Study K-350 August 25, 2008

Memorandum 2008-35

Attorney-Client Privilege After Client's Death: Discussion of Alternatives

The Commission is studying whether the attorney-client privilege should survive the client's death, and if so, under what circumstances. This memorandum discusses various guiding principles the Commission could use in selecting an approach for a tentative recommendation. The Commission should consider which guiding principle, and which approach, it would like to use for purposes of preparing a tentative recommendation.

This memorandum also discusses comments from Joseph Harvey, a retired superior court judge who was Assistant Executive Secretary of the Commission when the Commission drafted the Evidence Code in the early 1960's. His comments are attached as Exhibit pages 1-13.

The memorandum is organized as follows:

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.

SUMMARY OF THE POLICY UNDERLYING THE ATTORNEY-CLIENT PRIVILEGE

The competing policies relating to the attorney-client privilege, including its survival after the client's death, 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.

In considering the various approaches to a posthumous attorney-client privilege, the Commission should keep in mind those competing policies.

SUMMARY OF APPROACHES TO A POSTHUMOUS ATTORNEY-CLIENT PRIVILEGE

Previous memorandums discussed the policy implications of various approaches to a posthumous attorney-client privilege. See, e.g., CLRC Memorandums 2008-20 & 2008-34.

The approaches that were discussed are:

- *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.
- *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 dissent in *Swidler & Berlin v. United States*, 524 U.S. 399 (1998). 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.

GUIDING PRINCIPLES TO CONSIDER

Before the Commission selects a specific approach to a posthumous attorney-client privilege, it should choose a guiding principle to use in making its selection. Possible guiding principles include:

(1) Stick to the Commission's original approach enacted in the Evidence Code.
(2) Modify the Commission's original approach, but only in ways that are not inconsistent with its underlying policy determination.
(3) Significantly depart from the Commission's original approach and policy determination underlying it.

Each of the possibilities is discussed below.

GUIDING PRINCIPLE #1: STICK TO THE COMMISSION'S ORIGINAL APPROACH

The Commission has a policy of adhering to its previous recommendation on a subject, unless there is a good reason not to do that. As its Handbook of Practices and Procedures explains, "[t]he Commission has established that, as a matter of policy, unless there is good reason for doing so, the Commission will not recommend to the Legislature changes in laws that have been enacted on Commission recommendation." Rule 3.5.

Accordingly, one guiding principle the Commission could use would be to stick with the Commission's original approach enacted in the Evidence Code.

Substance of the Commission's Original Approach

Under the Commission's original approach, *the posthumous privilege only survives so long as there is a personal representative.* When there is no personal representative, or the personal representative is discharged, the privilege ends. See Evid. Code §§ 953-954.

The original approach recognizes exceptions that only apply after a client's death. These exceptions make the privilege posthumously inapplicable: (1) when all parties claim through a deceased client, or (2) when an issue relates to the intent or validity of a decedent's writing purporting to affect a property interest, or an issue relating to the validity or intent of a document attested to by the attorney. See Evid. Code §§ 957, 959, 960, 961.

Taking together all of the above, the Commission's original approach was designed to make the privilege survive in only two types of cases: (1) cases

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, or the validity or intended meaning of a decedent's document attested to by the attorney, and (2) cases between third parties, so long as the personal representative of the decedent's estate has not been discharged.

If the Commission decides to stick with its original approach, it should consider revisions to ensure its original approach is interpreted as intended. Those revisions are briefly described at the end of this memorandum, and will be discussed in greater detail in a supplement or a future memorandum, as feasible and appropriate.

Background on the Commission's Original Approach

As discussed at pages 2-6 of Memorandum 2008-20, the Commission carefully examined the posthumous attorney-client privilege during its study on whether California should adopt the Uniform Rules of Evidence (the "URE"), promulgated by the National Conference of Commissioners on Uniform State Laws. In a background study for the Commission, Prof. Chadbourn (Harvard Law School) discussed the competing policy concerns relating to the privilege and weighed various approaches to a posthumous privilege. See Chadbourn, A Study Relating to the Privileges Article of the Uniform Rules of Evidence, 6 Cal. L. Revision Comm'n Reports 301, 389-90 (1964) (hereinafter, "Chadbourn"). After considering the competing policy concerns, both Prof. Chadbourn and the Commission recommended the substance of the URE approach, which ends the posthumous privilege when there is no personal representative. The language they recommended differed from the language in the URE. See *Tentative Recommendation relating to the Uniform Rules of Evidence: Article V. Privileges*, 6 Cal. L. Revision Comm'n Reports 207 (1964); *Recommendation Proposing an Evidence Code*, 7 Cal. L. Revision Comm'n Reports 1, 223-25 (1965).

The approach of the URE was based on the Model Code, promulgated by the American Law Institute (the "ALI"). See Chadbourn, *supra*, at 389. The ALI has since changed its approach, adopting a posthumous balancing test. See CLRC Memorandum 2008-34, pp. 2-3.

The posthumous attorney-client privilege in the URE, however, remains unchanged, even though the URE as a whole has undergone revisions on three separate occasions (1974, 1986, 1999).

During the Commission's study of whether to adopt the URE, only one commenter, the Northern Section of the State Bar Committee, temporarily disagreed with the Commission's approach to the posthumous attorney-client privilege. *Ultimately, the Commission's approach to the posthumous attorney-client privilege had no opposition*, and the Northern Section and Southern Section of the State Bar Committees supported the Commission's approach. See CLRC Memorandum 1963-57, p. 2; CLRC Memorandum 1961-20, Exhibit II, pp. 1-4; see also CLRC Memorandum 2008-20, pp. 4-6.

In sum, the Commission's original approach based on the URE was well-studied, and was adopted without opposition.

The extent to which other states have adopted the URE's approach to a posthumous privilege is discussed below.

Adoption of the URE Approach in Other States

Twenty-five states have adopted a posthumous attorney-client privilege rule that is similar to the URE. These states are listed in the attached Exhibit at pages 15-16.

However, these states are *not* universally regarded as having an attorney-client privilege that ends after the client's estate is closed, as in California.

For example, the United States Supreme Court in *Swidler & Berlin v. United States*, 524 U.S. 399 (1998), indicated that California's approach is unlike any other state's. The *Swidler* Court stated:

> About half the States have codified the testamentary exception by providing that a personal representative of the deceased can waive the privilege when heirs or devisees claim through the deceased client .... These statutes do not address expressly the continuation of the privilege outside the context of testamentary disputes, although many allow the attorney to assert the privilege on behalf of the client apparently without temporal limit. They thus do not refute or affirm the general presumption in case law that the privilege survives. *California's statute is exceptional in that it apparently allows the attorney to assert the privilege only so long as a holder of the privilege (the estate's personal representative) exists, suggesting the privilege terminates when the estate is wound up. But no other state has followed California's lead in this regard.*

Swidler, 524 U.S. at 405 n.2 (citations omitted) (emphasis added).

But some commentators question the accuracy of the Court's assessment that California's approach is unique. See, e.g., E. Imwinkelried, The New Wigmore: A Treatise on Evidence *Evidentiary Privileges* § 6.5.2, p. 567 (2002); Wydick, *The*

Attorney-Client Privilege, Does It Really Have Life Everlasting?, 87 Ky. L.J. 1165, 1182-88 & n.94 (1999). These commentators believe that states with an attorney-client privilege based on the URE terminate the privilege at the closing of the decedent's estate. One of these commentators, Prof. Wydick (Univ. of Calif., Davis School of Law), explains his view that the plain language of these statutes supports this conclusion:

> [T]he plain meaning of the evidence rules in twenty-five states ... suggests that when the deceased client's estate closes, and the personal representative is discharged, the privilege ends because there is nobody left to claim it. But what about the lawyer? Shouldn't the lawyer still be able to claim the privilege? The answer ought to be "no." The evidence rules in all twenty-five states make clear that the lawyer can claim the privilege only on behalf of the client. While the client is alive, the lawyer's ability to claim the privilege is derived from the client. After the client dies, the lawyer's ability is derived from the personal representative; when the personal representative ceases to exist, the lawyer's ability to claim the privilege should also cease to exist.

Wydick, *supra*, at 1185.

Prof. Wydick also believes that the drafters of the URE and Model Code intended the rule to end the privilege once the client's estate had closed. *Id.* at 1185-86. That view was shared by Prof. Chadbourn (the Commission's consultant for the URE study). Whether the legislatures that adopted the URE language interpreted it in a similar manner is not clear.

But Prof. Wydick asserts that the approach of twenty-five states is like California's, and that the only difference is that California's statute "stated explicitly what was only implicit in the Model Code and the Uniform Rules." He concludes that, like California, these twenty-five states end the privilege "when the client's estate closes." Wydick, *supra*, at 1187.

In one of these states, however, an appellate court concluded that the privilege did not end at the closing of the client's estate. See, e.g., *Cooper v. State*, 661 P.2d 905, 907 (Okla. Crim. App. 1983). The staff has not found any other case that sheds light on how the language of the statutes in these twenty-five states are interpreted.

Comments in Support of the Commission's Original Approach

The Commission has received a letter from Judge Joseph Harvey urging the Commission to stick to its original approach. Judge Harvey was the

Commission's Assistant Executive Secretary when the Commission studied and made recommendations on whether to adopt the URE. Exhibit. p. 1. He provides the following account of the Commission's deliberations on the posthumous attorney-client privilege:

> The Commission discussions focused on the fact that privileges are designed to keep evidence from being disclosed that might be essential to do justice. Keeping relevant evidence secret may result in wrongful convictions, and it may result in wrongful civil judgments. The need to keep the evidence secret, therefore, must be very great to justify these harsh results. The Law Revision Commission reasoned in 1965 ... that the risk of wrongful conviction, or wrongful civil judgment, is necessary to protect the communications of a live client or his estate. But those risks are too steep a price to pay for the protection of the privacy of a person who is deceased and who has no estate remaining to protect.

Exhibit pp. 2-3.

Judge Harvey believes that "subsequent events have demonstrated the validity of this Commission's previous conclusions." Exhibit p. 3. Judge Harvey summarizes various cases, some of which are discussed in news articles he enclosed, in which he believes the privilege unjustifiably blocked admission of evidence. Exhibit pp. 3-5, 6-13.

Judge Harvey concludes by pointing out that "[t]he California rule has been in existence since the Evidence Code took effect on January 1, 1967." Exhibit p. 4. He states that he is unaware of any problems or complaints about the rule. He has

> never heard a complaint that a prospective client has said 'If you can't assure me that what I say won't be revealed after I'm dead and my estate has been distributed, I won't consult with you.'

Exhibit p. 5. He urges the Commission not to change the rule in the absence of problems. *Id.*

Dissatisfaction with the Commission's Original Approach

Although Judge Harvey apparently has not been alerted to it, some attorney groups are dissatisfied with the Commission's original approach. Last year, the State Bar Trusts and Estates Section sponsored a bill (AB 403) that would have made the privilege survive indefinitely, subject to waiver by a personal representative. And the State Bar Standing Committee on Professional Responsibility and Conduct (hereinafter, "the Professional Responsibility

Committee") supported the bill. See CLRC Memorandum 2008-20, pp. 14-17. (As enacted, the bill did not contain provisions providing for indefinite survival of the privilege.)

Thus far, the Commission has not received written comments on this study from the Trusts and Estates Section, its Executive Committee (TEXCOM), or the Professional Responsibility Committee. But their support for AB 403 as introduced indicates that they perceive a problem with the Commission's original approach.

At a recent Commission meeting, a TEXCOM representative (Neil Horton) explained TEXCOM's view that the privilege should survive beyond the period currently provided in the Evidence Code. He stated that a posthumous privilege should protect against disclosures a client would fear. In his opinion, a client would fear disclosures (1) that would harm a deceased client's reputation, (2) that would affect surviving family, or (3) that would lead to lawsuits that would deplete the client's estate. He said that TEXCOM disagrees with the current California approach because it doesn't fully protect against such disclosures.

But, when asked whether he knew of any client who was deterred from being fully candid because the privilege ends at death or after probate, Mr. Horton responded that he was not. He did cite one instance in which clients are concerned with privacy after death: when a client wants to privately provide for a child who was born out of wedlock.

There are several reasons why this situation — privately providing for a child — does not compel a departure from the Commission's original approach. First, the situation in which a client wants to privately provide for a child probably does not arise that often. Therefore, most clients would not be significantly deterred by the lack of a privilege. Second, even in the few instances in which the situation does arise, it does not appear that the limited scope of the posthumous privilege under the Commission's original approach has deterred clients from communicating about the child, and the client's desire to provide for the child. The attorney's duty not to voluntarily disclose the client's secrets, a duty which continues indefinitely after the client's death, may provide sufficient assurance of confidentiality to encourage the client to discuss the child, and testamentary wishes as to the child, with the attorney.

Another reason why TEXCOM believes there is a need to expand the posthumous privilege is because of the "nonprobate revolution," by which assets

frequently pass outside of probate. The increase in nonprobate transfers occurred after the enactment of the Commission's original approach.

Under the Commission's original approach, when assets transfer through probate, the personal representative holds the decedent's privilege. Accordingly, the privilege survives until the assets have definitively passed to the beneficiaries. If *some* assets pass through probate, and others pass outside of probate, the privilege still survives until the personal representative is discharged, which may or may not be after the nonprobate assets have definitively passed to the beneficiaries.

When *all* assets pass outside of probate, the decedent's privilege generally does not survive. However, there could be a personal representative if a successor in interest prosecutes a decedent's surviving cause of action and is appointed to be a special administrator. See Code of Civ. Proc. § 377.33; Prob. Code § 58(a). The privilege would seem to exist while the successor acts as personal representative. Also, even if the decedent's privilege does not generally survive, a decedent's communications relating to a trust can remain privileged under *Moeller v. Superior Court*, 16 Cal. 4th 1124, 947 P.2d 279, 69 Cal. Rptr. 2d 317 (1997). Aside from these situations, there does not appear to be any basis for asserting the attorney-client privilege if a claim is made against the decedent's assets. If the assets had passed through probate instead, the privilege would have survived.

The modern trend toward use of nonprobate transfer mechanisms in estate planning thus means that in a significant number of cases, the privilege may end before all of the client's assets definitively pass to beneficiaries. The staff thinks this is TEXCOM's most convincing argument. Nonprobate transfers are will substitutes. In principle, it would make sense to apply the same privilege rules to both wills and will substitutes.

In many situations, however, if a client wants the attorney-client privilege to survive until the client's assets have definitively passed to beneficiaries, the client *could* achieve that result by employing a will. The client would have to forgo any benefit of a nonprobate transfer, such as privacy and saving time and expense. But if survival of the privilege until assets have definitively passed to the beneficiaries is more important to a client than those benefits, the client could use a will.

Additionally, there are two other ways to achieve continued survival of the privilege, at least as to communications relating to the client's assets. First, a

client could hold assets in trust, and transfer them upon death to a beneficiary through a successor trustee. Under *Moeller v. Superior Court*, 16 Cal. 4th 1124, 947 P.2d 279, 69 Cal. Rptr. 2d 317 (1997), the successor trustee would hold the predecessor trustee's privilege as to trust communications. Trusts of this type are one of the main nonprobate estate planning devices.

Or, a client could transfer assets to a separate legal entity. That entity would hold the privilege as to its own communications with counsel regarding these assets. See Evid. Code §§ 953(a), 954(c). The entity's privilege would not end with the death of the person who founded the entity.

To obtain continued survival of the privilege as to communications relating to assets, a client would have to create a trust or other separate legal entity, and relinquish personal ownership of the assets. But, in addition to using a will, the client has such options to make the privilege continue until the client's assets definitively pass to the beneficiaries.

Precedential Impact of Changing the Scope of the Posthumous Attorney-Client Privilege

In deciding whether to stick to the Commission's original approach, a further consideration is the potential precedential impact of revising that approach. A change to the posthumous attorney-client privilege might be used as a basis for a similar change to all other evidentiary privileges based on a confidential relationship (e.g., the doctor-patient privilege). Indeed, the Senate Judiciary Committee's analysis of AB 403 cited concern that if the posthumous attorney-client privilege were expanded, it would serve as a basis for expanding other privileges in a similar way. Therefore, changing the scope of the posthumous attorney-client privilege would be inadvisable without solid justification.

At the June meeting, Mr. Horton expressed TEXCOM's view that other privileges should also be expanded to last indefinitely. He stated that the interests of protecting individual autonomy justify expanding the privilege between an individual and a priest, psychotherapist, or doctor because an individual who needs advice, or needs to be made whole, may need to consult with one of these professionals to fully achieve that objective.

Although such considerations may justify the existence of a privilege for confidential communications between an individual and one these professionals, they might not justify a privilege that never ends after the individual dies. A privilege that never ends may not be needed to induce candor, and would

exclude relevant evidence at the expense of truth-finding. Furthermore, a person's interest in autonomy does not outweigh all other interests. There are competing interests that may sometimes outweigh the interest in autonomy. Moreover, it seems likely that a person's autonomy can be fully realized by a privilege that does not last forever.

Summary of the Pros and Cons of Guiding Principle #1

Under Guiding Principle #1, the Commission would adhere to its previous recommendation.

As discussed above, the Commission carefully weighed the competing policies of a posthumous privilege the first time around. The Commission's approach was well-studied, and widely supported. For over four decades, the approach has been in place and does not appear to have been problematic.

The area of privileges is highly controversial. A recommendation of no, or minimal, changes to the privilege might have the greatest likelihood of success.

Since the Commission made its original recommendation, however, nonprobate transfers have become increasingly common. Consequently, there may not be a personal representative after a client's death, and the attorney-client privilege may terminate before the client's assets are definitively distributed. There might thus be a post-death disclosure that affects the client's estate in a manner the client would not have wanted, and chills other clients from freely communicating with their attorneys.

But there are ways for a client to avoid such a result. In light of these options, the nonprobate revolution might not be sufficient justification to alter California's longstanding approach to a posthumous attorney-client privilege. Further, if the Commission sticks to its original approach, it would not be establishing a precedent that could trigger revisions of other evidentiary privileges.

GUIDING PRINCIPLE #2: STICK TO THE POLICY DETERMINATION UNDERLYING THE COMMISSION'S ORIGINAL APPROACH

Another guiding principle that the Commission could use in formulating a tentative recommendation would be to modify the Commission's original approach, but only in ways that are not inconsistent with the policy determination underlying that approach.

In other words, the Commission could stick to its original policy determination, while revising the precise manner of implementing that determination.

The Commission's Original Policy Determination

The Commission's original policy determination — as evidenced by the posthumous privilege and exceptions to it — was as follows: *The privilege should survive against third parties until a decedent's assets definitively pass to the beneficiaries, unless the issue relates to the validity or intended meaning of (1) a decedent's writing that purports to affect a property interest, or (2) a decedent's document attested to by the attorney.*

The reasoning underlying this determination can be summarized as follows:

- Most clients would be significantly deterred from candidly consulting with an attorney if the privilege did not survive until the client's assets definitively passed to beneficiaries.
- Most clients would *not* be significantly deterred from candidly consulting with an attorney if the privilege does *not* survive in any other circumstance.
- To help ensure that the decedent's intent is carried out, it is presumed that the decedent would want attorney-client communications disclosed when all parties claim through (rather than against) the decedent, or when an issue relates to the intent or validity of a decedent's writing purporting to transfer property or of a decedent's document attested to by the attorney.

See Evid. Code §§ 953-954, 957, 959, 960, 961 & Comments.

Possible Adjustments to the Posthumous Privilege

If the Commission chooses to stick with the Commission's original policy determination, the Commission could make adjustments to the posthumous privilege that seek to make the privilege operate in a manner that would more closely reflect that determination. For example, adjustments could extend the posthumous privilege so that it applies in circumstances similar to those in which the Commission determined the posthumous privilege should exist. Other adjustments could narrow the posthumous privilege by removing its application where, according to the Commission's original policy determination, a posthumous privilege is not needed.

Adjustments to further tailor the posthumous privilege to reflect the Commission's original policy determination might be consistent with the

Commission's policy not to recommend changing a law enacted on Commission recommendation, absent good reason. Because the adjustments aim to promote the Commission's original policy determination, there may be the requisite good reason for recommending them.

The discussion below explores four adjustments that would aim to make the privilege more closely reflect the Commission's original policy determination. Specifically, these adjustments focus on whether to (1) make revisions relating to the mechanics of ending the privilege upon discharge of the personal representative, (2) expand the posthumous privilege to survive until assets transferred outside of probate definitively pass to beneficiaries, (3) expand an exception so that the privilege is posthumously inapplicable when all parties claim through a nonprobate transfer, or (4) narrow the privilege to be posthumously inapplicable to criminal cases.

Discharge of the Personal Representative

A relatively recent article published by the *California Trusts and Estates Quarterly* criticized the Commission's approach enacted in the Evidence Code. See Burford & Nunan, *Dead Man Talking: Is There Life After Death for the Attorney-Client Privilege?*, 11 Calif. Trusts & Estates Q. 17, 21 (Summer 2005). One criticism focused on an operational detail of the privilege; namely, that the privilege ends upon the discharge of the personal representative.

The authors argue that ending the attorney-client privilege with the discharge of a personal representative creates "confusion and uncertainty" in the application of the privilege after a client's death. *Id.* at 21. They say that there is no requirement "that a personal representative ever obtain an order of discharge." *Id.* at 20. They add that, intentionally or not, "it is not uncommon for a personal representative" to refrain from seeking discharge. *Id.* Accordingly, the authors believe that it is unclear whether the privilege continues "in the event that a personal representative fails (or declines)" to seek discharge. *Id.* at 20.

Upon the personal representative's ex parte petition, a court must issue an order discharging the personal representative from all liability incurred thereafter. Prob. Code § 12250(a). But a personal representative appears to be under no *requirement* to request discharge. This might be because it is assumed that a personal representative would seek discharge to avoid liability.

The authors who criticize the Evidence Code approach explain why that assumption might be flawed. They quote a practice guide, which says that "[t]he

personal representative may not wish to obtain a discharge if there are further functions to be performed as representative," such as "dealing with tax authorities of the decedent or the estate." Burford & Nunan, *supra*, at 24 n.41 (quoting 2 CEB, California Decedent Estate Practice § 21.44).

While tax matters are handled, the circumstances in which the Commission determined the privilege should survive may still exist: A claim against the decedent's remaining property interests could arise. Therefore, continuation of the privilege until all tax matters are handled does not appear to be problematic.

But, the practice guide adds that, when the personal representative has not posted a bond, "some attorneys do not have the personal representative discharged." Because there is no discharge, the personal representative can, if needed, facilitate "handling assets discovered after final distribution." 2 CEB, California Decedent Estate Practice § 21.44. If there is a bond, however, the practice guide instructs that discharge will "avoid the needless expense of paying a bond premium." *Id.*

If some personal representatives (e.g., those who have not posted a bond) do not seek discharge, but wait around to see if undiscovered assets turn up after final distribution, the privilege could survive when the justification for its survival no longer exists. That would be contrary to the intent of Evidence Code Sections 953-954 to terminate the privilege after the decedent's estate is settled.

If the Commission decides to stick to its original policy determination, it might want to consider addressing the possibility that a personal representative might not seek discharge after the estate is administered.

The Commission could address this issue by using an event other than the personal representative's discharge to terminate the privilege. At this point, however, the staff has not identified an event that would be a better trigger than the personal representative's discharge.

Another way the Commission could address this issue would be to require a personal representative to file an ex parte petition for discharge once there are no further estate matters (including tax matters) to handle. That would prevent a personal representative from prolonging discharge just in case other assets turn up. If further assets were to turn up, Probate Code Section 12252 would require reappointment of the personal representative.

It is not immediately apparent to the staff how one could craft a requirement for a personal representative to seek discharge after the estate is closed, and all

related matters are handled. In particular, it might be difficult to identify an appropriate enforcement mechanism.

Furthermore, the staff is not aware of concrete evidence that a significant number of personal representatives fail to promptly seek discharge. And, arguably about half of the states (i.e., the states with an attorney-client privilege like the URE) also use discharge of the personal representative as the event that ends the privilege. That statistic suggests that using discharge of the personal representative as the triggering event is a workable and effective approach. Adjustments relating to that trigger might not be warranted.

Extend the Commission's Original Approach to Nonprobate Transfers

Another possible adjustment would be to revise the Commission's original approach to reflect the nonprobate revolution. In particular, the Commission could seek to make the privilege apply in the nonprobate context as it does in the probate context. That way, the privilege would survive when assets are passed outside of probate, regardless of whether other assets pass through probate. Such a reform would be consistent with the Commission's original policy determination, but would update the manner of implementing that determination.

This goal is easier to state than to accomplish. There are many different ways one might revise the attorney-client privilege to reflect the nonprobate revolution. Some of the key issues that would have to be resolved are discussed below.

Types of Cases in Which the Privilege Would Apply Posthumously

One way to revise the privilege to reflect the nonprobate revolution would be to limit the privilege to cases directly involving the client's assets, as follows: A provision could prescribe that (1) subject to existing exceptions, the privilege survives so long as any claim by or against the decedent or the decedent's property survives, and (2) the privilege only survives for purposes of such claims. *Cf.* Code of Civ. Proc. §§ 377.20 (stating that unless otherwise provided, cause of action survives death); 377.10-377.62 (prescribing effect of death in civil actions).

This would make the privilege posthumously applicable to any claim that could arise against the decedent's property, including property subject to a nonprobate transfer. Because the privilege would posthumously apply even

when there is no personal representative, this approach expands the posthumous privilege to apply in cases where the assets pass outside of probate.

In addition, a second benefit is that the privilege is narrowed to only apply to a claim by or against the decedent or the decedent's property. The posthumous privilege would not apply to a civil case that does not involve the decedent's estate, and it would not apply to a criminal case. Arguably, the Commission's original policy does not require application of the privilege in such cases.

However, disclosures in those types of cases could dampen client candor. A communication could be disclosed in a case not covered by the privilege and become known to a party in a case that is covered by the privilege. Knowledge of the communication could assist that party, even though the party could not use it in litigation in which the privilege applies.

To avoid that result, and its potential harm to client candor, a provision could perhaps be added to ensure that any disclosure would occur in a closed session, with that portion of the record sealed. But such procedural steps would create additional complexity, might not be fully effective, and would increase litigation expenses and consumption of judicial resources.

Who Would Hold the Privilege

If the Commission decided to extend the privilege to nonprobate transfers, regardless of whether there is a personal representative, the Commission would need to consider several related issues. Those issues were discussed in Memorandum 2008-34, at pages 20-28. Those issues include who would hold the privilege, what duty, if any, would govern the privilege holder's exercise of the privilege, and how, if at all, the duty could be enforced.

One option would be to provide that a person representing the decedent as a party in an action involving the decedent or the decedent's property holds the decedent's privilege. As under existing law, that person could be a personal representative. When there is no personal representative, a successor in interest or a trustee may litigate actions by or against the decedent or the decedent's property. See, e.g., Code of Civ. Proc. § 377.11 (defining successor in interest as "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"); see also 14 B. Witkin, Summary of California Law *Wills* § 518, p. 591 (10th ed. 2005) (explaining that beneficiary of decedent's estate is person

who succeeds to cause of action or item of property under decedent's will, intestacy statutes, or estates disposed of without administration).

What duty, if any, would govern the exercise of the privilege?

It appears that there is no existing duty that would apply if the successor in interest, rather than a personal representative, held the privilege. But it seems likely that the successor in interest would exercise the privilege in accord with the successor in interest's potential property interests, which would likely coincide with the remaining property interests of the decedent.

If the privilege was held by a trustee, the trustee's fiduciary duties to the beneficiaries would presumably govern the trustee's exercise of the decedent's privilege. See, e.g., Prob. Code §§ 16000-16082 (setting forth fiduciary duties of trustee).

Permitting each of these persons — a personal representative, successor in interest, and trustee — to hold the decedent's privilege, however, may create problems and confusion. For example, the privilege holders may disagree on how to exercise the privilege. Although existing law provides that a joint client's waiver of the privilege does not impact another holder's right to claim it, it is unclear *how* a deadlocked disagreement among multiple privilege holders of a decedent's privilege would be resolved. See Evid. Code § 912.

It is worth noting that when the Commission previously studied this issue, the Northern Section of the State Bar Committee temporarily supported an approach that would permit heirs or legatees to assert a decedent's privilege. See CLRC Memorandum 1961-20, Exhibit II, pp. 1-2. However, because it "might cause complications where one heir or legatee would wish to claim the privilege and another would wish to waive it," the Committee rescinded its position and supported the Commission's approach. See *id.* at p. 4.

Additionally, authorizing multiple persons to hold the decedent's privilege could make it more difficult to determine who holds the privilege.

Paul Gordon Hoffman, an attorney in Los Angeles, submitted comments that were discussed in Memorandum 2008-34. He recently contacted the staff by phone to further explain his comments. The staff appreciates Mr. Hoffman's further explanation.

Mr. Hoffman expressed concern relating to the difficulty of identifying a privilege holder. He stated that if it is unclear who the privilege holder is, it would be unclear to whom the attorney may disclose the deceased client's communications and files without violating the duty of confidentiality. He thus

suggested that, if the Commission authorizes more persons to hold the privilege, the Commission should limit it so only one person could hold the privilege at a time. For example, a provision could identify one person who holds the decedent's privilege, and in the event that there is no such person, identify an alternative, and so forth.

His suggestion to permit only one person to hold the decedent's privilege at a time would help avoid confusion that could arise if multiple persons litigating separate claims by or against a decedent or the decedent's assets could all hold the decedent's privilege. His suggestion would also seem to avoid the problem of conflicting claims among multiple privilege holders. However, it might be difficult to work out the details of such an approach.

Temporal Limitation on Survival

If the Commission sought to modify the privilege to make the privilege apply in the nonprobate context as it does in the probate context, the length of time in which the privilege could survive should be considered.

A nonprobate transfer could occur much more quickly than probate. But, it could also take much longer. For example, if the privilege were to last until all the assets have definitively passed to trust beneficiaries, the privilege could survive as long as a trust. Under the statutory rule against perpetuities, that appears to be ninety years. See Prob. Code § 21200-21207; see also Prob. Code § 15414. (While the same duration of the privilege exists under *Moeller*, the scope of the privilege would be broader than *Moeller*. Under *Moeller*, a deceased predecessor trustee's privilege survives, but *only as to communications relating to trust matters*).

Ninety years is much longer than the time in which the privilege was envisioned to last under the Commission's original approach. Is a ninety-year posthumous privilege justified? The answer to this question hinges on whether client-trustees would be significantly deterred from consulting and being candid with attorneys if attorney-client communications were not protected until the property had definitively passed to beneficiaries.

Alternatively, the privilege could last only during the optional trust procedure for settling claims against a trust under Probate Code Sections 19000-19403. This would be more in keeping with the duration of probate estate administration.

Summary of the Pros and Cons of Extending the Posthumous Privilege to the Nonprobate Context

Extending the posthumous privilege to the nonprobate context would enable a client to choose among estate planning vehicles without having to take into account the potential impact on post-death confidentiality of attorney-client communications. No matter which estate planning vehicle a client selected, the client would be assured that attorney-client communications would remain protected for some period and to some extent after the client's death.

Precisely what level of protection would be appropriate is not clear-cut. Issues for consideration include:

- The types of cases in which the posthumous privilege would apply.
- Who would hold the posthumous privilege, what duties would govern exercise of the privilege, how those duties would be enforced, and how to avoid or resolve conflicts between multiple privilege holders.
- How long the privilege should survive.

Attempting to address these issues would be far more complicated than retaining the clarity and simplicity of the Commission's original approach.

Modify Exception Where All Parties Claim through the Decedent

Another possible adjustment of the Commission's original approach, without altering the underlying policy determination, relates to the impact of nonprobate transfers on an existing exception.

Evidence Code Section 957 makes the privilege posthumously inapplicable when all parties claim through the decedent. Section 957 states:

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

The reason for the exception is because a "deceased client presumably would want his [or her] communications disclosed in litigation" between parties who all claim through the deceased client (as opposed to a party who claims against the deceased client, such as a creditor). Evid. Code § 957 Comment.

In theory, such disclosures would help ensure that the client's desires regarding disposition of assets "might be correctly ascertained and carried out." *Id.*

When the parties do not claim "by testate or intestate succession," but by nonprobate transfer, the same reason for creating an exception to the posthumous privilege exists. Without an exception, the posthumous privilege could block communications that a deceased client presumably would have wanted disclosed. For example, suppose (1) a client transferred some assets outside of probate, but transferred other assets by will, and (2) disclosure of attorney-client communications was sought in connection with a nonprobate claim, but the personal representative administering the assets transferred by will refused to waive the privilege. In that situation, the decedent's desires might be thwarted.

Accordingly, the Commission could modify Section 957 so that it would include nonprobate transfers. That would narrow the privilege to make it posthumously inapplicable in a circumstance in which, according to the Commission's original policy determination, the privilege is not needed.

It appears that this adjustment wouldn't be difficult. It would likely set a precedent supporting the same adjustment to be made to analogous exceptions of other privileges. See, e.g., Evid. Code §§ 984 (exception to marital privilege), 1000 (exception to doctor-patient privilege), 1019 (exception to psychotherapist-patient privilege). But the degree of need for this adjustment is unclear. The situation described above, in which the personal representative refuses to waive the privilege and adverse consequences follow, may not arise that often. Moreover, if all parties claim through a nonprobate transfer, there is potentially no probate estate at all, no personal representative, and no privilege in existence anyway. Without clear evidence that an adjustment to Section 957 is needed, such a step may be unwarranted.

No Posthumous Privilege in a Criminal Case

A final way in which the Commission could revise the posthumous attorney-client privilege, while remaining faithful to the Commission's original policy determination, would be to make the privilege posthumously inapplicable in a criminal case. In other words, the Commission could propose a new exception to the privilege, which would say that when the client is dead, the privilege does

not apply in a criminal case. Such an exception was discussed in Memorandum 2008-34, at pages 13-16.

The Commission's original policy determination was that the posthumous privilege is only needed to prevent disclosures that could harm a deceased client's assets before they definitively pass to beneficiaries. An exception making a deceased client's privilege posthumously inapplicable in a criminal case would narrow the privilege so that it would not apply in a circumstance in which, according to the Commission's original policy determination, the privilege is not needed.

Posthumous disclosure in a criminal proceeding should not affect a decedent's assets. First, the decedent cannot be held criminally liable. *Swidler & Berlin v. United States*, 524 U.S. 399, 412 (1998) (J. O'Connor, dissenting) (stating that "after death, ... the risk that the client will be held criminally liable has abated altogether"). Thus, disclosure of a deceased client's communication in a criminal proceeding after the client's death could not lead to a criminal restitution order against the deceased client's assets.

Second, disclosure of a decedent's attorney-client communication in a criminal proceeding (to which the posthumous privilege would not apply) should not render the statement unprivileged in other cases, which may impact the deceased client's assets. See Evid. Code § 912 (prescribing waiver rules). But to avoid any misunderstanding, the Commission could state in its Comment that disclosure of a communication in a criminal proceeding (to which the posthumous privilege would not apply) does not constitute a waiver of the privilege as to that communication in other proceedings in which the posthumous privilege continues to exist. The Comment could also state that there is no requirement to assert the privilege in the criminal proceeding for the communication to remain privileged in those other proceedings.

A posthumous exception for criminal cases would not effectuate a large change in law. That is because when there is no personal representative, the privilege is already posthumously inapplicable in all cases, including criminal cases.

Although the posthumous privilege eventually ends with the personal representative's discharge, by that time, it might be too late to impact a criminal proceeding in which an attorney-client communication would have been relevant. It might be preferable to have an exception for criminal cases, so that

the relevant evidence is available the first time around, to help prevent erroneous prosecutions and erroneous convictions.

Without such an exception, if a criminal case arises before the personal representative is discharged, and the personal representative does not waive the privilege, the privilege could block relevant evidence. See Evid. Code §§ 916, 953-54. Even if the evidence contained in the communication is important to the accurate determination of a criminal matter, the personal representative can refuse to waive the decedent's privilege. See, e.g., *In the Matter of a John Doe Grand Jury Investigation*, 408 Mass. 480, 481, 562 N.E.2d 69 (Mass. 1990) (personal representative refuses to waive privilege in homicide investigation). A personal representative might refuse to waive if the personal representative, who may be related to the decedent, fears embarrassment by association. See Prob. Code §§ 8420 (person named in will has right to appointment as executor), 8461 (setting forth persons with priority of appointment as administrator when decedent dies without a will, beginning with surviving spouse and partner, then children, etc.). And it appears that a party to the criminal case could not obtain the evidence, apart from persuading the personal representative. *Cf.* Prob. Code §§ 8500-8505 (providing for removal of personal representative by interested person); see also Prob. Code § 48 (defining interested person).

It thus may be overly broad to allow the personal representative to hold the privilege as to criminal cases. Perhaps the privilege should not survive in such cases. To allow the privilege to apply beyond when it is needed may unnecessarily hinder the search for truth.

Disclosure of the communication in the criminal matter could, however, allow a litigant against the estate to learn the content of the communication. The litigant wouldn't be permitted to introduce the communication in litigation against the estate, but merely knowing the content of the communication could give the litigant an advantage. According to the Commission's original policy determination, that potential harm to the decedent's estate could deter client candor. Thus, if an exception for criminal cases after the client's death is adopted, perhaps a provision should prescribe that disclosure pursuant to the exception may only be done in a closed court, and that the portion of the record containing the disclosure must be sealed.

Again, however, such procedural steps would create additional complexity, might not be fully effective, and would increase litigation expenses and consumption of judicial resources. These detriments might not be warranted to

address a slightly overbroad application of the privilege that probably does not arise with very much frequency. The benefits of creating an exception for criminal cases after the client's death might not outweigh the detriments.

Summary of the Pros and Cons of Guiding Principle #2

Under Guiding Principle #2, the aim would be to stick to the Commission's original policy determination, but to adjust the law to make the posthumous privilege more closely effectuate the determination underlying it.

Possible adjustments include:

(1) **Revisions relating to discharge of the personal representative as the trigger for ending the privilege.** Such revisions could include selection of a new trigger or a mandate that the personal representative seek discharge once the estate is wound up. Neither of these approaches would be easy to implement.

(2) **Revisions to reflect the nonprobate revolution.** The Commission could try to make the privilege apply in the nonprobate context as it does in the probate context. That would enable a client to select an estate planning vehicle without worrying about the potential for post-death disclosure of an attorney-client communication. Implementing this type of approach would involve many drafting complexities, and result in a body of law that is more complicated and difficult to administer than the Commission's original approach.

(3) **Expansion of Evidence Code Section 957 (which makes the privilege posthumously inapplicable when all parties claim through the decedent) to the nonprobate context.** This adjustment would be relatively straightforward, but there might not be sufficient need for it to justify a change in the law.

(4) **Revisions to make the attorney-client privilege inapplicable in a criminal case when the client is dead.** Such a narrowing of the posthumous privilege might promote justice by making evidence available that otherwise could not have been used in a criminal case. However, it might also result in disclosures that could give an advantage to a litigant against the decedent's estate, which could chill client candor. Attempting to effectively control such disclosures could be costly and may not be fully effective.

In sum, the posthumous privilege might not operate in precise conformity with the Commission's original policy determination of when the privilege should and shouldn't survive. Few legal rules achieve their aims without being slightly overbroad in some areas, and slightly under-inclusive in others. Although there are a number of ways in which the Commission's original

approach might be revised consistent with its original policy determination, it's not clear that such revisions would represent an overall improvement.

GUIDING PRINCIPLE #3: SIGNIFICANTLY DEPART FROM THE COMMISSION'S ORIGINAL APPROACH

The third guiding principle that the Commission could select in formulating a tentative recommendation would be to completely depart from its original approach, and select a new approach pursuant to a different policy determination of when the privilege should survive.

There are at least three approaches that would drastically depart from the Commission's original approach. These approaches would make the posthumous privilege (1) survive indefinitely, (2) end with the client's death, or (3) become subject to a balancing test.

To be consistent with its policy of adhering to its previous recommendations, the Commission should only depart from its original approach if it believes there is a good reason to do so.

Indefinite Posthumous Survival

An approach that entails indefinite survival would be a drastic change from the Commission's original approach enacted in the Evidence Code and from the policy determination underlying it.

The federal approach, governed by federal common law, is that the attorney-client privilege lasts beyond the testamentary context, is not subject to balancing, and presumably never ends. See *Swidler*, 524 U.S. 399. This approach was discussed in Memorandum 2008-20, at pages 20-25.

The attorney-client privilege in twenty-four states is also governed by common law. See Exhibit p. 16. It is unclear, however, how many of these states follow the federal approach. Many of these states have not squarely addressed how long the posthumous privilege survives or whether it is subject to balancing.

Some courts in these states have addressed the posthumous privilege, and upheld it, but in an action involving a claim by or against the decedent's estate. See, e.g., *Wesp v. Everson*, 33 P.3d 191, 200 (Colo. 2001); *Curato v. Brain*, 715 A.2d 631, 636 (R.I. 1998); *Spence v. Hamm*, 226 Ga. App. 357, 358, 487 S.E.2d 9 (Ga. App. 1997); *McCaffrey v. Estate of Brennan*, 533 S.W.2d 264, 267 (Mo. App. 1976); *Taylor v. Sheldon*, 172 Ohio St. 118, 173 N.E.2d 892, 15 O.O.2d 206 (Ohio 1961); see also *Bailey v. Chicago, Burlington & Quincy Railroad Co.*, 179 N.W.2d 560, 564 (Iowa

1970) (administrator action for wrongful death). These cases do not support or refute the notion that the privilege survives death indefinitely, because even in states that reject indefinite survival, the privilege survives when the estate is open. But in a couple of these cases, the courts employed language strongly suggesting that the privilege survives without temporal limit. See, e.g., *Wesp*, 33 P.3d at 200; *Curato*, 715 A.2d 631 at 636.

Courts in at least seven of the common law states have determined that the privilege survives in circumstances that do not involve a claim by or against the estate. See, e.g., *In re: The Investigation of the Death of Eric Dewayne Miller and of any Information in the Possession of Attorney Richard T. Gammon Regarding that Death*, 357 N.C. 316, 323, 584 S.E. 2d 772 (N.C. 2003); *Mayberry v. Indiana*, 670 N.E.2d 1262, 1265, 1267 (Ind. 1996); *In the Matter of a John Doe Grand Jury Investigation*, 408 Mass. 480; *State v. Doster*, 276 S.C. 647, 650-51, 653, 284 S.E.2d 218 (S.C. 1981); *State v. Macumber*, 112 Ariz. 569, 571, 544 P.2d 1084 (Ariz. 1976); see also *People v. Vespucci*, 192 Misc. 2d. 685, 692-93, 695, 745 N.Y.S. 2d 391 (N.Y. Co. Ct. 2002) (not determining whether posthumous privilege is subject to "absolute" or "balancing test" doctrine, but that statements at issue remain privileged under both); *Cohen v. Jenkintown Cab Co.*, 238 Pa. Super. 456, 461-64, 357 A.2d 689 (Pa. Super. Ct. 1976) (holding privilege survives in circumstances where there was no estate, but applying balancing test and overriding privilege).

But it shouldn't be assumed that all the common law states have an attorney-client privilege that survives indefinitely. In at least one common law state, its highest court found that the privilege was posthumously inapplicable in a criminal case in circumstances in which there was no estate open. See, e.g., *State v. Kump*, 76 Wyo. 273, 291, 301 P.2d 808 (Wyo. 1056).

Indefinite survival of the privilege would differ from the Commission's original approach by expanding the privilege to last beyond a personal representative's discharge. That would have an advantage of making the posthumous privilege apply until a decedent's assets definitively pass to beneficiaries, regardless of whether the assets pass inside or outside of probate.

However, indefinite survival would also make the privilege survive in instances that go far beyond those necessary, according to the Commission's original policy determination, to achieve the privilege's goals of encouraging client consultation and candor. And even if a person is designated to waive a privilege that lasts indefinitely, it only leaves the *possibility* of waiver.

Indefinite survival of the posthumous privilege would give clients an assurance that its protection against compelled disclosure would last forever. Clients might like the idea of having such protection.

But, while a client might *like* to have indefinite protection against compelled disclosure, and might not affirmatively wish for the client's communications to ever be disclosed, the *issue is whether most clients are likely to openly communicate with an attorney anyway*. If most clients would openly communicate anyway, then indefinite survival of the posthumous privilege would unnecessarily exclude relevant evidence from the factfinder. That exclusion of relevant evidence by the posthumous privilege has stronger force than the privilege's exclusion of evidence during a client's life, when the client is available as an independent source of information and can be deposed as a witness.

As the Commission originally determined, when a client has no remaining property interests — i.e., all claims are settled, and assets have definitively passed to beneficiaries — it seems that there is little reason to continue the privilege. See Evid. Code § 954 Comment. It seems likely that most clients would be candid with counsel, and would be more concerned about receiving accurate advice than a remote possibility that communications with counsel could be disclosed under compulsion after death.

An expansion to make the privilege survive indefinitely may thus exclude far more evidence than necessary. That would unnecessarily interfere with the public's right to every person's evidence and hinder the truth-seeking function of courts.

No Posthumous Survival

Another drastic change from the Commission's original approach and the policy determination underlying it would be to end the privilege at death. That approach, and exactly how it differs from the Commission's original approach, was discussed in Memorandum 2008-34 at pages 18-20.

One might criticize the Commission's original approach, under which the privilege survives during estate administration, on the ground that the privilege blocks relevant evidence and, therefore, impedes the search for truth. At first glance, it might seem that the privilege unjustly makes it more difficult for a person litigating against the client's estate to discover information relevant to the case. The litigant cannot access the adverse party, the dead client, as a source of

information, and the information contained in the decedent's attorney-client communications remains privileged.

However, without the protection of the privilege, the attorney-client communications might never have come into existence. Therefore, the litigant's need for the evidence doesn't compel a conclusion that the privilege should end with death. If eliminating the post-death privilege would chill client candor, the litigant's need for the evidence would not be met by eliminating the privilege.

Posthumous Balancing

An approach that employs case-by-case balancing of a deceased client's continued interest in confidentiality versus the need for the evidence would also be drastically different from the Commission's original approach and policy determination underlying it. The case-by-case balancing approach was discussed in Memorandum 2008-34, at pages 2-10.

The appeal of balancing is that it allows a court to determine whether there is a need for the evidence that justifies overriding the privilege. The scope of the privilege can be tailored to reflect the competing interests in each case.

However, precisely because balancing permits a court to override the privilege when the evidence is needed, it has the potential for undermining the privilege's purpose of encouraging client candor. Balancing provides clients with little certainty whether a particular communication would be protected by the privilege.

It may thus be preferable to strike a policy balance in advance by clearly delineating the privilege and its exceptions, than to permit a court to weigh, after the fact on a case-by-case basis, the value of continued confidentiality against the need for the communication. It is questionable whether there is a solid justification to depart from the Commission's original determination and propose a case-by-case balancing approach.

Summary of the Pros and Cons of Guiding Principle #3

Guiding Principle #3 would be to depart from the Commission's original approach and underlying policy determination, and select a new policy regarding when the attorney-client privilege should survive the client's death. Possible approaches that would significantly depart from the Commission's original policy determination include:

(1) **Make the privilege survive indefinitely.** This approach would encourage client candor but may result in unnecessary exclusion of relevant evidence, impeding the pursuit of justice.

(2) **No posthumous survival.** This approach may promote justice by permitting introduction of attorney-client communications. But such an impact may be minimal, because the possibility of post-death disclosure might inhibit clients from engaging in such communications in the first place.

(3) **Posthumous balancing.** A case-by-case balancing approach would permit courts to tailor the scope of the posthumous privilege to appropriately reflect the competing interests in each case. But the approach might chill attorney-client communications, because a client could not predict with any certainty whether a communication would be privileged after death.

COMPARISON OF THE GUIDING PRINCIPLES

This memorandum has discussed three guiding principles that the Commission could use in selecting an approach for drafting a tentative recommendation.

Guiding Principle #1 would be to stick with the Commission's original approach. The Commission's policy is to adhere to its previous recommendations, absent good reason. It appears that there are good reasons to stick with the Commission's original approach.

The Commission's approach was selected after careful study of the issue. It is based on the URE approach, which remains unchanged, and which half the states have used as a model for their attorney-client privilege. Additionally, as expressed in comments by Judge Harvey, there is no evidence that the scope of the posthumous privilege, as it has existed for over forty years, has hampered attorneys in inducing clients to be candid. Also, the area of evidentiary privileges is highly controversial. An approach that involves minimal or no changes might have a greater likelihood of success than other possible approaches.

Guiding Principle #2 would be to stick to the Commission's original policy determination, but deviate from the manner in which that determination was originally implemented. If the Commission selects this guiding principle, the Commission could explore adjustments to the Commission's original approach that would seek to make it more closely effectuate the policy determination of when the privilege should and shouldn't posthumously apply.

For example, the Commission could explore an adjustment to make the privilege terminate more closely to the time in which there is no longer justification for the privilege. Other adjustments could seek to address the "nonprobate revolution," by which nonprobate transfers frequently occur. Or, the Commission could adjust the privilege by making it posthumously inapplicable to criminal cases.

These adjustments may sound appealing because they could make the privilege operate more closely in accordance with the Commission's determination of when a posthumous privilege is justified, and when it is not. However, the adjustments would entail drafting complexities (some more so than others), and it is not clear that these adjustments are needed to achieve the policy goal behind the Commission's original approach of encouraging client candor.

Guiding Principle #3 would be to depart from the Commission's original policy determination. Thus far, the staff has not seen a compelling reason supporting such a change. There are advantages and disadvantages of the various alternative approaches, and none of them is indisputably superior to the Commission's original approach.

Because it appears there is no good reason to deviate from the Commission's original approach, the staff recommends against doing so. Accordingly, the staff recommends that the Commission select Guiding Principle #1.

ISSUES TO CONSIDER IF COMMISSION SELECTS GUIDING PRINCIPLE #1

If the Commission selects Guiding Principle #1, **there are still revisions that the Commission should consider.** In particular, the staff has identified three ideas that warrant exploration.

First, the Commission should consider clarifying the recent amendment of Probate Code Section 12252, relating to reappointment of a personal representative, by AB 403 (Tran) (2007 Cal. Stat. ch. 388). Second, the Commission should consider further revising Probate Code Section 12252 to prevent its use to expand the scope of the posthumous attorney-client privilege. Third, the Commission should consider whether to make any revisions in light of the California Supreme Court decision *Moeller*, 16 Cal. 4th 1124, which held that a

successor trustee holds a predecessor's attorney-client privilege as to trust communications.

These three issues will be discussed in a future memorandum, or, if time permits, in a supplement to this memorandum.

Respectfully submitted,

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July 17, 2008

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

Re: Attorney-Client Privilege after client's death

Dear Law Revision Commission:

I was the Assistant Executive Secretary of the Law Revision Commission when the Evidence Code was drafted and enacted, and I participated in all of the Commission discussions that resulted in the Commission's recommendation that the privilege terminate when there was no longer any one in existence who had any interest in claiming the privilege (except to suppress evidence).

The Commission reasoned that,

> Although there is good reason for maintaining the privilege while the estate is being administered–particularly if the estate is involved in litigation–there is little reason to preserve secrecy at the expense of excluding relevant evidence after the estate is wound up and the representative is discharged. [Law Revision Commission Comment to Evidence Code section 954.]

The Commission recommended a similar rule in regard to the physician-patient privilege, stating

> When the patient's estate has no interest in preserving confidentiality, or when the estate has been distributed and the representative discharged, the importance of providing complete access to information relevant to a particular proceeding should prevail over whatever remaining interest the decedent may have in secrecy. [Law Revision Commission Comment to Evidence Code section 993.]

Because I was privy to the discussions which led to these recommendations, I am writing this letter to expand on these brief explanations for the Commission recommendations and to bring to your attention some serious injustices that have occurred in jurisdictions that cling to the rule that the privilege continues, but no one can waive it no matter how dire the injustice.

The Evidence Code project started when the Legislature asked the Commission to study whether the Uniform Rules of Evidence should be adopted in California. The Commission retained Professor James Chadbourn, then of UCLA Law School, but later of Harvard Law School, to do the

background studies. In reporting on the privilege under the existing law, and in explaining the URE (Uniform Rules of Evidence), Professor Chadbourn reported that the American Law Institute (ALI), in proposing the URE, recommended that the privilege terminate when there was no one left to claim it. Although there was disagreement, this was the position advocated by Professor Edmund M. Morgan (of Harvard, and one of the nation's giants in evidence law) and Judge Learned Hand; and it was the position eventually recommended by the ALI.. (6 Cal. Law Rev. Com Rpts 389.)

Professor Chadbourn surmised that California law at that time was that the privilege survived the death of the client and any party could claim the privilege on behalf of the deceased client. He based this surmise on a case involving another communication privilege, the physician-patient privilege. (See discussion at 6 Cal. Law Rev. Com Rpts 408-410, particularly the examples of the harmful and unjust results of a posthumous privilege that no one can waive.)

Harrison v. Sutter St. Ry (1897) 116 Cal.156 was a wrongful death action brought by the decedent's administrator. The administrator called the physician who attended the decedent prior to his death to testify that the injuries suffered in the relevant accident caused his death. Defendant objected. *Held:* The testimony is inadmissible because the privilege is the decedent's, and since he is dead, he cannot waive it, even in favor of his estate's representative..

Professor Chadbourn surmised that the same rule would be applied in an attorney-client case. *Collette v. Sarrasin* (1920) 184 Cal. 283 supports that view. That was an action by the father and sole heir of the decedent seeking to have a deed delivered by the decedent to the defendant, his uncle, declared to be a mortgage. The plaintiff father called the attorney who prepared the deed to testify to the instructions given by the decedent and the conversation the attorney held with the decedent concerning the purpose of the deed. The trial court sustained an objection based on the attorney-client privilege because the decedent was dead and his sole heir could not waive the privilege on his behalf. The Supreme Court reversed because it was not established that the attorney was acting as an attorney and not simply as a scrivener. It said, however, that if the attorney was acting as an attorney, "The mere fact that both parties claim under the deceased does not, in our opinion, make the communication admissible, for . . . the privileged communication cannot be received unless that privilege is directly or inferentially waived by the client." (184 Cal. at 289.)

The specific rulings in these cases have been remedied by statute. The personal representative can waive the privilege. There is no privilege in litigation where both parties claim through the deceased client or patient. But, these limited exceptions don't address wrongful death actions brought by dependents. There are other problems that the exceptions don't address: the news reports have identified wrongful imprisonments that have continued for decades because attorneys cannot reveal the communications of deceased clients (see below). Other similar situations may exist that aren't so dramatic and therefore do not attract the attention of the press. The URE and the Evidence Code avoided these problems by providing that the privilege must be claimed by the client himself or by his personal representative. It can't be claimed by someone whose only interest in the privilege is the suppression of relevant evidence.

The Commission discussions focused on the fact that privileges are designed to keep evidence from being disclosed that might be essential to do justice. Keeping relevant evidence secret may result in wrongful convictions, and it may result in wrongful civil judgments. The need to keep

the evidence secret, therefore, must be very great to justify these harsh results. The Law Revision Commission reasoned in 1965 (and the ALI reasoned in promulgating the URE) that the risk of wrongful conviction, or wrongful civil judgment, is necessary to protect the communications of a live client or his estate. But those risks are too steep a price to pay for the protection of the privacy of a person who is deceased and who has no estate remaining to protect.

It appears to me that subsequent events have demonstrated the validity of this Commission's previous conclusions.

In *Arizona v. Macumber* (1976) 112 Ariz. 569, 544 P.2d 1084, the defendant was found guilty of two counts of first degree murder. He was sentenced to two concurrent life terms. At trial, he sought to introduce the testimony of two attorneys that another individual, now deceased, had confessed to them that he had committed the crimes. The trial court, *sua sponte*, refused to receive the evidence on the ground that it was privileged. The Arizona Supreme Court approved the ruling, stating, "The legislature has presumably weighed the possibility of hampering justice in originally providing for the privilege." The case was reversed for a new trial on other grounds.

Justice Holohan concurred in the reversal on other grounds, but disagreed with the ruling on the posthumous privilege. Justice Holohan pointed out that the two attorneys had been defending the third person in an unrelated murder trial in federal court. Their client had confessed to the murders with which Macumber was charged during the course of that representation. When they heard that Macumber was charged, their own client having died in the meantime, they sought and received an informal ethics ruling from the State Bar that they could reveal the confession to the parties involved in the Macumber prosecution. Hence, they did reveal their information to both prosecution and defense; but the trial judge, *sua sponte*, ruled that the evidence was privileged and inadmissible. Justice Holohan opined that, when the confessing client died, the defendant's constitutional right to defend himself against a double charge of first degree murder should override what little interest the deceased client might still have in keeping his confession secret.

The information would be admissible in California under Evidence Code section 1230 as a declaration against penal interest, the declarant being unavailable because of his death. Because California now has no posthumous attorney-client privilege, the trial judge could not have made the ruling he did; and Macumber's defense evidence would not have been excluded.

I attach to this letter an excerpt from the May 4, 2008 edition of the New York Times, headed by the title, "When Law Prevents Righting a Wrong." It relates how a North Carolina lawyer, Staples Hughes, when testifying in support of a motion for a new trial, was about to reveal a secret that he believed would free the defendant, who had been imprisoned for 22 years. The judge, again *sua sponte*, stopped him. The information was a disclosure by a client, now deceased, who had confessed that he had acted alone in committing the double murder for which the defendant was convicted. The judge ruled that the statement was subject to the attorney-client privilege, even though the declarant was deceased. He also ruled on the basis of hearsay. The North Carolina Supreme Court affirmed.

The article points out that the prisoner can make application to a newly created North Carolina Innocence Inquiry Commission, but in view of the privilege ruling by the North Carolina

courts, it seems to me unlikely that Mr. Hughes would be permitted to testify before that tribunal.

Again, in California, the privilege ruling would be different. The hearsay ruling would have to be evaluated in the light of Evidence Code section 1230. Many states do not recognize that exception to the hearsay rule.

The Times article also identifies a Virginia case where an attorney waited 10 years to disclose a communication from a deceased client that may save a convicted defendant from execution. If Virginia recognizes a posthumous attorney-client privilege, the disclosure may not save the convicted defendant from execution.

I attach another article dated March 10, 2008, entitled "Attorneys: Chicago Man Was Wrongfully Convicted." Following that is another article about the same matter, but giving a fuller description of what has occurred. The following article is entitled, "Inmate Hopes To Go Free After Attorneys' Bombshell." The subject of these articles was also the subject of a 60 Minutes segment on March 9, 2008.

These articles relate how Alton Logan has been imprisoned for murder for 26 years, serving a sentence of life without parole. Years before, the real killer, Andrew Wilson, had confessed to the murder to two public defenders who were then defending him on a different charge. Andrew Wilson died in prison last fall, and the attorneys came forward with the information. If the privilege applies posthumously, Alton Logan may have to serve the rest of his life-without-parole sentence because the exonerating information cannot be presented to a court or to any other tribunal.

In *Swidler & Berlin v. United States* (1998) 524 U.S. 399, Chief Justice Rehnquist justifies the posthumous recognition of the privilege with these words:

> Clients may be concerned about reputation, civil liability, or possible harm to friends or family. Posthumous disclosure of such communications may be as feared as disclosure during the client's lifetime. [524 U.S. at 407.]

These reasons are both hypothetical and speculative. At the time he wrote, Justice Rehnquist was aware of the California rule (which had then been in existence for over 31 years), yet he could cite no study or survey suggesting that legal consultation in California had somehow actually been impaired by the rule. (524 U.S. at 405, footnote 2.) In the 41 plus years that the Evidence Code has been in existence in California, in the almost 30 years that I have been a superior court judge, and in the preceding years that I was an attorney in active practice, I have never heard of an instance where anyone was reluctant to talk to an attorney because some time after his death, and after his estate has been completely wound up and distributed, the attorney might be compelled to disclose what was said because that disclosure is essential to ensure justice to persons who are still alive. I know of no surveys suggesting that the California rule has actually impeded the seeking of legal advice.

The Law Revision Commission's proposal to abolish the posthumous recognition of the privilege was first made public in February 1964 with the publication of its tentative recommendation in regard to Article V of the Uniform Rules of Evidence. (6 Cal. Law Rev. Com

Rpts 201.) The Commission received many comments, considered them, and eventually published a tentative recommendation proposing an Evidence Code. Finally, the Commission in February 1965 proposed the Evidence Code. (7 Cal. Law Rev. Com Rpts 1.) The Code was enacted in 1965 with a delayed effective date of January 1, 1967, to provide a further opportunity to address problems that might exist in the adopted version. (8 Cal. Law Rev. Com Rpts 107.) Representatives of the State Bar, the District Attorneys' Association, and the Judges' Association regularly attended Commission meetings while the tentative and final recommendations were being prepared. In all of this process, I do not recall any concrete problem raised in connection with the proposal to abolish the posthumous privilege after the client has died and his estate has ceased to exist.

Far more cogent than Justice Rehnquist's speculation and conjecture is Staple Hughes' comment quoted in the New York Times (see attached):

> What reputational interest did Jerry [the real killer] have? He had pleaded guilty to killing two people. He didn't have an estate. His estate was a pair of shower shoes and two paperback books.

The California rule has been in existence since the Evidence Code took effect on January 1, 1967. I am unaware of any complaints about the rule. I have never heard of any actual problems resulting from the rule. I have never heard a complaint that a prospective client has said, "If you can't assure me that what I say won't be revealed after I'm dead and my estate has been distributed, I won't consult with you." In the absence of any reports about problems created by the rule, I urge you to follow the maxim, "If it ain't broke, don't fix it."

In the light of the foregoing reports concerning the injustices created by the posthumous privilege in Arizona, Illinois, North Carolina, and Virginia, I think it is obvious that the Law Revision Commission made the right decision when it proposed the Evidence Code in 1965, and the Legislature made the right decision when it enacted the Code as proposed. I don't think we want results like those set forth above in California.

Very truly yours,

Joseph B. Harvey

Joseph B. Harvey

att. 3

The New York Times
nytimes.com

May 4, 2008

THE NATION

When Law Prevents Righting a Wrong

By ADAM LIPTAK

STAPLES HUGHES, a North Carolina lawyer, was on the witness stand and about to disclose a secret he believed would free an innocent man from prison. But the judge told Mr. Hughes to stop.

"If you testify," Judge Jack A. Thompson said at a hearing last year on the prisoner's request for a new trial, "I will be compelled to report you to the state bar. Do you understand that?"

But Mr. Hughes continued. Twenty-two years before, he said, a client, now dead, confessed that he had acted alone in committing a double murder for which another man was also serving life. After his own imprisoned client died, Mr. Hughes recalled last week, "it seemed to me at that point ethically permissible and morally imperative that I spill the beans."

Judge Thompson, of the Cumberland County Superior Court in Fayetteville, did not see it that way, and some experts in legal ethics agree with him. The obligation to keep a client's secrets is so important, they say, that it survives death and may not be violated even to cure a grave injustice — for example, the imprisonment for 26 years of another man, in Illinois, who was freed just last month.

A lawyer's broad duty to keep clients' confidences is the bedrock on which the justice system is built, they argue. If clients did not feel free to speak candidly, their lawyers could not represent them effectively. And making exceptions risks eroding the trust between clients and their lawyers in future cases. Experts in legal ethics are quick to point out that the various players in the adversary system have assigned roles and that lawyers generally must tend to a limited one.

"Lawyers are not undercover informants," said Stephen Gillers, who teaches legal ethics at New York University. Indeed, said Steven Lubet, who teaches legal ethics at Northwestern, few clients would confess to their lawyers if they knew the lawyers might some day choose to disclose that information.

The analysis does bend a bit, in two ways, in cases involving death.

Legal ethics rules vary from state to state, but many allow disclosure of client confidences to prevent certain death or substantial bodily harm. That means, several legal ethics experts said, that lawyers may break a client's confidence to stop an execution, but not to free an innocent prisoner. Massachusetts seems to be alone in allowing lawyers to reveal secrets "to prevent the wrongful execution or incarceration of another."

And there is debate over how a client's death affects a lawyer's obligation to keep the client's secrets. Most

lawyers and courts say the obligation lives on. But it can be hard to live with the consequences.

"I've never, ever, ever before violated a client's confidence, never," Mr. Hughes told Judge Thompson as he described what his client, Jerry Cashwell, had told him. "But Jerry's dead. My disclosure can't hurt him and I have to weigh that disclosure against the continuing harm" to the lifer, Lee Wayne Hunt.

Other lawyers have recently faced similar choices. In the Illinois case, Dale Coventry and W. Jameson Kunz waited 26 years to speak up about a client's confession that freed Alton Logan, who had been serving a life sentence for murder. The lawyers said their client had given them permission to talk once he was dead. Last month, Mr. Logan was granted a new trial and freed on bond.

A Virginia lawyer, Leslie P. Smith, waited 10 years to disclose a secret that may save Daryl R. Atkins from execution, acting only after the Virginia State Bar gave him permission to speak.

Those lawyers have faced criticism from some laypeople for staying quiet so long. Mr. Hughes, by contrast, was rewarded with a disciplinary complaint for speaking up at all.

"Mr. Hughes has committed professional misconduct," Judge Thompson wrote last year in a decision refusing to consider testimony that seemed to clear Mr. Hunt. The disciplinary complaint against Mr. Hughes was dismissed in January in a confidential decision. But the next day, the North Carolina Supreme Court refused to hear an appeal of Judge Thompson's ruling, which had also accepted the prosecution's argument that Mr. Hughes' testimony was properly excluded because it was hearsay. Mr. Hughes is 56 and has seen a few things in a long career as a defense lawyer. He said there was not much reason to focus on his own travails.

"The only consequence for me is the bitterness and anger I feel over Mr. Hunt," Mr. Hughes said. "I go home, have a glass of wine, work in the yard. And there's a guy sitting in a prison camp two counties away, and my feeling is he's going to be there for the rest of his life."

Most experts in legal ethics agree that lawyers should be allowed to violate a living client's confidences to save an innocent man from execution, but not to free someone serving a prison term, however long.

"I prefer to draw the line at the life-and-death situation," said Monroe Freedman, who teaches legal ethics at Hofstra. "That situation is sufficiently rare that is doesn't present a systemic threat. If that is extended to incarceration in general, it would end the sense of security clients have in speaking candidly with their lawyers."

The questions get more complicated when the client has died.

Mr. Cashwell, Mr. Hughes's client, committed suicide in 2002, more than a decade after he pleaded guilty to the 1984 killings of Roland and Lisa Matthews. Prosecutors had maintained that Mr. Hunt also participated in the killings, and Mr. Cashwell did nothing to refute them. But Mr. Hughes said that Mr. Cashwell confessed in private that he single-handedly killed the couple after an argument over whether a television was playing too loud. "Lee Wayne Hunt had nothing to do with it," Mr. Hughes said.

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Mr. Hunt has one novel avenue left — applying to the recently created North Carolina Innocence Inquiry Commission. That board makes recommendations to a three-judge panel that can free exonerated prisoners.

Both the United States Supreme Court and the North Carolina Supreme Court have said the lawyer-client privilege survives death, though they recognized that narrow exceptions might be possible. "Clients may be concerned about reputation, civil liability or possible harm to friends of family" if their secrets were disclosed after they died, Chief Justice William H. Rehnquist wrote for the majority in a 1998 Supreme Court decision.

Professor Freedman said that room remains for case-by-case analysis, and that Mr. Hughes was probably entitled to tell what he knows.

"If there is no threat of civil action against the client's estate and there are no survivors who continue to believe in the client's innocence," Professor Freedman said, "there is no confidentiality obligation to begin with."

Mr. Hughes said that sounded about right.

"What reputational interest did Jerry have?" he asked. "He had pleaded guilty to killing two people. He didn't have an estate. His estate was a pair of shower shoes and two paperback books."

EX 8

Skip to comments.

Attorneys: Chicago Man Was Wrongfully Convicted

CBS2-Chicago ^ | 10 MARCH 2008 | Dorothy Tucker

Posted on **Tuesday, March 11, 2008 6:48:00 AM** by **radar101**

Attorney-Client Privelege Kept Them From Speaking Up Before Man Spent 26 Years In Prison

Alton Logan has spent the last 26 years in jail on a murder conviction that's now being called into question.

Two local attorneys kept a secret for more than a quarter of a century. They knew about a wrongful conviction, but could not say anything.

CBS 2's Dorothy Tucker reports they finally told their story on "60 Minutes" Sunday night, and went to court Monday.

Alton Logan has spent 26 years behind bars for a crime he didn't commit. In 1983 he was wrongly convicted of shooting a guard at a McDonald's. Back then, two men, attorneys Dale Conventry and Jamie Kunz knew Logan was innocent, because they were representing the real killer, Andrew Wilson, who admitted to them he had committed the murder.

But that information didn't become public knowledge until Wilson died last fall and the attorneys finally told their story on "60 Minutes" March 9. They said they kept the secret because they couldn't violate attorney-client privilege.

"I could not figure out a way and still cannot figure out a way, how we could have done something to help Alton Logan that would not have put Andrew Wilson in jeopardy of another capital case," Kunz said.

Logan accepts the explanation, but it still makes him angry.

"Why would you allow this person to be prosecuted, convicted, sent to prison for all these years?" he said.

Logan has been fighting to get his conviction overturned ever since.

His case was back in court Monday, and Kunz was present. His knowledge -- spelled out in this affidavit -- that Logan was not responsible for the crime may be considered as evidence to get Logan a new trial. But a new trial could take months, and Logan's family wants the state to free him now.

"My brother been in jail, has been incarcerated... since 1982, 26 years of his life," Tony Logan said. "He didn't get a chance to raise a family, he didn't get a chance to spend time with me and my younger brother here."

And to make sure another innocent man isn't sent to prison because lawyers don't want to violate client-attorney

EX 9

privileges, some attorneys involved in the case talked Monday about the need to make exceptions to the rule. But until that happens, Kunz had a message for Logan.

"I would say you poor son of a b----. I know you're innocent. I believe you're innocent. I'm sorry I couldn't do more. I wish you luck," Kunz said.

Attorneys who don't want to see any changes to the rules of attorney-client privilege say it would hurt the profession.

Those opposed say it's important that clients know they can trust their lawyers, even if they confess to a crime where someone else is being blamed.

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Apr 12, 2008 1:00 pm US/Central

Inmate Hopes To Go Free After Attorneys' Bombshell

Attorney-Client Privelege Kept Lawyers From Speaking Up, Although Another Man Had Told Them He Did It

CHICAGO (AP) —

For nearly 26 years, the affidavit was sealed in an envelope and stored in a locked box, tucked away with the lawyer's passport and will. Sometimes he stashed the box in his bedroom closet, other times under his bed.

It stayed there -- year after year, decade after decade.

Then, about two years ago, Dale Coventry, the box's owner, got a call from his former colleague, W. Jamie Kunz. Both were once public defenders. They hadn't talked in a decade.

"We're both getting on in years," Kunz said. "We ought to do something with that affidavit to make sure it's not wasted in case we both leave this good Earth."

Coventry assured him it was in a safe place. He found it in the fireproof metal box, but didn't read it. He didn't need to. He was reminded of the case every time he heard that a wronged prisoner had been freed.

In January, Kunz called again. This time, he had news: A man both lawyers had represented long ago in the murder of two police officers, Andrew Wilson, had died in prison.

Kunz asked Coventry to get the affidavit.

"It's in a sealed envelope," Coventry said.

"Open it," Kunz said, impatiently.

And so, Coventry began reading aloud the five-line declaration the lawyers had written more than a quarter-century before:

An innocent man was behind bars. His name was Alton Logan. He did not kill a security guard in a McDonald's restaurant in January 1982.

"In fact," the document said, "another person was responsible."

They knew, because Andrew Wilson told them: He did it.

But that was the catch.

Lawyer-client privilege is not complete; most states allow attorneys to reveal confidences to prevent a death, serious bodily harm or criminal fraud. But this case didn't offer that kind of exception.

So when Andrew Wilson told his lawyers that he, and not Alton Logan, had killed the guard, they felt powerless -- aware of information that could free a man they believed to be innocent, but unable to do anything with that knowledge. And for decades, they said nothing.

As they recall, Wilson -- who was facing charges in the February 1982 murders of police officers William Fahey and Richard O'Brien -- was even a bit gleeful about the

Alton Logan has spent the last 26 years in jail on a murder conviction that's now being called into question. 60 Minutes

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McDonald's shooting. To Kunz, he seemed like a child who had been caught doing something naughty.

"I was surprised at how unabashed he was in telling us," he says. "There was no sense of unease or embarrassment. ... He smiled and kind of giggled. He hugged himself, and said, 'Yeah, it was me.'"

Alton Logan already had been charged with the McDonald's shooting that left one guard dead and another injured. Another man, Edgar Hope, also was arrested, and assigned a public defender, Marc Miller.

Miller says he was stunned when his client announced he didn't know Alton Logan and had never seen him before their arrests. According to Miller, Hope was persistent: "You need to tell his attorney he represents an innocent man."

Hope went a step further, Miller says: He told him Andrew Wilson was his right-hand man -- "the guy who guards my back" -- and urged the lawyer to confirm that with his street friends. He did.

Miller says he eventually did tell Logan's lawyer his client was innocent, but offered no details.

First, though, he approached Kunz, his fellow public defender and former partner.

"You think your life's difficult now?" Miller recalls telling Kunz. "My understanding is that your client Andrew Wilson is the shooter in the McDonald's murder."

Coventry and Kunz brought Wilson to the jail law library and this, they say, was when they confronted him and he made his unapologetic confession. They didn't press for details. "None of us had any doubt," Coventry says.

And, he adds, it wasn't just Wilson's word. Firearms tests, according to court records, linked a shotgun shell found at McDonald's with a weapon that police found at the beauty parlor where Andrew Wilson lived. The slain police officers' guns also were discovered there.

Now the lawyers had two big worries: Another killing might be tied to their client, and "an innocent man had been charged with his murder and was very likely ... to get the death penalty," Kunz says.

But bound by legal ethics, they kept quiet.

Instead, they wrote down what they'd been told. If the situation ever arose when they could help Logan, there would be a record -- no one could say they had just made it up. They say they didn't name Wilson, fearing someone would hear about the document and subpoena it. They didn't even make a copy.

But on March 17, 1982, Kunz, Coventry and Miller signed the notarized affidavit: "I have obtained information through privileged sources that a man named Alton Logan ... who was charged with the fatal shooting of Lloyd Wickliffe ... is in fact not responsible for that shooting ... "

Knowing the affidavit had to be secret, Wilson's lawyers looked for ways to help Logan without hurting their client. They consulted with legal scholars, ethics commissions, the bar association.

Kunz says he mentioned the case dozens of times over the years to lawyers, never divulging names but explaining that he knew a guy serving a life sentence for a crime committed by one of his clients.

There's nothing you can do, he was told.

Coventry had another idea. He figured Wilson probably would be executed for the police killings, so he visited him in prison and posed a question: Can I reveal what you told me, the lawyer asked, after your death?

"I managed to say it without being obnoxious," Coventry says. "He wasn't stupid. He understood exactly what I was asking. He knew he was going to get the death penalty and he agreed."

Coventry says he asked Wilson the same question years later -- and got the same answer.

But ultimately, Wilson was sentenced to life in prison without parole.

His death penalty was reversed after he claimed Chicago police had electrically shocked, beaten and burned him with a radiator to secure his confession. (Decades later, a special prosecutor's report concluded police had tortured dozens of suspects over two decades.)

Logan's case was working its way through the courts, too. During the first of two trials in

EX 12

years in this hellhole, I want to get as far away from here as I possibly can," he says.

Last month, the Chicago Sun-Times, in an editorial, urged the attorney general or governor to release Logan, noting his claims of innocence "ring achingly true." (The state has declined comment on the case.)

Logan keeps a copy of the 26-year-old affidavit in his cell. Every now and then, he reads the single paragraph, trying to divine what the lawyers were thinking and if this piece of paper will help unlock the prison doors.

He's not banking on it.

"I'm not sold on it," he says. "The only time I'll be sold is when they tell me I can go."

For now, though, Alton Logan waits. The heavy prison doors clank behind him as he walks down the corridor to his cell. He does not look back.

EX 13

POSTHUMOUS PRIVILEGE UNDER UNIFORM RULES OF EVIDENCE

The portion of the URE that sets forth who may claim the privilege is in Rule 502(c), which states:

> (c) Who may claim privilege. The privilege under this rule may be claimed by the client, the client's guardian or conservator, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. A person who was the lawyer or the lawyer's representative at the time of the communication is presumed to have authority to claim the privilege, but only on behalf of the client.

The full text of Rule 502, which relates to the attorney-client privilege, is available on the web at <<http:www. http://www.law.upenn.edu/bll/archives/ulc/ure/evid1200.htm>>.

STATES WITH A POSTHUMOUS ATTORNEY-CLIENT PRIVILEGE LIKE THE URE

The twenty-five states that have a posthumous attorney-client privilege similar to the URE are:

Alabama: Ala. R. Evid. 502
Alaska: Alaska R. Evid. 503
Arkansas: Ark. R. Evid. 502
Delaware: Del. R. Evid. 502
Florida: Fla. Stat. Ann. § 90.502
Hawaii: Haw. R. Evid. 503
Idaho: Idaho R. Evid. 502(c)
Kansas: Kan. Stat. Ann. § 60-426
Kentucky: Ky. R. Evid. 503
Louisiana: La. R. Evid. 506
Maine: Me. R. Evid. 502
Mississippi: Miss. R. Evid. 502(c)
Nebraska: Neb. Rev. Stat. § 27-503
Nevada: Nev. Rev. Stat. §§ 49.035-49.115
New Hampshire: N.H. R. Evid 502
New Jersey: N.J.S.A. 2A:84A-20
New Mexico: N.M. R. Evid. 11-503
North Dakota: N.D. R. Evid. 502
Oklahoma: Okla. Stat. Ann. Tit. 13 § 2502
Oregon: Or. Rev. Stat. § 40.225
South Dakota: S.D. Codified Laws §§ 19-13-2–19-13-5
Texas: Tex. R. Evid. 503
Utah: Utah R. Evid. 504

Vermont: Vt R. Evid. 502(c)
Wisconsin: Wis. Stat. Ann. § 905.03(3).

See also Wydick, *The Attorney-Client Privilege: Does It Really Have Life Everlasting?*, 87 Ky. L.J. 1165 n.88 (1999) (listing these states as having posthumous attorney-client privilege rule similar to URE).

STATES WITH AN ATTORNEY-CLIENT PRIVILEGE GOVERNED BY COMMON LAW

The states that have an attorney-client privilege governed by common law are: Arizona, Colorado, Connecticut, Georgia, Illinois, Indiana, Iowa, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Virginia, Washington, West Virginia, and Wyoming. See Wydick, *The Attorney-Client Privilege: Does It Really Have Life Everlasting?*, 87 Ky. L.J. 1165 n.88 (1999).

Apparently, fifteen of these states have adopted rules based on the URE, but not for the attorney-client privilege. (The fifteen states are Arizona, Colorado, Indiana, Iowa, Michigan, Minnesota, Montana, North Carolina, Ohio, Rhode Island, South Carolina, Tennessee, Washington, West Virginia, Wyoming.) See Legal Information Institute of Cornell University of Law, available at <<http://www.law.cornell.edu/uniform/evidence.html>> (listing states that have adopted the URE).)