

Memorandum 2008-46

**Attorney-Client Privilege After Client's Death:
Draft Tentative Recommendation**

At the September meeting, the Commission decided provisionally that its draft tentative recommendation should, as a general matter, stick with the Commission's original policy determination that a deceased client's privilege should survive until the client's estate is distributed. CLRC Minutes (September 2008), p. 4.

The Commission decided to make two minor adjustments to the privilege in the draft tentative recommendation:

- (1) Change the terminating event of the privilege to final distribution of the client's estate, rather than discharge of a personal representative.
- (2) Expand an existing exception when all parties claim through the deceased client, to include a claim under a nonprobate transfer.

Id. An attached draft tentative recommendation implements the second of those adjustments, but not the first.

The staff decided against including the first adjustment after receiving new information from the Executive Committee of the Trusts and Estates Section of the State Bar (TEXCOM). See the attached email from Neil Horton. That new information is discussed below.

TERMINATION OF THE PRIVILEGE

Termination on Final Distribution of the Estate

The Commission had tentatively decided that the privilege should end upon final distribution of the estate, rather than on discharge of the personal representative. That would preclude the privilege from being claimed by a personal representative who has no further duty to perform as personal representative, but who has not been formally discharged. See CLRC

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Memorandum 2008-35, pp. 14-16; see also 2 CEB, California Decedent Estate Practice § 21.44 (stating that when the personal representative has not posted a bond, "some attorneys do not have the personal representative discharged").

To preclude such a personal representative from holding the privilege beyond the circumstances in which its survival is justified, the Commission tentatively decided to end the privilege upon final distribution of the estate, regardless of whether the personal representative is formally discharged.

To implement that decision, the staff recommended revising Evidence Code Section 953(c) as follows:

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).

See Memorandum 2008-45, pp. 8-9.

Unresolved Claims Against the Estate after Final Distribution

The approach described above is based on the assumption that a personal representative has no duties following final distribution.

However, TEXCOM now points out that "in many instances, the court will make an order of final distribution, but will authorize the personal representative to retain a substantial reserve." See Exhibit p. 1. TEXCOM explains that "[t]he reserve exists to deal with contingencies, most usually an unresolved claim against the estate, such as undetermined tax liabilities." *Id.*

As TEXCOM recognizes, the purpose of the privilege would not be served if it ended upon final distribution while an unresolved claim existed against the estate. See *id.* A claimant against the estate could compel disclosure of the decedent's attorney-client communications relating to that claim. According to

the Commission's original policy determination, that possibility could significantly chill attorney-client communication, undermining the purpose of the privilege.

The proposed change discussed above was intended to cure a theoretical problem that the privilege might survive perpetually if the personal representative is never discharged. However, the new information from TEXCOM suggests that the change would have an unintended substantive effect, ending the privilege prematurely where there are some personal representative duties that remain after final distribution of the estate.

Surviving Claim Brought by Successor in Interest When There is No Estate

The staff sees another way in which the proposed revision could have an unintended substantive effect. The revision would limit the personal representative's authority to hold the privilege "during estate administration, until the order of final distribution of the estate, and during any subsequent administration of the estate." It appears that this would change existing law by making the privilege inapplicable when a personal representative is appointed for reasons other than estate administration.

For example, a deceased client's successor in interest can bring a surviving claim on the decedent's behalf. See Code of Civ. Proc. § 377.30 (providing that successor in interest may commence surviving action if there is no personal representative).

When that occurs, the successor in interest may be appointed special administrator, which is a type of personal representative. See Code of Civ. Proc. § 377.33; Prob. Code § 58. Thus, the special administrator would hold the decedent's attorney-client privilege. See Evid. Code § 953(c) (personal representative holds decedent's attorney-client privilege); *cf. Rittenhouse v. Superior Court*, 235 Cal. App. 3d 1584, 1588-89, 1 Cal. Rptr. 2d 595 (1991) (special administrator, as personal representative, holds decedent's physician-patient privilege).

If Evidence Code Section 953(c) were revised to expressly state that a personal representative holds the privilege "during estate administration ... " (as the staff recommended at pages 8-9 of Memorandum 2008-45), it seems that the privilege would *not* survive in the circumstance described above. See Code of Civ. Proc. § 377.30. That would appear to substantively change the law. See *id.*; Evid. Code

§ 953(c) (personal representative holds privilege, without qualification); see also Prob. Code § 58 (personal representative includes special administrator).

Recommendation

The staff recommends against revising Evidence Code Section 953(c) to expressly state that the personal representative holds the privilege during estate administration, with the privilege ending on final distribution of the estate. The proposed change was intended as a technical clarification to address a theoretical problem — the perpetual survival of the privilege when administration of an estate is complete, but the personal representative is never discharged.

The staff considered alternative ways to address that problem. However, the staff is concerned that any attempt to precisely describe termination of the privilege in the statute would add complexity and could have unintended consequences. The risk of creating new problems may be greater than the potential problem in existing law.

In light of the above, it might be more appropriate to address the issue in a Comment, rather than in statutory language.

The staff has recommended that Evidence Code Section 953(c) be revised for another purpose. See Memorandum 2008-45, pp. 7-9. That revision would be part of an effort to clarify the meaning of recent amendments to Probate Code Section 12252. Specifically, the revision would clarify that the recent amendments to Section 12252 provide that a personal representative performing subsequent estate administration holds the deceased client's privilege. The revision would relocate that clarification from Probate Code Section 12252 to Evidence Code Section 953(c), so that rules pertaining to the holder of the privilege are in the same place.

That change could be implemented, along with Comment language clarifying that the privilege exists only while a personal representative is acting as a personal representative, with the following proposed revision:

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, including a personal representative appointed pursuant to Probate Code Section 12252.

(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. Subdivision (a) of Section 953 is amended to revise a gender reference.

Subdivision (c) is amended to make clear that a personal representative holds the decedent's lawyer-client privilege at anytime while the personal representative is performing the duties of a personal representative, including, without limitation, during any subsequent estate administration. See, e.g., Prob. Code § 12252 (appointment of personal representative for subsequent administration of an estate); see also Prob. Code § 58 (personal representative).

The staff recommends that approach. It has been incorporated into the attached draft recommendation.

NEXT STEP

The Commission needs to decide whether to approve the attached draft recommendation, with or without revision, for circulation as a tentative recommendation.

Respectfully submitted,

Catherine Bidart
Staff Counsel

**EMAIL FROM NEIL HORTON [EXECUTIVE COMMITTEE OF THE
TRUSTS AND ESTATES SECTION OF THE BAR]
(SEPTEMBER 30, 2008)**

Dear Catherine,

Texcom understands that CLRC is going to take another look at the survival of the attorney-client privilege after death when it considers the issue of creditor's rights with regard to non-probate transfers.

In the meantime, Texcom will not oppose the proposed changes to Probate Code Section 12252 and Evidence Code Section 953.

Members commented that many situations exist in which the court never enters an order of final distribution. Under the current scheme, the attorney-client privilege in those cases will exist indefinitely. A "dry probate" occurs in at least the following situations in which a personal representative is appointed but never seeks an order of final distribution:

1. To search for assets, but none are ever discovered.
2. To exercise a power of appointment, where the donative instrument requires the power to be exercised by will.
3. To exercise an election, where the Internal Revenue Code requires that the election be made by a personal representative, e.g., IRC Section 2056(b)(7)(B)(v).

Although these kinds of situations are not common, they do periodically occur.

In addition, in many instances, the court will make an order of final distribution, but will authorize the personal representative to retain a substantial reserve. The reserve exists to deal with contingencies, most usually an unresolved claim against the estate, such as undetermined tax liabilities. The privilege would not be served in those cases if the order of final distribution ended the privilege's existence despite the unresolved claim. The creditor or the tax authority then could subpoena the records of the decedent's attorney relating to that claim.

My sense is that Texcom is not satisfied with the current scheme but has not yet come up with a better one.

I appreciate your considering these views.

NEIL F. HORTON
HORTON & ROBERTS LLP

CALIFORNIA LAW REVISION COMMISSION

STAFF DRAFT

TENTATIVE RECOMMENDATION

Attorney-Client Privilege After Client's Death

October 2008

The purpose of this tentative recommendation is to solicit public comment on the Commission's tentative conclusions. A comment submitted to the Commission will be part of the public record. The Commission will consider the comment at a public meeting when the Commission determines what, if any, recommendation it will make to the Legislature. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you believe revisions should be made to it.

COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN **January 16, 2009**.

The Commission will often substantially revise a proposal in response to comment it receives. Thus, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

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SUMMARY OF TENTATIVE RECOMMENDATION

Properly invoked, the attorney-client privilege prohibits compelled disclosure of a confidential communication between a client and the client's attorney. For example, when the privilege applies, it prevents use of the confidential communication as evidence in court.

The purpose of the privilege is to promote justice by encouraging clients to fully disclose information to their attorneys, without fear that the attorney may be forced to reveal that information. A countervailing consideration is that the privilege's exclusion of evidence may hinder the search for truth.

Under the Evidence Code (Sections 953-954), the attorney-client privilege survives the client's death so long as there is a personal representative, who holds the decedent's privilege. Accordingly, the privilege survives during administration of the client's estate.

Under case law (*Moeller v. Superior Court*), the attorney-client privilege of a deceased client who was a trustee may survive so long as there is a successor trustee, who holds the deceased trustee's privilege. Survival of the deceased trustee's privilege extends only to the trustee's attorney-client communications made in a fiduciary capacity relating to administration of the trust.

Chapter 388 of the Statutes of 2007 directs the Law Revision Commission to study the attorney-client privilege after the client's death.

The Commission considered several alternatives to existing law. None appears to be clearly superior to existing law. The Commission believes that existing law strikes a good balance between competing policy considerations.

Accordingly, the Commission recommends to preserve the general approach of existing law, with a few minor adjustments. These adjustments would be consistent with the policy determination underlying existing law.

In particular, the Commission recommends to:

- Expand an existing exception in Evidence Code Section 957, which applies when all parties claim through the deceased client, to include a beneficiary of a nonprobate transfer.
- Clarify that the privilege is held by a personal representative who is appointed for purposes of subsequent estate administration pursuant to Probate Code Section 12252.

This tentative recommendation was prepared pursuant to 2007 Cal. Stat. ch. 388, § 2 (AB 403).

ATTORNEY-CLIENT PRIVILEGE AFTER THE CLIENT'S DEATH

1 Properly invoked, the attorney-client privilege prohibits compelled disclosure of
2 a confidential communication between a client and the client's attorney.¹ For
3 example, when the privilege applies, it prevents use of the confidential
4 communication as evidence in court.²

5 The Legislature directed the Commission to study "whether, and if so, under
6 what circumstances, the attorney-client privilege should survive the death of the
7 client."³ Under existing law, the privilege has limited duration after the client's
8 death.⁴

9 This recommendation discusses the policy served by the attorney-client
10 privilege, and describes existing law on the survival of the privilege after the death
11 of the client. It then sets forth several alternatives to existing law that the
12 Commission considered.

13 The Commission recommends that the general approach of existing law be
14 preserved. The Commission does, however, recommend minor adjustments that
15 are consistent with that general approach.

16 POLICY OF THE ATTORNEY-CLIENT PRIVILEGE

17 The fundamental purpose of the attorney-client privilege is to encourage clients
18 to fully disclose information to their attorneys, without fear that the attorney may
19 be forced to reveal that information.⁵ The privilege seeks to encourage candid

1. Evid. Code §§ 952, 954. The protection of a confidential communication includes an attorney's "legal opinion and advice given" in the course of the attorney-client relationship. Evid. Code § 952.

2. The attorney-client privilege is not limited to court proceedings, but applies in "any action, hearing, investigation, inquest, or inquiry (whether conducted by a court, administrative agency, hearing officer, arbitrator, legislative body, or any other person authorized by law) in which, pursuant to law, testimony can be compelled to be given." Evid. Code § 901; see also Evid. Code § 910.

It should be noted that when the privilege is inapplicable, the attorney-client communication is not necessarily admissible. Other evidentiary exclusionary rules still apply. See, e.g., Evid. Code § 1200 (hearsay rule).

3. 2007 Cal. Stat. ch. 388, § 2 (AB 403).

4. See Evid. Code §§ 953-954 & Comments; *Moeller v. Superior Court*, 16 Cal. 4th 1124, 1127, 1134, 947 P.2d 279, 69 Cal. Rptr. 2d 317 (1997); see also Prob. Code §§ 15414, 21200-21207 (rules against perpetuities).

5. *Fisher v. United States*, 425 U.S. 391, 403 (1976) ("[I]f the client knows that damaging information could more readily be obtained from the attorney following disclosure than from [the client himself or herself] in the absence of disclosure, the client would be reluctant to confide in [the] lawyer ..."); see Evid. Code § 950 Comment; *People v. Meredith*, 29 Cal. 3d 682, 690-91, 631 P.2d 46, 175 Cal. Rptr. 612 (1981); *Dep't of Public Works v. Donovan*, 57 Cal. 2d 346, 354, 369 P.2d 1, 19 Cal. Rptr. 473 (1962); *Greyhound Corp. v. Superior Court*, 56 Cal. 2d 355, 396, 364 P.2d 26, Cal. Rptr. 90 (1961).

The goal of encouraging client candor is also furthered by a related doctrine, the duty of

1 communication between clients and their attorneys in order to promote “broader
2 interests in the observance of law and the administration of justice.”⁶

3 The privilege is an exception to the general rules that any witness with
4 knowledge of an issue may be called to testify, and that the public has a right to
5 every person’s evidence.⁷ Thus, a countervailing consideration is that the privilege
6 may hinder the search for truth.⁸

confidentiality. See Bus. & Prof. Code § 6068(e); Rules of Professional Conduct R. 3-100. While the attorney-client privilege protects against *compelled* disclosure, the duty of confidentiality is broader, protecting a client’s secrets from disclosure, even if not compelled. This duty has an unlimited duration after the client’s death. Vapnek *et al.*, California Practice Guide: Professional Responsibility, *Confidentiality and Privilege* §§ 7:35-7:36 (2007).

Another doctrine, the work-product privilege, protects certain aspects of the attorney-client relationship. See, e.g., Code of Civ. Proc. § 2018.030(a) (protecting, nearly absolutely, discovery of “[a]ny writing that reflects the attorney’s impressions, conclusions, opinions, or legal research or theories”); Penal Code § 1054.6 (providing same protection in criminal cases); see also Code of Civ. Proc. § 2018.030(b) (providing limited protection to other work product in civil cases). Unlike the attorney-client privilege and duty of confidentiality, the work-product privilege seeks to protect the freedom of attorneys to prepare their cases, rather than to encourage attorney-client communication. See Code Civ. Proc. § 2018.020.

6. *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981); see also *Chirac v. Rinaker*, 24 U.S. 280, 294 (1826) (stating that attorney-client privilege “is indispensable for the purposes of private justice”). The complexity of law may make it necessary for a layperson to consult an attorney in order to understand the law, and to vindicate the layperson’s rights. 24 C. Wright & K. Graham, *Federal Practice and Procedure* § 5472 (2007). Having citizens informed about the law and having the law administered fairly are in the public interest, which is best realized if both sides have help of counsel. *Id.* “[S]ound legal advice or advocacy serves public ends ... and depends upon the lawyer’s being fully informed by the client.” *Upjohn*, 449 U.S. 383. If the attorney’s “professional mission is to be carried out,” the attorney must “know all that relates to the client’s reasons for seeking representation.” *Id.* The attorney-client privilege is thus “founded upon necessity, in the interest and administration of justice,” of having attorneys aid laypersons who are “free from consequences or apprehension of disclosure.” *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888).

Some commentators also put forth a non-instrumental rationale, under which the privilege is justified as promoting values, such as privacy, autonomy, client loyalty, or the policy against self-incrimination. See C. Mueller & L. Kirkpatrick, *Evidence* § 5.8, p. 309 (3d. ed. 2003); E. Imwinkelried, *The New Wigmore: A Treatise on Evidence* *Evidentiary Privileges* §§ 5.1.2, 5.3.2, pp. 259, 327 (2002); Radin, *The Privilege of Confidential Communication Between Lawyer and Client*, 16 Cal. L. Rev. 487, 489 (1927-28).

7. See Evid. Code § 911; *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972) (public has right “to every [person’s] evidence except for those persons protected by a constitutional, common-law or statutory privilege”); 1 E. Epstein, *The Attorney-Client Privilege and the Work-Product Doctrine*, 11 (5th ed. 2007); Mueller & Kirkpatrick, *supra* note 6, at 285 (stating that privileges “exempt certain testimony, and sometimes certain witnesses, from the scope of compulsory process”).

8. See 1 K. Broun, *McCormick on Evidence*, § 72, pp. 388-89 (6th ed. 2006); Mueller & Kirkpatrick, *supra* note 6, at 285. However, ascertainment of the truth might be more difficult if the attorney-client privilege did not exist. The privilege facilitates legal representation of clients, helping them present their cases before the factfinder. “The privilege helps to ensure that the representation will be competent and fully informed.” *Report of the American Bar Association’s Task Force on the Attorney-Client Privilege*, 60 Bus. Law. 1029, 1037 (2005). When a client tells an attorney all the facts, the attorney is best able to ensure that the truth will prevail. See Wright & Graham, *supra* note 6 (stating that privilege, by encouraging open communication between clients and attorneys, helps to prevent erroneous litigation results). Without an attorney-client privilege, meritorious cases may be lost, due to clients’ failures to fully disclose facts that they thought might be harmful. See *id.*; see also *Chirac*, 24 U.S. at 294 (stating that attorney-client privilege “is indispensable for the purposes of private justice”).

1 The privilege is based on a long-standing public policy determination that the
2 aggregate benefits to the justice system justify the risk that the privilege may result
3 in unjust decisions through suppression of relevant evidence.⁹ Because the
4 privilege excludes evidence from the factfinder, however, limits to the privilege
5 have always been recognized.¹⁰

CALIFORNIA'S LONGSTANDING APPROACH

7 **Background**

Over fifty years ago, the Legislature directed the Commission to study whether California should adopt the Uniform Rules of Evidence (the “U.R.E.”).¹¹ In response to that directive, the Commission drafted the Evidence Code. The attorney-client privilege after the client’s death was one of many topics the Commission considered in its study of the U.R.E.

13 The Commission recommended the approach in the U.R.E., which provides for
14 posthumous survival of the privilege only when there is a personal

It should be noted that the privilege would not apply if its exclusion of evidence would unconstitutionally infringe a person's right. See Evid. Code §§ 230, 910; see, e.g., *People v. Godlewski*, 17 Cal. App. 4th 940, 945, 21 Cal. Rptr. 2d 796 (1993) (stating that if criminal defendant shows compelling need for disclosure of privileged communication, criminal defendant's constitutional right to fair trial would mandate overriding attorney-client privilege).

9. Mitchell v. Superior Court, 37 Cal. 3d 591, 599-600, 208 Cal. Rptr. 866, 691 P.2d 642 (1984); United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 358 (D.Mass 1950) (“The social good derived from the proper performance of lawyers acting for their clients ... outweigh[s] the harm that may come from the suppression of the evidence.”); see also 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, 328, 384 S.E. 2d 772 (2003) (stating that attorney-client privilege’s “protection of confidential communications is one of the oldest and most revered in law”).

10. Hazard, *An Historical Approach to the Attorney-Client Privilege*, 66 Cal. L. Rev. 1061, 1091 (1978). “[C]ourts and legislators naturally try to avoid extravagant applications of the privilege that would block access to information while contributing little to the values and interests at stake.” Mueller & Kirkpatrick, *supra* note 6, at 311; see, e.g., *Fisher*, 425 U.S. at 403 (attorney-client privilege only applies where necessary to achieve its purpose because it often withholds relevant information from factfinder); see also *United States v. Zolin*, 491 U.S. 554, 562 (1989) (recognizing crime-fraud exception because attorney-client privilege “is not without its costs”); *Trammel v. United States*, 445 U.S. 40, 50 (1980) (privileges should be construed “only to the very limited extent that a refusal to testify ... has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth,” as liberal application can frustrate justice). However, the privilege does not cause a loss of evidence if the communication would not have been made without the privilege’s protection. See *Wright & Graham*, *supra* note 6; Mueller & Kirkpatrick, *supra* note 6, at 287. The United States Supreme Court explains that “the loss of evidence admittedly caused by the privilege is justified in part by the fact that without the privilege, the client may not have made such communications in the first place.” *Swidler & Berlin v. United States*, 524 U.S. 399, 408 (1998); *Jaffee v. Redmond*, 518 U.S. 1, 12 (1996); *Fisher*, 425 U.S. at 403.

11. 1956 Cal. Stat. res. ch. 42.

1 representative.¹² The Legislature adopted that approach when it enacted the
2 Evidence Code in 1965.¹³

3 Twenty-five other states have also adopted an attorney-client privilege based on
4 the U.R.E.¹⁴

5 **Duration of the Attorney-Client Privilege After the Client's Death**

6 Before the enactment of the Evidence Code, the provision setting forth the
7 attorney-client privilege did not specify its posthumous effect.¹⁵

8 Since the Evidence Code went into effect in 1967, the attorney-client privilege
9 survives the client's death so long as there is a personal representative.¹⁶

12. See *Tentative Recommendation relating to the Uniform Rules of Evidence: Article V. Privileges*, 6 Cal. L. Revision Comm'n Reports 201, 208 (1964); see also *Recommendation proposing an Evidence Code*, 7 Cal. L. Revision Comm'n Reports 1, 173-74 (1965); Chadbourn, *A Study relating to the Privileges Article of the Uniform Rules of Evidence*, 6 Cal. L. Revision Comm'n Reports 301, 389 (1964).

The portion of the U.R.E. 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 at <www.law.upenn.edu/bll/archives/ulc/ure/evid1200.htm>.

13. See Evid. Code §§ 953-954 & Comments; *HLC Properties, Ltd. v. Superior Court*, 35 Cal. 4th 54, 65-68, 105 P.3d 560, 24 Cal. Rptr. 3d 199 (2005).

14. Ala. R. Evid. 502 (Alabama); Alaska R. Evid. 503 (Alaska); Ark. R. Evid. 502 (Arkansas); Del. R. Evid. 502 (Delaware); Fla. Stat. Ann. § 90.502 (Florida); Haw. R. Evid. 503 (Hawaii); Idaho R. Evid. 502(c) (Idaho); Kan. Stat. Ann. § 60-426 (Kansas); Ky. R. Evid. 503 (Kentucky); La. R. Evid. 506 (Louisiana); Me. R. Evid. 502 (Maine); Miss. R. Evid. 502(c) (Mississippi); Neb. Rev. Stat. § 27-503 (Nebraska); Nev. Rev. Stat. §§ 49.035-49.115 (Nevada); N.H. R. Evid. 502 (New Hampshire); N.J.S.A. 2A:84A-20 (New Jersey); N.M. R. Evid. 11-503 (New Mexico); N.D. R. Evid. 502 (North Dakota); Okla. Stat. Ann. Tit. 13 § 2502 (Oklahoma); Or. Rev. Stat. § 40.225 (Oregon); S.D. Codified Laws §§ 19-13-2-19-13-5 (South Dakota); Tex. R. Evid. 503 (Texas); Utah R. Evid. 504 (Utah); Vt R. Evid. 502(c) (Vermont); Wis. Stat. Ann. § 905.03(3) (Wisconsin).

However, the privilege in these states is not universally regarded as ending after the client's estate is closed, as in California. See, e.g., *Swidler*, 524 U.S. at 405 n.2. The drafters of the U.R.E. intended the attorney-client privilege to end after the estate closes and personal representative is discharged. Chadbourn, *supra* note 12, at 389; see also Wydick, *The Attorney-Client Privilege, Does It Really Have Life Everlasting?*, 87 Ky. L.J. 1165, 1185-87 (1999) (stating that drafters intended to end privilege after estate closes, and reasoning that plain language of U.R.E. requires that result). But it is unclear whether each state legislature that adopted the U.R.E.'s language shared that intent.

15. See former Code Civ. Proc. § 1881(2) (1939 Cal. Stat. ch. 129, § 5). It seems probable that the privilege survived indefinitely, and that nobody could waive it. See *Collette v. Sarrasin*, 184 Cal. 283, 289, 193 P. 571 (1920); see also Chadbourn, *supra* note 12, at 389-90 (stating that attorney-client privilege might have survived indefinitely because courts had determined that physician-patient privilege and marital privilege survived indefinitely).

16. See 1965 Cal. Stat. ch. 299, § 2, operative Jan. 1, 1967; Evid. Code §§ 953-954 & Comments; *HLC Properties*, 35 Cal. 4th at 65-68. Provisions pertaining to who is personal representative are set forth in the Probate Code. See, e.g., Prob. Code §§ 58(a) ("Personal representative" means executor, administrator,

1 Accordingly, the privilege survives during administration of the deceased client's
2 estate, and during the resolution of claims by¹⁷ or against¹⁸ the estate.

3 The reasoning underlying the approach in the Evidence Code is as follows:

4 Although there is good reason for maintaining the privilege while the estate is
5 being administered — particularly if the estate is involved in litigation — there is
6 little reason to preserve secrecy at the expense of excluding relevant evidence
7 after the estate is wound up and the personal representative is discharged.¹⁹

8 The duration of the privilege in the Evidence Code rests on two key policy
9 determinations. First, it reflects a conclusion that attorney-client communication
10 would be chilled significantly if the privilege ended *before* a personal
11 representative has completed his or her duties as personal representative, such as
12 administration of the decedent's estate.²⁰ Second, it reflects a conclusion that
13 attorney-client communication would *not* be chilled significantly if the privilege
14 ended *after* the personal representative has completed his or her duties.²¹

15 Two other privileges based on a confidential relationship — the physician-
16 patient and psychotherapist-patient privileges — have the same limited

administrator with the will annexed, special administrator, successor personal representative, public administrator acting pursuant to Section 7660, or a person who performs substantially the same function under the law of another jurisdiction governing the person's status."), 8420 (providing that person named in will has right to appointment as personal representative), 8461 (setting forth priority of appointment where decedent dies without will). Note, however, that when the deceased client was a trustee, the deceased trustee's privilege appears to survive so long as there is a successor trustee (who holds the predecessor trustee's privilege), but only as to communications relating to trust administration. See discussion of "Limited Expansion by *Moeller v. Superior Court*" *infra*.

17. See Code of Civ. Proc. §§ 377.30 (providing that personal representative, or if none, successor in interest, may *bring* surviving action), 377.31 (providing for personal representative, or if none, successor in interest, to *continue* action brought by decedent).

18. See Prob. Code § 9000 et seq. (claims against estate); see also Code of Civ. Proc. § 377.40 (subject to Probate Code Section 9000 et seq., surviving action against decedent may be asserted against personal representative, or to extent provided by statute, successor in interest).

19. Evid. Code § 954 Comment.

20. See *id.* A personal representative may also have duties to perform when there is no estate. For example, a successor in interest may be appointed special administrator (a type of personal representative) in prosecuting a surviving claim where there is no estate open. See Code of Civ. Proc. §§ 377.30 (providing that successor in interest may *bring* surviving action if is no personal representative), 377.31 (providing for successor in interest to *continue* surviving action if there is no personal representative), 377.33 (providing that successor in interest who brings or continues surviving action under Code of Civil Procedure Sections 377.30 or 377.31 may be appointed special administrator) & Comment (stating that appointment of special administrator is authorized because "there may be a need to impose fiduciary duties on the successor to protect the interests of other potential beneficiaries"); see also Prob. Code § 58 (personal representative includes special administrator).

21. See Evid. Code § 954 Comment. The approach presumes that disclosures that would only impact an interest *other than a property interest* (e.g., the decedent's interest in reputation) would not significantly chill attorney-client communication.

1 posthumous effect as the attorney-client privilege.²² All the other privileges in the
2 Evidence Code that are based upon a confidential relationship also have a limited
3 posthumous duration, if any at all.²³

4 **Holder of the Decedent's Privilege**

5 Under the Evidence Code, the personal representative holds the privilege of a
6 deceased client.²⁴ Although the Evidence Code permits the personal representative
7 to exercise the decedent's privilege without qualification,²⁵ the personal
8 representative has a fiduciary duty to the estate.²⁶ Thus, a client may be assured
9 that a personal representative will not exercise the posthumous privilege in a
10 manner that could harm the decedent's estate, and thereby, hurt the beneficiaries.²⁷

22. See Evid. Code §§ 993-994 (physician-patient privilege), 1013-1014 (psychotherapist-patient privilege); see also *Rittenhouse v. Superior Court*, 235 Cal. App. 3d 1584, 1588 n.2, 1 Cal. Rptr. 2d 595 (1991); *Boling v. Superior Court*, 105 Cal. App. 3d 430, 440, 164 Cal. Rptr. 432 (1980). The rationale for the posthumous scope of these privileges is the same as the rationale for the posthumous scope of the attorney-client privilege:

Sections 993 and 994 enable the personal representative to protect the interest of the patient's estate in the confidentiality of these statements and to waive the privilege when the estate would benefit by waiver. 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 had in secrecy.

Evid. Code § 993 Comment.

23. See, e.g., Evid. Code §§ 980 & Comment (providing that privilege for confidential marital communication, after a spouse's death, can only be claimed on behalf of surviving spouse), 1034 & Comment (providing that clergy-penitent privilege grants clergy member discretion over whether to disclose penitent's confidential communication both during penitent's life and after penitent's death). Three more privileges based on a confidential relationship were enacted, without Commission involvement, after the adoption of the Evidence Code. See Evid. Code §§ 1035-1036.2 (sexual assault counselor-victim privilege), 1037-1037.8 (domestic violence counselor-victim privilege), 1038-1038.2 (human trafficking caseworker-victim privilege). Of these, the domestic violence counselor-victim privilege and the human trafficking caseworker-victim privilege end outright on the victim's death. See Evid. Code §§ 1037.4, 1037.5, 1038(a), 1038.2(d). The sexual assault counselor-victim privilege survives posthumously so long as there is a personal representative. See Evid. Code §§ 1035.6, 1035.8. However, in a criminal proceeding, or proceeding related to child abuse, the sexual assault counselor-victim privilege is subject to a balancing test. See Evid. Code § 1035.4 (court may override privilege if probative value outweighs effect compelled disclosure would have on victim, or treatment relationship and services).

24. Evid. Code § 953(c). Provisions relating to who is appointed personal representative are cited in note 16 *supra*.

25. See Evid. Code §§ 953-954; *cf. Rittenhouse*, 235 Cal. App. at 1588, 1590 (stating that physician-patient privilege, which tracks attorney-client privilege, places no restrictions on personal representative's right to claim or waive, and grants same right to do so as any other holder of physician-patient privilege).

26. See 24 Cal. Jur. 3d *Decedents' Estates* § 423 (2008) (discussing personal representative's duty to estate).

27. See *id.*

1 **Exceptions to the Attorney-Client Privilege After the Client’s Death**

2 There are several exceptions to the attorney-client privilege.²⁸ A number of these
3 exceptions apply specifically after the client’s death. In particular, one exception
4 provides that the privilege does not apply “to a communication relevant to an issue
5 between parties all of whom claim through a deceased client, regardless of
6 whether the claims are by testate or intestate succession or by inter vivos
7 transaction.”²⁹ Other exceptions provide that the privilege does not apply to a
8 communication if it is relevant to an issue concerning the validity or intended
9 meaning of a deceased client’s writing purporting to affect a property interest.³⁰

10 These exceptions seek to permit disclosures that a deceased client presumably
11 would have wanted, to help ensure that the client’s property is transferred as
12 intended.³¹ Because clients presumably would want such disclosures, there seems
13 to be a diminished danger that these exceptions would interfere with the
14 privilege’s goal of encouraging candid attorney-client communication. Due to that
15 diminished danger, disclosure of a communication pursuant to one of these
16 exceptions would appropriately give expression to the public’s interest in having
17 the evidence before the factfinder.³²

18 **Scope of the Attorney-Client Privilege After the Client’s Death**

19 The exceptions that specifically apply after a client’s death, combined with the
20 rule that the privilege only survives so long as there is a personal representative,
21 result in a privilege with limited application after the client’s death. Unless the
22 issue relates to the validity or intended meaning of a client’s writing that purports
23 to affect a property interest,³³ the privilege applies after the client’s death only in a
24 few types of cases, including:

28. See, e.g., Evid. Code §§ 956 (attorney’s services used to commit crime or fraud), 956.6 (attorney believes disclosure is reasonably necessary to prevent criminal act likely to cause death or serious harm), 958 (issue relating to breach by client or attorney of duty arising from attorney-client relationship), 959 (attorney was attesting witness as to issue concerning client’s competence or intent, or execution or attestation of document), 962 (dispute among former joint clients); see also *Meredith*, 29 Cal. 3d at 690-91 & n.8 (stating that if “counsel chooses to remove evidence to examine or test it, the original location and condition of that evidence loses the protection of the privilege,” but that “the prosecution should present the information in a manner which avoids revealing the content or the original source of the information”).

29. Evid. Code § 957.

30. Evid. Code §§ 960-961.

31. See Evid. Code §§ 957, 960-961 Comments.

32. Without these exceptions, it would seem to be much harder for the factfinder to decide correctly an issue relating to the intent or validity of a client’s writing transferring property. The evidence contained in the communication relevant to the decedent’s wishes may not be available from any other source. Testimony by the client, who is deceased, is not available.

33. Cf. Evid. Code §§ 960-961.

- 1 (1) A case between a personal representative of a client's estate and a third
2 party (i.e., a person who does not claim through the client).³⁴
- 3 (2) A case between third parties that arises while the client's estate is open.³⁵
- 4 (3) A case that arises when an estate is not open, but that involves a claim
5 prosecuted by a decedent's successor in interest, who is appointed special
6 administrator (a type of personal representative).³⁶

7 Although the privilege is applicable to these cases, the personal representative,
8 as holder of the privilege, may waive it.³⁷

9 RECENT AMENDMENTS TO PROBATE CODE SECTION 12252

10 In 2007, amendments to Probate Code Section 12252 were made relating to the
11 posthumous attorney-client privilege.³⁸ Section 12252 relates to reappointment of
12 a personal representative. The amendments may be subject to two different
13 interpretations.

14 One interpretation would expand the attorney-client privilege after the client's
15 death by requiring a court to reappoint a personal representative solely to hold the
16 privilege, even when there is no estate to administer. However, this interpretation
17 appears to be at odds with legislative intent.³⁹

34. See, e.g., Code of Civ. Proc. §§ 377.40 (subject to Probate Code Section 9000 et seq., action against decedent that survives may be asserted against personal representative, or, to extent provided by statute, against successor in interest), 377.60 (wrongful death action may be asserted by personal representative); see also Prob. Code § 9000 et seq. (claims against estate); *cf.* Evid. Code § 957 (providing exception for issue disputed between parties who all claim through decedent).

35. See Evid. Code § 953(c). This could be a criminal case or a civil case in which the estate is not a party.

36. See Code of Civ. Proc. §§ 377.30 (providing that successor in interest may *bring* surviving action if there is no personal representative), 377.31 (providing for successor in interest to *continue* surviving action if there is no personal representative); 377.33 (providing that successor in interest bringing or continuing claim under Code of Civil Procedure Sections 377.30 or 377.31 may be appointed special administrator); see also Prob. Code § 58 (personal representative includes special administrator); *cf. Rittenhouse*, 235 Cal. App. 3d at 1588-89 (special administrator, as personal representative, holds decedent's physician-patient privilege).

37. See Evid. Code § 953(c) & Comment (stating that personal representative "may either claim or waive the privilege on behalf of the deceased client"); see also Evid. Code § 912 (providing that only a holder of a privilege may waive it); *cf. Rittenhouse*, 235 Cal. App. at 1587-89 (holding that personal representative has same right to waive physician-patient privilege as any other holder of that privilege).

38. See 2007 Cal. Stat. ch. 388, § 1 (AB 403). These amendments were enacted by the same bill that assigned the Commission this study. See 2007 Cal. Stat. ch. 388, § 2 (AB 403).

39. Under this interpretation, the effect of the amendment would permit indefinite survival of the privilege, a significant change from existing law, which was expressly rejected by a committee. See Senate Committee on Judiciary Analysis of AB 403 (June 26, 2007), p. 6.

Further, if the intended effect had been to permit a personal representative to hold the privilege when there is no estate to administer, it would be odd to use Probate Code Section 12252 to make that change in the law. Located in Section 12252, any expansion of the privilege would be limited to circumstances in

1 Another interpretation is that the amendments merely clarify that a personal
2 representative who is appointed to perform subsequent estate administration holds
3 the deceased client's privilege. The legislative history of the bill provides stronger
4 support for this interpretation than for the first interpretation.⁴⁰

5 **LIMITED EXPANSION BY MOELLER V. SUPERIOR COURT**

6 A California Supreme Court decision appears to affect the duration of the
7 posthumous attorney-client privilege when the deceased client was a trustee. In
8 *Moeller v. Superior Court*, the Court held that a successor trustee is holder of the
9 predecessor trustee's attorney-client privilege, but only as to communications
10 made in a fiduciary capacity relating to trust administration.⁴¹ Although *Moeller*
11 did not involve a deceased trustee, the principle of the case would seem to apply
12 even if the predecessor trustee were deceased. Accordingly, it appears that a
13 deceased trustee's attorney-client communication relating to trust administration
14 may remain privileged after death, via a successor trustee.

15 **ALTERNATIVES CONSIDERED IN THIS STUDY**

16 In this study, the Commission considered several alternatives to existing law.
17 The alternatives that were considered are discussed below.⁴²

18 **Expand Privilege To Survive Until Nonprobate Assets Definitively Pass to Beneficiaries**

19 Under the Evidence Code, the attorney-client privilege survives the client's
20 death only when there is a personal representative. That will most often be when

which a personal representative had previously been discharged. See Prob. Code § 12252 (relating to reappointment of a personal representative).

40. See Assembly Floor Analysis of AB 403 (Aug. 29, 2007), p. 1; Senate Committee on Judiciary Analysis of AB 403 (June 26, 2007), p. 6.

41. *Moeller v. Superior Court*, 16 Cal. 4th 1124, 1127, 1134, 947 P.2d 279, 69 Cal. Rptr. 2d 317 (1997). *Moeller* did not affect the privilege as to a natural person seeking advice in a personal capacity. See *Borisoff v. Taylor & Faust*, 33 Cal. 4th 523, 533-34, 93 P.3d 337, 15 Cal. Rptr. 3d 735 (2004) (citing *Moeller* and stating that "successor fiduciary does not become the holder of the privilege for confidential communications that occurred when a predecessor fiduciary in his or her personal capacity sought an attorney's advice." (emphasis in original)).

42. The Commission also considered new exceptions that would specifically apply after the client's death, including the following:

- An exception for criminal cases.
- An exception if there was a probable conspiracy involving the deceased client, and if disclosure of the communication is necessary to resolve investigation of the conspiracy.
- An exception if a client's suicide causes a knowing destruction of evidence that otherwise could have been available.
- An exception for a communication relating solely to third parties.

The Commission does not propose any of these exceptions. Some would add unpredictability, while others would seem to chill the very communication sought to be disclosed by the exception.

1 the deceased client's property passes by will, which generally requires probate
2 administration.⁴³

3 When the Evidence Code was enacted, the main estate planning instrument was
4 a will. Since then, there has been a "nonprobate revolution." Trusts and other
5 nonprobate transfer mechanisms are now often used to transfer property at death
6 outside of probate.

7 In light of this change in estate planning practice, the Commission considered
8 expanding the privilege to survive in the nonprobate context, regardless of whether
9 property passes through probate (i.e., regardless of whether there is a personal
10 representative). That would be consistent with the policy determination underlying
11 existing law — i.e., that the privilege should survive until a deceased client's
12 property definitively passes to beneficiaries.

13 However, the manner in which property passing by various nonprobate devices
14 might be subject to surviving adverse claims is unclear.⁴⁴ There is no uniform
15 treatment of creditor claims outside of probate. Accordingly, it would be difficult
16 to specify the types of cases in which the privilege should apply.⁴⁵ Other obstacles
17 to expanding the privilege to apply beyond the context of probate administration
18 are discussed below.

43. An example of an exception, in which a will might not require probate, is administration of a small estate. See Prob. Code §§ 13000-13210.

44. This area of the law warrants clarification. A background study on rights of creditors against property transferred by a nonprobate mechanism is being prepared for the Commission. See <http://www.clrc.ca.gov/Mreports-bkstudies.html>.

45. The Commission considered crafting a provision that would make the privilege apply after the client's death only in cases involving surviving claims by or against a decedent or decedent's property. See Code 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). However, that would allow disclosure in a claim between third parties (where the privilege would not apply), even though a claim could be pending against a decedent's property (where the privilege would apply). The litigant against the decedent's property could learn of the communication disclosed in the claim between third parties. The litigant against the decedent's property could not use it as evidence, but knowing the content of the communication could help the litigant be successful in the claim against the decedent's property. That might deter client candor, undermining the purpose of the privilege. To minimize that risk, disclosure in the claim between third parties could occur in closed court, with that portion of the record sealed. However, this would add complexity, might not be fully effective, and would increase litigation expenses and consumption of judicial resources.

The Commission alternatively considered specifying a set time period in which the privilege would survive after the client's death. The time period would end when no action could impact a deceased client's assets before they definitively pass to beneficiaries. Formulating an accurate time period (neither too short nor too long), however, would be difficult to do.

1 ***Holder of the Decedent's Privilege***

2 If the privilege were expanded to apply in the nonprobate context, regardless of
3 whether there is a personal representative, it is unclear who should hold the
4 decedent's privilege.⁴⁶

5 It would be important to identify the privilege holder so that it would be clear
6 when a decedent's attorney-client communication may be excluded.⁴⁷

7 It would also be important to designate a holder of the decedent's privilege so
8 that it could be waived.⁴⁸ If no one could waive the decedent's privilege, the
9 privilege would have stronger force than it does during a client's life, when the
10 client can waive. A living client who refuses to waive is still available as a source
11 of information, and may be called as a witness. After the client's death, if no one
12 may waive the privilege, it might be impossible for the factfinder to obtain
13 relevant information contained in a decedent's attorney-client communication.

14 ***Duty Governing the Holder's Exercise of the Decedent's Privilege***

15 If the privilege were expanded to the nonprobate context, regardless of whether
16 there is a personal representative, it would be necessary to determine what duty
17 would govern the holder's exercise of the privilege. In the absence of a personal
18 representative's fiduciary duty to the decedent's estate, it is unclear what duty
19 would apply. Without a clear duty, the privilege might be exercised in a manner
20 that does not further the purpose for continuing the privilege.

21 ***Survival of Privileged Communications Relating to Trust Administration***

22 Under case law, the privilege already appears to survive the client's death with
23 respect to trust-related communications.⁴⁹ The revocable living trust⁵⁰ is the main

46. The person representing the decedent's interest (who is not a personal representative) could be designated the decedent's privilege holder. But this would be difficult to implement without a clear picture of the manner in which an adverse claim might affect property that passes by nonprobate transfer.

Also, it is not clear how a new holder of the decedent's privilege could be properly integrated into existing law. There could be different individuals representing a decedent's interest (who would thus each hold the decedent's privilege) in different actions. It is unclear what should happen if one holder asserted the privilege, but the other holder waived it. Current law provides that waiver by a joint holder does not impact another joint holder's right to claim the privilege. Evid. Code § 912(b). But it is unclear whether the potentially numerous holders of a deceased client's privilege (who would hold because the person is representing a decedent's interest) would be considered joint privilege holders.

47. See Evid. Code §§ 916, 954.

48. See Evid. Code § 912.

49. See discussion of "Limited Expansion by *Moeller v. Superior Court*" *supra*.

50. The creator of a revocable living trust, the settlor, places the settlor's property into a revocable trust, with the settlor as trustee. See Prob. Code § 15200(a). When the settlor dies, the successor trustee distributes the trust property to the beneficiaries.

1 alternative to a will. Therefore, when a revocable living trust is used instead of a
2 will, the protection of the privilege under existing law may be adequate.⁵¹

3 **Conclusion**

4 Survival of the privilege in the nonprobate context would generally be consistent
5 with the policy determination underlying existing law. That is, the privilege would
6 survive until a deceased client's property definitively passes to beneficiaries.⁵²
7 However, to implement this alternative, several obstacles would need to be
8 resolved. The Commission believes that any attempt to do so would be premature,
9 until California has a more comprehensive treatment of creditor rights with respect
10 to nonprobate assets.⁵³

11 **Indefinite Survival**

12 Another alternative to existing law is indefinite survival of the privilege. That
13 approach is discussed below.

14 **Other Jurisdictions**

15 Under federal common law, the attorney-client privilege lasts beyond the
16 context of probate administration, and presumably never ends.⁵⁴ In twenty-four
17 states, the attorney-client privilege is governed by common law.⁵⁵ It is unclear how
18 many of these states have a privilege that survives indefinitely.⁵⁶

51. The trustee's duties to the trust would presumably govern the trustee's exercise of the posthumous privilege as to a communication that could affect the trust. A trustee has a fiduciary duty, among other things, to preserve trust property and administer the trust in the interest of the beneficiaries. See Prob. Code § 16002(a); *Atascadero v. Merrill Lynch et al*, 68 Cal. App. 4th 445, 462, 80 Cal. Rptr. 2d 329 (1998). If a trustee breaches a duty, it appears that there are enforcement mechanisms in place. See, e.g., Prob. Code § 16420(a)(5) (removal for breach of trust); see also Prob. Code § 16420 (providing other remedies for breach of trust).

52. See Evid. Code § 954 Comment.

53. See *supra* note 44.

54. See *Swidler*, 524 U.S. 399.

55. 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, *supra*, note 14, at n.88. Apparently, fifteen of these states have adopted rules based on the U.R.E., but not for the attorney-client privilege. Those fifteen states are Arizona, Colorado, Indiana, Iowa, Michigan, Minnesota, Montana, North Carolina, Ohio, Rhode Island, South Carolina, Tennessee, Washington, West Virginia, and Wyoming. See Legal Information Institute of Cornell University of Law, available at <www.law.cornell.edu/uniform/evidence.html> (listing states that have adopted the U.R.E.).

56. Several of these states have addressed survival of the privilege after the client's death, but only in the context of estate administration. 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 &*

1 **Pros and Cons**

2 Indefinite survival would broaden the privilege to survive when there is no
3 personal representative. That would have an advantage of making the posthumous
4 privilege apply until a decedent's assets definitively pass to beneficiaries,
5 regardless of whether a decedent's property passes inside or outside of probate.

6 However, indefinite survival would also seem to make the privilege survive in
7 instances that go far beyond those necessary to achieve the privilege's goal of
8 encouraging client candor.⁵⁷

9 Indefinite survival of the posthumous privilege would give clients an assurance
10 that its protection against compelled disclosure would last forever.

11 While a client might prefer indefinite protection against compelled disclosure,
12 and might not affirmatively wish for the client's communications ever to be
13 disclosed, the issue is whether indefinite survival of the privilege is required for
14 client candor. If most clients would communicate effectively with counsel under
15 existing law, indefinite survival of the posthumous privilege would unnecessarily
16 exclude relevant evidence from the factfinder. This exclusion would have greater
17 effect than the exclusion of evidence during a client's life, when the client can be
18 deposed as a witness.

19 Finally, if the privilege were expanded indefinitely, the same difficulties relating
20 to who would hold the privilege, and the duty governing the exercise of the
21 privilege, would arise.⁵⁸ Even if a person could be authorized to waive a privilege

Quincy Railroad Co., 179 N.W.2d 560, 564 (Iowa 1970) (administrator's action for wrongful death). This adds little, if any, insight into whether the privilege survives death indefinitely, because even in states that reject indefinite survival, the privilege survives during estate administration. Therefore, survival in these states may be no broader than survival under California's Evidence Code.

However, several common law states have determined that the privilege survives beyond the context of estate administration. See, e.g., *In re Miller*, 357 N.C. at 323; *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, 562 N.E. 2d 69, 59 USLW 2329 (Mass. 1990); *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 that privilege survives in circumstances where there was no estate, but applying balancing test and overriding privilege). But these states should not be used as a basis for a determination that *all* common law states have an indefinite privilege. In at least one common law state, the state's highest court determined that the privilege did not apply beyond the context of estate administration. See, e.g., *State v. Kump*, 76 Wyo. 273, 278, 291, 301 P.2d 808 (Wyo. 1956).

57. An indefinite privilege would preclude testimony to an attorney-client communication long after the decedent's property interests have been settled. For a description of the policy determination underlying existing law, see discussion of "Duration of the Attorney-Client Privilege After the Client's Death" *supra*.

58. See discussions of "Holder of the Decedent's Privilege" and "Duty Governing Exercise of the Decedent's Privilege" *infra*. Jurisdictions with survival beyond the context of estate administration vary in whether the posthumous privilege may be waived, and if so, by whom. See 67 A.L.R. 2d 1268 §§ 2-5 (1959 & Cum. Supp.); see, e.g., *Tucker v. Honda of South Carolina Mfg., Inc.*, 354 S.C. 574, 577, 582 S.E.2d 405 (2003) (stating that privilege can only be waived by client); *State v. Macumber*, 119 Ariz. 516, 582 P.2d

1 that lasts indefinitely, it would only leave the possibility of waiver, and it is
2 unclear what standard would govern that person's control of the privilege.⁵⁹

3 **Conclusion**

4 It may be, as the Legislature determined when it adopted the Evidence Code,
5 that "there is little reason to continue the privilege" after a client's property is
6 distributed.⁶⁰

7 There is no evidence that California's long-standing approach to the posthumous
8 attorney-client privilege is deterring attorney-client communications.⁶¹ Expanding
9 the privilege to survive indefinitely would thus likely exclude more evidence than
10 is necessary to achieve the purpose of the privilege. That would unnecessarily
11 interfere with the public's right to every person's evidence and hinder the truth-
12 seeking function of courts.

13 **Balancing Competing Interests After the Client's Death**

14 The Commission also considered a balancing approach to the attorney-client
15 privilege after the client's death. Under a balancing approach, the privilege
16 survives the client's death beyond estate administration, but becomes subject to
17 balancing by a court on a case-by-case basis. Under this approach, the court
18 balances the evidentiary need for disclosure of the attorney-client communication
19 against the decedent's continued interest in confidentiality. Balancing could be
20 done after the client's death in all cases, or limited to certain types of cases.⁶²

162 (Ariz. 1978) (noting that waiver occurred by deceased client's mother at proceedings on remand); see also Epstein, *supra* note 7, at 27 (noting that few cases discuss who may waive privilege after client's death, and that reasoning is sparse by courts that indicate certain relatives may waive).

59. See, e.g., *John Doe Grand Jury Investigation*, 408 Mass. at 481 (personal representative refused to waive privilege in homicide investigation). A personal representative might refuse to waive the privilege 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.).

60. See Evid. Code § 954 Comment.

61. It seems that most clients would be more concerned about receiving accurate advice by providing full information to their attorneys than about a remote possibility that communications with counsel could be disclosed under compulsion after the client's death. See Greenberg, Comment, *Swidler & Berlin v. United States ... and Justice for All?*, 80 B.U. L. Rev. 939, 946-47 (June 2000).

62. For example, the dissent in *Swidler & Berlin v. United States* advocates balancing in criminal cases after the client's death. See *Swidler*, 524 U.S. at 411 (O'Connor, J., dissenting). Another example is the Restatement approach, which advocates balancing after the client's death if the issue is of pivotal significance. Restatement (Third) of the Law Governing Lawyers § 77, Comment d, p. 591 (2000).

1 **Other Jurisdictions**

2 A small number of states employ balancing.⁶³

3 **Pros and Cons**

4 The appeal of balancing is that it allows a court to determine whether an
5 evidentiary need for an attorney-client communication justifies overriding the
6 privilege. It allows the scope of the privilege to be tailored to reflect competing
7 interests on a case-by-case basis.

8 However, because balancing permits a court to override the privilege based on a
9 need for the evidence, it gives clients little certainty over whether a particular
10 communication would be protected by the privilege. That could undermine the
11 privilege's purpose of encouraging client candor.⁶⁴

12 Additionally, there would be the same implementation difficulties, discussed
13 above, relating to who would hold the privilege, and what duty, if any, would
14 govern the holder's exercise of the privilege.⁶⁵

63. An appellate court in one state applied a balancing approach after the client's death beyond the context of estate administration. See, e.g., *Cohen v. Jenkintown Cab Co.*, 238 Pa. Super. 456, 462-65, 357 A.2d 689 (Pa. Super. Ct. 1976) (overriding deceased taxi driver's privilege in claim against taxi company by pedestrian injured in hit-and-run accident). In a few jurisdictions, courts have applied a balancing test to determine whether the privilege applies during the client's life. It seems probable that courts in these jurisdictions would apply the same test after the client's death. These jurisdictions are:

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

64. As the United States Supreme Court has repeatedly stressed, the goal of encouraging attorney-client communication requires that the privilege be predictable in its application. See, e.g., *Swidler*, 524 U.S. at 408-09; *Jaffee*, 518 U.S. at 18; *Upjohn*, 449 U.S. at 393 ("An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.")

65. See discussions of "Holder of the Decedent's Privilege" and "Duty Governing Exercise of the Decedent's Privilege" *infra*.

1 **Conclusion**

2 A balancing approach would permit a court to weigh, after the fact on a case-by-case basis, the decedent's remaining interest in confidentiality against the evidentiary need for the communication. Due to the unpredictability of this type of approach, it might be preferable to strike a balance between policy considerations in advance, by clearly delineating the privilege and its exceptions.

7 **End Privilege Outright at Client's Death**

8 A final alternative to existing law would be to simply end the attorney-client privilege upon the client's death.

10 **Other Jurisdictions**

11 It appears that no state takes this approach.⁶⁶

12 **Pros and Cons**

13 Proponents of this approach believe that ending the privilege outright at death would not significantly deter clients from openly communicating with their attorneys. Proponents of this approach believe that clients might want disclosure of their attorney-client communications to help promote the success of a surviving claim on their behalf.⁶⁷

18 However, it is not clear that a decedent would want to promote a claim that is adverse to the interests of the decedent's beneficiaries.

20 Moreover, existing exceptions already make the privilege inapplicable when a deceased client presumably would have wanted his or her attorney-client communications disclosed (when parties all claim through the deceased client,⁶⁸ and when an issue concerns the validity or intended meaning of a decedent's writing that purports to affect a property interest⁶⁹).

66. See Wydick, *supra*, note 14, at 1180 (stating that his research revealed this approach is not adopted by any state, nor by England). However, a few eminent scholars have supported this approach. Such scholars include Judge Learned Hand and Professors Morgan and McCormick. *Id.*; see also Chadbourn, *supra*, note 12, at 389.

67. Professor McCormick, a proponent of this approach, explained as follows:

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

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

68. See Evid. Code § 957 & Comment.

69. See Evid. Code §§ 960, 961 & Comments.

1 **Conclusion**

2 Under this approach, the privilege would not survive while a claim is litigated
3 by or against a deceased client's estate. That would be a significant departure from
4 California's longstanding approach. Such a change might deter clients from
5 candidly communicating with their attorneys. There has been no demonstrated
6 need for such a departure.

7 **Assessment of the Alternatives**

8 The first alternative, expanding the privilege to apply in the nonprobate context
9 as it does in the probate context, would be consistent with the general policy
10 determination underlying existing law. That is, the privilege would survive until
11 the deceased client's property definitively passes to beneficiaries.

12 However, it is currently unclear how this alternative could be implemented.⁷⁰
13 Furthermore, existing law under *Moeller v. Superior Court* appears to provide for
14 continuation of a deceased trustee's privilege (as to communications relating to
15 trust administration) when there is a successor trustee. This could continue the
16 privilege while surviving claims are resolved against property transferred by
17 revocable living trust, the main alternative to a will. For that reason, it appears that
18 the need to expand the posthumous privilege to nonprobate transfers is not as great
19 as it might otherwise be.

20 Each of the other alternatives depart from the general policy determination
21 underlying existing law. Each of these alternatives has pros and cons. But none of
22 these alternatives appears to be clearly superior to the policy balance struck by
23 existing law. Nor is the Commission convinced that existing law is deterring
24 candid attorney-client communication.

25 **RECOMMENDATION**

26 After carefully considering several alternatives, the Commission recommends
27 that the Legislature preserve the general approach of existing law. That approach
28 has served the state well for over forty years, and there does not appear to be any
29 clear justification for changing to another approach.

30 The Commission does, however, recommend minor adjustments to existing law,
31 which are discussed below. These adjustments would be consistent with the
32 general approach of existing law regarding when the privilege should and should
33 not survive.

34 **Expand an Existing Exception To Include Nonprobate Transfers**

35 Under an existing exception in Evidence Code Section 957, the privilege does
36 not apply after a client's death "as to a communication relevant to an issue

70. See discussion "Expand Privilege To Survive Until Nonprobate Assets Definitively Pass to Beneficiaries" *supra*.

1 between parties all of whom claim through a deceased client, regardless of
2 whether the claims are by testate or intestate succession or by inter vivos
3 transaction when all parties claim through the deceased client.”

4 This exception is based on the assumption that a decedent would have wanted
5 the attorney-client communication disclosed in litigation between the decedent’s
6 beneficiaries (as opposed to litigation in which a third party, such as a creditor,
7 claims against the decedent). Such disclosure would help to ensure the client’s
8 intent regarding disposition of the client’s assets “might be correctly ascertained
9 and carried out.”⁷¹

10 That rationale applies not only to beneficiaries under a will, but also with equal
11 force to a person who claims through the decedent by operation of a nonprobate
12 transfer.⁷² Accordingly, the Commission recommends modifying this exception to
13 include a nonprobate transfer.⁷³

14 **Probate Code Section 12252**

15 The Commission also recommends amending Probate Code Section 12252 to
16 clarify the meaning of recent amendments to it.

17 As discussed above, the amendments may be subject to two different
18 interpretations. Each interpretation results in a very different outcome as to the
19 duration of the posthumous privilege.⁷⁴

20 The Commission believes that the amendments were intended merely to clarify
21 that a personal representative who is appointed to perform subsequent estate
22 administration holds the decedent’s privilege.

23 To avoid any uncertainty in meaning, the Commission recommends removing
24 the amendments from Section 12252 and placing the clarification in Evidence
25 Code Section 953(c), which sets forth the general rule that a personal
26 representative holds the decedent’s privilege.⁷⁵

71. Evid. Code § 957 Comment.

72. If all parties claim through a nonprobate transfer, there is potentially no probate estate at all, no personal representative, and no privilege would exist. However, if there is a probate estate, the privilege would continue, and the decedent’s intent behind the nonprobate transfer could be thwarted if the personal representative refuses to waive the privilege as to a communication relating to the nonprobate transfer.

73. See proposed amendment to Evid. Code § 957 *infra*. The Legislature may want to consider making the same revision to analogous exceptions to other privileges. See, e.g., Evid. Code §§ 984 (exception to marital privilege), 1000 (exception to physician-patient privilege), & 1019 (exception to psychotherapist-patient privilege). Such changes would be beyond the scope of the current study. See 2007 Cal. Stat. ch. 388, § 2.

74. See discussion of “Recent Amendments to Probate Code Section 12252” *infra*.

75. See proposed amendment to Evid. Code § 953(c) *infra*; proposed amendment to Prob. Code § 12252 *infra*. Although the clarification in Probate Code Section 12252 was specific to the attorney-client privilege, the same principle would seem to apply to any other privilege that may be held by a personal representative. Accordingly, the Legislature may want to consider making a similar revision to those other privileges. See, e.g., Evid. Code §§ 993(c) (physician-patient privilege), 1013(c) (psychotherapist-patient

CONCLUSION

The general approach of existing law should be preserved. Under the Evidence Code, the attorney-client privilege survives the client's death while there is a personal representative.⁷⁶ And under *Moeller v. Superior Court*, it appears that the attorney-client privilege also survives when there is a successor trustee.⁷⁷

The Commission recommends a few minor adjustments that are consistent with the policy balance struck by existing law:

- Expand an existing exception in Evidence Code Section 957, which applies when all parties claim through the decedent, to include a beneficiary of a nonprobate transfer.
 - Clarify that the privilege is held by a personal representative who is appointed for purposes of subsequent estate administration pursuant to Probate Code Section 12252.

The first adjustment would help effectuate a deceased client's intent with respect to a nonprobate transfer, while the second adjustment would help prevent confusion and needless disputes.

privilege) & 1035.4(c) (sexual assault victim-counselor privilege). Such a change would be beyond the scope of the current study. See 2007 Cal. Stat. ch. 388, § 2.

The Commission also considered amending Section 953 to expressly provide that the privilege held by the personal representative is terminated upon final distribution of the estate. However, that rule would be problematic because there are circumstances in which a personal representative may act, in the personal representative's capacity as personal representative, after final distribution of the estate. (For example, in many instances, courts allow the personal representative to retain a substantial reserve after final distribution to deal with contingencies, such as an unresolved claim against the estate, including unresolved tax liability. See also note 20 *supra*.) The proposed amendment to Section 953 and its Comment underscores that point, indicating that a personal representative holds the decedent's attorney-client privilege at anytime while the personal representative is performing the duties of a personal representative.

76. Evid. Code §§ 953-954 & Comments; *HLC Properties*, 35 Cal. 4th at 65-68.

77. See *Moeller*, 16 Cal. 4th 1124.

PROPOSED LEGISLATION

1 **Evid. Code § 953. Holder of privilege**

2 SECTION 1. Section 953 of the Evidence Code is amended, to read:

3 953. As used in this article, “holder of the privilege” means:

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

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

7 (c) The personal representative of the client if the client is dead, including a
8 personal representative appointed pursuant to Probate Code Section 12252.

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

12 **Comment.** Subdivision (a) of Section 953 is amended to revise a gender reference.

13 Subdivision (c) is amended to make clear that a personal representative holds the decedent’s
14 lawyer-client privilege at anytime while the personal representative is performing the duties of a
15 personal representative, including, without limitation, during any subsequent estate
16 administration. See, e.g., Prob. Code § 12252 (appointment of personal representative for
17 subsequent administration of an estate); see also Prob. Code § 58 (personal representative).

18 **Evid. Code § 957. Parties claiming through deceased client**

19 SEC 2. Section 957 of the Evidence Code is amended, to read:

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

24 **Comment.** Section 957 is amended to make the exception applicable to parties who all claim
25 through a deceased client, including a person who claims through a nonprobate transfer.

26 **Prob. Code § 12252. Reappointment of a personal representative**

27 SEC 3. Section 12252 of the Probate Code is amended, to read:

28 12252. If subsequent administration of an estate is necessary after the personal
29 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
33 becomes necessary or proper for any other cause, both of the following shall
34 apply:

35 (a) The court shall appoint as personal representative the person entitled to
36 appointment in the same order as is directed in relation to an original appointment,
37 except that the person who served as personal representative at the time of the
38 order of discharge has priority. ~~The appointed personal representative shall be a~~

1 holder of the decedent's lawyer client privilege for purposes of Article 3
2 (commencing with Section 950) of Chapter 4 of Division 8 of the Evidence Code.

3 (b) Notice of hearing of the appointment shall be given as provided in Section
4 1220 to the person who served as personal representative at the time of the order
5 of discharge and to other interested persons. If property has been distributed to the
6 State of California, a copy of any petition for subsequent appointment of a
7 personal representative and the notice of hearing shall be given as provided in
8 Section 1220 to the Controller.

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