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# Evidentiary Issues Unique To Trusts and Estates Litigation

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Surrogate's Courts rely on heavily interested party testimony to adjudicate trusts and estates contests. Determining what the testator's intent was lies at the heart of many disputes, and often invokes competing stories, vague, incomplete documentary evidence, and parties with conflicting interests. We address the most common evidentiary obstacles trusts and estates litigators should be aware of, including: (1) the probate exception to the attorney-client privilege; (2) how to invoke the Three-Two Year Rule; and (3) the Dead Man's statute.

## Probate Exception to the Attorney-Client Privilege

The attorney-client privilege precludes testimony concerning confidential conversations between an attorney and client in the course of the representation. A fundamental principle which protects the attorney-client relationship, the attorney-client privilege is not unique to trusts and estates litigation, but the exception found at NY CPLR §4503(b) is.

Under what is colloquially called the "probate exception," communications between an attorney and deceased client concerning the preparation, execution or revocation of the client's will, is not privileged in probate proceedings. NY CPLR §4503(b) *compels* an attorney to "disclose information as to the preparation, execution or revocation of any will, revocable trust, or other relevant instrument" in any action "involving the probate, validity or construction" of a will or revocable trust.

The probate exception does not typically apply to retainers or other fee arrangements between counsel and a deceased client, nor invoices issued to the client; the content of the invoice may be redacted for privilege. Notably, the probate exception only applies to probate and construction proceedings—it *does not* come into play in accounting, discovery or other proceedings incidental to probate. Practically, the probate exception is most utilized at NY SCPA §1404 examinations, wherein the person who prepared the will or relevant instrument may be examined as to its validity or construction.

Of course, the attorney-client privilege can be waived entirely. Courts have found that a decedent's personal representative, like an executor, can waive the privilege on the deceased's behalf, that an objectant can waive the privilege where such waiver is in the best interests of the estate, and that an estate fiduciary can waive the privilege where the waived communication bears directly on the issue before the court. The broadly interpreted ability to waive is premised on the assumption that a testator would have wanted his or her confidential communications revealed to best effectuate his or her testamentary intent. In either case, the burden of proof is on the party claiming the privilege, and the privilege must be invoked via objection to prevent inadvertent disclosure and waiver of the privilege.

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### The Three-Two Rule

Aptly named, the three-two year rule is the bane of trusts and estates practitioners. The rule limits the scope of an examination before trial of any deponent in a contested probate proceeding to the (1) three-year period prior to the date of the propounded instrument; and (2) two years thereafter *or* to the date of the decedent's death—whichever is shorter. Absent special circumstances, any testimony referring to events happening outside that period is objectionable and inadmissible. The three-two year rule is designed to "prevent the costs and burdens of a runaway inquisition."

Curiously, the language of this section is strictly enforced in some respects and interpreted broadly in others. For instance, the three-two year rule only applies in contested probate proceedings "in which objections to probate [have already been] made." Simply put, an examination before trial occurring *before* objections have been filed is not subject to the three-two year rule. On the other hand, although the rule refers specifically to examinations before trial, courts apply it to *all* discovery devices.

What special circumstances will justify expansion of the three-two year scope? Generally, expansion is only warranted where the objectant has set forth some evidence supporting an allegation of undue influence or a pattern of fraudulent conduct; even in those circumstances, the court will only expand the scope of the inquiry to cover the conduct in question. If counsel anticipates that events outside of the three-two period are relevant, he or she should seek permission from the court to expand the inquiry beyond the three-two period.

### The Dead Man's Statute

Codified at NY CPLR §4519, the "Dead Man's Statute" precludes persons with an interest in the outcome of a probate proceeding (or their predecessors in interest) from offering testimony in support of their position concerning a "transaction or communication" with the decedent. The protection afforded by the Dead Man's Statute can be invoked by the executor/administrator of an estate, an estate beneficiary who has not revoked his or her interest in the estate, or any distributee.

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For the purposes of the statute, a person is deemed "interested" if he or she has a vested, present financial stake in the outcome of the proceeding—the size of the interest is irrelevant. What is considered a "personal transaction or communication" has been interpreted very broadly, ranging anywhere from negotiations and interviews, to small talk.

The New York Court of Appeals has held the statute excludes an interested witness's testimony concerning "any knowledge which he has gained by the use of his senses from the personal presence of the decedent." Stated differently, any testimony "which the deceased person if living could contradict or explain," is barred. Although the statute surely covers verbal interactions and statements, it also precludes the witness's observations of the decedent's condition and behavior—even what the decedent *did not* say.

Founded upon a concern that the decedent cannot speak for him or herself, the "Dead Man's Statute" has been criticized as being too restrictive, with some courts suggesting the self-interest of the witness should go to the weight of the testimony, rather than its admissibility. As restrictive as the statute is, it does not apply to authenticated documentary evidence concerning the transaction at issue, communications with a representative of the decedent (like an attorney-in-fact) or facts independent to the transaction or communication at issue. Provided they are not also beneficiaries, fiduciaries and nominated fiduciaries are also not precluded from providing testimony otherwise inadmissible under the statute.