

Memorandum 2008-20

Attorney-Client Privilege After Client's Death (Approaches)

This memorandum continues the Commission's study of whether the attorney-client privilege should survive the client's death, and if so, under what circumstances. The memorandum begins discussion of specific approaches to the posthumous attorney-client privilege.

First, this memorandum describes the posthumous approach to the attorney-client privilege recommended by the Commission in 1965, which the Legislature adopted when it enacted the Evidence Code. See Evid. Code §§ 953-954, 957, 959-961; 1965 Cal. Stat. ch. 299 § 2. The memorandum then briefly discusses the posthumous approach to other privileges based on a confidential relationship that were enacted on Commission recommendation. It also briefly discusses the posthumous approach to other privileges based on a confidential relationship that the Legislature has enacted, without Commission involvement.

Next, the memorandum describes a recent bill, AB 403 (Tran), which proposed changing California's posthumous attorney-client privilege, but was amended to, among other things, assign the Commission this study. The memorandum discusses the posthumous approach proposed by AB 403 as introduced, amended, and enacted.

Finally, the memorandum describes the federal approach to the posthumous attorney-client privilege.

Approaches not discussed in this memorandum will be discussed in future memoranda.

The staff would like to thank Andrew Slade, who recently completed his second year at U.C. Davis School of Law, for his assistance in researching matters discussed in this memorandum.

In assessing the various approaches, the Commission should keep in mind the competing policies underlying the privilege, discussed in Memorandum 2008-19.

Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission's website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission's staff, through the website or otherwise.

The traditional rationale supporting the privilege is that it promotes the fair administration of justice because it encourages clients to consult and be candid with an attorney. Newer rationales supporting the privilege are based on promoting values, such as privacy and autonomy. The countervailing concern is that the privilege may undermine the search for truth by excluding relevant evidence from the factfinder.

COMMISSION'S RECOMMENDED APPROACH ADOPTED IN EVIDENCE CODE

In 1956, the Legislature directed the Commission to study whether California should enact the Uniform Rules of Evidence (the "URE"), which were promulgated in 1953 by the National Conference of Commissioners on Uniform State Laws. In response to that directive, the Commission drafted the Evidence Code. Among the many topics it considered in that study was the posthumous scope of the attorney-client privilege. See *Tentative Recommendation relating to the Uniform Rules of Evidence: Article V. Privileges*, 6 Cal. L. Revision Comm'n Reports 207 (1964) (hereinafter, *Tentative Recommendation*); see also Chadbourn, *A Study relating to the Privileges Article of the Uniform Rules of Evidence*, 6 Cal. L. Revision Comm'n Reports 301 (1964) (hereinafter, "*Chadbourn*").

At the time of the Legislature's assignment, California's provision on the attorney-client privilege did not specify the privilege's posthumous effect. See former Code Civ. Proc. § 1881(2) (1939 Cal. Stat. ch. 129, § 5); see also Chadbourn, *supra*, at 381-82.

In studying whether to recommend adoption of the URE, the Commission hired Prof. Chadbourn (Harvard Law School) as a consultant. Because the URE followed the approach in the Model Code (promulgated by the American Law Institute before the URE), Prof. Chadbourn discussed the approaches considered by the Model Code drafters:

There was much difference of opinion among the draftsmen of the Model Code and the members of the American Law Institute as to the effect upon the lawyer-client privilege of the death of the client. Some, such as Professor Morgan and Judge Learned Hand, advocated the view that the privilege should not survive the death of the client. Others thought that the privilege should survive death and that the client's personal representative, devisee, or heir should be entitled to claim the privilege. Still others thought that the privilege should survive but should be vested only in the client's personal representative. This last is the view which prevailed and which was incorporated in the Model Code and later in the

Uniform Rules. (Note that the second sentence of Rule 26 provides in part: “The privilege may be claimed by the client ... , or if deceased, by his personal representative.”)

Chadbourn, *supra*, at 389.

Prof. Chadbourn considered whether any of these approaches reflected California law. He concluded that the law was unclear, but believed that the URE’s approach was preferable.

It *may* be that the current California view is not any of the three views stated above but is, rather, a fourth view to this effect: The privilege survives the death of the client and nobody can waive the privilege in behalf of the deceased client. Or, to put it another way, any party is entitled to claim the privilege in behalf of the deceased client.

This is the view that California has adopted concerning the physician-patient privilege and the marital privilege for confidential communication. It may, therefore, be the view in force by analogy respecting the lawyer-client privilege. If so, there could today be no waiver in a case such as the following: Action by an administrator for wrongful death of his intestate; plaintiff administrator calls intestate’s lawyer to testify to intestate’s relevant confidential communication to the lawyer. Defendant’s objection on the basis of Code of Civil Procedure Section 1881(2) is sustained.

If this is the California view, it would clearly be changed — and meritoriously so — by adopting the URE view. Under that view the executor or administrator is the sole holder of the posthumous privilege of the deceased client. As such holder he could, of course, elect (under [URE] Rule 37) to waive the privilege.

Id. at 389-90 (footnotes omitted).

URE’s Rationale for the Attorney-Client Privilege

The URE’s attorney-client privilege appears to be based on the traditional rationale of encouraging client candor. See *id.* at 381 n.1.

The privilege is justified on grounds of social policy. In a society as complicated in structure as ours and governed by laws as complex and detailed as those imposed upon us, expert legal advice is essential. To the furnishing of such advice the fullest freedom and honesty of communication of pertinent facts is a prerequisite. To induce clients to make such communications, the privilege[s] prevent[ion of] their later disclosure is said by courts and commentators to be a necessity. The social good derived from the proper performance of the functions of lawyers acting for their

clients is believed to outweigh the harm that may come from the suppression of the evidence in specific cases.

Id. (quoting Model Code Comment because URE's Comment states it embodies Model Code's rule).

Commission's Rationale for the Attorney-Client Privilege

The Commission's recommended approach to the attorney-client privilege was similarly based on the traditional rationale. See Tentative Recommendation, *supra*, at 224 ("[T]he privilege is intended to encourage full disclosure by giving the client assurance that [the client's] communication will not be disclosed.") (Note: To discern the Commission's intent, the staff consulted the Comments, relevant staff memoranda, tentative recommendation, and final recommendation. The final recommendation contains the same approach as the tentative recommendation, but is much less detailed.)

Commission's Adoption of URE's Posthumous Approach

With the traditional rationale in mind, the Commission agreed with the URE's approach — that the privilege should survive, *but only so long as there is a personal representative*, who may claim or waive the privilege. *Once the client's estate is wound up and the personal representative is discharged, the privilege terminates.* This approach was enacted in Evidence Code Sections 953 and 954, using language slightly different than the URE.

The Commission expressed its rationale for adopting the URE's approach as follows:

Under the California law, it seems probable that the privilege survives the death of the client and that no one can waive it after the client's death. Hence, the privilege apparently must be recognized even though it would be clearly to the interest of the estate of the deceased client to waive it. If this is the present California law, the URE provision would be a desirable change. Under the URE and under the [Commission's] revised rule, the personal representative of a deceased client may waive the privilege when it is in the advantage of the estate to do so. The purpose underlying the privilege — to provide a client with the assurance of confidentiality — does not require the recognition of the privilege when to do so is detrimental to [the client's] interest or to the interests of [the client's] estate.

Tentative Recommendation, *supra*, at 223 (citations omitted).

The Commission also explained its view that this approach is consistent with the rationale underlying the privilege:

Although there is good reason for maintaining the privilege while the estate is being administered — particularly if the estate is involved in litigation — there is little reason to preserve secrecy at the expense of justice after the estate is wound up and the personal representative is discharged. Thus, the better policy seems to be expressed in the URE and the [Commission’s] revised rule, which terminates the privilege upon discharge of the client’s personal representative.

Id. at 224-25 (emphasis added). The italicized language is repeated in the Commission’s Comment to Evidence Code Section 954.

Comments Considered by the Commission

The staff reviewed Commission materials to discern whether the Commission received input on its proposed approach.

Prior to the tentative recommendation, the Northern Section of the State Bar Committee disagreed with the Commission’s approach. The Northern Section believed that it was too restrictive to end the privilege after the client’s death, and to only allow the personal representative to hold the privilege while the estate was open. It stated that “many cases could arise after distribution of an estate in which *the heirs or legatees of the deceased client should be able to assert the privilege.*” CLRC Memorandum 1961-20, Exhibit II, pp. 1-2 (emphasis added). No elaboration was given.

Later, the Northern Section rescinded its position that heirs and legatees should be able to claim a deceased client’s privilege. The Northern Section explained that it “might cause complications where one heir or legatee would wish to claim the privilege and another would wish to waive it.” CLRC Memorandum 1961-20, Exhibit II, p. 4. It then approved the Commission’s approach. *Id.*

No other opposition was found.

Apart from the temporary disagreement by the Northern Section, the regional Bar Committees supported the Commission’s approach. See CLRC Memorandum 1963-57, p. 2 (noting “that the Northern Section of the State Bar Committee is in general agreement with the tentative recommendation” and the “Southern Section is in general agreement except for [points not relevant here]”); see also CLRC Memorandum 1964-39, pp. 1, 8, 320 (explaining that comments on tentative recommendation were considered at time of its approval,

and listing new comments, none by State Bar, and none objecting to personal representative approach).

Posthumous Exceptions

An integral part of the Commission's approach to the posthumous privilege consists of exceptions.

In conjunction with posthumous survival of the privilege, so long as the client's estate is open and there is a personal representative, the Commission recommended four exceptions that apply posthumously before the privilege terminates. See Evid. Code §§ 957, 959, 960, 961 & Comments. There are also other exceptions to the attorney-client privilege, which may apply posthumously before the privilege terminates. However, these other exceptions apply to the privilege generally — they do not apply only when the client is dead. See, e.g., Evid. Code § 956 (stating that there is no attorney-client privilege if client sought attorney's services "to enable or aid anyone to commit or plan to commit a crime or fraud").

The exceptions that apply only when the client is dead are discussed below.

All Parties Claim Through Deceased Client

Evidence Code Section 957 provides an exception where all parties claim through a deceased client:

957. There is no privilege under this article as to a communication relevant to an issue between parties all of whom claim through a deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction.

The Commission's stated rationale is that the disclosure of the deceased client's communications is consistent with the client's wishes. The exception

is based on the theory that claimants in privity with the estate claim *through* the client, not adversely, and the deceased client presumably would want [the client's] communications disclosed in litigation between such claimants so that [the client's] desires in regard to the disposition of [the client's] estate might be correctly ascertained and carried out.

Evid. Code § 957 Comment (emphasis in original).

The Commission describes the exception as an existing, traditional exception. It adds that Section 957 slightly expands the exception to make it apply if one of the parties, all of whom claim through the client, does so by an inter vivos

transaction (e.g., by a deed). This expansion is consistent with the rationale for the exception. *Id.*

It has been pointed out, however, that excepting the privilege from disputes among heirs claiming under a client's will might result in embarrassing disclosures. For example, a decedent might want to provide for an illegitimate child, but prefer that the relationship remain private. See *Swidler & Berlin v. United States*, 524 U.S. 399, 414 (1998) (O'Connor, J., dissenting).

A properly advised client, however, would be aware of the exception, and could decide how to proceed, knowing the risk that if a challenge arose, certain statements may be disclosed. It also seems likely that the client would prefer disclosure to effectuate the client's intent as to the property. See Evid. Code § 957 Comment; see also *Swidler*, 524 U.S. at 405-06 (stating that rationale for testamentary exception under which deceased testator's attorney-client communications are admissible in litigation between heirs, "is that it furthers client's intent"). This exception thus doesn't appear to undermine the privilege's goals of encouraging consultation and candor.

Attorney as Attesting Witness

Evidence Code Section 959 permits an attorney who acts as an attesting witness to testify to a communication relevant to the client's intent or competence in executing the attested document. The exception is to permit an attorney "to perfor[m] the duties expected of an attesting witness." Evid. Code § 959 Comment.

It seems clear that if a client asks an attorney to be an attesting witness, the client would want the attorney to be able to testify as necessary to fulfill the role of an attesting witness. Accordingly, this exception should not interfere with a policy of encouraging client candor in seeking legal representation or counseling.

Section 959 partially continued an exception for *any* relevant attorney-client communication concerning the document if the attorney also acted as an attesting witness. Evid. Code § 959 Comment. But, "the mere fact that an attorney acts as an attesting witness should not destroy the lawyer-client privilege as to all statements made concerning the document attested." *Id.*

There are some statements, however, that a deceased client may wish the attorney to disclose. The final two exceptions that specifically apply when the client is dead — Evidence Code Sections 960 and 961 — attempt to capture such statements.

Deceased Client's Written Property Transfer

Sections 960 and 961 make the privilege inapplicable to an attorney-client communication relevant to an issue concerning the validity or intended meaning of a writing purporting to affect a property interest. These sections allow an attorney, whether an attesting witness or not, “to testify concerning the intention or competency of a deceased client” and “to testify to communications relevant to the validity of various dispositive instruments that have been executed by the client.” Tentative Recommendation, *supra*, at 228.

The intent is to allow disclosures that the deceased client would want.

A client ordinarily would desire [the client's] lawyer to communicate [the client's] true intention with regard to a dispositive instrument if the instrument itself leaves the matter in doubt and the client is deceased. Likewise, the client ordinarily would desire [the client's] attorney to testify to communications relevant to the validity of such instruments after the client dies.

Evid. Code § 960 Comment (citations omitted); see also Evid. Code § 961 Comment.

Like the exception for all parties who claim through a client, these exceptions could result in embarrassing disclosures. See Greenberg, Comment, *Swidler & Berlin v. United States ... And Justice For All?*, 80 B.U. L. Rev. 939, 948 (2000) (explaining that statement “I always loved Son A more than Son B” could be disclosed in case challenging gift to one son that is larger than gift to other son). But again, the exception is likely to allow disclosures that the client would want, to help ensure the client's property transaction is effectuated as intended. Accordingly, there seems to be a diminished danger of interfering with the privilege's goal of encouraging client communication.

Commission's Posthumous Exceptions Promote Correct Resolution of Cases

Without the above exceptions, the factfinder would be deprived of important evidence. The information contained in the attorney-client communications is not likely to be available from other sources. And the client's own testimony is not available. Without the client's communications, it would be much harder to ascertain the client's intent and assess a document's validity. Disclosure of the communications would promote the public's interest in having cases decided correctly. And, in the circumstances in which these exceptions arise, the client personally shares that interest in having the case decided correctly.

Cases in Which Posthumous Privilege Applies Under Commission's Approach

The above exceptions, in combination with the rule that the privilege terminates when the client's estate is wound up and the personal representative is discharged, mean that the privilege applies posthumously in two types of cases:

- (1) A case involving a dispute between the client's estate and a third party (i.e., a person who does not claim through the client).
- (2) A case that does not involve distribution of property transferred by the client, but which arises while the estate is open.

The Commission decided that these were the only kinds of cases in which it was appropriate for the attorney-client privilege to apply after the client's death. Note, however, that the personal representative may waive the privilege in these types of cases.

How the Commission's Approach Handles the Competing Policies

The Commission's approach entails posthumous survival, so long as the client's estate remains open and there is a personal representative. This approach rests on several assumptions.

First, it assumes that attorney-client communication would be chilled if the privilege ended before the deceased client's property was distributed. Accordingly, the privilege survives until the deceased client's property is distributed. Otherwise, the communication may not have occurred, and it is thus less likely that relevant evidence would be excluded from the factfinder (i.e., but for survival of the privilege, the evidence wouldn't exist).

Second, the approach assumes that ending the privilege after the personal representative's discharge would not significantly chill attorney-client communications. Thus, the privilege terminates when the personal representative is discharged, permitting the factfinder to access relevant information contained in the communications.

Third, the approach assumes that giving a personal representative responsibility for protecting the privilege until the deceased client's property is distributed sufficiently assures confidentiality. Placing responsibility with the personal representative is intended to protect against disclosures that would harm the client's estate. *Cf.* 24 Cal. Jur. 3d *Decedents' Estates* § 423 (discussing fiduciary duty owed to estate and parties possessing interest in estate).

However, the personal representative's duty to the client's estate doesn't appear to include a duty to prevent disclosures that embarrass surviving family or tarnish a deceased client's reputation, but do not harm the estate. Thus, either (1) it is assumed that the personal representative will seek to prevent such disclosures despite the absence of a formal duty to do so (e.g., out of loyalty to the decedent or the decedent's family), or (2) it is assumed that permitting posthumous disclosures that are merely embarrassing wouldn't significantly chill attorney-client communication.

If the second assumption is correct, merely embarrassing attorney-client communications don't need to be privileged after the client's death. But the personal representative could claim the privilege as to such communications, even if the evidence were highly probative and unavailable from another source. That might not be sound policy.

Other Considerations

Generally, the Commission's policy is to adhere to its previous recommendations, absent a good reason for changing its approach. As its Handbook of Practices and Procedures explains, "The Commission has established that, as a matter of policy, unless there is a good reason for doing so, the Commission will not recommend to the Legislature changes in laws that have been enacted on Commission recommendation." Rule 3.5.

If the Commission decides to stick with its original approach, the Commission should consider whether there are certain types of trusts that possess similar characteristics to a will (e.g., a trust in which the assets are to be fully distributed and the trust is to be dissolved within a relatively short time after the client's death). If so, then in those situations, it might be appropriate to confer a trustee with the power to assert a deceased client's privilege. Like a personal representative, the trustee could hold the privilege while handling claims against the trust, but only until its assets are distributed to the beneficiaries, and the trust is dissolved.

Also, some commentators have raised the issue of whether tying the privilege's termination to discharge of the personal representative operates as intended. See Burford & Nunan, *Dead Man Talking: Is There Life After Death for the Attorney-Client Privilege?*, 11 Cal. Trusts & Estates Q. 17, 20 (2006). **If the Commission decides to stick with its original approach, the staff will research**

whether any adjustments need to be made to ensure its proper implementation.

OTHER PRIVILEGES

In California, other privileges based on a confidential relationship are also curtailed after death. This is true for privileges that were recommended by the Commission, and privileges enacted by the Legislature without the Commission's involvement. The posthumous approaches of these other privileges are briefly discussed below.

Commission's Approach to Other Privileges

When the Commission recommended the Evidence Code, it recommended four other privileges based on confidentiality, including a (1) physician-patient privilege, (2) psychotherapist-patient privilege, (3) privilege for confidential marital communications, and (4) clergy-penitent privilege. The posthumous approach for each of these privileges is discussed below.

Physician-Patient and Psychotherapist-Patient Privileges

The posthumous effects of the physician-patient and psychotherapist-patient privileges largely mirror the posthumous effect of the attorney-client privilege: the posthumous privilege is held by the patient's personal representative, and the privilege does not survive after the estate is closed. See Evid. Code §§ 993-994 (physician-patient privilege), 1013-1014 (psychotherapist-patient privilege); see also *Rittenhouse v. Superior Court*, 235 Cal. App. 3d 1584, 1588 n.2, 1 Cal. Rptr. 2d 595 (1991); *Boling v. Superior Court*, 105 Cal. App. 3d 430, 440, 164 Cal. Rptr. 432 (1980).

The Commission believed that this would change the law, but for the better:

The change is desirable, for the personal representative can protect the interest of the patient's estate in the confidentiality of these statements and can waive the privilege when the estate would benefit by waiver. And, *when the patient's estate has no interest in preserving confidentiality, or when the estate has been distributed and the representative discharged, the importance of providing complete access to information relevant to a particular proceeding should prevail over whatever remaining interests the decedent may have had in secrecy.*

Tentative Recommendation, *supra*, at 232 (emphasis added).; see also Evid. Code § 993.

It should be noted that there is *no* posthumous physician-patient privilege in criminal proceedings, or in a civil case to recover damages from the patient's criminal conduct. This privilege does not apply to such proceedings during life or after death. Evid. Code §§ 998-999 & Comments.

By contrast, the psychotherapist-patient privilege (during life and after death) *does* apply in criminal proceedings, as the Commission determined such application was necessary to encourage consultation and candid communication. See Evid. Code § 1014 Comment (concluding that society is better served by privilege, even though it may withhold relevant information in particular cases, as Commission received "several reliable reports" that seriously disturbed persons constituting threat to community sometimes refuse psychiatric treatment because confidentiality cannot be assured).

Privilege for Confidential Marital Communication

Under the privilege for confidential communications, each spouse — the confidant, and the spouse being confided in — holds the privilege. Evid. Code § 980 & Comment; see also Evid. Code § 912(b) (stating that waiver by one spouse does not affect other spouse's right to claim privilege).

When one spouse dies, no one can claim the privilege for the deceased spouse. "[T]he privilege, if it is to be claimed at all, can be claimed only by or on behalf of the surviving spouse." Evid. Code § 980 Comment.

Clergy-Penitent Privilege

The clergy member has discretion over whether or not to disclose a penitent's confidential communication. Evid. Code § 1034 & Comment (stating that even if penitent has waived privilege, clergy member can still claim it). The clergy member has such discretion both during the penitent's life *and* after the penitent's death. Thus, if the penitent is dead and the clergy member does not claim the privilege, the privilege does not bar admission of the communication.

The Comment explains that it would be inappropriate to legislate when a clergy member must disclose a penitential communication. The Commission believed that the law should not compel a clergy member to violate a tenet of the clergy member's church, nor punish the clergy member for refusing to violate such a tenet. *Id.*

The Comment states that this probably changed existing law, but for the better. To illustrate, the Comment explains:

For example, if a murderer had confessed the crime to a clergy[member], the clergy[member] might under some circumstances (e.g., if the murderer has died) decline to claim the privilege and instead, give the evidence on behalf of an innocent third party who had been indicted for the crime.

Id.

Legislature’s Approach to Other Privileges

Since adopting the Evidence Code in 1965, the Legislature has enacted three additional privileges based on a confidential relationship: (1) a sexual assault counselor-victim privilege (Evid. Code §§ 1035-1036.2), (2) a domestic violence counselor-victim privilege (Evid. Code §§ 1037-1037.8), and (3) a human trafficking caseworker-victim privilege (Evid. Code §§ 1038-1038.2). The Commission was not involved with any of these privileges.

Of these privileges, only the sexual assault counselor-victim privilege survives posthumously. But it survives only so long as there is a personal representative. See Evid. Code §§ 1035.6, 1035.8. However, in a criminal proceeding, or proceeding related to child abuse, the posthumous privilege is *qualified* — i.e., a court may override the privilege if “the probative value outweighs the effect on the victim, the treatment relationship, and the treatment services if disclosure is compelled.” Evid. Code § 1035.4.

The remaining two privileges based on a confidential relationship — the domestic violence counselor-victim privilege and the human trafficking caseworker-victim privilege — end on the victim’s death. See Evid. Code §§ 1037.4, 1037.5, 1038(a), 1038.2(d).

The diminished posthumous scope of the privileges enacted by the Legislature may reveal a legislative trend for a narrower posthumous privilege.

Or, the narrower scope of these privileges may be due to other reasons. Each of these privileges relate to a victim. Thus, the narrower scope may be due to special concerns about victim safety and the prosecution of crimes.

RECENTLY PROPOSED CHANGES TO CALIFORNIA’S ATTORNEY-CLIENT PRIVILEGE

In 2007, a bill was introduced to change California’s approach to the attorney-client privilege after the client’s death. This portion of the memorandum examines the approaches to the attorney-client privilege embodied in that bill (AB 403 (Tran)), as introduced, amended, and enacted.

First, a brief summary of the bill's history is useful.

As *introduced*, AB 403 sought to expand the posthumous attorney-client privilege by amending the Evidence Code. It also proposed amending a Probate Code provision relating to reappointment of a personal representative.

As *amended*, the bill did not apply in criminal cases.

As *enacted*, the bill did *not* amend the Evidence Code. But it amended the Probate Code provision relating to reappointment of a personal representative, which may have expanded the attorney-client privilege. See 2007 Cal. Stat. ch. 388, § 1. The enacted bill also assigned this study to the Commission. See 2007 Cal. Stat. ch. 388, § 2.

The various versions of the bill are discussed in greater detail below. It is easier to evaluate the bill as enacted if its earlier forms are discussed first.

AB 403 As Introduced

As introduced, AB 403 would have permitted an attorney to claim the attorney-client privilege after the client's death, unless a client's personal representative instructed the attorney otherwise. Thus, instead of ending the privilege after a client's estate closed (or at death if there is no estate), the privilege would have lasted indefinitely, but could be waived by a personal representative. Further, a personal representative could be reappointed after an estate was wound up, for the sole purpose of waiving the privilege.

According to the bill analysis, the bill was intended to ensure that the posthumous application of the privilege did not depend on technical nuances of the client's estate. Assembly Committee on Judiciary, Analysis of AB 403 (April 10, 2007), pp. 1, 3 (hereafter, "Assembly Judiciary Analysis"). The bill was also intended to make the posthumous privilege better reflect the underlying values of the privilege. Assembly Judiciary Analysis, *supra*, at 4.

These two goals are discussed in turn below.

Technical Nuances

The bill analysis conveyed the author's view that posthumous application should not depend on technical nuances of the client's estate, which can lead to inconsistent results. Assembly Judiciary Analysis, *supra*, at 1, 3. As an example of how posthumous application depends on nuances of the client's estate, the author cited *HLC Properties v. Superior Court*, 35 Cal. 4th 54, 105 P.3d 560, 24 Cal. Rptr. 3d 199 (2005), which was discussed in CLRC Memorandum 2008-8, pp. 5-6. To summarize, the California Supreme Court upheld an order compelling

discovery of Bing Crosby's attorney-client communications in a royalties dispute between heirs to Crosby's recording contracts and record companies. According to the bill analysis,

The [bill] author explains that if Bing Crosby had created a revocable trust to pass his royalties at death without probate, his successor trustee would have been able to claim the privilege. The author concludes that the continuance of the attorney-client privilege after a client's death should not turn on fine distinctions that are unrelated to the privilege's underlying purposes, such as whether the decedent passed property at death by either a will or revocable trust.

Assembly Judiciary Analysis, *supra*, at 5.

The conclusion that Crosby's communications would have remained privileged if he had used a revocable trust appears to be based on a California Supreme Court decision, *Moeller v. Superior Court*, 16 Cal. 4th 1124, 947 P.2d 279, 69 Cal. Rptr. 2d 317 (1997). In *Moeller*, the Court determined that a successor trustee has the power to assert a predecessor trustee's attorney-client privilege relating to the predecessor trustee's administration of the trust in the trustee's fiduciary capacity. *Id.* at 1127, 1134.

Importantly, the issue before the Court was whether a predecessor trustee could claim the attorney-client privilege against a successor trustee. It did *not* involve facts in which a successor trustee asserts a predecessor trustee's attorney-client privilege *against a third party*.

Some practitioners nevertheless believe *Moeller* may provide a way for the attorney-client privilege to survive the client's death. See, e.g., Burford & Nunan, *supra*, at 22. Some of the Court's language does seem to suggest that a successor trustee has the general power to assert (or waive) a predecessor trustee's attorney-client privilege, for communications relating to trust administration matters. See *Moeller*, 16 Cal. 4th at 1127, 1131, 1133, 1139. If so, it would appear that a client's communications relating to the management of property held in trust could remain privileged long after the client's death.

However, that result would seem to depend on more than just technical nuances of the client's estate plan. The posthumous attorney-client privilege would operate differently because of the different manner in which the property is held and transferred.

Differing outcomes based on how property is held and transferred occur in other areas of law as well. For example, if a person holds assets personally,

liability is personal. But when a person places the person's property in a corporation, liability associated with ownership may flow solely to the corporation.

Thus, the concern that the posthumous privilege can result in different outcomes, depending on how assets are held and transferred, might not, without more, justify expanding the posthumous scope of the privilege.

Underlying Values

The bill analysis also reported the author's concern that "requiring a deceased client's successor in interest to turn over documents reflecting confidential communications weakens the values that the attorney-client privilege seeks to protect." Assembly Judiciary Analysis, *supra*, at 4.

The traditional value of the privilege is to promote the effective administration of justice by encouraging open attorney-client communication. And, traditionally, recognition of the privilege, and identification of its scope, has been based on an assumption that, without the privilege, the typical person would withhold necessary disclosures, unwilling to communicate as necessitated by the relationship. See E. Imwinkelried, *The New Wigmore: A Treatise On Evidence Evidentiary Privileges* § 5.1.1, p. 258 (2002). Because of its potential to exclude relevant evidence from the factfinder, the privilege has been construed to extend only so far as is necessary to achieve its purpose. See, e.g., *Fisher v. United States*, 425 U.S. 391, 403 (1976).

The appropriate scope of the posthumous privilege, therefore, depends on one's assumption that the scope (1) is necessary to fulfill the privilege's purpose, and (2) is not overbroad, unnecessarily excluding relevant evidence from the factfinder.

AB 403's initial approach appears to assume that the Commission's approach is inadequate, and that more protection is needed to encourage client candor. The bill proposed indefinite posthumous survival of the privilege, subject to waiver by a personal representative. Presumably, this approach is viewed as necessary to encourage a client to candidly communicate with an attorney, and would cause no significant loss of evidence. (Perhaps on the theory that it is unlikely that the communication would have occurred without this form of the posthumous privilege.) AB 403's initial approach further appears to assume that the possibility of a personal representative's waiver would not significantly deter open communication.

The United States Supreme Court also believes that a posthumous privilege that lasts beyond the closing of a client's estate is necessary to effectuate the purposes of the privilege. See *Swidler*, 524 U.S. 399. The approach in AB 403, as introduced, is very similar to the federal approach, discussed later in this memorandum.

Indefinite Posthumous Survival Except in Criminal Cases

While it was pending, AB 403 was amended such that its proposed new rule would not apply to a criminal case. The amendment occurred soon after the vote requirement for the bill was changed from a majority vote to a two-thirds vote. See Legislative Counsel's Digest on AB 403 (Tran) (as amended on April 9, 2007) ("Because this bill would result in the exclusion of relevant evidence in a criminal proceeding, the bill would require a two-thirds vote."); AB 403 §§ 1, 4 (Tran) (as amended April 16, 2007).

The staff did not find arguments in the bill analysis specifically related to this approach. Nor was the staff able to find a jurisdiction implementing such a distinction between civil and criminal cases. *Cf.* Evid. Code § 1035.4 (providing *qualified* posthumous exception in criminal cases to sexual assault counselor-victim privilege).

On one hand, the lack of an indefinite posthumous privilege in criminal cases might not significantly impact client candor because criminal liability ends with death. Inapplicability of the new rule in criminal proceedings would also avoid interfering with a criminal defendant's right to exculpatory evidence.

On the other hand, as the United States Supreme Court noted in rejecting a posthumous exception for criminal cases, posthumous disclosure in a criminal case might damage the client's reputation or embarrass surviving family. *Swidler*, 524 U.S. at 407.

Also, this approach might not provide the client with sufficient certainty in advance as to whether the privilege would apply to a particular communication. A client cannot predict in advance whether a statement would be relevant to a criminal, as opposed to a civil, proceeding. *Id.* at 409.

Posthumous Approach in Current Law

As enacted, AB 403 kept part of the status quo: an attorney may only claim the privilege if there is a privilege holder in existence. See Evid. Code § 954. And the holder may be either (1) the client, (2) the client's guardian or conservator, (3) a deceased client's personal representative, or (4) "a successor, assign, trustee

in dissolution, or any similar representative of a firm, association, organization, partnership, business trust, corporation, or public entity that is no longer in existence.” Evid. Code § 953. After the client’s death, therefore, the attorney may only claim the privilege so long as there is a personal representative.

In contrast, AB 403 as introduced would have (1) permitted an attorney to claim the privilege indefinitely after the client’s death, unless a personal representative waived it, and (2) provided that a personal representative could be reappointed for the sole purpose of waiving the privilege.

AB 403 enacted only the second part, relating to reappointment of a personal representative. Specifically, Probate Code Section 12252 was amended as shown in underscore below:

12252. If subsequent administration of an estate is necessary after the personal representative has been discharged because other property is discovered, disclosure is sought of a communication that is deemed privileged in the absence of a waiver by a personal representative under Article 3 (commencing with Section 950) of Chapter 4 of the Evidence Code, or because it becomes necessary or proper for any other cause, both of the following shall apply:

(a) The court shall appoint as personal representative the person entitled to appointment in the same order as is directed in relation to an original appointment, except that the person who served as personal representative at the time of the order of discharge has priority.

(b) Notice of hearing of the appointment shall be given as provided in Section 1220 to the person who served as personal representative at the time of the order of discharge and to other interested persons. If property has been distributed to the State of California, a copy of any petition for subsequent appointment of a personal representative and the notice of hearing shall be given as provided in Section 1220 to the Controller.

The meaning of this amendment to Section 12252, without any amendment making the privilege survive indefinitely, is somewhat unclear. That point is discussed below.

Probate Code Section 12252 as Amended by AB 403

The amendment to Section 12252 provides that, after the client’s death, if disclosure is sought of a communication “that is deemed privileged” under Evidence Code Sections 950-962, the personal representative shall be reappointed. A literal interpretation is unwieldy because a communication cannot be “deemed privileged” under Sections 950-962 in the circumstance in

which Section 12252 appears to apply: after the client's death and after the personal representative is discharged. Under these circumstances, the privilege no longer exists. (Note: As introduced, the bill would have made the attorney-client privilege survive the client's death, so a communication could have been "deemed privileged" in the circumstance in which Section 12252 applies.)

Section 12252 thus appears to mean that a personal representative is to be appointed if a person seeks disclosure of a communication that *would* be privileged, if the client were alive. Under this interpretation, the privilege has the potential to survive posthumously via a personal representative, who can be appointed solely to claim the privilege, even after the estate is distributed.

It is unclear, however, whether the staff's interpretation is correct. Under this interpretation, a personal representative may claim the privilege in circumstances in which the personal representative could not have previously claimed the privilege. That means that relevant evidence in a criminal case could be excluded when previously it would have been admissible. That appears to be a situation in which the Truth-In-Evidence constitutional provision, requiring a two-thirds vote in each house, would apply. See Cal. Const. art. I, § 28(d). However, the bill in this form was not designated to require a two-thirds vote. It was designated as requiring only a majority vote. This might indicate that the staff's interpretation is incorrect. However, it is unclear to the staff how else to interpret the bill.

In addition to the ambiguities just discussed, there is another interpretative issue relating to Section 12252. It seems that the amendment to Section 12252 was intended to apply after the client's death, regardless of whether there had been, at one time, a personal representative. But the mandatory procedures of Section 12252 only relate to *reappointment* of a personal representative. See Prob. Code §§ 12252(a) (stating that "the person who served as personal representative at the time of the order of discharge has priority") & (b) ("Notice of the hearing shall be given as provided in Section 1220 to the person who served as personal representative at the time of the order of discharge and other persons....").

It is thus unclear what is to happen if there has never been a personal representative to reappoint. If Section 12252 is intended to require appointment of a personal representative to assert a deceased client's privilege, even if there was no prior personal representative appointed, that should be made clear. One way to do so would be to separately state the requirement to appoint a personal representative and the requirement to reappoint the personal representative.

At a minimum, **the Commission should clarify the meaning and operation of Probate Section 12252.** We are not yet sure exactly how that should be done. It will be easier to assess how to clarify Section 12252 once the Commission has decided upon a posthumous approach for the privilege.

Personal Representative Appointment Before Section 12252 Was Amended

Some commentators maintain that even before it was amended by AB 403, Probate Code Section 12252 might have provided a means to have a personal representative reappointed after closure of the client's estate. See Burford & Nunan, *supra*, at 21 (stating that after California Supreme Court upheld order to disclose Crosby's communications, his heirs had personal representative appointed, who then claimed the privilege); see also former Prob. Code § 12252 (directing court to reappoint personal representative "[i]f subsequent estate administration is necessary ... because other property is discovered *or because it becomes necessary or proper for any cause*") (emphasis added)).

Accordingly, if the Commission decides to stick with the approach it took when it drafted the Evidence Code, simply changing Section 12252 back to its pre-AB 403 version might not suffice to prevent claims that the attorney-client privilege can be asserted after the client's estate is distributed. Further revisions might be needed to make clear that the privilege terminates when the client's estate is wound up and the personal representative is discharged.

THE FEDERAL APPROACH

Federal privilege law is governed by common law. Federal Rule of Evidence 501 provides that privileges "shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." Rule 501 also provides that, generally, federal courts are to apply federal common law to cases involving federal law questions, and state law to civil cases based upon diversity jurisdiction.

Under federal law, the attorney-client privilege survives the client's death. *Swidler*, 524 U.S. at 401. And, like the California privilege, the privilege has exceptions, but if no exception applies, it is "absolute." That is, the privilege cannot be overridden based on showing an evidentiary need for the attorney-client communication. *Id.* at 408-09.

Swidler & Berlin v. United States

In *Swidler & Berlin v. United States*, 524 U.S. 399 (1998), the United States Supreme Court held that the attorney-client privilege survived the client's death.

The background of the case is useful in evaluating the policy judgment underlying the Court's opinion. It is also a reminder that certain aspects of the attorney-client relationship are also protected by the work-product doctrine, which is discussed in CLRC Memorandum 2008-8, at pages 11-14.

The facts of the *Swidler* case arose out of Independent Counsel Kenneth Starr's investigation of whether various persons obstructed justice or committed other crimes during investigations of employee dismissals in 1993 at the White House Travel Office. *Swidler*, 524 U.S. at 401.

At Starr's request, a federal grand jury issued a subpoena for the written notes of James Hamilton, an attorney at the law firm Swidler & Berlin. *Id.* at 401-02. Hamilton's notes were taken during an initial consultation between him and his client, Vince Foster, shortly before Foster committed suicide. *Id.* at 401.

The district court quashed the subpoena, holding that Hamilton's notes were protected by the attorney-client and work-product privileges. *Id.* at 402. The court of appeal reversed. *Id.* As to the attorney-client privilege, the court of appeal held that the district court should have applied a balancing test, weighing the need for the information against the interest in confidentiality. See *In re Sealed Case*, 124 F.3d 230, 234-35 (D.C. App. 1997), rev'd sub nom *Swidler & Berlin v. U.S.*, 524 U.S. 399 (1998). In other words, the court of appeal held that the posthumous attorney-client privilege is not absolute, but qualified — i.e., it can be overridden under a balancing test. The court of appeal further held that the work-product privilege did not bar discovery of the notes to the extent that they contained needed facts not otherwise discoverable without undue hardship. *Id.* at 235-37 (applying Fed. R. Civ. Proc. 26(b)(3)).

The United States Supreme Court reversed the court of appeal. The Court upheld the claim that the notes were protected by the attorney-client privilege. *Swidler*, 524 U.S. at 401. Accordingly, the Court did not consider the work-product privilege claim. See *id.* at 403 n.1.

The Court rejected the court of appeal's balancing test. It stated that "[b]alancing *ex post* the importance of the information against client interests, even limited to criminal cases, introduces substantial uncertainty into the privilege's application." *Id.* at 409.

Drawing upon the traditional rationale for the attorney-client privilege of encouraging client candor, the Court believed that a balancing test, even if limited to criminal cases, might chill some attorney-client communications. The Court stated:

While the fear of disclosure, and the consequent withholding of information from counsel, may be reduced if disclosure is limited to posthumous disclosure in a criminal context, it seems unreasonable to assume that it vanishes altogether. Clients may be concerned about reputation, civil liability, or possible harm to friends and family. Posthumous disclosure of [attorney-client] communications may be as feared as disclosure during the client's lifetime.

Id. at 407. The Court also stated that a client might not know in advance whether the communication would later be relevant to a civil or criminal matter. *Id.* at 409.

The Independent Counsel argued that the only clients who would be reluctant to disclose would be those intending to perjure themselves; therefore, truthful clients, or clients who would assert the privilege against self-incrimination wouldn't be dissuaded from disclosing all the facts to the attorney. *Id.* The Court rejected the argument:

The Independent Counsel assumes, incorrectly we believe, that the privilege is analogous to the Fifth Amendment's protection against self incrimination. But as suggested above, the privilege serves much broader purposes. Clients consult attorneys for a wide variety of reasons, only one of which involves possible criminal liability. Many attorneys act as counselors on personal and family matters, where in the course of obtaining the desired advice, confidences about family members or financial problems must be revealed in order to assure sound legal advice. The same is true of owners of small businesses who may regularly consult their attorneys about a variety of problems arising in the course of the business. These confidences may not come close to any sort of admission of criminal wrongdoing, but nonetheless be matters which the client would not wish divulged.

Id. at 407-08.

As to the concern that the attorney-client privilege may cause an exclusion of relevant evidence from the factfinder, the Court felt that an absolute posthumous privilege wouldn't cause an unjustifiable loss of evidence. It explained:

In related cases, we have said that the loss of evidence admittedly caused by the privilege is justified in part by the fact

that without the privilege, the client may not have made such communications in the first place. This is true of disclosure before and after the client's death. Without assurance of the privilege's posthumous application, the client may very well not have made disclosures to [the client's] attorney at all, so the loss of evidence is more apparent than real. In the case at hand, it seems quite plausible that Foster, perhaps already contemplating suicide, may not have sought legal advice from Hamilton if he had not been assured the conversation was privileged.

Id. at 408 (citations omitted).

The Independent Counsel also urged that the privilege be strictly construed, and that it should not survive the client's death. He argued that privileges have been strictly construed in other cases, out of a recognition that privileges are inconsistent with the "paramount judicial goal of truth seeking." *Id.* at 410. The Court distinguished the other cases on the ground that they dealt with privileges not recognized in the common law, as opposed to the attorney-client privilege, "one of the oldest recognized privileges." *Id.* The Court stated that additionally, it was being "asked, not simply to 'construe' the privilege, but to narrow it, contrary to the weight of the existing body of case law." *Id.*

As to the case law, the Court stated that "cases addressing the existence of the privilege after death — most involving the testamentary exception — uniformly presume the privilege survives, even if they do not so hold." *Id.* at 404. The Court appeared to reason that the existence of the "testamentary exception" (which exempts the privilege from disputes between the testator's heirs) necessarily implied that the privilege survived the client's death. *Id.* at 404-05. However, the cases involving the testamentary exception arise in the context in which all parties claim through the client's will. Therefore, these decisions are just as consistent with a rule in which the privilege terminates after the client's estate closes. See *In re Sealed Case*, 124 F.3d 230, 232 n.2 (1997) *rev'd sub nom Swidler*, 524 U.S. 399; *Cf. Hart v. Burnett*, 15 Cal. 530, 598 (1860) (stating principle that "a decision is not ... authority except upon the point actually passed upon by the Court and directly involved in the case").

Nevertheless, the majority stated that "[t]he great body of case law supports, either by holding or considered dicta, the position that the privilege does survive in a case such as the present one." *Swidler*, 524 U.S. at 405. Accordingly, the Court said that the Independent Counsel had the burden "to show [under Rule 501]

that ‘reason and experience’ require a departure from this rule.” *Id.* at 405-06. The Court did not believe that the Independent Counsel had met this burden.

The Court did not consider whether “exceptional circumstances implicating a criminal defendant’s constitutional rights might warrant breaching the privilege,” as such “circumstances clearly are not presented here.” *Id.* at 409 n.3.

Posthumous Exception

The *Swidler* opinion discussed the “testamentary exception.” Under this exception, the privilege does not apply when all parties claim through the client’s will. It appears that such an exception could be applied by a federal court, but that the court would usually be applying state instead of federal law. See Fed. R. Evid. 501. But, if federal law did apply, it appears to include the “testamentary exception.” See *In re Covington*, 450 F.3d 917 (9th Cir. 2006).

Prof. McCormick believed that this exception applied in most cases in which the privilege was most likely to be asserted. See Frankel, *The Attorney-Client Privilege After the Death of the Client*, 6 Geo. J. Legal Ethics 45, 58 (1992). Indeed, in one commentator’s exhaustive study of cases (approximately 400) involving the posthumous privilege, approximately 95% of the cases arose in the testamentary context. Frankel, *supra*, at 58 n.65.

This exception means that it is rare for the attorney-client privilege to apply after the client’s death.

Unanswered Questions

Although the *Swidler* Court definitively decided that the attorney-client privilege survives the client’s death, the decision left many questions unanswered.

For instance, after the client dies, who can claim the privilege? Is it limited to the attorney? What if there is also a personal representative? Could a personal representative waive the privilege to preclude the attorney from claiming it? If so, could a personal representative waive the privilege in all cases, or just certain types of cases? Could an heir of the decedent waive the privilege?

The facts in *Swidler* did not indicate whether the deceased client, Foster, had a personal representative. The Court thus did *not* pass judgment on whether a personal representative (or heir, or other person) could waive a deceased client’s privilege. In at least one case, it appears that the federal common law was assumed to permit waiver by a personal representative. See *In re Estate of Covington*, 450 F.3d 917 (9th Cir. 2006).

If the federal approach does allow for a personal representative (or other person) to waive the deceased client's privilege, *Swidler* nevertheless makes clear that, in the absence of a waiver of the privilege, the attorney-client privilege continues.

How the Federal Approach Handles the Competing Policies

The United States Supreme Court determined that an absolute posthumous privilege is beneficial because it provides clients with certainty that, unless an exception applies, the privilege's application cannot be overridden by a court.

If no one can waive the posthumous privilege under federal law, it would provide even more certainty of confidentiality. However, if no one can waive a deceased client's privilege, the information contained in the communication could never be disclosed, regardless of whether it has a high probative value and whether it is unavailable from any other source, and whether it would have minimal or no impact on the deceased client's remaining interest in confidentiality.

As pointed out by the *Swidler* Court, however, but for the privilege, the evidence might not exist. Thus, the loss of evidence by precluding the possibility of its disclosure may be "more apparent than real." See *Swidler*, 524 U.S. at 408. But, if the communication would have been made regardless of whether the privilege absolutely and indefinitely survived posthumously, then posthumous survival of the privilege would result in a loss of evidence (provided the evidence was not inadmissible on other grounds).

It might also be considered whether, out of respect for the client's privacy, the communication should remain private, or, whether countervailing interests should override a client's remaining interest in privacy. The federal privilege provides a high degree of posthumous privacy protection. But, as to communications that would be made without such protection, the privilege causes a loss of relevant evidence. The need for the evidence might outweigh a deceased client's privacy interest.

Dissent

Three Justices dissented from the Court's opinion in *Swidler*. The approach advocated by the dissent, and its rationale, will be discussed in a future memorandum.

RECAP OF APPROACHES

The main elements of the posthumous attorney-client privilege approaches described in this memorandum are as follows:

- *Commission's Approach Enacted in Evidence Code.* Prior to enactment of AB 403, the attorney-client privilege survived death if there was a personal representative to hold the privilege, but only during the administration of the client's estate.
- *Current Approach Enacted by AB 403.* AB 403 appears to have modified former law, by specifically allowing for the reappointment of a personal representative to hold the privilege.
- *Federal Approach and Initial Approach of AB 403.* The federal approach is that the privilege survives death indefinitely, and appears it may be waived by a personal representative. This was also the approach taken in AB 403 as it was originally introduced.

NEXT STEP

The next memorandum will continue discussion of specific approaches to a posthumous attorney-client privilege.

Respectfully submitted,

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