Study K-350 May 20, 2008

Memorandum 2008-19

Attorney-Client Privilege After Client's Death (Discussion of Issues)

This memorandum continues the discussion of issues relating to the Commission's study of whether the attorney-client privilege should survive the client's death, and if so, under what circumstances.

The purpose of this memorandum is to provide a framework for discussion of several possible approaches to a posthumous attorney-client privilege. First, the memorandum briefly reviews the nature of an evidentiary privilege. Next, it discusses various justifications for the attorney-client privilege, beginning with the traditionally advanced rationale. Finally, the memorandum raises potential constitutional issues, and concludes by identifying the next step of the study.

NATURE OF AN EVIDENTIARY PRIVILEGE

A privilege is an exception to the general rules (1) that any witness with factual knowledge of an issue may be called to testify and (2) that the public has a right to every person's evidence. See *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972) (public has right "to every [person's] evidence except for those persons protected by a constitutional, common-law or statutory privilege"); 1 E. Epstein, *The Attorney-Client Privilege and the Work-Product Doctrine*, 11 (5th ed. 2007); C. Mueller & L. Kirkpatrick, Evidence § 5.1, p. 285 (3d. ed. 2003) (stating that privileges "exempt certain testimony, and sometimes certain witnesses, from the scope of compulsory process").

A privilege is unlike other evidentiary rules, which are "designed to enhance the reliability of the factfinding process." Mueller & Kirkpatrick, *supra*, § 5.1, p. 285. A privilege excludes evidence not because it is presumed to be unreliable, but to promote other interests. Katz, *Privileged Communications: A Proposal for Reform*, 1 Dalhousie L.J. 597, 597 (1973-74).

The attorney-client privilege's "protection of confidential communications is one of the oldest and most revered in law." *In re Miller*, 357 N.C. 316, 328, 384 S.E. 2d 772 (2003). The United States Supreme Court "has consistently recognized and upheld the privilege." See *Report of the American Bar Association's Task Force on the Attorney-Client Privilege*, 60 Bus. Law. 1029, 1033 (2005) (citing *Swidler & Berlin v. United States*, 524 U.S. 399 (1998); *Upjohn Co. v. United States*, 449 U.S. 383 (1981); *Hunt v. Blackburn*, 128 U.S. 464 (1888).) According to the American Law Institute,

> [e]very American jurisdiction provides — either by statute, evidence code, or common law — that generally neither a client nor the client's lawyer may be required to testify to or otherwise to provide evidence that reveals the content of confidential communications between client and lawyer in the course of seeking or rendering legal advice or other legal assistance.

Restatement (Third) of the Law Governing Lawyers § 68, p. 520 (2000) (hereinafter "Restatement").

Nonetheless, debate over why the attorney-client privilege exists is ongoing. *Developments — Privileged Communications*, 98 Harv. L. Rev. 1450, 1501 (1985). But the issue is generally what the scope of the privilege should be, not whether it should exist or not. Hazard, *An Historical Approach to the Attorney-Client Privilege*, 66 Cal. L. Rev. 1061, 1062 (1978).

The rationale used to justify the attorney-client privilege largely shapes its contours. See 24 C. Wright & K. Graham, Federal Practice and Procedure § 5472. Accordingly, in assessing the proper posthumous scope of the attorney-client privilege, it is important to understand the rationale for having an attorney-client privilege at all. See *id.*; *Developments — Privileged Communications*, *supra*, at 1486 (1985) ("The rationale used to justify a privilege plays an important role in debates about what form that privilege should take.")

Arguments relating to whether the privilege should survive the client's death, and to what extent, draw upon the same justifications for and criticisms of the attorney-client privilege generally. See Ottoson, Comment, *Dead Man Talking: A New Approach to the Post-Mortem Attorney-Client Privilege*, 82 Minn. L. Rev. 1329, 1337 (1998) (stating that debate over proper scope of attorney-client privilege is actually debate over appropriate reasons for having attorney-client privilege); see, e.g., S. Frankel, *The Attorney-Client Privilege After the Death of the Client*, 6 Geo.

J. Legal Ethics 45, 58 (1992) (arguing that rationales for "attorney-client privilege support its continuation beyond the client's life").

Accordingly, the commentary described in this memorandum is to help inform the Commission's decision on whether there is adequate justification for survival of the attorney-client privilege after the client's death, and if so, under what circumstances.

THE TRADITIONAL RATIONALE

The rationale that is traditionally advanced for the attorney-client privilege rests upon Wigmore's rationale for a privilege.

Because of the evidentiary cost of a privilege, Wigmore believed that a privilege should only be recognized if it "is a necessary means of promoting a valuable, confidential social relation" and is "essential to the full and satisfactory maintenance of the relation." E. Imwinkelried, The New Wigmore: A Treatise on Evidence *Evidentiary Privileges* § 5.1.1, p. 257 (2002) (quoting 8 Wigmore, Evidence § 2285 (McNaughton rev. 1961)). That is, without the privilege, the typical person would withhold necessary disclosures, unwilling to communicate fully and frankly as necessitated by the relationship. E. Imwinkelried, The New Wigmore: A Treatise on Evidence *Evidentiary Privileges* § 5.1.1, p. 258 (2002) (hereinafter, "Imwinkelried, The New Wigmore").

The attorney-client privilege is widely accepted as satisfying Wigmore's criteria for a privilege. The attorney-client privilege

> is considered indispensable to the lawyer's function as advocate on the theory that the advocate can adequately prepare a case only if the client is free to disclose everything, bad as well as good. The privilege is also considered necessary to the lawyer's function as confidential counselor in law on the similar theory that the legal counselor can properly advise the client what to do only if the client is free to make full disclosure.

Hazard, *supra*, at 1061. The attorney-client privilege, under its traditional rationale, "is to encourage full and frank communication between attorneys and their clients and thereby promote broader interests in the observance of law and the administration of justice." *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981)).

California's attorney-client privilege is based on this rationale. See, e.g., Evid. Code § 950 Comment; *People v. Meredith*, 29 Cal. 682, 690-91, 631 P.2d 46, 175 Cal.

Rptr. 612 (1981); *Dep't of Public Works v. Donovan*, 57 Cal. 2d 346, 354, 369 P.2d 1, 19 Cal. Rptr. 473 (1962), *Greyhound Corp. v. Superior Court*, 56 Cal. 2d 355, 396, 364 P.2d 266, 15 Cal. Rptr. 90 (1961); M. Méndez, California Evidence with Comparison to the Federal Rules of Evidence, § 21.01, p. 401 (2007 ed.).

The attorney-client privilege under federal law also rests on this rationale. In *Swidler & Berlin v. United States*, 524 U.S. 399 (1998), the United States Supreme Court held that the attorney-client privilege survives the client's death and cannot be overridden posthumously by a need for the communication. The Court's holding turned on its belief that posthumous disclosure could harm client candor, as a client may fear such disclosure as much as lifetime disclosure. See *Swidler*, 524 U.S. at 407.

Full and Frank Communication To Promote Fair Administration of Law

Under the traditional rationale for the attorney-client privilege, client candor is considered to be necessary to the fair administration of the law. This rationale rests on a number of propositions, set forth below.

First, the complexity of law makes it necessary for a layperson to consult an attorney in order to understand the law, and to vindicate the layperson's rights. 24 Wright & Graham, *supra*, § 5472. Second, having citizens informed about the law and having the law administered fairly are in the public interest, and best realized if both sides have help of counsel. *Id.* Third, "sound legal advice or advocacy serves public ends ... and depends upon the lawyer's being fully informed by the client." *Upjohn*, 449 U.S. 383. If the attorney's "professional mission is to be carried out," the attorney must "know all that relates to the client's reasons for seeking representation." *Id.*

The attorney-client privilege is thus "founded upon necessity, in the interest and administration of justice," of having attorneys aid laypersons who are "free from consequences or apprehension of disclosure." *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888). "[I]f the client knows that damaging information could more readily be obtained from the attorney following disclosure than from [the client himself or her]self in the absence of disclosure, the client would be reluctant to confide in [the] lawyer and it would be difficult to obtain fully informed legal advice." *Fisher v. United States*, 425 U.S. 391, 403 (1976).

The traditional rationale may be summarized as follows:

- The adversary system depends on attorneys effectively helping citizens resolve disputes.

- Attorneys can only be effective if they know all relevant facts.
- Clients will be deterred from seeking an attorney's advice, or will withhold certain information, unless the attorney-client relationship is confidential.

Zacharias, *Rethinking Confidentiality*, 74 Iowa L. Rev. 350, 358 (1989). Attorney-client confidentiality is thus necessary for an orderly and effective justice system. See *id.*

The traditional rationale for the attorney-client privilege rests on several assumptions. Debate surrounding the rationale relates to the following assumptions:

- *Clients Wouldn't Obtain Attorneys*. Without the attorney-client privilege, people would be deterred from obtaining an attorney. Snyder, *Is the Attorney-Client Privilege Necessary?*, 15 Geo. J. Legal Ethics 477, 484 (2002); S. Frankel, *supra*, at 51 n.27 (citing 1833 English case stating that, without privilege, "everyone would be thrown upon [one's] own resources").
- *Reduced Client Candor*. Without the attorney-client privilege, candor would be reduced out of fear of disclosure, causing clients to relate only facts they think are favorable. 24 Wright & Graham, *supra*, § 5472. Clients would be unwilling to disclose personal, embarrassing, or unpleasant facts unless assured there is no risk of compelled testimony by the client or attorney to what was communicated. Restatement, *supra*, § 68, p. 520 (2000) (hereinafter "Restatement"). Also, attorneys would hesitate in probing clients if it would risk exposure of the client's communication in court. *Id.* As a result, attorneys wouldn't receive all relevant information about their cases. Mueller & Kirkpatrick, *supra*, § 5.8, p. 309.
- *Attorneys Need Full Disclosure by Clients*. An attorney needs to be fully informed to give effective legal advice. 24 Wright & Graham, *supra*, § 5472; Epstein, *supra*, p. 6. Without the privilege, some valid claims and defenses would be lost because the attorney wasn't fully informed. Mueller & Kirkpatrick, *supra*, § 5.8, p. 309.
- *Overall Benefits Outweigh Overall Costs.* The benefits of having an attorney-client privilege outweigh the costs of suppressing evidence of the communications. 24 Wright & Graham, *supra*, § 5472.

Each of these assumptions is discussed in depth below.

CLIENTS WOULDN'T OBTAIN ATTORNEYS

One commentator observes that whether the attorney-client privilege encourages a person to obtain an attorney is speculative. Gardner, *A Re-*

Evaluation of the Attorney-Client Privilege (Part I), 8 Vill. L. Rev. 279, 318 (1963) (hereinafter, "Gardner, *Re-evaluation (Part I*)").

Prof. Imwinkelried (Univ. of Calif., Davis School of Law) says that the traditional rationale may seem credible, and there is at least anecdotal support for it. Imwinkelried, The New Wigmore, *supra*, § 5.2.1, p. 263. But, he and some other commentators argue that common sense sheds doubt on it. See *id.*

For example, some commentators argue that it is unlikely that a broad attorney-client privilege is necessary to induce clients needing legal advice to obtain an attorney. See, e.g., Snyder, *supra*, at 484. They argue that a person will usually have an independent incentive to consult an attorney — i.e., the necessity of getting legal advice will cause a client to consult an attorney even without a privilege. See Imwinkelried, The New Wigmore, *supra*, § 5.2.1, p. 264; Zacharias, *supra*, at 364. Prof. Imwinkelried thus argues that it's unrealistic to think that a risk of compelled disclosure would overcome a person's independent reason for seeking an attorney's advice. Imwinkelried, The New Wigmore, *supra*, § 5.2.1, p. 264.

There have been a few empirical studies that shed some light on this assumption (and the assumption relating to client candor, discussed below). The studies' relevant findings are described further below.

REDUCED CLIENT CANDOR

As discussed above, it is widely believed that the attorney-client privilege enhances client candor. But some commentators question whether the privilege actually encourages full and frank communication. They offer several reasons for this view, discussed below.

Clients May Not Know of Privilege's Scope or Existence

For the attorney-client privilege to encourage communication, a client must be aware of the privilege. Some commentators argue that it is unlikely that laypersons are aware of the privilege, and thus client candor isn't influenced by its existence or non-existence. See, e.g., Zacharias, *supra*, at 365 (arguing that privilege rules are unknown or unclear to clients, and so it is unlikely that privilege could cause client candor); see also M. Frankel, *The Search for Truth Continued: More Disclosure, Less Privilege*, 54 U. Colo. L. Rev. 51, 59 (1982) (calling it fiction that most clients are fairly warned about limits of attorney-client privilege).

Another view is that, given the complexity of the attorney-client privilege, it's likely that clients won't know the contours of the rules. Snyder, *supra*, at 505. Even if an attorney tries to explain them to a client, the client may be confused about the details, and will probably have only a general understanding of what is protected. Zacharias, *supra*, at 365.

Some commentators argue that the attorney-client privilege cannot encourage candor because of uncertainty in the application of the privilege's exceptions. For example, applicability of the privilege may be uncertain because it is in the judge's discretion whether advice is business advice, which is not privileged, or is privileged legal advice. See Note, *The Attorney-Client Privilege: Fixed Rules, Balancing, and Constitutional Entitlement*, 91 Harv. L. Rev. 464, 471 (1977). Thus, critics say that an attorney "cannot truly assure a client, up front, that any particular communication will be privileged." Paulsen, *Dead Man's Privilege: Vince Foster and the Demise of Legal Ethics*, 68 Fordham L. Rev. 807, 829 n.81 (1999).

Even if a client does not know exactly what is protected, however, a client's understanding that attorney-client communications are *generally* confidential may be sufficient to encourage a client to be candid.

Clients Might Be Frank Without the Attorney-Client Privilege

Some critics of the traditional rationale argue that clients would be frank without an attorney-client privilege. They say that clients would be candid for the same reason why a client would not be deterred from consulting an attorney if there were no privilege: because the client needs the help of an attorney. See, e.g., Rosenzweig, Essay, *Truth, Privileges, Perjury, and the Criminal Law*, 7 Tex. Rev. L. & Pol. 153, 156-57 (2002).

The critics of the rationale believe that clients would recognize that the cost of withholding facts from their attorneys is higher than any cost that might result from compelled disclosure. *The Attorney-Client Privilege: Fixed Rules, Balancing, and Constitutional Entitlement*, *supra*, at 470-71. In other words, a client might be completely candid without a privilege, due to a self-interested determination that full disclosure would enable the most effective representation by the attorney. Paulsen, *supra*, at 829-30 n.81. Also, there may be other reasons why a client might be candid without an attorney-client privilege, such as simple honesty, or a mental or emotional need to disclose. See *id.* Of course, such circumstances and cost-benefit assessment might not exist for every client, or even a majority of clients; it is difficult to quantify how often they occur.

Prof. Imwinkelried argues that psychological studies on self-disclosure reveal that a variety of factors, which vary greatly among individuals, drive client candor. He argues that it hasn't been shown that a privilege is more effective at encouraging candor than other factors, such as an emotional need to disclose due to a stressful experience, or reciprocal self-disclosure. Imwinkelried, *A Psychological Critique of the Assumptions Underlying the Law of Evidentiary Privileges: Insights from the Literature on Self-Disclosure*, 38 Loy. L.A. L. Rev. 707, 725-26 (2004) (hereinafter, "Imwinkelried, *Psychological Critique*").

Another view is that client candor depends more on the "level of trust between the parties" than on the existence of a privilege. For example, one treatise points out that people freely share incriminating information to friends, even though those communications aren't protected by a privilege. Mueller & Kirkpatrick, *supra*, § 5.1, p. 287.

Some scholars believe, however, that the attorney-client privilege strengthens a client's trust in the client's attorney. 24 Wright & Graham, *supra*, § 5472. As Justice O'Connor observed, "[t]he attorney-client privilege promotes trust in the representational relationship, thereby facilitating the provision of legal services and ultimately the administration of justice." *Swidler*, 524 U.S. at 412 (1998) (O'Connor, J., dissenting). Thus, even if candor depends more on the level of trust with the attorney than protection from compelled disclosure of attorney-client communications, the privilege may nevertheless enhance candor by strengthening the client's trust in the attorney.

Empirical Assumption

It is unclear how much clients rely on the privilege in being truthful and forthcoming with attorneys. Paulsen, *supra*, at 829 n.81. It is also unclear how truthful and forthcoming clients actually are. *Id.*; see also Zacharias, *supra*, at 366-67 (mentioning studies showing criminal defendants are rarely frank with their attorneys).

The assumption that the attorney-client privilege ensures open communication hasn't, and perhaps can't be, empirically proven or disproved. P. Rice, Attorney-Client Privilege in the United States, § 2.3, p. 18 (2d. ed. 1999); 1 K. Broun, McCormick on Evidence, § 87, p. 388 n.6 (6th ed. 2006) (noting difficulty of evaluating attorney-client privilege because investigator's presence would destroy privilege).

Nonetheless, three empirical studies have been conducted to assess the assumption that the attorney-client privilege encourages a client to consult and be candid with an attorney. Imwinkelried, The New Wigmore, *supra*, § 5.2.2, p. 289; see Alexander, *The Corporate Attorney-Client Privilege: A Study of the Participants*, 63 St. John's L. Rev. 191 (1989); Zacharias, *supra*, at 351; Comment, *Functional Overlap between the Lawyer and Other Professionals: Its Implications for the Privileged Communication Doctrine*, 71 Yale L.J. 1226 (1962).

However, "the available research is hardly conclusive," as the studies are few, and one acknowledged that it lacked reliable methodology (due to few subjects and non-random sampling). Imwinkelried, The New Wigmore, *supra*, § 5.2.2, p. 295; see also *Swidler*, 524 U.S. at 410 n.4 (stating that these studies "do not reach firm conclusions on whether limiting the privilege would discourage full and frank communication"). Moreover, even with perfect methodology, studies are inherently indeterminate because people often can't express what actually motivates them. Imwinkelried, The New Wigmore, *supra*, § 5.2.2, p. 295 (citing D. Pollard, *Unconscious Bias and Self-Critical Analysis: The Case for a Qualified Evidentiary Equal Employment Opportunity Privilege*, 74 Wash. L. Rev. 913, 999 (1999)).

Empirical Data

Although the studies aren't conclusive, they perhaps shed some light on whether the privilege is necessary to induce clients to consult attorneys and candidly disclose all the facts.

According to Prof. Imwinkelried, the studies reveal that "a small minority of clients ... would be altogether deterred from consulting and that perhaps a significant minority of clients would be dissuaded from being completely candid during the consultation." Imwinkelried, The New Wigmore, *supra*, § 5.2.2., p. 295. In his view, the bulk of the research is thus "inconsistent with the ... essential premise that the average client ... would refuse to either consult or withhold necessary information" from the attorney. Imwinkelried, The New Wigmore, *supra*, § 5.2.2, p. 296.

Accordingly, Prof. Imwinkelried believes that the available empirical evidence renders the validity of Wigmore's rationale for the attorney-client privilege subject to serious question. Imwinkelried, The New Wigmore, *supra*, § 5.2, p. 263. He concludes that the empirical evidence doesn't support Wigmore's criteria for a privilege because the evidence does not show that the

privilege is *necessary*, for the average layperson, to maintain the attorney-client relationship. Imwinkelried, *Psychological Critique*, *supra*, at 717.

Prof. Imwinkelried agrees that *some* attorney-client communication would likely be repressed without a privilege. Imwinkelried, The New Wigmore, *supra*, § 6.2.4, p. 474. It might only be a minority of clients who'd be unwilling to freely disclose to, or consult with, an attorney if there were no privilege. *Id.*; see, e.g., *Dean v. Dean*, 607 So.2d 494, 495 (Fla. App. 1992) (court upholds privilege where client consults attorney after learning attorney refused to reveal client's identity in widely publicized hit-and-run case). But given the large volume of attorney-client interactions, the absolute number of communications that might be affected by having no privilege could be very large. *Id.* This could significantly undermine the effective administration of justice and confidence in the justice system.

Others state that "it is of course possible to proceed from the [idea] that the privilege effects some unknown and unknowable marginal alteration in client behavior." 1 Broun, *supra*, § 87; see, e.g., Saltzburg, *Corporate and Related Attorney-Client Claims: A Suggested Approach*, 12 Hof. L. Rev. 279 (1984) ("Although it is conceivable that if there were no privilege clients would reveal almost as much information to their attorneys as they would do when a privilege protects them, it is not unreasonable to assume that some communication would be repressed.").

Upshot of Inconclusive Empirical Data

Assuming that the available empirical evidence is inconclusive, there is disagreement over whether that favors or undercuts the attorney-client privilege.

Dean Hale (former Dean, Univ. of Southern Calif. Law School) thought that a lack of empirical evidence should place the burden on those advocating for the attorney-client privilege. See Coward, Comment, *Privileged Communications*, 2 Hastings L.J. 31, 36 (1951).

The United States Supreme Court, however, holds the opposite view. In deciding that the attorney-client privilege survives the client's death, the Court determined that the lack of empirical evidence weighed in favor of the attorney-client privilege. See *Swidler*, 524 U.S. at 411. In addition to a lack of empirical data on the privilege, the Court believed that most case law supported survival of the privilege. *Swidler*, 524 U.S. at 410.

Notably, other fundamental principles underlying our governance system, such as the concept that freedom of speech promotes effective political decision-making, have not been empirically proven, and probably cannot be.

ATTORNEYS NEED FULL DISCLOSURE BY CLIENTS

The third assumption underlying the privilege is that an attorney must be fully informed by the client to give good legal advice.

This assumption seems self-evident, but has never been, and probably never will be, empirically tested. See 24 Wright & Graham, *supra*, § 5472. According to one treatise, "[t]he most that can be said for [this assumption] is that it seems plausible and many lawyers believe their experience validates it." *Id.*

Nonetheless, some commentators who question the assumption argue that attorneys could function if they had to go elsewhere for facts, as attorneys have shown they are able to try cases on behalf of clients who cannot communicate because they are dead, incompetent, or unconscious. See 24 Wright & Graham, *supra*, § 5472 & n.90; see also Zacharias, *supra*, at 366-67 (stating that society accepts criminal defendants are well-represented despite studies showing such defendants are rarely frank with their attorneys).

While it may be true that attorneys could go elsewhere for facts, the attorney-client privilege "helps to ensure that the representation will be competent and fully informed." See *Report of the American Bar Association's Task Force on the Attorney-Client Privilege*, 60 Bus. Law. 1029, 1037 (2005) (hereinafter, "*ABA Task Force Report*").

Also, one commentator argues that learning the facts from the client helps the attorney empathize and feel unity with the client, which improves the attorney's counseling and representation. See Gardner, *Re-evaluation (Part I)*, *supra*, at 310.

OVERALL BENEFITS OUTWEIGH OVERALL COSTS

The fourth, and perhaps most controversial, assumption underlying the attorney-client privilege is that its benefits outweigh its costs. Several issues raised by commentators in assessing the benefits and costs of the attorney-client privilege are discussed below.

Encouragement of Legal Compliance

One of the widely asserted benefits of the attorney-client privilege is to encourage legal compliance. Client candor "provides lawyers with information necessary to advise their clients on whether their intended conduct complies with the law, and to discourage illegal conduct." Snyder, *supra*, at 482; see also Zacharias, *supra*, at 359 (stating theory that confidentiality may help attorneys discover misconduct planned by client so attorney can advise against it).

If a person contemplating wrongdoing can communicate in confidence with an attorney, the attorney is more likely to learn about the contemplated wrongdoing and can seek to dissuade the client from doing the contemplated act. 24 Wright & Graham, *supra*, § 5472. The absence of an attorney-client privilege would deter people from seeking legal advice. When a person contemplating wrongdoing does not consult an attorney, society is harmed by wrongful acts that might have been avoided if the person had sought legal advice. See *id.*

Also, the privilege may help to instill a high degree of client trust and confidence in the attorney, which makes it more likely that the client will accept the attorney's advice, including advice to comply with the law. 24 Wright & Graham, *supra*, § 5472 n.94.

But some commentators question whether the attorney-client privilege encourages legal compliance.

Prof. Wolfram (Cornell Univ. Law School) observes that the theory is speculative. Wolfram, *supra*, § 6.4.1, p. 244. He says that the attorney-client privilege may actually facilitate law evasion because clients can more readily get legal advice about evading the law. He acknowledges, however, that this is also speculative. *Id.*

Some commentators argue that the attorney-client privilege may actually encourage client wrongdoing in some instances. For example, if a client learns that the expected liability from contemplated wrongdoing would be less than the expected gain, a client may decide to commit the wrongdoing, but wouldn't have done so absent that knowledge. Shavell, *Legal Advice About Contemplated Acts: The Decision to Obtain Advice, Its Social Desirability, and Protection of Confidentiality*, 17 J. Legal Stud. 123 (1989). (The crime-fraud exception may make the privilege inapplicable to an attorney-client communication about a contemplated wrongdoing. However, that exception only applies "if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a fraud." Evid. Code § 956.)

One skeptic says it is "unclear whether attorneys in fact invariably encourage honest and complete disclosure by their clients." Paulsen, *supra*, at 829 n.81.

Finally, the idea that the attorney-client privilege encourages legal compliance, by increasing the likelihood that an attorney may learn of and discourage contemplated client wrongdoing, rests on the assumption that the privilege encourages client candor.

Reduction of Litigation

Another widely asserted benefit of the attorney-client privilege is to reduce litigation by encouraging a client to unreservedly tell the client's attorney all the facts. See Radin, *The Privilege of Confidential Communication Between Lawyer and Client*, 16 Cal. L. Rev. 487, 491 (1927-28). When the attorney is fully informed, it helps to prevent baseless lawsuits, which harm the parties and society. See 24 Wright & Graham, *supra*, § 5472; Wolfram, *supra*, § 6.4.1, p. 244.

As the California Supreme Court observes, if the client does not tell the attorney "all the facts, the advice which follows will be useless, if not misleading; the lawsuit will be conducted along improper lines, the trial will be full of surprises, much useless litigation may result." *City and County of San Francisco v. Superior Court*, 37 Cal. 2d 227, 235, 231 P.2d 26 (1951) (quoting Morgan, Foreword, Model Code of Evidence, p. 25-26). A trial full of surprises prolongs fair resolution of disputes. Note, *Attorney-Client Privilege in California*, 10 Stan. L. Rev. 297, 297 (1958).

Additionally, the attorney-client privilege may help to avoid needless litigation by promoting settlement. A client's full disclosure may enable an attorney to discover a defense, facilitating settlement. *Id.*

Some commentators, however, say that the notion that the attorney-client privilege prevents useless litigation is speculative. They add that, even if the speculation is correct, just as many baseless lawsuits might be brought because of the attorney-client privilege. Wolfram, *supra*, § 6.4.1, p. 244.

To illustrate, a client consults an attorney, and learns the client's case is likely to be unsuccessful. The client may take the case to a different attorney, but withhold the unsupportive facts. Because of the attorney-client privilege, the first attorney cannot be compelled to disclose the unsupportive facts recounted by the client. A baseless claim or defense might thus proceed. But if there were no privilege, an opposing party could compel the first attorney to disclose the facts recounted by the client. That threat of disclosure would deter the client from

proceeding with the baseless claim with a different attorney. In this circumstance, the privilege may increase litigation. Overall, therefore, litigation might not be reduced. See Radin, *supra*, at 493; see also Weisberg, *supra*, at 617 ("Some commentators have said that the existence of the privilege may actually encourage litigation ... because a false claim can't be subsequently controverted or impeached by the attorney.").

And, like the idea that the privilege encourages compliance with the law, the idea that the attorney-client privilege prevents baseless lawsuits rests on the assumption that the privilege encourages client candor.

Impact on the Search for Truth

Critics argue that the attorney-client privilege "impede[s] the search for truth by excluding evidence that may be highly probative." See Mueller & Kirkpatrick, *supra*, § 5.1, p. 285; see also 1 Broun, *supra*, § 72 pp. 338-39. Much has been said about this interference with truth-seeking:

- The attorney-client privilege impairs the search for truth in some cases, causes a risk of "factual error and injustice in individual cases," and "no doubt protects wrongdoing in some instances." Restatement § 68, pp. 520-21.
- "The attorney-client privilege is not designed to exclude unreliable evidence or to aid in the truth-seeking function.... [T]he attorney-client privilege often suppresses relevant evidence, thereby frustrating the fact-finding process and society's need for the full disclosure of facts." Jewels, Comment, *Evidence — Attorney-Client Privilege Survives Client's Death — In re John Doe Grand Jury Investigation, 408 Mass. 480, 562 N.E. 2d 69 (1990)*, 25 Suffolk U. L. Rev. 1260, 1263 (1991).
- The attorney-client privilege conceals a discrepancy between a client's communications to the client's attorney and the client's testimony. This discrepancy should instead be exposed and explained. If the client testifies truthfully, there is no harm if the client or attorney must testify to what the client had communicated to the attorney. Wolfram, *supra*, § 6.1.4, p. 244.
- "The worst that can be said about the privilege is that it seriously impedes the discovery of truth by withdrawing from possible testimony one who has had the best opportunity for learning the truth.... [T]here can be no more unquestioned public policy than that which seeks to settle disputed claims as they properly should be." Radin, *supra*, at 490.

Critics also say that the attorney-client privilege "can be used to help unscrupulous clients escape detection when they circumvent the substantive law." *Developments — Privileged Communications*, *supra*, at 1509.

Wigmore, who strongly supported the privilege, nevertheless believed that it caused a "plain and concrete" obstruction of evidence. See 1 Broun, *supra*, § 87 p. 33 (citing 8 Wigmore, Evidence, § 2291 (McNaughton rev. 1961)). He also thought that the benefits of the privilege "are all indirect and speculative." *Id.* Accordingly, he said that the privilege should be "strictly confined within the narrowest possible limits consistent with the logic of its principle." Rice, *supra*, § 2.3, p. 18 (quoting 8 Wigmore, Evidence § 2291 at 554 (McNaughton rev. ed. 1961).

Because of the costs of the attorney-client privilege, it has always been recognized that there must be limits to it. Hazard, *supra*, at 1091. "[C]ourts and legislators naturally try to avoid extravagant applications of the privilege that would block access to information while contributing little to the values and interests at stake." Mueller & Kirkpatrick, *supra*, § 5.8, p. 311; see, e.g., *Fisher*, 425 U.S. at 403 (attorney-client privilege only applies where necessary to achieve its purpose because it often withholds relevant information from factfinder); see also *United States v. Zolin*, 491 U.S. 554, 562 (1989) (recognizing crime-fraud exception because attorney-client privilege "is not without its costs"); see also *Trammel v. United States*, 445 U.S. 40, 50 (1980) (privileges should be construed "only to the very limited extent that a refusal to testify ... has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth," as liberal application can frustrate justice).

Cost of Evidentiary Loss Depends on Probative Value of the Communication

The cost of the attorney-client privilege to truth-finding, however, depends on the probative value of the privileged communication. The cost may be mitigated if testimony to the privileged communication would be insufficient to impact the outcome, or if other available evidence could prove what the privileged communication would have shown. Katz, *supra*, at 597.

The probative value of the privileged communication may depend on the type of case and the availability of the client as a witness.

In a civil case, when the client is available as a witness, it has been said that the only evidence lost is evidence that would verify the accuracy and completeness of the client's testimony by comparing it with the client's

statements to the client's attorney. Mueller & Kirkpatrick, *supra*, § 5.1 p. 289. But some commentators argue that by preventing an attorney's testimony to impeach a client (or former client), the attorney-client privilege makes ascertainment of the truth more difficult. See, e.g., Weisberg, *supra*, at 617 n.61.

When the client is unavailable as a witness, due to death or lack of memory, the evidentiary loss may be greater. In these circumstances, the attorney-client privilege may frustrate factfinding by precluding the attorney's testimony to confidential client communications relating to factual issues in dispute. Wolfram, *supra*, § 6.1.4, p. 244. "[I]n one of its most extreme applications, the privilege can be invoked to bar from the witness stand ... a lawyer who could testify truthfully that a client now deceased had confessed in confidence that [the client] had committed the capital offense for which an innocent person is on trial." Wolfram, *supra*, § 6.1.4, p. 244; see also *State v. Macumber*, 112 Ariz. 569, 572-73, 544 P.2d 1084 (1976) (concurring opinion) (concurring with order for new trial but disagreeing with refusal to allow admission of deceased third person's confession to his attorneys that he killed victims defendant is charged with murdering).

Whether Evidentiary Loss Is Exaggerated or Non-Existent

While critics of the privilege argue that it is speculative whether the privilege actually encourages full and frank communication (among other things), the purported evidentiary cost of the privilege also seems speculative.

Indeed, some commentators argue that the cost of the attorney-client privilege is exaggerated. Mueller & Kirkpatrick, *supra*, § 5.1, p. 287. Without the privilege, they say that the communication wouldn't have occurred. *Id.*; *Attorney-Client Privilege in California*, *supra*, at 298; 24 Wright & Graham, *supra*, § 5472. As the United States Supreme Court has explained, "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." *Swidler*, 524 U.S. at 408; *Jaffee*, 518 U.S. at 12; *Fisher*, 425 U.S. at 403.

In addition, the purported evidentiary loss is based on an assumption that, but for the privilege, the evidence would have been admissible. But the evidence — an attorney-client communication — might have been excluded as hearsay, or on other evidentiary grounds. See Restatement § 68, p. 521. If a communication is inadmissible hearsay, then application of the attorney-client privilege causes no evidentiary loss. Some communications would, however, be admissible under a

hearsay exception. For example, without an attorney-client privilege, some attorney-client communications would be admissible under the exception for a statement against interest. Restatement § 68, p. 521; see Evid. Code § 1230 (hearsay exception for declarations against interest).

Whether Cost to Truth-Finding Would Be Higher Without the Privilege

Although there is concern that the privilege hides relevant evidence from the factfinder, ascertainment of the truth might be even more difficult absent the attorney-client privilege.

The attorney-client privilege facilitates legal representation of clients, helping them present their cases before the factfinder. "The privilege helps to ensure that the representation will be competent and fully informed." *ABA Task Force Report*, *supra*, at 1037. When a client tells an attorney all the facts, the attorney is best able to ensure that the truth will prevail. See 24 Wright & Graham, *supra*, § 5472 (stating that privilege, by encouraging open communication between clients and attorneys, helps to prevent erroneous litigation results). The United States Supreme Court has stated that the attorney-client privilege is "indispensable for the purposes of private justice." *Chirac v. Reinicker*, 24 U.S. 280, 294 (1826). Without an attorney-client privilege, meritorious cases may be lost, due to clients' failures to fully disclose facts that they thought might be harmful. See 24 Wright & Graham, *supra*, § 5472.

Also, it has been pointed out that privileged evidence, if admitted, could actually undermine the search for truth. See Gardner, *A Re-Evaluation of the Attorney-Client Privilege (Part II)*, 8 Vill. L. Rev. 447, 455 (1963). For example, absent a privilege, there may be perjury, due to a conflict of the confidant's conscience. Mueller & Kirkpatrick, *supra*, § 5.1 p. 287. One scholar explains this view in the context of the rationale for the attorney-client privilege in European jurisdictions:

> In European legal thought emphasis is placed upon the moral importance of refraining from coercion of witnesses in matters of conscience; such coercion in the face of conflicting concepts of loyalty and duty, is considered to put witnesses in an intolerable position, resulting as to some in the likelihood of perjury.

Gardner *Re-evaluation (Part II)*, *supra* at 455 (quoting Prof. Louisell, *Confidentiality, Conformity and Confusion: Privilege in Federal Courts Today*, 31 Tul. L. Rev. 101, 101 (1956)).

The privilege's exclusion of evidence avoids placing the attorney in the difficult position of having to testify to what the client told the attorney in seeking the attorney's help. *Id.* And that difficult position could render the attorney's testimony to be partially or wholly inaccurate, intentionally or not. Such testimony might be believed. And if it is, it might undermine the truth more than the privilege's exclusion of such testimony. See Katz, *supra*, at 597.

Thus, as explained by one scholar,

> It is the historic judgment of the common law, as it apparently is of European law and is generally in Western society, that whatever handicapping of the adjudicatory process is caused by the recognition of privileges, it is not too great a price to pay for secrecy in certain communicative relations.

Gardner, *Re-Evaluation (Part II)*, at 456 (quoting Louisell, *supra*, at 110).

Who Is Helped by the Privilege

Scholarly debate over whether the attorney-client privilege is beneficial has at times focused on who is helped by the attorney-client privilege.

Jeremy Bentham (renowned British utilitarian) argued that the attorney-client privilege only protects the guilty, as an honest client has nothing to fear. C. Wolfram, Modern Legal Ethics § 6.1, p. 246 (1986). According to Bentham, the attorney-client privilege only encourages candor of those clients who would testify differently from what they tell their attorneys. Innocent clients, having nothing to hide, would testify no differently from what they tell their attorneys. Because Bentham thought that the attorney-client privilege only protects the guilty, he opposed the privilege.

But Bentham's argument is unpersuasive for several reasons.

First, the accused are constitutionally entitled to the effective assistance of counsel. U.S. Const. am. VI.; Cal. Const. art. I., § 15; *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970). And open communication between a client and the client's attorney may be necessary to protect a person's constitutional right to the effective assistance of counsel. See *ABA Task Force Report*, *supra*, at 1040 (stating that courts have recognized that denial of attorney-client privilege may prevent effective assistance of counsel); Cohn, *The Evisceration of the Attorney-Client Privilege in the Wake of September 11, 2001*, 71 Fordham L. Rev. 1233, 1240 (2003).

Furthermore, the attorney-client privilege may be essential to due process in criminal cases. Gardner *Re-evaluation (Part I)*, *supra* at 314; see also Cohn, *supra*, at

1255; see also Comment, *Functional Overlap between the Lawyer and Other Professionals: Its Implications for the Privileged Communication Doctrine*, *supra*, at 1237 (stating that privilege contributes to ensuring fair trial). (Whether there is a constitutional basis for the attorney-client privilege is discussed further below.)

And there are other ways that an attorney-client privilege justifiably assists a guilty person. For example, a person might be guilty of a crime, but charged with several crimes with varying degrees of severity. If the privilege enables an effective defense against a more serious crime than what the person committed, the privilege promotes justice. It also avoids costly social and fiscal consequences that may flow from convicting a person for a more serious crime than what the person committed.

Furthermore, the attorney-client privilege doesn't just help guilty clients.

The absence of an attorney-client privilege may hinder effective legal representation of an innocent person. For example, absent the attorney-client privilege, a client might withhold important facts because they are embarrassing to the client (or others the client cares about), not because the client is guilty. See 24 Wright & Graham, *supra*, § 5472. Additionally, an innocent person might mistakenly believe that a fact is damaging and thus withhold it, when in reality, it is harmless or even helpful. See Cohn, *supra*, at 1254-55.

One critic argues, however, that the attorney-client privilege harms innocent clients by making it harder to credibly communicate that they have nothing to hide. See, e.g., Fischel, *Lawyers and Confidentiality*, 65 U. Chi. L. Rev. 1, 23 (1998).

But a person may have more trouble proving innocence (or otherwise vindicating the person's rights) without the attorney-client privilege, as the person's fear of disclosure may hinder the attorney's ability to effectively represent the person. See Wolfram, *supra*, § 6.1, p. 246.

The attorney-client privilege also helps a person who needs legal advice about whether a particular course of action is lawful. A person may believe a contemplated act is illegal, but it is not. 24 Wright & Graham, *supra*, § 5472. Without a privilege, such a person may refrain from seeking legal advice altogether. See Wolfram, *supra*, § 6.1, pp. 246-47.

Loss of Respect for the Legal System

Some commentators argue that the greatest cost of the attorney-client privilege is a social cost. 24 Wright & Graham, *supra*, § 5472. They say that the attorney-client privilege causes the public to lose respect for, and confidence in,

the legal system because the public assumes the secrecy is to hide wrongdoing by clients and lawyers. *Id.* But this might overestimate the lack of confidence in the legal system that stems from the attorney-client privilege.

They also say that the public perceives the attorney-client privilege as unjust by allowing confidentiality between wealthy clients and their attorneys, while no comparable privilege is available for family members and other non-spousal intimates. See *id.* (Note, if a person cannot afford an attorney, but receives a court-appointed attorney (or pro bono legal services), there is a privilege for communications between the person and the attorney.)

Weighing the Costs and Benefits

The key points relevant to weighing the privilege's costs and benefits are assessed below.

As discussed above, if the assumption that the communication wouldn't occur absent the attorney-client privilege is correct, then there may be no loss in evidence. Restatement § 68, p. 520; see S. Frankel, *supra*, at 72-73 (recounting argument that without privilege, client disclosures to attorney might not have been made, thus source of information excluded by privilege wouldn't exist). It isn't clear that, absent the attorney-client privilege, "evidence would inevitably profit," in terms of quality or quantity. See Gardner, *Re-evaluation (Part I)*, *supra*, at 321.

And, even assuming that (1) the communication would occur regardless of the privilege and (2) the privilege excludes probative evidence from the factfinder, it may be that the search for truth, although critically important, "is not necessarily paramount to all other interests of society." Mueller & Kirkpatrick, *supra*, § 5.1, p. 286. "For every instance where a privilege serves as an obstacle to the discovery of truth at a trial, there may be many more occasions where the existence of the privilege serves to solidify a professional relationship or enhance the quality of professional services." *Id.* Along similar lines, one scholar stated:

> Of course, it cannot be denied that there are many cases in which a party would obtain some valuable piece of evidence that might not otherwise be had through diligent investigation and the use of pretrial discovery methods. Still, it does not presently appear that these instances would occur often in proportion to the vast amount of litigation which is in the courts.

Gardner, *Re-evaluation (Part I)*, *supra*, at 325.

In addition, as an American Bar Association Task Force Report explains,

> Critics of the privilege argue that because the privilege prevents the disclosure of a client's communications, it hinders the public's ability to discover the truth. This argument fails to account for the countervailing benefits associated with the privilege. As one writer stated, "[T]he definition of the privilege [expresses] a value choice between protection of privacy and discovery of truth and the choice of either involves the acceptance of an evil — betrayal of confidence, or suppression of truth." The judiciary has recognized this choice and has consistently decided in favor of upholding and protecting the privilege.

ABA Task Force Report, *supra*, at 1033.

Some scholars feel, however, that there is too much emphasis on the value of confidentiality, and that opposing values are overlooked. J. Strong, McCormick on Evidence, § 6.2, p. 247 (4th ed. 1992); see, e.g., Snyder, *supra*, at 484 (urging value of promoting disclosure shouldn't be only one in making policy choice about attorney-client privilege); see also Weisberg, *supra*, at 617 n.61 (quoting McCormick, Evidence § 91, at 182 (1954)) ("If one were legislating [with a blank slate], it would be hard to maintain that a privilege for lawyer-client communications would facilitate more than it would obstruct the administration of justice.").

In weighing the potential costs and benefits of the attorney-client privilege, scholars have observed that fair administration of the law is the public policy both for and against the privilege under the traditional rationale. See Coward, *supra*, at 35-36. For example, where the privilege is recognized, the "sacrifice of social interest in the due administration of justice is obvious and eminent," but, if it is not recognized, "it would obstruct the administration of justice either by deterring clients from resorting to attorneys or by inducing clients to withhold essential facts from attorneys." *Id.*

The privilege is based on a public policy belief that its benefits justify the risk that it may result in unjust decisions because relevant evidence was suppressed. *Mitchell v. Superior Court*, 37 Cal. 3d 591, 599-600, 208 Cal. Rptr. 866, 691 P.2d 642 (1984); see also *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 358 (D.Mass 1950) ("As stated in Comment to Rule 210 of the A.L.I. Model Code of Evidence: '...The social good derived from the proper performance of lawyers acting for their clients ... outweigh[s] the harm that may come from the

suppression of the evidence.'") That is, the systemic benefits, the aggregate of benefits, justify the attorney-client privilege. S. Frankel, *supra*, at 52.

For purposes of this study, **the Commission must decide which formulation of a posthumous attorney-client privilege will best promote the public policy of fair administration of the law.**

CONTOURS OF AN ATTORNEY-CLIENT PRIVILEGE JUSTIFIED BY THE TRADITIONAL RATIONALE

Before discussing other rationales for the attorney-client privilege, the contours of the privilege based on the traditional rationale is briefly discussed.

The attorney-client privilege has traditionally been an "absolute" privilege. See Restatement § 68, Comment *c*, p. 523 (2000) (stating that "overwhelming weight of authority states or assumes that the privilege is absolute").

An "absolute" privilege does not mean there are no exceptions. Instead, it means that if an enumerated exception does not apply, the privilege's protection is absolute — i.e., it cannot be overridden by showing a need for the privileged matter. Rice, *supra*, § 2.2, p. 10. Traditionally, the privilege has been absolute because 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. See Ottoson, *supra*, at 1338.

In California, the attorney-client privilege is absolute. *2,022 Ranch, L.L.C. v. Superior Court*, 113 Cal. App. 4th 1377, 1388, 7 Cal. Rptr. 3d 197 (2003). There is no balancing of a need for the evidence against the need for confidentiality. *Id.*

The attorney-client privilege under federal law is also absolute. The United States Supreme Court has stressed repeatedly that the privilege's purpose of encouraging attorney-client communication necessitates predictability of whether a communication will be protected. See, e.g., *Swidler*, 524 U.S. at 408-09; *Jaffee*, 518 U.S. at 18; *Upjohn*, 449 U.S. at 393. The Court explains that

> [a] 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.

In sum, the traditional approach to the attorney-client privilege is to have the privilege be absolute in nature both during the client's life, and after the client's

death. That is, if the communication is privileged and not subject to an exception, the privilege cannot be overridden by showing a compelling need for the evidence.

But another approach is that, regardless of whether the privilege is absolute during the client's life or not, the privilege becomes a "qualified" privilege after the client's death — i.e., the posthumous privilege may be overridden by showing a need for the evidence. These posthumous formulations — "absolute" versus "qualified" — among others, will be discussed in future memoranda.

OTHER RATIONALES

Wigmore's instrumental rationale of encouraging full and frank attorney-client communication is the dominant rationale for the attorney-client privilege. See Mueller & Kirkpatrick, *supra*, § 5.1 p. 289 (stating that prevailing modern justification is that non-existence of privilege would deter or inhibit clients from communicating with attorney); Imwinkelried, The New Wigmore, *supra*, § 4.2.4, pp. 225, 231-32.

At least one scholar welcomes reliance on a "non-instrumental" rationale because it "may offer a theoretical basis for a more satisfactory accommodation ... between the legitimate demands" for freedom from unwarranted intrusion and the requirements of the judicial system. 1 Broun, *supra*, § 77, p. 363. A "non-instrumental justification for the privilege rests upon the belief ... that it is wrong for courts to compel revelation of attorney-client confidences." 24 Wright & Graham, *supra*, § 5472; see, e.g., *The Attorney-Client Privilege: Fixed Rules, Balancing, and Constitutional Entitlement*, *supra*, at 480 (stating that it is morally wrong to burden person seeking legal advice by threat of disclosure at trial).

Under such a rationale, the purpose of the attorney-client privilege is not to influence behavior. Instead, it is based on a view that a privilege is desirable "out of respect for personal rights such as autonomy or privacy." Imwinkelried, The New Wigmore, *supra*, § 5.1.2, p. 259.

One scholar explains that non-instrumental rationales take several forms, including that an attorney-client privilege is justified to (1) protect individuals' rights (e.g., the right to effective counsel), (2) protect individuals' dignity (i.e., a forced choice between truth and self-interest of having fully informed counsel would affront a person's dignity), or (3) allow a person control over the spread of

personal information, showing respect for the relationship. See Wolfram, *supra*, § 6.4.1, p. 245. Other scholars similarly say that non-instrumental rationales justify an attorney-client privilege "to safeguard values of privacy, freedom, trust, and honor in important personal and professional relationships." Mueller & Kirkpatrick, *supra*, § 5.1, p. 287.

Privacy

Privacy considerations are increasingly offered as a justification ancillary to the traditional rationale of encouraging full and frank communication. 1 Broun, *supra*, § 87 p. 388; see also *Jaffee v. Redmond*, 51 F.3d 1346 (7th Cir. 1995) (advancing privacy and instrumental rationales), *affirmed*, 518 U.S. 1 (1996) (advancing only instrumental rationale); Imwinkelried, The New Wigmore, *supra*, § 10.4.2-.3, pp. 1246-48 (stating that both instrumental and rights-based arguments were made to Congress when it considered privilege rules); Katz, *supra*, at 603 (arguing that attorney-client privilege should be recognized when person has justifiable expectation of confidentiality).

An attorney-client privilege based upon privacy recognizes that "certain privacy interests in society are deserving of protection" by a privilege, regardless of whether the existence of the privilege "actually operates substantially to affect conduct" within the protected relationship. 1 Broun, *supra*, § 72, p. 340.

A privacy-based privilege and the traditional rationale of encouraging full and frank communication can

> be seen as different views of a common justification for the privilege. The privacy rationale looks directly to the inherent harm which can inure to individuals when personal information is compelled to be released; the [traditional] rationale looks to individuals' awareness of this potential harm, the impact this will likely have on their willingness to reveal information to attorneys, and the damage this will in turn have on attorneys' ability effectively to represent clients in a complex legal system.

S. Frankel, *supra*, at 55.

Autonomy

A privilege based on autonomy is "to enable the citizen to make more intelligent, independent life preference choices" by creating "privacy enclaves with particular types of consultants." 1 Broun, *supra*, § 72, p. 340; Imwinkelried, The New Wigmore, *supra*, § 5.3.2, p. 327.

Several justifications for an attorney-client privilege based on promoting the client's autonomy have been advanced:

- The attorney-client privilege is to increase client autonomy by giving a client the ability to decide whether to pursue a legal claim, increasing participation in decisions affecting the client's future. Mueller & Kirkpatrick, *supra*, § 5.8, p. 309.
- The attorney-client privilege is to protect an individual's rights and autonomy. Because individual rights can only be protected through the legal process, confidentiality is essential to preserving individual autonomy. Subin, *The Lawyer as Superego: Disclosure of Client Confidences to Prevent Harm*, 70 Iowa L. Rev. 1091, 1096 (1985).
- The attorney-client privilege is to enable people to exercise their right to know what their rights are. *The Attorney-Client Privilege: Fixed Rules, Balancing, and Constitutional Entitlement*, *supra*, at 480, 482.

Prof. Imwinkelried supports autonomy as a justification for the attorney-client privilege because a person "has a right to make independent choices with respect to the judicial system," and those choices are necessary to pursue a person's life plan. Imwinkelried, The New Wigmore, *supra*, § 5.3.3, p. 333.

Put another way, "[t]o be autonomous, a person must sometimes form a relationship of trust with another person." Wydick, *The Attorney-Client Privilege: Does It Really Have Life Everlasting?*, 87 Ky. L.J. 1165, 1175 (1999). By protecting communications of this relationship, a person can share information with the assurance of privacy. The relationship helps the person become more autonomous by learning options available to the person and thus enabling the person to make well-informed important life choices. *Id.*

Loyalty

Another view is that the attorney-client privilege is justified out of "respect for the importance of confidentiality and trust in the attorney-client relationship." Mueller & Kirkpatrick, *supra*, § 5.8 p. 309.

The attorney's loyalty to the client was the historical basis for the attorney-client privilege in England. The privilege protected the gentlemanly honor of the barrister, who should not be compelled to betray the confidences of his client. Radin, *supra*, at 489.

The attorney's loyalty to the client still underlies the rationale for the attorney-client privilege in continental Europe. See Katz, *supra*, at 598 (stating

that European jurisdictions base privilege on belief that testimony would be untruthful or biased by virtue of relationship). This rationale stems from Roman times, as Roman law forbade the attorney's testimony because it would be valueless. Radin, *supra*, at 488 (explaining Roman view that attorney's compelled testimony would be untrustworthy, and that attorney's willing testimony would be from disreputable person unworthy of belief).

Prof. McCormick, unconvinced by the traditional justification for an attorney-client privilege, attributed the privilege's existence to a strong sentiment of client loyalty, which would be affronted by routine examination of client disclosures. See Weisberg, *supra*, at 617 n.61; see also Radin, *supra*, at 492 (attributing attorney-client privilege's existence to societal value of "relationships based on mutual fidelity" and reluctance to disturb them even to aid justice).

Some commentators argue a justification for the attorney-client privilege is that it allows an attorney to avoid the uncomfortable position of testifying against a client that the attorney has been hired to represent. Wolfram, *supra*, § 6.4.1, p. 245; see also Zacharias, *supra*, at 359 (recounting argument that privilege fosters dignity of attorney and client). However, others say that if the attorney tells the client up front that the attorney may be compelled to reveal certain types of information, then later disclosure isn't unseemly. Zacharias, *supra*, at 368; see also M. Frankel, *supra*, at 57 (arguing no betrayal by attorney disclosing communication if client wasn't promised confidentiality as to communication disclosed).

Policy Against Self-Incrimination

At least one legal scholar says that the best basis for the privilege is that it is part of a public policy against self-incrimination, that "[a]ll persons ought to be able to fully and freely tell their lawyers all the facts ... without fear that the lawyer's knowledge of these facts may be used to establish claims against them or subject them to penalties." See, e.g., Radin, *supra*, at 490.

Contours of a Privilege Based on These Other Rationales

Other rationales, which do not depend on prospective certainty that a contemplated communication would be protected from disclosure, might be better suited to balancing than the traditional rationale. *Cf.* Cohn, *supra*, at 1236 (stating that privilege based on loyalty yielded "to the ends of justice" in England). For example, a commentator who maintains the attorney-client privilege should be based upon a right to know one's rights says that the

privilege should be qualified — i.e., for compelling reasons, the privilege may be overridden and disclosure compelled. *The Attorney-Client Privilege: Fixed Rules, Balancing, and Constitutional Entitlement*, *supra*, at 480, 482. The commentator explains that a right to know one's rights is not unlimited, but should be balanced against, and may yield to, other purposes. *Id.*

Similarly, an attorney-client privilege based on privacy would appear to yield when other moral values override the value of privacy. See Wolfram, *supra*, § 6.4.1, p. 245. One scholar says that an attorney-client privilege based on privacy would make the privilege more "amenable to the finer touch of the specific solution." 1 Broun, *supra*, § 77, p. 363.

Arguments in Favor of These Other Rationales

Some commentators favor a non-instrumental rationale because they believe the traditional rationale is based "on empirical propositions that have not and cannot be proved." 24 Wright & Graham, *supra*, § 547; See, e.g., Imwinkelried, The New Wigmore, *supra*, § 5.2, pp. 262-63 (stating that traditional rationale is superficially plausible and shouldn't be exclusive rationale, as it'd be "a grave mistake to equate the plausible with the proved"); Wydick, *supra*, at 1173-74 (stating that, "if we depend solely" on traditional rationale, "shortage of empirical evidence about whether the candor of the attorney-client communications would or would not be lessened if the privilege were curtailed at the client's death" is troubling).

Others favor a non-instrumental rationale for the attorney-client privilege based on a view that it would be "more in tune with contemporary emphasis on human values over property rights and the notion that human dignity is one of the core values of the adversary system." 24 Wright & Graham, *supra*, § 5472 n.67 (citing, e.g., Gardner, *Re-evaluation (Part II)*, *supra*,); see, e.g., Imwinkelried, The New Wigmore, *supra*, § 5.2, p. 263 (stating that traditional rationale is too narrow and legalistic, and "overlooks the broader political and philosophical questions implicated by the privilege doctrine").

Still others favor a non-instrumental rationale on the ground that the traditional rationale does not withstand its criticism. 24 Wright & Graham, *supra*, § 5472 n.66 (citing Gardner, *Re-evaluation (Part I)*, *supra*). For example, one treatise says that, "any fair-minded person surveying the arguments would likely conclude" that the traditional rationale is "not so much stronger" than a non-instrumental rationale. 24 Wright & Graham, *supra*, § 5472.

Arguments in Favor of Traditional Rationale and Other Rationales

At least one scholar says that there is no apparent reason why the attorney-client privilege cannot have multiple justifications, like other rules of law. See, e.g., 1 Broun, *supra*, § 87 p. 389 n.11. But multiple rationales may cause confusion about the proper scope of the privilege. *Id.* For example, balancing might be inconsistent with the traditional rationale of encouraging open-communication, by undermining predictability. 1 Broun, *supra*, ch. 10 § 87 p. 390. Nevertheless, one scholar believes that balancing "may ultimately result in a more rational administration of the privilege" than the traditional rationale entailing an absolute privilege, the scope of which is controlled by extending exceptions and by the waiver doctrine. *Id.*

Prof. Imwinkelried supports relying on the traditional rationale *and* on an autonomy-based rationale, saying that they are neither irreconcilable nor mutually exclusive. See Imwinkelried, The New Wigmore, *supra*, § 5.3.4 p. 388. He says that if the facts show client concern about confidentiality, a court should invoke the instrumental theory. Imwinkelried, The New Wigmore, *supra*, § 5.2.2, pp. 295-96. He then explains how the level of protection afforded by the privilege should vary, depending on whether one, both, or neither rationale applies. If both apply, the attorney-client privilege should give the greatest protection. If only one applies, the privilege should give "a measure" of protection; but if neither apply, there should be no protection. Imwinkelried, The New Wigmore, *supra*, § 5.3.4 pp. 390-93.

In any event, one scholar emphasizes that "[w]hether the rationale ... rests upon professional ethics, the right to privacy, or the need to encourage clients to confide fully in their attorneys," the privilege is a "necessary tool to the effective operation of the American jurisprudential system." Cohn, *supra*, at 1254.

WHETHER A CONSTITUTIONAL BASIS EXISTS FOR AN ATTORNEY-CLIENT PRIVILEGE

The attorney-client privilege developed without any relationship to constitutional rights. Strong, *supra*, § 6.2.1 (stating that attorney-client privilege existed in Roman times and medieval Europe). But there is disagreement over whether there is a constitutional basis for the attorney-client privilege. See 24 Wright & Graham, *supra*, § 5472 n.60 (setting forth cases finding, and cases not finding, that privilege protects constitutional right).

Several commentators claim that there is a constitutional basis for the attorney-client privilege in criminal cases, pointing to the privilege's importance in protecting the right to counsel and right to be free from self-incrimination. See, e.g., Ottoson, *supra*, at 1335-36 (stating that, in criminal context, privilege against self-incrimination precludes use of incriminating information in attorney-client communication); Dashjian, Note, People v. Meredith*: The Attorney-Client Privilege and the Criminal Defendant's Constitutional Rights*, 70 Cal. L. Rev. 1048, 1050 (1982) ("While the attorney-client privilege did not originate as a constitutional doctrine, in criminal cases it plays an important role in protecting the defendant's fifth and sixth amendment rights."); *The Attorney-Client Privilege: Fixed Rules, Balancing, and Constitutional Entitlement*, *supra*, at 480, 485 (stating that Fifth and Sixth Amendments support attorney-client privilege); but see Restatement § 68, p. 523 (stating that attorney-client privilege is not corollary to privilege against self-incrimination because there is no governmental compulsion of client to reveal to attorney).

Other commentators posit that the privilege protects a constitutional right to counsel in both criminal and civil cases by shielding attorney-client communications from intrusion. See, e.g., *Developments — Privileged Communications*, *supra*, at 1506 (citing *Gideon v. Wainright*, 372 U.S. 335 (1963) (criminal) and *Potashnick v. Port City Constr. Co.*, 609 F.2d 1101, 1117-18 (5th Circ.), *cert. denied*, 449 U.S. 820 (1980) (civil); see also Ottoson, *supra*, at 1336 (stating that attorney-client privilege protects right to counsel, because absence of privilege would impede attorney-client communications).

However, other commentators disagree that the attorney-client privilege has any constitutional basis. See, e.g., Subin, *supra*, at 1132 (stating that privilege is not grounded in constitutional right to counsel nor constitutional right to be free from self-incrimination).

But at least one California court of appeal considers the constitutional right to *privacy* relevant to the protection of attorney-client communications. See *Hooser v. Superior Court*, 84 Cal. App. 4th 997, 1003-04, 1007 101 Cal. Rptr. 2d 341 (4th Dist. 2000) (stating that information not protected by statutory attorney-client privilege may be protected by constitutional right to privacy, and holding that party's need for client's identity did not override undisclosed clients' privacy rights).

These constitutional issues might have little relevance, if any, in the context of a deceased client. But, if the Commission decides the privilege should end at the

client's death, the staff will research the possibility of interference with a constitutional protection that could survive the client's death.

CONSTITUTIONAL LIMITS TO AN ATTORNEY-CLIENT PRIVILEGE

The attorney-client privilege causes "tension with [the] right to confront and cross-examine opposing witnesses" by precluding relevant testimony of the attorney, and preventing full examination of the client as a witness. Restatement § 68, p. 521.

Noting the potential conflict between a privilege and the constitutional right of criminal defendants to present exculpatory evidence, one treatise states that "three lines of federal authority — based on the constitutional guarantees of compulsory process, confrontation, and due process — have converged to establish" a constitutional right to exculpatory evidence otherwise blocked by a privilege. Mueller & Kirkpatrick, *supra*, § 5.5, pp. 295-96.

But the constitutional right to present exculpatory evidence doesn't necessarily trump a privilege. Mueller & Kirkpatrick, *supra*, § 5.5, p. 296. Most of the time, the assertion of an attorney-client privilege withstands constitutional attack. Mueller & Kirkpatrick, *supra*, § 5.5, p. 300.

To determine if the attorney-client privilege must yield to a defendant's constitutional right, courts favor a balancing approach. At least one California court of appeal has employed such an approach. See, e.g., *People v. Godlewski*, 17 Cal. App. 4th 940, 945, 21 Cal. Rptr. 2d 796 (1993) (stating that if criminal defendant shows compelling need for disclosure of privileged communication, criminal defendant's constitutional right to fair trial would mandate overriding attorney-client privilege); see also *Rinaker v. Superior Court*, 62 Cal. App. 4th 155, 170, 74 Cal. Rptr. 2d 464 (1998) (determining that trial court should have examined evidence in camera to weigh claimed constitutional need for mediator's testimony before overriding statutory mediation confidentiality).

If a privilege would result in a constitutional violation, there are various remedies, such as:

- Compel disclosure.
- Dismiss the prosecution, and thus avoid compelled disclosure.
- Other sanction. For example, if the privileged evidence would be used to impeach a witness, strike testimony by that witness (or if the witness hasn't yet testified, bar the witness's testimony), and thus avoid dismissal and compelled disclosure.

Mueller & Kirkpatrick, *supra*, § 5.5 pp. 298, 301.

If the Commission decides to adopt an approach that involves posthumous survival of the attorney-client privilege, it would be subject to the above constitutional constraints.

NEXT STEP

The next memorandum will begin discussion of various approaches to a posthumous attorney-client privilege. In weighing each approach, the Commission should keep in mind the competing policies underlying the privilege.

To recap, 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 discussed many arguments supporting and criticizing the privilege. The lists below summarize the main arguments covered in the memorandum. As the study proceeds, it may be helpful to refer to these lists.

Arguments supporting the privilege:

- The privilege promotes justice by encouraging open attorney-client communication, which enables an attorney's effective representation.
- It is not unreasonable to assume that the privilege enhances candor in some cases, even if empirical evidence is inconclusive.
- The privilege may reduce litigation because fully informed attorneys can prevent baseless lawsuits and encourage settlement.
- The privilege may encourage legal compliance because fully informed attorneys can encourage conduct that complies with the law.
- The privilege helps safeguard various rights, such as the right to privacy, to due process, and to be free from self-incrimination.
- The privilege assists a person achieve autonomy by allowing a person to make informed legal decisions.
- The privilege's exclusion of evidence might not hinder the search for truth, as the evidence might not be probative or admissible or might not even exist absent the privilege. Overall, the privilege

helps the search for truth by enabling clients to effectively present their claims.

- The need to promote confidentiality outweighs the cost of secrecy.

Criticisms of the privilege:

- The privilege undermines justice by excluding relevant evidence, which may not be available from an alternative source.
- The privilege's exclusion of evidence may cause erroneous, unjust results.
- When asserted against a criminal defendant, the privilege conflicts with the right to present exculpatory evidence.
- Existing empirical evidence, although inconclusive, suggests that the privilege does not significantly enhance candor in most cases.
- A privilege may not be necessary because clients' need for legal advice and representation independently induces them to consult, and be candid with, attorneys.
- The privilege may facilitate wrongdoing by a client who learns in confidence that the expected liability is less than the expected gain, and decides to commit the wrongdoing.
- The public's right to the truth outweighs the client's interest in confidentiality.

Respectfully submitted,

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