

Memorandum 2008-45

**Attorney-Client Privilege After Client's Death:
Clarification of Probate Code Section 12252**

The Commission is studying whether the attorney-client privilege should survive the client's death, and if so, under what circumstances. At the September meeting, the Commission provisionally decided to preserve the general approach of existing law on the issue. That is, a deceased client's privilege should (1) survive during estate administration, and (2) be held by the personal representative of the estate. See CLRC Minutes (Sept. 2008), p. 4. The proposed law will include some minor changes consistent with that general approach.

This memorandum discusses recent amendments made by AB 403 (Tran) to Probate Code Section 12252, which relates to reappointment of a personal representative. In an earlier memorandum, the staff recommended that the Commission clarify the meaning of Section 12252. See CLRC Memorandum 2008-20, p. 20. Now that the Commission has selected a general approach to the posthumous attorney-client privilege, it should consider how to handle Section 12252.

This memorandum first sets forth the recent amendments by AB 403 to Section 12252. The memorandum then discusses two different interpretations of the amendments. Next, the memorandum considers revisions to clarify the meaning of the amendments.

RECENT AMENDMENTS TO PROBATE CODE SECTION 12252

AB 403 amended Section 12252 by adding the underlined text below:

12252. If subsequent administration of an estate is necessary after the personal representative has been discharged because other property is discovered, disclosure is sought of a communication that is deemed privileged in the absence of a waiver by a personal representative under Article 3 (commencing with Section 950) of Chapter 4 of Division 8 of the Evidence Code, or because it

becomes necessary or proper for any other cause, both of the following shall apply:

(a) The court shall appoint as personal representative the person entitled to appointment in the same order as is directed in relation to an original appointment, except that the person who served as personal representative at the time of the order of discharge has priority. The appointed personal representative shall be a holder of the decedent's lawyer-client privilege for purposes of Article 3 (commencing with Section 950) of Chapter 4 of Division 8 of the Evidence Code.

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

See 2007 Cal. Stat. ch. 388, § 1 (AB 403).

As shown above, AB 403 made two significant amendments to Section 1225.2. One amendment added language to the introductory paragraph, which sets forth prerequisites for the reappointment of a personal representative.

The second amendment added language to subdivision (a), providing that a reappointed personal representative holds the deceased client's privilege.

Two possible interpretations of these amendments are discussed below.

POSSIBLE INTERPRETATIONS OF THE RECENT AMENDMENTS

Expansion of Privilege To Apply without Estate Administration

One possible interpretation is that the amendments expand the privilege by providing for reappointment of a personal representative solely to hold the privilege, even when there is no estate to administer. This interpretation was discussed in detail in CLRC Memorandum 2008-20, at pages 17-20.

Under this interpretation, the privilege may be resurrected *anytime* there is an attempt to disclose a communication that would be privileged if the client were still alive. The privilege could be resurrected by reappointment of a personal representative, *even when there is no estate to administer*.

This interpretation would be a significant expansion of the privilege, as set forth in the Evidence Code. The Evidence Code provides that the privilege survives only so long as there is a personal representative. See Evid. Code §§ 953-

954 & Comments. After an estate is administered and personal representative discharged, the privilege ends. *Id.*

As the Comment to Evidence Code Section 954 says:

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 personal representative is discharged.*

(Emphasis added.) If the amendment to Section 12252 is interpreted to permit resurrection of the privilege through reappointment of a personal representative *even when there is no estate to administer*, that would squarely contradict the theory underlying the Evidence Code provisions enacted years ago on recommendation of the Commission.

Clarification that Privilege Survives During Subsequent Estate Administration

Another possible interpretation of the recent amendments to Section 12252 is that they were only intended to clarify that (1) if an estate is reopened, the privilege survives during subsequent estate administration, and (2) in that case, the reappointed personal representative holds the privilege.

Former law might have been slightly unclear as to whether a personal representative who is reappointed to perform subsequent estate administration holds the decedent's privilege. The above-quoted Comment to Evidence Code Section 954 might have been interpreted to reflect an intent to end the privilege *forever* after an estate closed and personal representative was discharged. However, the plain language of the relevant provisions of the Evidence Code place no such restriction on the personal representative's ability to assert the privilege. See Sections 953(c) (personal representative holds deceased client's privilege) & 954(a) (privilege may be claimed by holder).

As amended last year, Section 12252 made it clear that the privilege revives during subsequent estate administration. Subdivision (a) now expressly provides that a personal representative reappointed to perform subsequent estate administration holds the decedent's privilege. The amendment to Section 12252 may have been intended to do nothing more than this.

Proper Interpretation of Section 12252

Which interpretation of Section 12252 is correct?

As discussed below, it appears that the Legislature intended the amendments to Section 12252 merely to clarify that a reappointed personal representative holds the decedent's privilege. It does not appear that the Legislature intended to expand the privilege.

Analysis of AB 403 by Senate Committee on the Judiciary

The analysis by the Senate Committee on the Judiciary (the "Committee") suggests that the recent amendments were not intended to expand the privilege.

While there is some language in the Committee's analysis that could support either interpretation, there is other language that is incompatible with the first interpretation, *because it makes clear that there was no intention to make a significant substantive change in the law*. The Committee squarely rejected indefinite survival of the privilege, out of concern that it might not be appropriate in all civil actions, could set a precedent for expanding other evidentiary privileges beyond death, and could lead to instances where relevant evidence is inappropriately excluded, even though the privilege is no longer protecting the interests of a deceased client. Senate Committee on Judiciary Analysis of AB 403 (June 26, 2007), p. 6. The Committee added:

Because the Evidence Code was specifically drafted so that the attorney-client privilege does not indefinitely survive a client's death, it would be appropriate to have the Law Revision Commission conduct a study of whether the privilege should extend beyond death *prior to enacting such a drastic policy change*.

Id. (emphasis added). That position is incompatible with the first interpretation, which would make the privilege indefinitely survive the client's death.

Due to the concerns cited by the Committee, provisions were removed from the bill that would have amended the Evidence Code to make the privilege survive indefinitely. When those provisions were removed, subdivision (a) of Section 12252 was amended to expressly provide that a reappointed personal representative holds the decedent's privilege.

In light of all of the above, it appears that the Committee's intent in passing AB 403 was merely to clarify that a personal representative who is reappointed to perform subsequent estate administration holds the decedent's privilege.

Concurrence Analysis

The Assembly's analysis regarding whether to concur in the Senate amendments also strongly suggests an intent merely to clarify that a personal

representative reappointed to perform subsequent administration holds the privilege. The only portion of the analysis relating to the amendments to Section 12252 states:

The Senate amendments narrow the Assembly version of this bill by providing that:

(1) *In a subsequent administration of an estate, the court-appointed personal representative shall be a holder of the decedent's lawyer-client privilege.*

(2) CLRC shall study the issue of whether and, if so, under what circumstances, the attorney-client privilege should survive the death of the client [and] report its findings to the Legislature on or before July 1, 2009.

Assembly Floor Analysis of AB 403 (Aug. 29, 2007), p. 1 (emphasis added).

Nothing in that analysis implies that a personal representative may be reappointed outside of the context of subsequent administration, solely to hold the privilege.

Vote Designation Changed from Two-Thirds to Majority Vote

The designation by Legislative Counsel of the number of votes needed to pass AB 403 provides further support that the recent amendments were not intended to expand the privilege.

An earlier version of the bill would have made the attorney-client privilege survive indefinitely. Accordingly, Legislative Counsel designated the bill as requiring a two-thirds vote. It cited the Truth-in-Evidence constitutional provision, which requires a two-thirds vote in both houses to enact a new evidentiary exclusion in criminal cases. See Cal. Const. art. I, § 28(d).

When the bill was amended to its enacted form, Legislative Counsel re-designated the bill as requiring only a majority vote. This removal of the two-thirds vote requirement indicates that the enacted version was *not* seen as an expansion of the privilege. If the enacted version had been understood as an expansion, which could cause a new exclusion in a criminal case, it seems likely that the enacted version would still have been subject to a two-thirds vote requirement.

Limited Scope

Finally, the limited scope of Section 12252 suggests that the recent amendments were not intended to expand the privilege.

Section 12252 relates to the *reappointment* of a personal representative (i.e., appointment of a personal representative where there already had been a personal representative). If the intent had been to expand the privilege to survive even when there is no estate to administer, it would be odd to expand the privilege *only* where there previously had been a personal representative. In other words, if the intent was for the privilege to survive when there was no estate, it seems unlikely that the rule would be conditioned on the prior existence of an estate.

Conclusion

For all of the reasons discussed above, it is probable that the recent amendments to Section 12252 were not intended to expand the privilege. The amendments do not appear to authorize appointment of a personal representative when there is no estate to administer. Rather, the amendments seem intended merely to clarify that upon reopening of an estate, a reappointed personal representative holds the decedent's privilege.

REVISIONS TO CLARIFY RECENT AMENDMENTS

As discussed above, the recent amendments may be subject to two interpretations. Each one results in a very different outcome as to the duration of the posthumous privilege. As part of its assigned task to study the posthumous privilege, the Commission should seek to remove any ambiguity in Section 12252 so that the duration of the privilege is clear.

Policy To Respect Recent Enactments

In considering whether to clarify the meaning of the recent amendments, it should be noted that the Commission has a general policy of respecting recent enactments. The Commission seeks to avoid disrupting recent policy judgments made by the Legislature.

If the recent amendments to Section 12252 were intended merely to clarify that a personal representative reappointed to perform subsequent estate administration holds the privilege, further clarification would not be at odds with that policy.

However, if the recent amendments were intended to *expand* the privilege (to resurrect it by reappointment of a personal representative even when there is no estate to administer), the amendments would seem to reflect a clear policy

judgment by the Legislature. However, that would not *necessarily* mean that the Commission should defer to that judgment. The amendments to Section 12252 were simultaneous with a directive for the Commission to study “whether, and if so, under what circumstances, the attorney-client privilege should survive the death of the client.” 2007 Cal. Stat. ch. 388, § 2 (AB 403). The Commission’s policy not to disrupt recent policy judgments by the Legislature would seem to be overridden by the clear directive that the Commission study the matter.

Revision To Avoid Interpretation that Section 12252 Expands Privilege

The recent amendment to the introductory paragraph of Section 12252 could be interpreted to expand the privilege to exist even when there is no estate to administer. As discussed above, the staff does not believe that was the intended result.

Furthermore, if that interpretation were correct, it would be at odds with the approach selected by the Commission. At the September meeting, the Commission decided generally to stick with its original approach, under which the privilege *only* survives *during estate administration*.

Accordingly, **the staff recommends the following clarifying revision of the introductory paragraph:**

12252. If subsequent administration of an estate is necessary after the personal representative has been discharged because other property is discovered, ~~disclosure is sought of a communication that is deemed privileged in the absence of a waiver by a personal representative under Article 3 (commencing with Section 950) of Chapter 4 of Division 8 of the Evidence Code, or because it becomes necessary or proper for any other cause, both of the following shall apply:~~

....

Comment. Section 12252 is amended to remove language relating to a personal representative holding the attorney-client privilege. That issue is addressed in Evidence Code Section 953.

This revision would avoid an interpretation of Section 12252 that would expand the privilege beyond its intended scope.

Revision To Clarify Survival During Subsequent Estate Administration

As discussed above, AB 403 also added language to Section 12252(a). This added language expressly states that a reappointed personal representative holds the decedent’s attorney-client privilege. It thus clarifies that a deceased client’s privilege survives during subsequent estate administration.

In essence, the added provision is a rule relating to who holds the deceased client's privilege. That issue might be better addressed in Evidence Code Section 953, which relates to who holds the privilege. That way, all rules identifying the holder of the decedent's privilege would be located in the same place. See Evid. Code § 953(c).

The Commission will already be proposing revisions to Evidence Code Section 953 to end the privilege when there is no estate to administer (e.g., after final distribution of the estate), instead of after discharge of the personal representative (which may never occur). It would make sense to address the privilege held during subsequent estate administration in the same Evidence Code section.

That would also provide an opportunity to address the fact that some personal representatives are never discharged. Evidence Code Section 953 could provide that *any* personal representative holds the privilege during subsequent administration, without conditioning that rule on the prior discharge of a personal representative (as Section 12252 appears to do).

In light of the above, **the staff recommends moving the clarification from Probate Code Section 12252(a) to Evidence Code Section 953.**

Accordingly, the language in Probate Code Section 12252(a) containing the clarification would be deleted.

12252. ...

(a) The court shall appoint as personal representative the person entitled to appointment in the same order as is directed in relation to an original appointment, except that the person who served as personal representative at the time of the order of discharge has priority. ~~The appointed personal representative shall be a holder of the decedent's lawyer-client privilege for purposes of Article 3 (commencing with Section 950) of Chapter 4 of Division 8 of the Evidence Code.~~

....

Comment. Section 12252 is amended to remove language relating to a personal representative holding the attorney-client privilege. That issue is addressed in Evidence Code Section 953.

To incorporate the clarification from Section 12252(a), and to adjust the privilege to end when there is no estate to administer, **the staff recommends revising Evidence Code Section 953 along the following lines:**

953. As used in this article, "holder of the privilege" means:

(a) The client when ~~he~~ the client has no guardian or conservator.

(b) A guardian or conservator of the client when the client has a guardian or conservator.

(c) The personal representative of the client if the client is dead. The personal representative holds the privilege during estate administration, until the order of final distribution of the estate, and during any subsequent administration of the estate.

(d) A successor, assign, trustee in dissolution, or any similar representative of a firm, association, organization, partnership, business trust, corporation, or public entity that is no longer in existence.

Comment. Section 953 is amended to clarify when a personal representative holds the decedent's lawyer-client privilege, and to revise a gender reference. See also Prob. Code § 12252 (appointment of personal representative for subsequent administration of an estate).

NEXT STEP

The next memorandum will present a draft of a tentative recommendation, which will include the revisions to Evidence Code Section 953 and Probate Code Section 12252 presented in this memorandum. If the Commission decides to make different revisions, the staff will incorporate the necessary changes in the tentative recommendation.

Respectfully submitted,

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