Study K-350 August 11, 2008

Memorandum 2008-34

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

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

At the last meeting, the Commission considered the following approaches:

- *Commission's Approach Enacted in Evidence Code.* Prior to enactment of AB 403 (Tran) (2007 Cal Stat. ch. 388), the attorney-client privilege survived death so long as there was a personal representative, who held the privilege. The intent was to terminate the privilege after the client's estate was wound up.
- *Current Approach Enacted by AB 403.* AB 403 may have modified former law by allowing for the reappointment of a personal representative to hold the privilege, even when there is no estate to administer.
- *Federal Approach and Initial Approach of AB 403.* The federal approach is that the privilege survives death indefinitely; it appears that the privilege may be waived by a personal representative. This was also the approach taken in AB 403 as it was originally introduced.

These approaches were discussed in CLRC Memorandum 2008-20.

This memorandum describes five more approaches: (1) balance policies for and against the posthumous privilege on a case-by-case basis, (2) exempt the posthumous privilege from certain cases, (3) limit survival of the privilege to protect a deceased client's remaining property interests, (4) limit survival of the privilege to a set number of years, and (5) end the privilege at the client's death. Some of these approaches are suggestions by commentators, and do not appear to have been adopted in any state.

Next, the memorandum discusses several issues relating to selecting a holder of a deceased client's privilege. Discussion of these issues includes comments by

Paul Gordon Hoffman, an attorney in Los Angeles. His comments are attached as an Exhibit.

In formulating an approach to a posthumous attorney-client privilege, the Commission should keep in mind the competing policies underlying the privilege. Those policies were discussed in detail in Memorandum 2008-19.

To summarize, 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.

This memorandum discusses policy implications of the approaches presented, but does not attempt to identify the best approach. The staff will make a recommendation on that matter in a future memorandum. If possible, we will prepare that memorandum in time to present it at the September meeting, along with the instant memorandum.

BALANCE POLICIES ON CASE-BY-CASE BASIS

One approach is to have the attorney-client privilege turn into a *qualified* privilege after the client's death — i.e., a posthumous privilege that may yield to competing interests under a balancing test. There are several variations of this approach.

Posthumous Balancing Limited by Significance of Issue

The Restatement, promulgated by the American Law Institute ("ALI"), recommends a posthumous privilege that is subject to a balancing test. If an attorney-client "communication bears on a litigated issue of pivotal significance," the ALI advocates "balanc[ing] the interest in confidentiality against any exceptional need for the communication." Restatement (Third) of the Law Governing Lawyers § 77, Comment *d*, p. 591 (2000) (hereinafter "Restatement"). The ALI adds that the court could minimize disclosure by limiting use of the communication to a particular issue, or by sealing the record. *Id.*

The ALI says that there is a heightened cost with a *posthumous* attorney-client privilege because death precludes waiver of the privilege by the client. Restatement § 77, p. 592. The ALI's balancing approach is intended to address that perceived heightened cost.

In California, and several other jurisdictions, a personal representative may waive the deceased client's privilege. Even though posthumous waiver is possible, it is different from a possibility of waiver *by the client*. The personal representative must exercise the privilege in the estate's best interests. See 24 Cal. Jur. 3d *Decedents' Estates* § 423. As to matters not impacting the estate, it is unclear what governs the personal representative's exercise of the privilege.

Another reason the posthumous privilege has a heightened cost is that a deceased client cannot be consulted for information. The client's death precludes a party from deposing the client, or calling the client as a witness.

The ALI does not believe that its proposed posthumous balancing would significantly undermine the privilege's goal of encouraging communication. In its view, posthumous disclosure pursuant to the balancing test "would do little to inhibit clients from confiding in their lawyers." Restatement § 77, p. 591. By contrast, when the client is alive, the ALI believes that balancing "would exact a high price of uncertainty, possibly frustrating the purpose of the privilege of inducing frank communication." See Restatement § 68, Comment *c*, p. 523.

The ALI's posthumous approach in the Restatement differs from the ALI's former approach in the Model Code. Under the Model Code (drafted in 1942), the attorney-client privilege survived the client's death, but only during a client's estate administration, and ended with the discharge of the personal representative. See Chadbourn, A Study relating to the Privileges Article of the Uniform Rules of Evidence, 6 Cal. L. Revision Comm'n Reports 301, 389 (1964). Recall that this was the approach recommended by the Commission and enacted in the Evidence Code. See Evid. Code §§ 953-954 & Comments; see also CLRC Memorandum 2007-20, pp. 2-5.

Posthumous Balancing in Criminal Cases

Another approach is to limit posthumous balancing to criminal cases. In civil cases, the attorney-client privilege would apply posthumously without being subject to balancing.

The federal approach to the posthumous attorney-client privilege, set forth in *Swidler & Berlin v. United States*, 524 U.S. 399 (1998), is that the privilege survives indefinitely. (This approach was discussed in CLRC Memorandum 2008-20 at pages 21-25.)

Three Justices dissented, arguing for a qualified posthumous privilege in criminal cases. *Id.* at 411 (J. O'Connor, dissenting). The dissent argued that a

longstanding basis for all evidentiary rules is that they should be adapted to the "successful development of the truth." *Id.* (Citations omitted). It added that a privilege should only operate where necessary to achieve its purpose. *Id.* at 412.

To promote those principles, the dissent believed that

> a criminal defendant's right to exculpatory evidence or a compelling law enforcement need for information may, where the testimony is not available from other sources, override a client's posthumous interest in confidentiality.

Id. at 411.

The dissent recognized that "a deceased client may retain a personal, reputational and economic interest in confidentiality." *Id.* at 412. But, it added that "the potential that disclosure will harm the client's interests has been greatly diminished" by the client's death, and that there is no longer any risk "that the client will be held criminally liable." *Id.*

The dissent further explained its reasoning as follows:

> Given that the complete exclusion of relevant evidence from a criminal trial or investigation may distort the record, mislead the factfinder, and undermine the central truth-seeking function of the courts, [we] do not believe that the attorney-client privilege should act as an absolute bar to the disclosure of a deceased client's communications. *When the privilege is asserted in the criminal context, and a showing is made that the communications at issue contain necessary factual information not otherwise available, courts should be permitted to assess whether interests in fairness and accuracy outweigh the justifications for the privilege.*

Id. at 413-14 (emphasis added).

The dissent acknowledged that such balancing might be inconsistent with the privilege's goals of "encouraging full and frank communication or protecting the client's interests." *Id.* at 414 (internal quotation marks omitted). But, the dissent did not believe that this potential inconsistency should necessarily preclude balancing in criminal cases.

In support of its view, the dissent argued that existing exceptions to the privilege might not necessarily be consistent with the privilege's goals either. *Id.* The dissent cited the "testamentary exception" (applicable in litigation between heirs to determine a decedent's testamentary intent) and the crime-fraud exception (applicable if the client used the attorney's services to commit a crime or fraud) as examples, because they could result in unwanted disclosures. The

dissent thus stated that these exceptions reflect the understanding that, in certain circumstances, the privilege ceases to operate, so as to safeguard the proper functioning of the adversary system. *Id.* Likewise, the dissent believed that after the client's death, the privilege should cease to operate in certain criminal cases, so as to safeguard the proper functioning of the adversary system.

Finally, the dissent criticized the majority's view that precedent supports a continuous privilege after the client's death. The dissent criticized the majority's reliance "on the case law's 'implicit acceptance' of a continuous privilege." *Id.* at 414-15. The dissent argued that few opinions squarely address the posthumous force of the privilege. *Id.* at 415. According to the dissent, in those opinions that do deal with this matter, "courts do not typically engage in detailed reasoning, but rather conclude that the cases construing the testamentary exception imply survival." *Id.*

The dissent added that "the common law authority ... that the privilege remains absolute after the client's death is not a monolithic body of precedent." *Id.* at 414. Rather, the dissent said that "there is some authority for the proposition that a deceased client's communications may be revealed," even when a testamentary exception does not apply. *Id.* at 415. Authority cited by the dissent includes the Restatement, the California Evidence Code, a Pennsylvania appellate court decision, and an academic treatise. *Id.* at 415-16. The Pennsylvania decision is discussed below.

Jurisdictions with Balancing

It appears that a few jurisdictions have a qualified privilege, applying a balancing test.

An appellate court in Pennsylvania applied a balancing test to an attorney-client privilege claim after the client's death in *Cohen v. Jenkintown Cab Co.*, 238 Pa. Super. 456, 357 A.2d 689 (Pa. Super. Ct. 1976).

The *Cohen* case involved litigation against a taxi cab company by a pedestrian who had been struck in a hit-and-run accident. The issue was whether a deceased cab driver's attorney-client communications, in which the driver admitted hitting the pedestrian, were privileged. The court cited four factors that weighed in favor of disclosure: (1) the client was deceased, (2) the client was not a party to the suit, (3) the communications weren't scandalous so as to blacken the memory of the deceased client, and (4) the testimony was needed because the

plaintiff's recollection was severely limited, and there were no other witnesses to the accident. *Id.* at 462-65.

Applying those four factors, the court stated that

> [w]hen we balance the necessity for revealing the substance of the conversation ... against the unlikelihood of any cognizable injury to the rights, interests, estate or memory of Mr. Guise [the deceased client], we conclude that the privilege must fail and the testimony be admitted. The privilege exists only to aid in the administration of justice, and when it is shown that [those] interests ... can only be frustrated by the exercise of the privilege, the trial judge may require that the communication be disclosed.

Id. at 464.

The staff found no contrary holding in Pennsylvania case law.

In a few jurisdictions, listed below, courts have applied a balancing test in deciding an attorney-client privilege claim *during the client's life*. It seems probable that these courts would also apply a balancing test after the client's death, and would do so regardless of the civil or criminal nature of the case.

- **New Jersey**. *In the Matter of Joseph L. Nackson, Esq., Charged with Contempt of Court*, 114 N.J. 527, 534, 555 A.2d 1101 (N.J. 1989) (stating that attorney-client privilege "must in some circumstances yield to the higher demands of order," and that privilege can be pierced by showing need for evidence where information sought couldn't be obtained by less intrusive means).
- **New York**. *Matter of Grand Jury Investigation*, 175 Misc. 2d. 398, 401-02, 669 N.Y.S. 2d 179 (N.Y. Co. Ct. 1998) ("[E]ven where the technical requirements of the [attorney-client] privilege are satisfied, it may, nonetheless, yield in a proper case, where strong public policy requires disclosure."); see, e.g., *Matter of Jacqueline F.*, 47 N.Y. 2d 215, 221-23, 391 N.E. 2d 967, 417 N.Y.S. 2d 884 (N.Y. 1979) (holding that attorney-client privilege yields and attorney must disclose client's address, because non-disclosure would frustrate court's judgment in child's best interests); but see *People v. Vespucci*, 192 Misc. 2d 685, 692-93, 695, 745 N.Y.S. 2d 391 (N.Y. Co. Ct. 2002) (stating that some New York courts apply balancing test to attorney-client privilege claims, but others don't, and holding that deceased client's communications remain privileged under either "absolute" or "balancing test" doctrine without determining which one governs posthumous privilege).
- **Washington**. *Amoss v. Univ. of Washington*, 40 Wash. App. 666, 687-88, 700 P.2d 350, 25 Ed. Law Rep. 618 (Wash. Ct. App. 1985) (upholding trial court's balancing of evidentiary need for disclosure of attorney-client communication versus need to preserve attorney-client confidentiality).

Balancing in Specific Contexts

Although the United States Supreme Court in *Swidler* rejected a balancing test after the client's death, the attorney-client privilege is subject to balancing in a number of specific contexts. Federal courts balance the attorney-client privilege against competing interests in some cases involving a fiduciary. See 1 K. Broun, McCormick on Evidence, § 87.1, p. 395 (6th ed. 2006) (stating that courts have performed balancing to override attorney-client privilege in derivative lawsuits); *Developments — Privileged Communications*, 98 Harv. L. Rev. 1450, 1525-27 (1985) (stating that courts pierce attorney-client privilege when shareholders seek corporate management's attorney-client communications during alleged wrongdoing, and that courts pierce privilege in other situations where fiduciary is to act on beneficiary's behalf).

Also, courts conduct balancing in adjudging whether an assertion of the privilege infringes upon a person's constitutional rights. See 1 Broun, *supra*, § 77, pp. 363-64; see, e.g., *Murdoch v. Castro*, 489 F.3d 1063, 1066, 1068 (9th Cir. 2007) (upholding balancing and stating that under right facts, attorney-client privilege could yield to defendant's right to confrontation); *People v. Godlewski*, 17 Cal. App. 4th 940, 945, 948-50, 21 Cal. Rptr. 2d 796 (1993) ("[A] court must employ a balancing process to decide if a breach of the privilege is necessary to implement the accused's constitutional rights ... ."). One scholar thus observes that "the existence of a constitutional right in effect renders the privilege qualified." E. Imwinkelried, The New Wigmore: A Treatise on Evidence *Evidentiary Privileges* § 11 (2002) (hereinafter, "Imwinkelried, The New Wigmore").

Predictability

A qualified posthumous privilege balances the need for confidentiality and the need for evidence on a case-by-case basis. The approach has strong support among commentators. See Paulsen, *Dead Man's Privilege: Vince Foster and the Demise of Legal Ethics*, 68 Fordham L. Rev. 807, 831 n.96 (1999) (stating that "dominant view of most academic commentators [is] that the posthumous privilege should yield for compelling reasons").

Most courts and legislatures, however, opt for an absolute privilege. In other words, instead of case-by-case balancing, most courts and legislatures seek to strike the right balance between the privilege's competing policies by limiting the privilege's application, through carefully defining the rule and clearly delineating categorical exceptions. This provides more predictability, which is

important to the privilege's purpose of encouraging candor. If a client is unsure whether potentially incriminating or embarrassing information would be subject to compelled disclosure, the client may hesitate to disclose that information to the client's attorney. Ottoson, Comment, *Dead Man Talking: A New Approach to the Post-Mortem Attorney-Client Privilege*, 82 Minn. L. Rev. 1329, 1338 (1998).

The United States Supreme Court rejected a posthumous balancing approach because it "introduces substantial uncertainty into the privilege's application." *Swidler*, 524 U.S. at 409. The Court said that even if balancing were limited to criminal cases where the information is substantially important, there would be an adverse impact on the privilege because "a client may not know at the time he discloses information to his attorney whether it will later be relevant to a civil or a criminal matter, let alone whether it will be of substantial importance." *Id.*

Due to similar concerns about predictability, the North Carolina Supreme Court recently rejected a posthumous balancing approach. The Court stated that a balancing test

> subjects the client's reasonable expectation of nondisclosure to a process without parameters or standards, with an end result no more predictable in any case than a public opinion poll, the weather over time, or any athletic contest. Such a test, regardless of how well intentioned and conducted it may be, or how exigent the circumstances, would likely have, in the immediate future and over time, a corrosive effect on the privilege's traditionally stable application and the corresponding expectations of clients.

In re: The Investigation of the Death of Eric Dewayne Miller and of any Info. in the Possession of Attorney Richard T. Gammon regarding that Death, 357 N.C. 316, 332-33, 584 S.E.2d 772 (N.C. 2003) (hereafter, *In re Investigation of Miller*).

For similar reasons, the Colorado Supreme Court also rejected posthumous balancing. See *Wesp v. Everson*, 33 P.3d 191, 201 (Colo. 2001) (holding that posthumous attorney-client privilege could not be pierced "on the basis of an unpredictable manifest injustice standard" because it would undermine the privilege's purpose).

Some commentators argue, however, that the privilege is already unpredictable because its contours vary from jurisdiction to jurisdiction. See, e.g., 24 C. Wright & K. Graham, Federal Practice and Procedure § 5507. A person cannot predict which law, state or federal, would apply to an action in which the client's communication would be relevant. Paulsen, *supra*, at 834; see also Fed. R. Evid. 501 (prescribing that common law of privilege applies in federal cases

arising under federal law, and that state privilege law applies in diversity cases). Even if there were uniformity of attorney-client privilege law in the United States, a degree of uncertainty would persist, as the privilege law of another nation might apply. See 24 Wright & Graham, *supra*, § 5507 (citing example of federal court applying Italian privilege law); Imwinkelried, The New Wigmore, *supra*, at 1384, 1388 (explaining that privilege law of foreign nation may apply, which will occur increasingly with growth of international transactions).

Some proponents of balancing argue that it "would make no real difference to clients," and would not affect the attorney-client relationship. Ottoson, *supra*, at 1338-39; see also Note, *The Attorney-Client Privilege: Fixed Rules, Balancing, and Constitutional Entitlement*, 91 Harv. L. Rev. 464, 470-71 (1977) (stating belief that clients are generally candid despite existing uncertainties, that certainty may not be necessary, and a qualified privilege would best address competing concerns).

However, while existing uncertainty might not undermine the privilege, new uncertainty from a balancing test might render the privilege insufficiently predictable for clients to rely on it. See Comment, *Functional Overlap between the Lawyer and Other Professionals: Its Implications for the Privileged Communication Doctrine*, 71 Yale L.J. 1226, 1245 (1962) (criticizing judicial discretion to determine when "disclosure is necessary 'for the proper administration of justice'" because balancing would inject more uncertainty into privilege than exists already, deeply undercutting privilege's goal).

As one commentator states, existing uncertainty doesn't justify adding more uncertainty. Paulsen, *supra*, at 833. That commentator believes, however, that unless a client believes that death is impending, it seems likely that a client would be more concerned about the privilege's protection during the client's life than uncertainty over the privilege's protection after death. *Id.*

Balancing in California

Notably, none of the privileges based on a confidential relationship in the Evidence Code that were adopted on Commission recommendation prescribes a balancing test. See Evid. Code §§ 950-962 (attorney-client privilege), 980-987 (confidential marital communication), 990-1007 (physician-patient privilege), 1017-1028 (psychotherapist-patient privilege), 1030-1034 (clergy-penitent privilege) & Comments; see also CLRC Memorandum 2008-20, pp.11-12.

The Legislature, however, has since enacted three confidential privileges relating to victims, without Commission involvement, that permit balancing. See

Evid. Code §§ 1035-1036.2 (sexual assault counselor-victim privilege, enacted by 1980 Cal. Stat. ch. 917 § 2); 1037-1037.8 (domestic violence counselor-victim privilege, enacted by 1986 Cal. Stat. ch. 854, § 1); 1038-1038.2 (human trafficking caseworker-victim privilege, enacted by 2005 Cal. Stat. ch. 240, § 4). For these privileges, a court may compel disclosure of relevant evidence in certain proceedings "if the court determines that the probative value outweighs the effect on the victim, the [treatment or counseling] relationship, and the [treatment or counseling] services if disclosure is compelled." See Evid. Code §§ 1035.4, 1037.2, 1038.1. Only the sexual assault victim-counselor privilege survives death, so long as there is a personal representative. See Evid. Code §§ 1035.6, 1035.8; see also CLRC Memorandum 2008-20, p. 13. But, under the balancing test above, it appears that this privilege may be overridden after the victim's death in criminal cases and cases relating to child abuse. See Evid. Code § 1035.4. (Note: In applying the balancing test, the judge may review the evidence in determining admissibility, contrary to the general rule prohibiting such review. See Evid. Code §§ 1035.4, 1037.2 (c) & (d), 1038.1.)

EXEMPT POSTHUMOUS PRIVILEGE FROM CERTAIN CASES

Another approach is to remove certain cases from the privilege's application after the client's death. In other words, this approach entails survival of the privilege — in whatever form (e.g., without balancing, or balancing in certain cases, etc.) and for whatever length of time (e.g., indefinite, until the personal representative's discharge, etc.) — subject to exceptions that *only apply after the client's death*.

The aim of a posthumous exception is to exempt the privilege from cases in which deceased clients' remaining interests in continued confidentiality are so diminished that disclosure wouldn't deter frank communication with attorneys. In those cases, an exception would appropriately give expression to the public's interest in having relevant evidence before the factfinder.

It should be remembered that a posthumous exception would not necessarily result in admission into evidence of otherwise privileged information. Other evidentiary limitations, such as the rule against hearsay and the right to confront witnesses, would remain intact, and could exclude the information.

The Evidence Code already has four exceptions to the attorney-client privilege that only apply after the client's death. See, e.g., Sections 957, 959, 960,

961. As discussed in CLRC Memorandum 2008-20 at pages 6-8, these four exceptions generally occur in the testamentary context, and are aimed at effectuating the client's intent in disposing of the client's property. Such an exception is often referred to as a "testamentary exception."

Every state has a "testamentary exception" in some form. Frankel, *The Attorney-Client Privilege After the Death of the Client*, 6 Geo. J. Legal Ethics 45, 74 (1992). Therefore, the discussion below focuses on non-testamentary exceptions — i.e., exceptions that apply outside of the testamentary context and are not aimed at effectuating the client's intent in disposing of property.

Posthumous Exception for Communication Relating to Third Parties

North Carolina has a posthumous exception where the communication "solely relate[s] to a third party." *In re Investigation of Miller*, 357 N.C. at 342-43. And, it appears that some communications not solely relating to a third party may be disclosed. As the North Carolina Supreme Court explained:

> To the extent the communications relate to a third party but also affect the client's own rights or interests and thus remain privileged, such communications may be revealed only upon a clear and convincing showing that their disclosure does not expose the client's estate to civil liability and that such disclosure would not likely result in additional harm to loved ones or reputation.

Id. at 343.

If "harm to loved ones or reputation" is interpreted broadly, the posthumous attorney-client privilege might apply in most cases. For example, if disclosure reveals that a client knew of some occurrence, and if mere knowledge of it could slightly impugn the client's reputation, the privilege might continue to apply.

But at least one North Carolina court appears not to interpret the exception so broadly. On remand of *In re Investigation of Miller*, 357 N.C. 316, it appears that the trial court ordered the attorney to testify to his deceased client's communications that a woman, with whom the client had an affair, had fatally poisoned her husband. See A. Beard, Wife Pleads Guilty in Poison Conspiracy, The Washington Post, November 7, 2005 (available at <<http://www.washingtonpost.com/wp-dyn/content/article/2005/11/07/AR2005110700869.html>>).

(Note: North Carolina's test to determine application of this exception is not a balancing test because it does not weigh the need for the communication against competing interests. See *In re Investigation of Miller*, 357 N.C. at 332-33 (criticizing

uncertainty of balancing tests). Rather, the test simply looks to whether disclosure would cause certain harms. Application of the privilege *doesn't turn on the degree of need for the information*, but depends *only* on the likelihood that disclosure would harm the deceased client's remaining interest in confidentiality.)

Posthumous Exception Where Client Suicide Destroys Evidence

One commentator suggests a posthumous exception to the privilege that is specifically aimed at the facts of the *Swidler* case. Paulsen, *supra*, at 841. *Swidler* upheld the privilege after Vince Foster's suicide. That decision prevented disclosure of Foster's attorney-client communications relating to a grand jury investigation into wrongdoing during investigations of White House Travel Office firings.

In the commentator's view, there should be a posthumous exception where suicide causes "the knowing and voluntary destruction of evidence that otherwise could have been available had the client lived." *Id.* (emphasis omitted). In other words,

> if the prosecutor can show good reason to believe that an individual committed suicide in part with the known and intended consequence of rendering his or her own material testimony unavailable in a criminal investigation or other criminal proceeding, the individual forfeits the attorney-client privilege as to communications related to the subject [thereof].

Id.

If Foster were alive, he could have been compelled to testify to his knowledge of any wrongdoing if the prosecution granted him immunity. *Cf. United States v. Balsys*, 524 U.S. 666, 682 (1998) ("[U]nder the Self-Incrimination Clause, the government has an option to exchange the stated privilege for an immunity to prosecutorial use of any compelled inculpatory testimony.").

But this exception is aimed at clients who would likely be dissuaded by the exception from consulting with an attorney. A client who is contemplating suicide to avoid testifying in a criminal investigation, and who is properly advised of the limits of the privilege before confiding in an attorney, would likely opt to forgo legal advice. Accordingly, the exception would undermine the policy of encouraging clients to consult with attorneys. And the evidence the exception seeks to make available to the factfinder would not likely come into existence. Thus, the exception should be disfavored because it would promote

neither the privilege's goal of encouraging consultation and candor, nor the policy of having all relevant evidence before the factfinder. The staff isn't aware of any jurisdiction that has adopted this exception.

Posthumous Exception in Conspiracy Investigation

Another commentator proposes a posthumous exception in criminal cases, where it is shown that there was a probable conspiracy involving the deceased client, if the communication is necessary to resolve the investigation of the conspiracy. Ottoson, *supra*, at 1353. Like the suicide exception discussed above, this exception was suggested with the *Swidler* case in mind. See *id.*

Although criminal liability ends at death, a client might hesitate to seek legal advice if posthumous disclosure could implicate the client's surviving coconspirators. On the other hand, a client might be more concerned with getting legal advice to help the client avoid liability while the client is alive. Thus, it is unclear what impact this exception would have on the privilege's goal of encouraging client candor. The staff isn't aware of any jurisdiction that has adopted this exception.

(Note: There already is an exception if a client uses an attorney's advice to commit a crime or fraud, and another exception if an attorney believes disclosure is reasonably necessary to prevent a criminal act likely to cause death or serious harm. Evid. Code §§ 956, 956.5. This proposed new exception is different because it could exempt attorney-client communications relating to a *past* criminal conspiracy.)

Posthumous Exception in All Criminal Cases

Another approach is to make the privilege posthumously inapplicable in all criminal cases. The staff isn't aware of any jurisdiction with a posthumous exception for criminal cases. At one stage, however, before it was further amended, AB 403 embodied an approach of indefinite survival of the privilege, *except* in criminal cases. See AB 403 §§ 1, 4 (Tran) (as amended April 16, 2007); see also CLRC Memorandum 2008-20, p. 17. That approach differs from the approach advocated in the *Swidler* dissent, which entails a *balancing* test to determine whether the attorney-client privilege applies posthumously in a criminal case, rather than simply making the privilege posthumously inapplicable in all criminal cases.

Under an exception that would make the privilege posthumously inapplicable in all criminal cases, the privilege would not bar the use of a

decedent's attorney-client communication by or against a criminal defendant. The criminal defendant's own attorney-client privilege is not implicated.

The discussion below explores the implications of this exception. The discussion begins with the impact on a criminal defendant, then turns to the impact on the prosecution, and finally considers the impact on predictability of the privilege.

Defendant's Use of a Decedent's Attorney-Client Communications

If the attorney-client privilege was posthumously inapplicable in all criminal cases, it could not be used to block a defendant's use of a decedent's relevant attorney-client communications in defending a criminal charge. Other evidentiary rules (such as the rule against hearsay) could still be invoked to exclude the information.

Even without the exception, a defendant's constitutional right can override an assertion of a decedent's privilege. See U.S. Const. art. VI, cl. 2 (Supremacy clause); Cal. Const. art. III, § 1 (federal Constitution is supreme law of land); *Sands v. Morango Unified Sch. Dist.*, 53 Cal. 3d 863, 902, 281 Cal. Rptr. 34, 809 P.2d 809 (1991) (subject to federal Constitution, California Constitution is "supreme law of our state"); Evid. Code §§ 230 (defining statute to include constitutional provision), 910 (stating that privilege provisions apply in all proceedings, "[e]xcept as otherwise provided by statute"). However, a constitutional challenge to an assertion of the privilege is rarely successful. C.B. Mueller & L.C. Kirkpatrick *Evidence* § 5.5, p. 298 (3d. ed. 2003). A posthumous exception that would make the privilege posthumously inapplicable in all criminal cases would go beyond the constitutional minimum.

An exception for criminal cases would avoid the perception of unfairness that can result when a deceased client's privilege is asserted and prevents a defendant from presenting exonerating evidence. For example, suppose a deceased client had confessed to counsel of committing a crime for which another person is prosecuted. Continuing the privilege after the client's death, thus blocking the exonerating evidence from the factfinder, strikes some members of the public, and some attorneys, as unjust. See, e.g., *Macumber v. State*, 112 Ariz. 569, 572, 544 P.2d 1084 (Ariz. 1976) (J. Holohan, specially concurring) (noting that two attorneys wanted to testify to deceased client's confession at trial of another person for the same crime, and disagreeing with majority's decision to exclude their testimony); CBS 60 Minutes, May 27, 2008, *A 26-Year*

Secret (available on Westlaw at 2008 WLNR 9953706) (discussing murder conviction that was reversed after attorneys disclosed deceased client's confession); Liptak, *Lawyer Who Opened Up Should Have Kept Client's Confidence, Judge Rules*, S.F. Daily Journal, 5/17/08, p. 5 (recounting that attorney testified to deceased client's murder confession at hearing for new trial for person serving life sentence for the murder, and that laypeople criticized both that attorney and other attorneys in similar situations for keeping quiet for so long).

(Note: An attorney's testimony to a deceased client's communication to exonerate a living person could arise if the attorney voluntarily disclosed the communication. However, voluntary disclosure would violate an attorney's ongoing ethical duty of confidentiality, unless the client had authorized the disclosure. See *Commercial Std. Title Co. v. Superior Court*, 92 Cal. App. 3d 934, 945, 155 Cal. Rptr. 393 (1979) (stating that client can release attorney from duty to preserve client's secrets), see, e.g., CBS 60 Minutes, *supra* (stating that attorneys disclosed deceased client's confession *with client's permission* to do so after client's death). Although some State Bar associations might grant a waiver of the duty, it appears that the State Bar of California would not give such a waiver. See *Commercial Std. Title Co*, 92 Cal. App. at 945 (stating that "*only* the client can release the attorney" from duty) (emphasis in original)); Liptak, *supra* (stating that before attorney in Virginia disclosed deceased client's secret that might exonerate a person on death row, State Bar gave attorney permission).

An attorney's testimony to a deceased client's communication could also arise without the attorney's voluntary disclosure. For example, the client's attorney could be deposed if it was apparent that the deceased client had knowledge about an event, which is the subject of a prosecution.)

Prosecution's Use of Decedent's Attorney-Client Communications

Making the privilege posthumously inapplicable in all criminal cases would also mean that the privilege could not be used to block the use of relevant information in prosecuting a crime. *Swidler* is an example of a situation in which presentation of such evidence was blocked by the attorney-client privilege. Other examples also exist. See, e.g., *In re Matter of John Doe Grand Jury Investigation*, 408 Mass. 480, 562 N.E. 2d 69, 59 USLW 2329 (Mass. 1990) (holding posthumous attorney-client privilege applies to grand jury murder investigation).

Again, other evidentiary rules (such as hearsay, or the right to confront witnesses) could be invoked to exclude the information.

Predictability

As pointed out by the *Swidler* Court, a client wouldn't be able to predict whether a contemplated statement to the client's attorney would later be relevant to a criminal as opposed to a civil case. *Swidler*, 524 U.S. at 409. For that reason, a rule that turns on the distinction between use in a civil or criminal case would be unpredictable in its application. That could deter client candor in some cases.

SURVIVAL TO PROTECT DECEDENT'S REMAINING PROPERTY INTERESTS

Another approach is to limit survival of the privilege to certain cases in which a decedent's remaining property interests could be affected, regardless of whether the assets are transferred by means requiring probate administration.

Under the Commission's approach, the privilege survives so long as there is a personal representative. Evid. Code §§ 953-954. That means the privilege survives while claims against the estate in probate are handled. See Prob. Code § 9000 et seq.; see also Code of Civ. Proc. §§ 377.31 (after death of person who brought action, court must allow personal representative, or if none, the decedent's successor in interest, to continue action), 377.40 (subject to Probate Code Section 9000 et seq., action against decedent that survives may be asserted against personal representative, or to extent provided by statute, successor in interest). Exceptions make the privilege inapplicable when all parties claim through a deceased client, or when an issue relates to the intent or validity of a decedent's writing purporting to affect a property interest. See Evid. Code §§ 957, 960, 961.

It appears that the Commission's original approach is based on a determination that, in general, a client would not consult or be fully candid with an attorney if the privilege did not apply during administration of the deceased client's estate. The client would not want the privileged communications to be used in a way that would harm the estate. Once the estate is finally distributed, the need to protect the estate from third party claims would end, and with it the need for the privilege. The exceptions to the privilege are consistent with that rationale because they serve to effectuate the client's intent.

Since the "nonprobate revolution," estates often pass by means that do not require probate administration. Thus, the Commission's original approach might no longer fully effectuate its intent of keeping the privilege intact against third parties until the deceased client's assets have definitively passed to the

beneficiaries. Extending the privilege to survive against third parties, regardless of whether assets are transferred inside or outside of probate, might be appropriate to achieve the general objective of the Commission's original approach in today's world.

Under this expanded approach, the privilege could survive until there was no longer any possibility of litigation that could affect a deceased client's assets before they definitively pass to the client's beneficiaries, regardless of the transfer mechanism. A provision could prescribe that the privilege survives so long as any action by or against the decedent or the decedent's property survives the decedent's death, and that the privilege only survives in such actions. *Cf.* Code of Civ. Proc. §§ 377.2 (stating that unless otherwise provided, actions survive death); 377.10-377.62 (prescribing effect of death in civil actions). In all other actions, the decedent's attorney-client communications would no longer be privileged.

SURVIVAL FOR A SET PERIOD OF YEARS

Another approach is to continue the privilege after the client's death, but only for a limited time, measured by a set period of years.

The staff isn't aware of any jurisdiction that employs this approach. And there is very little commentary on this approach.

One commentator surmised that a posthumous privilege that lasted thirty or fifty years might sufficiently protect a deceased client's interests. See, e.g., Frankel, *supra*, at 72-73 n.151. However, this commentator dismissed his own suggestion out of a belief that

> such a rule would probably involve far more administrative trouble than it would be worth given the fact that the lawyers involved frequently would themselves be dead; the information would likely be irrelevant to any potential litigation; and, perhaps most significantly, the applicable statute of limitations would likely bar any action in which the lawyer's testimony might be relevant.

Id.

But even if the attorney were dead, there could be a living person, such as a paralegal, who knows of and could testify to a decedent's attorney-client communication. See Evid. Code § 952 & Comment ("Confidential communications include those made to third parties — such as the lawyer's

secretary, a physician or similar expert — for the purpose of transmitting such information to the lawyer because they are 'reasonably necessary for the transmission of information.'") (internally quoting Section 952).

Also, the statute of limitations in some criminal cases may not have ended. See Penal Code § 799 ("Prosecution for an offense punishable by death or by imprisonment in the state prison for life or for life without the possibility of parole, or for the embezzlement of public money, may be commenced at any time."); *People v. Nelson*, 43 Cal. 4th 1242, 1247, 1250, 185 P.3d 49, 78 Cal. Rptr. 3d 69 (2008) (stating that there is no statute of limitations on murder, and holding that prosecution for 1976 killing after recent DNA testing didn't violate defendant's right to fair trial or due process). Also, several years' passage wouldn't seem to preclude reopening a case based on newly discovered exculpatory evidence, such as an attorney's testimony to a deceased client's confession, once the privilege expired.

Those problems could perhaps be avoided if the time period was much shorter than thirty or fifty years.

Another alternative is to specify the period of years after which it would no longer be possible for a case to be brought that would impact the deceased client's assets before they pass definitively to the beneficiaries. The privilege could last for that specified period of years, and for the duration of any suit brought within that period. The intent of specifying such a time period would be similar to the intent of the Commission's original approach enacted in the Evidence Code, which ties survival of the privilege to the existence of a personal representative. But formulating the number of years that would need to pass before a case could no longer be brought might be difficult to do with exactitude.

Finally, the approach of specifying the survival of the privilege in terms of a number of years could be modified by combining the approach with balancing. For example, the privilege could last for a set period, then be subject to balancing. Or, the privilege could be subject to balancing for a set period, then end.

END AT DEATH

The final approach discussed in this memorandum is to simply end the privilege at the client's death.

The staff is unaware of any jurisdiction that takes this approach. See Wydick, *The Attorney-Client Privilege: Does It Really Have Life Everlasting?*, 87 Ky. L. J. 1165, 1180 (stating that his research revealed this approach is not adopted by any state, nor by England). But a few eminent scholars have supported this approach, such as Judge Learned Hand and Professors Morgan and McCormick. See Wydick, *supra*, at 1180; see also Chadbourn, *supra*, at 389.

Proponents of this approach do not believe that ending the privilege at death would significantly deter client consultation or candor. They also believe that a client might want the client's attorney-client communications disclosed to help ensure a case is correctly decided. Professor McCormick cited these reasons for why he believed the privilege should end at death:

> The attorney's offered testimony would seem to be of more than average reliability. If such testimony supporting the claim is true, presumably the deceased would have wanted to promote, rather than obstruct, the success of the claim. It would only be a short step forward for the courts to apply here the notion that the privilege is "personal" to the client, and to hold that in all cases death terminates the privilege. This could not to any substantial degree lessen the encouragement for free disclosure which is the purpose of the privilege.

J. Strong, McCormick on Evidence, § 94, pp. 133-34 (4th ed. 1992).

Consistent with the theory that the client would want disclosure to promote the proper resolution of a claim, an *existing* exception makes the privilege posthumously inapplicable to litigation between parties who all claim through the deceased client. See Evid. Code § 957 & Comment. Similarly, two other *existing* exceptions make the privilege posthumously inapplicable to litigation between the decedent's estate and third parties *if* the issue concerns the validity or intended meaning of a decedent's writing that purports to affect a property interest. See Evid. Code §§ 960, 961 & Comments. However, those exceptions involve the proper resolution of the claims of the beneficiaries and the proper interpretation of the decedent's intent. It is not clear that a decedent would want to promote a claim that is adverse to the interests of the beneficiaries.

The combined effect of these existing exceptions is to significantly narrow the application of the posthumous privilege in California. It only survives in cases (1) between the personal representative (on behalf of the estate) and a third party, provided that the issue does *not* concern the validity or intended meaning of a decedent's writing that purports to affect a property interest, and (2)

between third parties, so long as the personal representative of the decedent's estate has not been discharged. The Commission's approach thus differs from an approach ending the privilege at death by making the privilege survive in these two types of cases.

Under an approach that ends the privilege at death, the privilege would not apply in any litigation after the client's death, regardless of the parties and the issues. The key difference from the Commission's original approach is a policy determination that ending the privilege after the client's death in all cases, regardless of the parties and issues, would not significantly diminish client consultation and candor with attorneys. It is not clear that this assumption is correct. A client might be deterred from candidly consulting an attorney if the communication could be used to advance a claim against the interest of the client's estate.

HOLDER OF THE POSTHUMOUS PRIVILEGE

For any approach that entails posthumous survival of the privilege, who would hold the decedent's privilege?

Under the Commission's original approach enacted in the Evidence Code, the personal representative holds the decedent's privilege, which survives while the decedent's estate is administered. Evid. Code §§ 953-954 & Comments.

If the privilege survived in other situations besides probate administration, who would hold the privilege?

It is important to identify the privilege holder so that it is clear who has a right to claim the decedent's privilege to exclude the information. See Evid. Code §§ 916, 954. Another reason why it is important to designate a posthumous holder of the decedent's privilege is so that the privilege can be waived. See Evid. Code § 912. If no one could waive the posthumous privilege, it would have a stronger force than the privilege during a client's life. This is because, during a client's life, the client can waive the privilege. And even if a client refuses to waive, the client is nonetheless available as a source of information because the client can be called as a witness. If no one can waive the privilege after the client's death, it might be impossible for the factfinder to access the information contained in the deceased client's attorney-client communications.

Several issues relating to the posthumous privilege holder are discussed below, in the order listed: (1) who would hold the privilege, (2) the possibility of

multiple privilege holders, (3) the duty of the holder, and (4) the impact on predictability.

Who Would Hold the Privilege

Under the Commission's original approach, only the personal representative holds the decedent's privilege. After the personal representative is discharged, the privilege ends. If a different approach were followed, it would be necessary to consider who would hold the privilege after the client's death, and what standard would govern its exercise. These issues are discussed below.

Trustee, Surviving Spouse, or Children

Paul Gordon Hoffman, an attorney in Los Angeles, suggests that the Commission consider designating a person other than the personal representative to assert the privilege. The staff appreciates his comments, which are attached as an Exhibit.

Mr. Hoffman suggests that the Commission consider

> allowing the privilege to be asserted in the absence of formal administration, to some designated person or persons, such as the Trustee of an individual's living trust to whom a general assignment of assets has been made, or to the individual's spouse or children or other family members.

Exhibit pp. 1-2. He points out that, in many cases, no personal representative is ever appointed because formal estate administration is unnecessary. *Id.* at 1-2. He says that it seems to waste resources to require appointment of a personal representative to assert a deceased client's privilege when assets pass by means that do not require appointment of a personal representative (such as living trust, Transfer on Death Account, joint tenancy, etc.). *Id.*

It appears that a few jurisdictions permit certain relatives, such as a spouse or parent, to waive a deceased client's privilege. See 1 E. Epstein, *The Attorney-Client Privilege and the Work-Product Doctrine*, 27 (5th ed. 2007); see, e.g., Ohio Rev. Code Ann. § 2317.02(A)(1) (permitting waiver by deceased client's spouse or personal representative); *State v. Macumber*, 119 Ariz. 516, 582 P.2d 162 (Ariz. 1978) (discussing waiver by deceased client's mother at proceedings on remand).

Person Entitled to Deceased Client's Files

In addition to asking the Commission to consider designating a trustee, spouse, or relative to hold the privilege, Mr. Hoffman suggests that the person

who is entitled to a deceased client's files should hold the privilege. His suggestion stems from his interpretation of a regional Bar Committee's advisory opinion.

According to the advisory opinion, before an attorney destroys a deceased client's files, the attorney must make "reasonable efforts to notify the decedent's legal representatives or legatees of the proposed destruction," and give them an opportunity to inspect or take valuable documents, subject to the obligation to protect the client's secrets and maintain the client's confidences. See L.A. County Bar Association, Prof. Responsibility and Ethics Committee, Op. No. 491 (Oct. 1997).

Mr. Hoffman believes that the advisory opinion implies that the decedent's files belong to the decedent's legal representatives or legatees, but that the attorney must not disclose the files if they contain client secrets. Exhibit p. 3.

Mr. Hoffman states that the person entitled to a deceased client's files may be different from the deceased client's privilege holder. Mr. Hoffman therefore suggests that the holder of the deceased client's privilege should be the person who is entitled to inspect or have a deceased client's files. Exhibit p. 4. Otherwise, he says, an attorney could be subjected to conflicting demands. *Id.* at 3-4. As an example, he points out that the holder of the deceased client's privilege could order the attorney not to disclose the client's files to the person who is entitled to them. *Id.*

However, the advisory opinion does not provide that both the legal representatives and legatees have a concurrent right to the files. It seems likely that the privilege holder (provided there is one) would have priority. Otherwise, it could threaten the integrity of the privilege. If a legatee disagreed, the legatee could seek a court order, which would resolve the competing claims to the files.

To avoid a perceived danger of conflicting demands from the privilege holder and the person entitled to the files, Mr. Hoffman also proposes that the scope of the posthumous privilege should be the same as the posthumous duty of confidentiality. *Id.* at 4. It isn't clear to the staff how that would resolve the issue. If the privilege continued indefinitely like the duty of confidentiality, then the potential for conflicting demands from a privilege holder and a person allegedly entitled to the decedent's papers could still arise.

If the staff has misunderstood the issue raised by Mr. Hoffman or his suggestion, the staff encourages him to provide further comments explaining his concerns.

Mr. Hoffman also submits that there should be a clear rule instructing an attorney what to do with a client's files after a client's death when the files contain confidential information. Exhibit pp. 2-3. He poses questions relating to the duty to preserve confidences and how to handle files that other persons may be entitled to have. *Id.* ("Is the lawyer required to turn over trust files to a successor trustee, where the client was both the settlor and the trustee, even if the files contain 'secrets' and 'confidences'? With regard to non-trust files, who (if anyone) is entitled to possession of the files, particularly if the files contain 'secrets' and 'confidences'?") Because these issues relate primarily to the duty of confidentiality, they are beyond the scope of this study. It might, however, be appropriate to refer these issues to the State Bar, which is responsible for overseeing ethical duties of attorneys.

Successor in Interest

Another option is to designate a decedent's successor in interest to hold the decedent's privilege. A successor in interest is the "beneficiary of the decedent's estate or other successor in interest who succeeds to a cause of action or to a particular item of property that is the subject of a cause of action." Code of Civ. Proc. § 377.11. (A beneficiary of the decedent's estate is a person who succeeds "to a cause of action or an item of property that is the subject of a cause of action" under the decedent's will, intestacy statutes, or under estates disposed of without administration. 14 B. Witkin, Summary of California Law *Wills* § 518, p. 591 (10th ed. 2005) (citing Code of Civil Procedure Section 377.10 and Probate Code Section 13006).)

This would allow the privilege to survive while the decedent's remaining property interests are being settled, regardless of whether the property passes inside or outside of probate. During any surviving actions relating to the decedent's property, before it has definitively passed to the beneficiaries, the successor in interest would hold the decedent's privilege.

Attorney

Because the attorney already knows the substance of the attorney-client communications, one option is to designate the attorney as the holder of the decedent's privilege. This could afford the most privacy to the client, as the communication would not be shared with any new persons in determining how to exercise the privilege.

Multiple Holders

If there are multiple privilege holders, they may disagree on how to exercise the privilege. During the Commission's initial study of the posthumous attorney-client privilege, the potential for problems of competing privilege claims among multiple holders led the Northern Section of the State Bar to rescind its position that the privilege should pass to heirs, and to agree with the Commission's approach of vesting the deceased client's privilege *only* with the personal representative. CLRC Memorandum 1961-20, Exhibit II, p. 4.

The Evidence Code provides that waiver by one joint holder of a privilege does not impact the other holder's right to claim it. Evid. Code § 912(b). But it is unclear how a conflict between multiple holders is to be resolved. See Wright & Graham, *supra*, § 5487 n.22 (stating that 912(b) provides no solution for ensuing deadlocks). It appears that it would be up to the court presiding over the proceedings to resolve the competing privilege claims.

If the approach ultimately selected by the Commission could result in multiple privilege holders, it might want to consider whether it should provide guidance on how competing privilege claims should be resolved.

Duty of Holder

How should a holder of the deceased client's privilege exercise it?

If a holder exercises the privilege in accord with the holder's own interests, rather than those of the deceased client, the privilege might be applied beyond when it is necessary to further its purpose of assuring confidentiality to encourage client candor, unnecessarily excluding relevant evidence from the factfinder.

The discussion below seeks to identify what duty, if any, a holder of the deceased client's privilege would have in determining whether to assert it. It then discusses the possibility of assigning a duty to exercise the privilege according to a particular standard.

Personal Representative

A personal representative has a duty to protect the interests of the client's estate. If a personal representative holds the privilege, the personal representative would have a duty not to allow a disclosure that would harm the decedent's remaining property interests. See 24 Cal. Jur. 3d *Decedents' Estates* § 423.

If disclosure of a communication would not affect the estate, it is unclear what duty, if any, would govern the personal representative's exercise of the privilege. For that reason, if the Commission's original approach were expanded to permit a personal representative to hold a deceased client's privilege, regardless of whether the client has an estate (as proposed by AB 403 as introduced last year), it would be likewise unclear what duty, if any, would govern the personal representative's exercise of the privilege.

Trustee

If a trustee is the holder, the trustee's duties to the trust would presumably govern the trustee's exercise of the posthumous privilege as to communications that could affect the trust. A trustee has a fiduciary duty to, among other things, preserve trust property and to administer the trust in the interest of the beneficiaries. See Prob. Code § 16002(a); *Atascadero v. Merrill Lynch et al*, 68 Cal. App. 4th 445, 462, 80 Cal. Rptr. 2d 329 (1998). But if disclosure of a communication would not affect the trust, it is unclear what duty, if any, would govern the trustee's exercise of the privilege.

Spouse or Relative

If a spouse or family member held the deceased client's privilege, it appears that no existing standard would govern the holder's exercise of the privilege. In many situations, however, a spouse or family member may share the same interests as the decedent. Thus, even absent a duty to do so, a spouse or family member might exercise the privilege consistent with the decedent's interests.

Successor in Interest

If a successor in interest held the decedent's privilege, there may be an existing standard that would govern the exercise of the decedent's privilege. It would depend on whether the successor in interest is prosecuting as opposed to defending a surviving claim. If the successor in interest is defending a claim (e.g., a decedent's creditor claim), it appears that there would be no existing standard. But if the successor in interest prosecutes a claim (e.g., a surviving tort claim against a defendant), the court may order the successor in interest to be a special administrator. See Code of Civ. Proc. § 377.33. If the court does so, the successor in interest would have a fiduciary duty to other beneficiaries, and may have to exercise the decedent's privilege according to that duty. See Code of Civ. Proc. § 377.33 Comment (stating that court is authorized to appoint successor in

interest as special administrator "to recognize that there may be a need to impose fiduciary duties on the successor to protect the interests of other potential beneficiaries.").

Attorney

An attorney continues to owe the client a duty of confidentiality after the client's death. See L.A. County Bar Association, Prof. Responsibility and Ethics Committee, Op. No. 491 (Oct. 1997) (stating that obligation "to preserve the deceased client's confidence and secrets survives the death of the client"); Vapnek, et al, California Practice Guide: Professional Responsibility, *Confidentiality and Privilege*, § 735 (2007) ("The duty of confidentiality continues after the client's death."). However, because an attorney's duty is "[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client," it seems the duty would almost always require the attorney to assert the privilege. See Bus. & Prof. Code § 6068(e); see also Evid. Code § 955 (stating that attorney must claim privilege whenever attorney is authorized to do so under Section 954 and is present when disclosure is sought). Thus, in nearly all cases, there could be no waiver even if it wouldn't harm the deceased client's remaining interests.

Prescribing a Duty

To help ensure that the exercise of a decedent's privilege is consistent with the purpose for continuing the privilege beyond death, the holder could be assigned a duty to exercise the privilege according to a particular standard. The standard would aim to protect against disclosures that would deter client consultation and candor with an attorney.

One option is an objective standard. This standard would require a holder to exercise the privilege in accord with the best interests of the deceased client. For example, there could be a duty not to exercise the privilege in a way that would harm the decedent's remaining property or reputational interests.

An objective standard might not result in the privilege being exercised in a manner the client would have wanted. For example, suppose a client's confession or other exculpatory information would harm a client's remaining reputational interests, but that the client would have preferred disclosure after death if it could help avoid an innocent person's wrongful punishment.

An alternative would be to apply a subjective standard, which would require the holder to exercise the privilege in accord with what the holder reasonably

believes the client would have wanted. Although the decedent's likely wishes would often be difficult to determine, a privilege holder who knew the decedent might be able to make a good estimation, based on the decedent's character and values in life.

A clear standard (objective or subjective) could help the holder decide how to exercise the privilege. However, it would be difficult to determine whether a holder's exercise of the privilege, particularly an assertion of it, is actually consistent with the holder's duty. It would be hard for anyone (other than the holder) to assess whether the holder's exercise of the privilege complies with the standard.

Furthermore, even if others *could* assess whether the holder's exercise of the privilege is consistent with the duty, it is unclear what, if any, remedy could be available if a holder breached that duty. Under the Commission's original approach (where the personal representative is the holder), an interested person (e.g., a beneficiary) could seek removal of the personal representative for a breach of duty. See Prob. Code §§ 8500-8505; see also Prob. Code § 48 (defining interested person). A similar remedy exists for trustees. See Prob. Code § 16420(a)(5) (removal for breach of trust); see also Prob. Code § 16420 (providing other remedies for breach of trust).

Predictability

The United States Supreme Court has repeatedly stressed that the privilege's purpose of encouraging attorney-client communication requires predictability of whether a communication will be protected. See, e.g., *Swidler* at 408-09; *Jaffee v. Redmond*, 518 U.S. 1, 18 (1996); *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981).

> [T]he attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.

Upjohn, 449 U.S. at 393.

Reliance on a designated privilege holder to exercise a privilege after the client's death necessarily involves some unpredictability in how it will be exercised.

But some degree of unpredictability might not dampen client candor if the client knew that a trusted person, such as a spouse, family member or other

loved one, would have control over posthumous disclosures. This would also seem to be true for a successor in interest.

If the holder were a trustee, the client would know that the trustee would have a duty to act to preserve trust property in the interest of the beneficiaries. That might be sufficient to assure a client that the trustee wouldn't permit disclosures that could harm the trust assets and thereby hurt the beneficiaries. As to other interests, the client might simply trust the judgment of the trustee, who was likely personally selected by the client.

Also, if the holder were a trustee, the predictability would be comparable to the predictability under the Commission's original approach in the Evidence Code, which makes the personal representative the holder. See Evid. Code §§ 953-954. A client can be assured that a personal representative will not exercise the posthumous privilege in a manner that could harm the decedent's estate and thereby hurt the beneficiaries. See 24 Cal. Jur. 3d *Decedents' Estates* § 423 (discussing personal representative's duty to estate). As to other interests, the client might also simply trust the personal representative's judgment, especially where the client has selected the personal representative. See, e.g., Prob. Code § 8420 ("The person named as executor in decedent's will has the right to appointment as personal representative."). Even where the client has not selected a personal representative, it is likely that the appointed person will have been closely related to the decedent, and thus might reasonably be expected to share the decedent's interests or values. See, e.g., Prob. Code § 8461 (setting forth persons with priority to appointment, beginning with surviving spouses and partners, then children, grandchildren, etc., where decedent dies without will); see also Prob. Code §§ 8440-8441 (providing that priority of appointment in Section 8461 applies where will names no executor).

RECAP OF APPROACHES

In summary, the posthumous attorney-client privilege approaches described in this memorandum are:

- *Balance Policies on Case-by-Case Basis.* This approach entails a balancing test. Balancing could be done if a "communication bears on a litigated issue of pivotal significance," as advanced by the Restatement. Or, balancing could be limited to criminal cases, as proposed by the *Swidler* dissent. Finally, balancing could apply regardless of the criminal or civil nature of the case, as appears to be the approach in a few jurisdictions.

- *Exempt Posthumous Privilege from Certain Cases.* Exceptions that only apply after death could be added. For example, in North Carolina, the attorney-client privilege does not apply after the client's death where (1) a communication solely relates to a third party, or (2) disclosure would not likely impact the deceased client's remaining interests. Or, there could be a posthumous exception for some, or all, criminal matters.
- *Survival To Protect a Client's Remaining Property Interests.* Another alternative is to make the privilege posthumously applicable to protect a deceased client's assets before they have definitively passed to beneficiaries, regardless of whether the assets transfer inside or outside of probate.
- *Survival for Period of Years.* The attorney-client privilege could survive, without balancing, but end (or become subject to balancing) after a period of years. Or, the posthumous privilege could be subject to balancing, but end entirely after a period of years.
- *End at Death.* The attorney-client privilege could simply end upon the client's death.

This memorandum also discussed several issues that should be considered if the privilege is held by a person other than the personal representative.

NEXT STEP

The next memorandum (Memorandum 2008-35) will identify various guiding principles that the Commission could use in selecting an approach, and will recommend an approach for purposes of a tentative recommendation.

Respectfully submitted,

Catherine Bidart
Staff Counsel