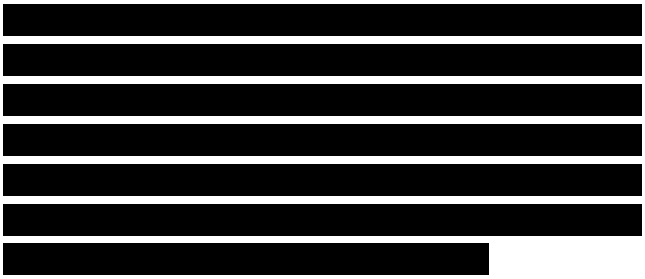

CONFIDENTIALITY AND PRIVILEGE IN POST-DEATH DISPUTES: IS IT TIME TO TWEAK R.C. 2317.02?

By Jessica S. Forrest, Esq.[*]
Reminger Co., L.P.A.
Cleveland, Ohio

Let's begin with two principles with which everyone ought to agree: 1) attorneys owe their clients confidentiality and this duty is sacrosanct; and, 2) in a post-death dispute about the transfer of the client's assets, the intent of the client should be a primary factor in determining the recipient of those assets.

Yet, in almost every will contest and similar post-death dispute, these two principles are at odds with one another. Assuming that reaching the client via séance or Ouija Board is out of the question, the estate planning attorney often has the best information about *what the client intended*. The attorney most likely—and under best practices, absolutely—learned the client's intent within the confines of attorney-client confidentiality.

In Ohio, an attorney is bound by statute to protect attorney-client privileged communications and bound by the Rules of Professional Conduct to maintain complete confidentiality relating to the representation of the client. If the attorney is obligated to keep client matters confidential, how will we learn what the client truly intended when there is a post-death dispute concerning the transfer of the client's assets? Ohio has attempted to address this tug-of-war by codifying a release of the attorney-client *privilege* for certain post-death disputes. But, is the fix broad enough?

Attorney-client privilege is codified in Ohio at R.C. 2317.02(A). This statute states that an attorney shall not testify without express consent of the client, or, in the case of a deceased client, the express consent of the surviving spouse or estate fiduciary. In 2006, through the efforts of the OSBA EPTPL Section Council, Ohio amended the privilege statute to allow for the reveal of otherwise privileged information in certain circumstances—even without the express consent of a surviving spouse or estate fiduciary. The statute, as currently in place, provides that the "testimonial privilege does not apply" when 1) the client is deceased; and 2) the communication is relevant to a dispute between parties who claim through the deceased client; and 3) the dispute involves issues of competency, fraud, undue influence, or duress at the time the client executed a document that is the basis of the dispute.

It has been 17 years since this major amendment to privilege became part of Ohio law, and it has been just as long since it was assessed in this publication.[1] It is clear from the commentary on the statute and from anecdotal evidence among my colleagues that the majority of practitioners *want* this statute to mean perhaps more than it says. Most attorneys want this statute to mean that once a post-death dispute arises, any party can request or subpoena the estate planning attorney's file without clashes over privilege. Unfortunately, however, neither

[*]I am grateful to Timothy J. Gallagher, Esq. for his editing of and contributions to this article.

the language of the statute nor the Rules of Professional Conduct seem to permit such a broad application. An amendment to the statute and/or the Rule should correct this issue to better allow probate disputes to get to the real issue: what did the decedent intend?

CURRENTLY, R.C. 2317.02 ADDRESSES ONLY "TESTIMONIAL" PRIVILEGE

R.C. 2317.02 begins that attorneys "shall not *testify*. . . concerning communications made to the attorney by a client . . . or concerning the attorney's advice to a client. . ." and goes on to state that the "*testimonial privilege* established under this division does not apply. . ." in certain circumstances (including the post-death disputes described above). Once there has been an express waiver by a surviving spouse or estate fiduciary, or a release by the statute for post-death litigation, then "the attorney may be compelled to *testify*. . ."

In resolving a post-death dispute, the parties likely need more than just the attorney's testimony or communications between attorney and client: files notes, the attorney's observations during discussions with the client, draft documents, and an array of other non-communication records could be relevant to resolving the issue of what the decedent intended.

Ohio Courts have found that "items that are not attorney-client communications are not subject to R.C. 2317.02(A) as the statute only involves communications to or from the client."[2] Helpfully, *Hohler* did expand a very narrow view that the privilege statute could only compel *testimony* from the lawyer; it found the statute applied "not only to a request to compel testimony but also. . .to a request for attorney-client communications contained within the attorney's file. . ."[3] Even our federal courts have found that Ohio's privilege statute is "applicable only to the attorney-client *testimonial* privilege, and not to privilege claims over documents."[4]

If R.C. 2317.02(A) doesn't apply to the situation, (i.e., if the information sought is not "communications" between the attorney and client) the common law surrounding attorney-client privilege may still apply.[5] The amendment to R.C. 2317.02 went a long way to clearing a path for highly relevant discovery in post-death disputes; but, it didn't release all that is necessary to understand what the client intended.

THE PRIVILEGE STATUTE DOES NOT RELEASE CONFIDENTIALITY UNDER PROF. COND. 1.6

In addition to narrowly limiting its application to testimonial privilege, the post-death dispute release provided for in R.C. 2317.02(A)(1)(b) does not clearly address the broader concept of confidentiality. Prof. Cond. 1.6, expressly referencing "*Confidentiality* of Information," states that the lawyer "shall not reveal information relating to the representation,. . . *including* information protected by the attorney-client privilege under applicable law. . ." The Rule clearly contemplates *confidentiality* as being a larger umbrella than just attorney-client *privilege:*

> The confidentiality rule, for example, applies not only to matters communicated in confidence by the client ***but also to all information relating to the representation, whatever its source***. A lawyer may not disclose such information except as authorized or required by the Ohio Rules of Professional Conduct or other law.

(emphasis added) Prof.Cond. 1.6 cmt at ¶ 3.

The Rule lists circumstances under which a lawyer may reveal confidential information: a) informed consent of the client; b) implied authorization in order to carry out the representation; c) when the attorney reasonably believes the disclosure is necessary to prevent various harms which are not relevant to this discussion; and, d) "to comply with other law or a court order."

The most likely request the estate planner is to receive in the context of a post-death dispute is a subpoena for their file and notes. A subpoena is clearly not the "informed consent" required by the Rules. Nor is it a "law" or "court order" under Prof. Cond. 1.6(b)(6). Even if the estate planner deems that they must release information to comply with R.C. 2317.02 (i.e., to comply with "other law" under Prof. Cond 1.6(b)(6)), that "other law" releases testimonial privilege *only*. It does not (at least not explicitly) release all of the attorney's notes of the meetings, draft documents, internal office communications between the attorney and their staff about the client, information the attorney may have learned from the client's other professional advisors or doctors, and a host of other material that may be relevant to learning the decedent's intent, capacity, and susceptibility.

There is a gap between the goal of the privilege statute as written in R.C. 2317.02 and the confidentiality rule at Prof. Cond. 1.6; and, that gap could result in hesitancy from estate planning attorneys who otherwise wish to share their complete files and information of their client's intent.

HOW DO WE FIX IT?

If we all agree that the client's intent should guide the outcome of probate litigation, then we should want to hear about the client's situation from the person most involved and with arguably the least bias—the estate planning attorney. There are multiple options to widen the path to allow estate planners to illuminate their client's intent more fully.

First, we could all agree that releasing the complete estate planning file during a post-death dispute is *impliedly authorized* by our clients in order to fulfill their estate planning goals and objectives. Estate planners can—and should!—release their files if they believe its release "is impliedly authorized in order to carry out the representation. . ." under Prof. Cond. 1.6(a). The privilege statute releases the testimonial privilege under the right post-death dispute circumstances, and the Rules *already* allow a lawyer to reveal *all* confidential information needed to "carry out the representation." This ought to be a complete release and one that the lawyer feels justified in providing in order to represent their (now deceased) client. *But* there are many who would say that the representation ended at death (or at the execution of the documents), so there is no representation left to be "carried out" under Prof. Cond. 1.6(a). Each estate planning attorney would have to make this decision on a case-by-case basis. That certainly will not eliminate delay or discovery disputes in probate litigation.

Next, when asked to release confidential information, the attorney could always demand informed consent from the estate fiduciary. While this would release privilege under R.C. 2317.02 and confidentiality under Prof. Cond. 1.6, it is unwieldly. Many post-death disputes concern non-probate transfers and there never is an appointed fiduciary. A fiduciary may be hesitant to sign such a release leading to delays or actions for

removal.[6] In fact, the potential for an interested fiduciary or surviving spouse to withhold consent is precisely one of the reasons Ohio amended R.C. 2317.02 in the first place.[7] Without an appointed fiduciary, the attorney seeking the confidential information could file a motion within the litigation for release of the privileges and confidentialities to allow production of the file. I have successfully used these both for attorney-client files and medical records where no estate was opened. Oftentimes, both sides of the dispute believe the attorney file will vindicate their position, so this motion can be a joint one.

One option that is within the estate planner's direct control is to address this with the client upfront, *especially* when the client is making a substantial change or is disinheriting an heir-at-law or previously-named beneficiary. If the attorney discusses consent to release information with the client first, they can get an express and informed consent signed right alongside the planning documents. When subpoenaed, the estate planner will have tucked away in their file the express and informed consent as required by the privilege statute *and* Prof. Cond. 1.6.

Given that the intent in 2006 to amend the privilege statute was to avoid discovery disputes to obtain the highly relevant and best information of the decedent's intent, the most complete solution is to amend the privilege statute, the confidentiality Rule, or both. The Ohio Supreme Court dictates the Rules of Professional Conduct and they (the justices and the Rules!) are not subject to proposals or lobbying from the electorate. It may be tougher to get the Rules amended; but, adding a section under Prof. Cond. 1.6(b) to allow the release of confidential information to promote or protect the client's intent as part of a post-death dispute over the transfer of assets should fill the gap that presently exists. Or, an amendment to R.C. 2317.02 could provide that neither attorney-client privilege *nor* common law privilege and confidentiality apply under the post-death disputes described in R.C. 2317.02(A)(1)(b). By enacting changes to the Rule or statute, conscientious lawyers could be sure that releasing the information is either explicitly authorized or at least reasonably necessary under Prof. Cond. 1.6(b)(6) "to comply with other law or a court order."

CONCLUSION

Probate practitioners know and understand that client intent is paramount. When a client has passed and their intent is in dispute, the estate planning attorney and their file may be the last and best evidence of that client's intent. The privilege statute and the Rules of Professional Conduct, in their current form, however, put the estate planner into an unnecessary predicament and have the potential to create more post-death disputes than they solve. Ohio "fixed" the privilege problem once. Ohio should fix the privilege and confidentiality problem once and for all.

ENDNOTES:

[1]*See,* Kolb, Waiver of Legal and Medical Privileges in Certain Probate Disputes; the Savings Statute; Clarification of Will Contest Statute of Limitations, 16 PLJO 5, 16 Ohio Prob. L.J. 130 (May/June 2006).

[2]*Estate of Hohler v. Hohler*, 185 Ohio App. 3d 420, 428, 2009-Ohio-7013, 924 N.E.2d 419 (7th Dist. Carroll County 2009); *see also Grace v. Mastruserio*, 182 Ohio App. 3d 243, 249, 2007-Ohio-3942, 912 N.E.2d 608 (1st Dist. Hamilton County 2007).

[3]*Estate of Hohler v. Hohler*, 185 Ohio App. 3d 420, 428, 2009-Ohio-7013, 924 N.E.2d 419 (7th Dist. Carroll County 2009)

[4]*Fifth Third Bancorp v. Certain Under-*

writers at Lloyd's, 2017 WL 1881339, at *6 (S.D. Ohio 2017), citing *Grace v. Mastruserio*, 182 Ohio App. 3d 243, 249, 2007-Ohio-3942, ¶ 17, 912 N.E.2d 608 (1st Dist. Hamilton County 2007) ("limiting statute [R.C. 2317.02(A)] to cases in which a party is seeking to compel testimony of an attorney for trial or at a deposition—as opposed to cases where a party is seeking to compel production of nontestimonial documents").

[5]*Squire, Sanders & Dempsey, L.L.P. v. Givaudan Flavors Corp.*, 127 Ohio St. 3d 161, 165, 2010-Ohio-4469, 937 N.E.2d 533, 71 A.L.R.6th 717 (2010) citing *State ex rel. Leslie v. Ohio Hous. Fin. Agency*, 105 Ohio St. 3d 261, 264, 2005-Ohio-1508, 824 N.E.2d 990 (2005).

[6]*See, e.g. In re Estate of Russolillo*, 69 Ohio App. 3d 448, 590 N.E.2d 1324 (10th Dist. Franklin County 1990) (refusal to waive physician-patient privilege during a will contest could be a basis for removal, if the fiduciary is otherwise provided notice and a hearing).

[7]*See,* Kolb, Waiver of Legal and Medical Privileges in Certain Probate Disputes; the Savings Statute; Clarification of Will Contest Statute of Limitations, 16 PLJO 5, 16 Ohio Prob. L.J. 130 (May/June 2006) (amended statute waived attorney-client privilege under R.C. 2317.02).