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Court of Appeals Finds Receiver Controls Corporation's Attorney-Client Privilege

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Division I of the Washington Court of Appeals in Seattle recently addressed a seldom-plumbed area of privilege law: who controls a corporation's attorney-client privilege when the corporation goes into receivership? *Matter of Elcon Corporation*, ___ Wn. App.2d ___, ___ P.3d ___, 2025 WL 3204260 (2025), arose on prosaic facts. Elcon was an electrical contractor that had a loan from a bank secured by virtually all of its assets. When Elcon defaulted on the loan, the bank sought appointment of a receiver. A receiver was appointed and eventually requested Elcon's email accounts—including those with attorneys prior to the receivership. There was no dispute that the email accounts were included in the assets within the receivership. Elcon, however, declined to produce emails it contended were covered by the attorney-client privilege for the period prior to the receivership. The receiver moved to compel their production. The trial court granted the motion—albeit prohibiting the receiver from sharing them with the bank. Elcon filed an interlocutory appeal and, on discretionary review, the Court of Appeals affirmed.

In doing so, the Court of Appeals relied on both the broad sweep of the assets involved and that RCW 7.60.060(1)(c) specifically grants a receiver the power to assert the rights of the entity involved in the receivership. The Court of

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Appeals also cited federal rulings taking the same approach to privilege in the context of bankruptcy trustees. In sum, the nub of the Elcon decision is not that privilege has been waived, but, rather, the receiver steps into the shoes of entity involved in the receivership to control privilege.

As noted, the Court of Appeals relied on analogous law from the bankruptcy context. *Grassmueck v. Ogden Murphy Wallace, P.L.L.C.*, 213 F.R.D. 567 (W.D. Wash. 2003), offers a local example and a discussion of this point. Similarly, Aronson, Howard and Aronson's *The Law of Evidence in Washington* (rev. 5th ed. 2024 at § 9.05[4]) includes a discussion of the functionally similar result in the context of a personal representative generally controlling a decedent's privilege.

ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP advises lawyers, law firms and legal departments throughout the Northwest on professional responsibility and risk management. Mark has chaired both the WSBA Committee on Professional Ethics and its predecessor, the WSBA Rules of Professional Conduct Committee. Mark has served on the Oregon State Bar Legal Ethics Committee and is a member of the Idaho State Bar Section on Professionalism & Ethics. Mark writes the Ethics Focus column for the Multnomah (Portland) Bar's *Multnomah Lawyer*, the Ethics & the Law column for the WSBA *Bar News* and is a regular contributor on legal ethics to the WSBA *NWSidebar* blog. Mark is a contributing author and the editor-in-chief for the WSBA *Legal Ethics Deskbook* and is a contributing author and principal editor for the OSB *Ethical Oregon Lawyer* and the WSBA *Law of Lawyering in Washington*. Before co-founding Fucile & Reising LLP in 2005, Mark was a partner and in-house ethics counsel

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