Evid. 503 (1992); Me. R. Evid. 502 (2002); Miss. R. Evid. 502 (1986); Neb. Rev. Stat. § 27-503 (1975); Nev. Rev. Stat. § 49.115 (1971); N.H. R. Evid. 502 (2006); N.J. Stat. Ann. § 2A:84A-20 Rule 26; N. M. R. Evid. 11-503 (1995); Ohio Rev. Code Ann. § 2317.02 (2006); Okla. Stat. tit. 12 § 2502 (2002); Or. Rev. Stat. § 40.225 (2005); S.D. Codified laws § 19-13-5 (West 2006); Utah R. Evid. 504 (West 2007); Vt. R. Evid. 502 (1995); Wis. Stat. Ann. § 905.03 (1991).

29. Ala. R. Evid. 504 (1979); Ark. R. Evid. 503 (West 2006); Del. R. Evid.503 (West 2006); Fla. Stat. § 90.503 (1999); Haw. R. Evid. 504.1 (2002); Idaho R. Evid 503 (1987); Ky. R. Evid. 507 1996); La. Code Evid. Ann. art. 510 (2001); Me. R. Evid. 503 (2002); Mich. Comp. Laws § 330.1750 (1996); Neb. Rev. Stat. § 27-503 (1994); N.J. Stat. Ann. § 2A:84A-22.2; N. M. R. Evid. 11-504 (1995); N.D. Cent. Code § 31-01-06.6 (2005); Ohio Rev. Code Ann. § 2317.02 (2006); Okla. Stat. tit. 12 § 2503 (2004); Or. Rev. Stat. § 40.230 (1987); S.D. Codified laws § 19-13-11 (2003); Utah R. Evid. §506 (1994); Vt. R. Evid. 503 (1993); Wis. Stat. Ann. § 905.04 (2005). ■