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Testimonial Privilege When the Competency of a Deceased Client is Placed at Issue

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At times, an estate-planning attorney may question whether it is appropriate to testify as to the capacity of a client who has since passed. Although an attorney may testify as to the capacity of the testator or settlor regarding a will or trust, and as to any facts affecting the validity of the will or trust, an attorney ordinarily may not testify concerning communications made to counsel by the testator or settlor regarding the estate or trust. This is especially true when the provisions of the will or trust are not ambiguous. R.C. Section 2317.02 governs testimonial privileges and provides the means by which privileged communications between an attorney and a client can be waived.

This testimonial privilege is subject to certain, statutorily-defined exceptions. For example, the attorney-client testimonial privilege does not apply concerning a communication between a deceased client and the deceased client's attorney ***if the communication is relative to a dispute between parties who claim through that deceased client, and the dispute concerns: (1) the competency of the deceased client; (2) whether the deceased client was a victim of fraud; or (3) whether the deceased client is a victim of undue influence or duress, when the deceased client executed the document that is the basis of the dispute.***

In these circumstances, the Ohio General Assembly determined that the deceased client's attorney may testify – and that the testimonial privilege established under R.C. 2317.02(A) does not apply – when the dispute addresses the competency of the deceased client, or when the deceased client was a victim of fraud, undue influence, or duress when the deceased client executed a document that is the basis for the dispute.