

First Supplement to Memorandum 2009-3

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

The Commission has received additional comments on its tentative recommendation on the attorney-client privilege after the client's death. A letter from the Executive Committee of the Trusts and Estates Section of the California State Bar ("TEXCOM") is attached. See Exhibit pp. 1-2.

TEXCOM writes that it supports the tentative recommendation.

TEXCOM believes that the proposal's clarifying amendments appear to be consistent with legislative intent, and are "supported by the same sound policy considerations that support the existing law." Exhibit p. 1.

In particular, TEXCOM supports the clarification that the exception in Evidence Code Section 957 applies when all parties claim through the decedent, including a claim under a nonprobate transfer. TEXCOM agrees that the clarification is appropriate, "given the frequency by which decedents' assets now pass via nonprobate transfers." *Id.*

Lastly, TEXCOM supports the Commission's decision not to expand the privilege "to apply when there is no personal representative." *Id.* Due to the variety of nonprobate transfers, and the "variety of persons acting in different capacities," TEXCOM concludes "that to expand the privilege to nonprobate transfers would be complex if, indeed, any workable solution could be devised at all." *Id.* And, noting (1) that "the substantial preponderance of nonprobate transfers" is by trust, and (2) that the *Moeller* case indicates that a successor trustee may assert a deceased predecessor trustee's privilege with respect to communications with counsel concerning trust administration, TEXCOM does "not believe that there is justification to complicate the law in this area." *Id.*

Respectfully submitted,

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February 10, 2009

VIA E-MAIL AND U.S. MAIL

cbidart@c/rc.ca.gov

Brian Hebert
CA Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, CA 94303-4739

Re: Texcom Response to CLRC's Tentative Recommendation

Dear Mr. Hebert:

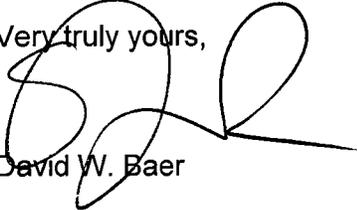
I write this letter on behalf of the Executive Committee of the Trusts and Estates Section of the California State Bar ("Texcom") to confirm its support of the CLRC's Tentative Recommendation to make minor changes to the statutes governing the attorney-client privilege after a client's death. Texcom agrees with the recommendation's conclusion that while some minor clarifying amendments to current law will be helpful, no problem exists to warrant a major overhaul of the statutory scheme. The clarifying amendments are well-drafted and consistent with what already appears to be the Legislature's intent or, to the extent that they may slightly modify existing law, supported by the same sound policy considerations that support the existing law. In particular, given the frequency by which decedents' assets now pass via nonprobate transfers, the proposed amendment to clarify that the exception to the attorney-client privilege under Evidence Code section 957 extends to nonprobate transfers is appropriate.

For your information, Texcom also considered the alternative of expanding the post-death attorney-client privilege to apply when there is no personal representative. There are a variety of forms of nonprobate transfers and therefore a variety of different persons acting in different capacities who might assert the attorney-client privilege were this alternative adopted. Consequently, Texcom found that to expand the privilege to nonprobate transfers would be complex if, indeed, any workable solution could be devised at all. We do not believe that there is justification to complicate the law in this area, particularly when the *Moeller* case indicates that a successor trustee may assert the attorney-client privilege with respect to a deceased predecessor trustee's communications with counsel concerning the trust's administration. It is evident that the substantial preponderance of nonprobate transfers in California now occur pursuant to trust instruments.

Brian Hebert
February 10, 2009
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Please contact me if you have any questions about this letter or Texcom's position.

Very truly yours,

A handwritten signature in black ink, appearing to read 'David W. Baer', with a long horizontal stroke extending to the right.

David W. Baer

cc (via email only): Catherine Bidart (bhebert@c/rc.ca.gov)
Bette Epstein, Texcom Committee (bepstein@reedsmith.com)
May Tong, Texcom Committee (mayleetong@gmail.com)
Neil Horton, Texcom Committee (neil@laweastbay.com)