

First Supplement to Memorandum 2008-35

**Attorney-Client Privilege After Client's Death
(Comments by Judge Joseph Harvey)**

The Commission has received another letter from Judge Joseph Harvey (ret.), which is attached as an Exhibit. The staff appreciates Judge Harvey's further comments.

Judge Harvey continues to believe that the Commission's original approach — ending the privilege after the client's estate closes — is correct. He writes to express disagreement with an approach that permits a personal representative to control a deceased client's privilege *after* the client's estate has been fully distributed.

He interprets Probate Code Section 12252, as amended last year by AB 403, to permit "appointment of a personal representative to exercise the attorney-client privilege after the estate has been distributed." Exhibit p. 1. (This is not the only possible interpretation of Section 12252, as we plan to discuss in a future memorandum.) For reasons explained below, Judge Harvey believes that the amendment made "an unwise change in the law." Exhibit p. 2.

Section 12252 says that the personal representative at the time of discharge is entitled to reappointment. If that person is not appointed, persons entitled to appointment are listed in order of priority in Probate Code Section 8461. "Any other person" is at the bottom of the list.

If the court has reached the bottom of the list of persons entitled to appointment, which "any other person" is the court to choose? It appears there is no existing standard for a court to apply. Therefore, the winner of a "race to the courthouse" could be appointed. See Exhibit p. 2.

Judge Harvey believes that "[t]he 'any other person' who will seek appointment as personal representative will likely be some litigant or potential litigant whose only interest is the suppression of evidence" contained in a decedent's attorney-client communication. Exhibit p. 1.

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.

For example, suppose the communication might exonerate a wrongfully convicted person. A personal foe or prosecutor (perhaps reluctant to admit error) could seek appointment as personal representative to try to suppress that evidence. Exhibit pp. 1-2.

At the same time, friends and supporters of the convicted person might seek appointment to make the exonerating evidence available. Exhibit p. 2.

The staff thinks that Judge Harvey raises valid objections to allowing a personal representative to control a deceased client's privilege beyond the circumstances of estate administration. Even if the personal representative appointed is not "any other person," but a deceased client's relative, at or near the top of the appointment list, similar problems could occur.

The root of these problems seem to stem from an apparent absence of a duty to guide the personal representative's exercise of the privilege. When there is an estate, the personal representative has a fiduciary duty to protect the interests of the estate. 24 Cal. Jur. 3d *Decedents' Estates* § 423. The personal representative should thus exercise the privilege consistent with that duty. When there is no estate, it appears that no existing duty would govern the personal representative's exercise of the privilege. There appears to be nothing to prevent a personal representative from exercising the privilege in a self-interested way that is disconnected from any interest of the decedent.

A standard could perhaps be prescribed to govern the personal representative's exercise of the privilege. But it would be difficult for anyone, apart from the personal representative, to determine whether the representative's assertion of the privilege is consistent with the standard.

Moreover, without an estate, who, if anyone, could seek to remove the personal representative? An "interested person" — e.g., a beneficiary — may seek removal of the personal representative. See Prob. Code §§ 8500-8505. But when there is no estate, and therefore no beneficiary, it isn't clear that anyone would have standing to seek the personal representative's removal.

To summarize, when there is no estate, it appears that no existing standard would govern a personal representative's exercise of the privilege. A standard could be created, but probably would be difficult to enforce. It is also unclear whether anyone could seek removal of the personal representative.

Judge Harvey believes that the Commission got it right the first time. Exhibit p. 2. He states that he has not seen any report of "reluctance on the part of clients to be candid with their lawyers because some time after they are dead and their

estates have been distributed the lawyer might be compelled to disclose the information to prevent a wrongful conviction or wrongful civil judgment.” *Id.* He concludes:

Naturally, we don’t want lawyers blabbing about their dead clients’ affairs; but that is a matter to be dealt with by the disciplinary rules of the Bar. Privileges deal with the concealment of information from courts and other official tribunals when that information is necessary to do justice between the parties. The Law Revision Commission concluded originally that the need to do justice between living person, and the need to prevent wrongful judgments and wrongful convictions, is more important than some speculation that lawyer client communications might be inhibited in the absence of a posthumous privilege that no one can waive. I think the intervening history shows that the Commission’s original conclusion was correct.

Id. In closing, he adds an interesting and thought-provoking postscript:

P.S. I heard a recent rumor that, in renovating a colonial-era building in Charlottesville, Virginia, some one just discovered a cache of letters between Thomas Jefferson and an attorney; and the names of Sally Hemings and some of her children appear to be mentioned. Obviously, their contents should never be disclosed.

Respectfully submitted,

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Law Revision Commission
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August 25, 2008

AUG 27 2008

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California Law Revision Commission
4000 Middlefield Road, Room D-1
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File: _____

Re: Posthumous Attorney-Client Privilege

Dear Ms. Bidart:

Your memorandum brought to my attention the 2007 amendment to Probate Code section 12252 permitting the appointment of a personal representative to exercise the attorney-client privilege for a deceased client after the estate has been distributed.

Subdivision (a) provides that entitlement to appointment shall be in the same order as directed in relation to the original appointment.

Probate Code section 8461 lists the persons entitled to appointment. After listing everyone who would appear to be interested in the distribution of the estate, the section lists "any other person."

There seems to be an assumption underlying the amendment to section 12252 that the person who will seek appointment as personal representative will do so out of concern for the privacy or interests of the deceased client. Such a person obviously would be able to exercise discretion to exercise or waive the privilege the way the client would have done so if he were still alive. But, with the client dead, and with estate completely distributed, I doubt that this assumption is true. Why would anyone who would be totally unaffected by the exercise or waiver of the privilege want to incur attorney fees, filing fees, court appearances, etc. when there is nothing at stake for that person to win or lose?

The "any other person" who will seek appointment as personal representative will likely be some litigant or potential litigant whose only interest is the suppression of evidence.

If Alton Logan (see my letter of July 17), who has served 22 years in an Illinois prison, should petition for habeas corpus on the ground that an attorney had received information from a now deceased client confessing (in elaborate detail) to the murder for which Logan is doing time, any number of people might petition to be appointed personal representative for the deceased client in order to prevent Logan from being exonerated. Perhaps a prosecutor (reluctant to admit a mistake) would seek appointment in order to exercise the privilege to prevent Logan from showing that the prosecutor went after the wrong man. A fellow prisoner—or someone else—might have a grudge

against Logan, and would not want to see him exonerated, whether he is really guilty or not. Perhaps someone has received property that belongs to Logan, and does not want Logan out of prison and seeking to get his property back. Under Probate Code section 12252, any of them would be eligible to be appointed personal representative to exercise the deceased client's privilege in order to keep Logan locked up.

On the other hand, friends and supporters of Logan might engage in a race to the courthouse to see who could get appointed personal representative first. There are no standards in the code sections to guide the court in determining which of the competing petitions for appointment ought to be granted.

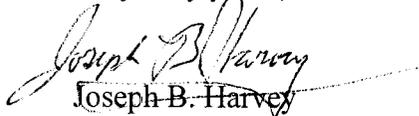
I suppose you could attempt to draft some guidelines for the court to follow; but to what purpose?

There has been no posthumous attorney-client or physician-patient privilege in California for the past 41+ years. (Since the Evidence Code became effective.) In that 41 years, I have seen no reports of reluctance on the part of clients to be candid with their lawyers because some time after they are dead and their estates have been distributed the lawyer might be compelled to disclose the information in order to prevent a wrongful conviction or wrongful civil judgment.

I think the amendment to section 12252 was not thought through; and it is an unwise change in the law.

Naturally, we don't want lawyers blabbing about their dead clients' affairs; but that is a matter to be dealt with by the disciplinary rules of the Bar. Privileges deal with the concealment of information from courts and other official tribunals when that information is necessary to do justice between the parties. The Law Revision Commission concluded originally that the need to do justice between living persons, and the need to prevent wrongful judgments and wrongful convictions, is more important than some speculation that lawyer client communications might be inhibited in the absence of a posthumous privilege that no one can waive. I think the intervening history shows that the Commission's original conclusion was correct.

Very truly yours,


Joseph B. Harvey

P.S. I heard a recent rumor that, in renovating a colonial-era building in Charlottesville, Virginia, some one just discovered a cache of letters between Thomas Jefferson and an attorney; and the names of Sally Hemings and some of her children appear to be mentioned. Obviously, their contents should never be disclosed.