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Evidence - The Attorney-Client Privilege: Nearly Breached - Swidler & (and) Berlin v. United States

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EVIDENCE—The Attorney-Client Privilege: Nearly Breached. *Swidler & Berlin v. United States*, 118 S. Ct. 2081 (1998).

INTRODUCTION

In July 1993, Deputy White House Counsel Vincent W. Foster, Jr. met with James Hamilton, with the law firm of Swidler and Berlin, to seek legal representation regarding his involvement in the dismissal of White House Travel Office employees.¹ Nine days later, Foster committed suicide.² While investigating the Travel Office firings, a federal grand jury subpoenaed the handwritten notes Hamilton took during the meeting.³ The United States District Court for the District of Columbia refused to enforce the subpoena, concluding the handwritten notes were protected by the attorney-client privilege and the work product privilege.⁴ The Court of Appeals for the District of Columbia Circuit reversed, saying the district court read both privileges too broadly and remanded for further proceedings.⁵ The appellate court reasoned the attorney-client privilege “obstructs the truth-finding process, and should be construed narrowly.”⁶ Accordingly, the court held the attorney-client privilege should be qualified after the death of the client in criminal proceedings,⁷ saying such a restriction of the privilege would create only a nominal chilling effect

1. *Swidler & Berlin v. United States*, 118 S. Ct. 2081, 2083 (1998); see generally Brief for the United States, *Swidler & Berlin v. United States*, 118 S. Ct. 2081 (1998) (No. 97-1192) [hereinafter Brief for the United States].

The dismissal of the Travel Office employees produced an immediate controversy about why the employees had been fired and why the White House had involved the FBI in the matter. . . . The White House . . . responded by conducting an internal investigation into the firings. On July 2, 1993, the White House issued a public report of that investigation. Chief of Staff Thomas F. McLarty reprimanded four White House officers and employees (including David Watkins and Associate Counsel William Kennedy) for their actions in connection with the firings. Although Mr. Foster was not reprimanded, the White House report recounted his apparent role in the events leading to the firings.

Controversy over the Travel Office firings did not abate with the White House’s report and the publicly announced reprimands. On July 2, 1993, the President signed the Supplemental Appropriations Act of 1993 . . . which required the General Accounting Office to conduct a review of the firings. At the same time, calls were issued for further congressional or federal law enforcement investigation into the matter.

On Sunday, July 11, 1993, Mr. Foster met with petitioner James Hamilton, an attorney at Swidler & Berlin (also a petitioner).

Id. at 3-4.

2. *Swidler*, 118 S. Ct. at 2083.

3. *Id.*

4. *Id.* See Brief for the United States, *supra* note 1, at 7 (noting the judge made this ruling without elaboration or explanation).

5. *In re Sealed Case*, 124 F.3d 230, 231 (D.C. Cir. 1997).

6. *Id.* at 233.

7. *Id.* at 234.

on communications between clients and attorneys.⁸

Counsel for Swidler & Berlin then submitted a suggestion for rehearing *en banc*.⁹ This motion was denied and the United States Supreme Court granted certiorari. The Supreme Court reversed, ruling that the attorney-client privilege survives the death of the client and rejecting the exception offered by the court of appeals.¹⁰

This case note examines the *Swidler* decision and focuses on the Supreme Court's justification of the attorney-client privilege. The note explains the history of the attorney-client privilege by examining the development and the modern status of the privilege. Next, it summarizes the decisions of the court of appeals and the Supreme Court in this case. This note concludes the Supreme Court made the proper determination in this case, but recognizes the lack of clear precedent and examines the Court's choice of policy justification for the privilege. The note also suggests the privilege may be susceptible to challenges in future posthumous application cases.¹¹

BACKGROUND

Development of the Privilege

The attorney-client privilege, one of the oldest privileges for confidential communications, originated around the time that testimonial compulsion was authorized during the reign of Elizabeth I.¹² At its inception, the privilege was rooted in the attorney's honor and oath to keep the client's secrets (hereinafter the oath and honor theory).¹³ As the eighteenth century neared, the courts' search for truth overshadowed the attorney's honor¹⁴ and there

8. *Id.* at 233.

9. See *In re Sealed Case*, 129 F.3d 637 (D.C. Cir. 1997).

10. *Swidler & Berlin v. United States*, 118 S. Ct. 2081, 2084 (1998).

11. The reader should keep in mind that *Swidler* construes the Federal Rule of Evidence 501 and the federal common law privilege. The treatment of the attorney-client privilege under Wyoming (or any other state) rules is not controlled by this decision.

12. 8 WIGMORE, EVIDENCE § 2290 (McNaughton rev. 1961). Wigmore asserts that the privilege probably did not come into existence before testimonial compulsion because there would have been little need for the privilege and the privilege was a natural exception to the right of testimonial compulsion. *Id.*

13. *Id.* (citing *Taylor v. Blacklow*, 132 Eng. Rep. 401, 406 (C.P. 1836)).

14. 1 J. STRONG, MCCORMICK ON EVIDENCE § 87 (4th ed. 1992) [hereinafter MCCORMICK]. Until the later 1700s, courts allowed witnesses to invoke their "honor among gentlemen" as a basis for not revealing the secrets entrusted to them. 8 WIGMORE, *supra* note 12, at § 2286. However, this view was abandoned in the Duchess of Kingston case where the Duchess was accused of bigamy. Lord Barrington, a friend of the Duchess, refused to say whether the Duchess had admitted to the first marriage. The court announced that "it is the judgment of this House that you [Lord Barrington] are bound by law to answer all such questions as shall be put to you." *Id.* § 2286 n.16. Wigmore defined the common law rule saying "[n]o pledge of privacy nor oath of secrecy can avail against demand for the truth in a court of justice." *Id.* § 2286.

was no longer “any moral delinquency or public odium in breaking one’s pledge under force of the law.”¹⁵ This emphasis on “truth” threatened the existence of the privilege until a new justification emerged: “providing subjectively for the client’s freedom of apprehension in consulting his legal advisor.”¹⁶

This new theory, concerned with encouraging candor between the client and the attorney (hereinafter the utilitarian theory), first appeared in the early 1700s, but coexisted with the oath and honor theory until the mid-1800s.¹⁷ As the two theories struggled for predominance, three main differences stood out. First, under the oath and honor theory the attorney took the oath; therefore, the attorney asserted the privilege.¹⁸ In 1801, the utilitarian theory began to make its mark when Lord Eldon declared that the privilege belonged to the client.¹⁹ Second, the oath and honor theory limited the privilege to cover only those communications related to the litigation at bar.²⁰ Conversely, the utilitarian theory extended the privilege to communications irrespective of litigation, and in relation to any consultation for legal advice.²¹ Third, under the oath and honor theory the privilege could be waived by the attorney.²² Today, “the lawyer has an ethical obligation to claim [the attorney-client privilege] when necessary to protect the interests of the client.”²³

The utilitarian theory continues to be the primary justification for the privilege.²⁴ The utilitarian view of the attorney-client privilege is based on the rationale that full disclosure is necessary for the attorney to competently represent the client in a complex legal system.²⁵ In order to obtain full dis-

15. 8 WIGMORE, *supra* note 12, § 2290.

16. *Id.* See also 1 MCCORMICK, *supra* note 14, § 87, at 314 (noting the loss of facts that results from the privilege is outweighed by the benefits to justice derived from franker disclosure). While this theory (which is also the modern theory) focuses on the *subjective* freedom of the client in consulting the attorney, the theory is justified because of the benefits which accrue to society from effective legal representation. See *infra* notes 25-26 and accompanying text. This emphasis on looking to the benefits to society rather than emphasizing the attorney’s oath of honor enabled the privilege to withstand challenges from the judiciary’s search for truth. 8 WIGMORE, *supra* note 12, § 2290.

17. 8 WIGMORE, *supra* note 12, § 2290.

18. *Id.*

19. *Id.* § 2290 n.8 (quoting *Wright v. Mayer*, 31 Eng. Rep. 1051 (Ch. 1801)).

20. *Id.* § 2290.

21. See *id.* (“[T]he shackles of the earlier precedents were not finally thrown off until the decade of 1870.”).

22. *Id.*

23. 2 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, *FEDERAL EVIDENCE* § 200 (2d ed. 1994).

24. Simon J. Frankel, *The Attorney-Client Privilege After the Death of the Client*, 6 GEO. J. LEGAL ETHICS 45, 49-50 (1992). The Supreme Court adopted this rationale, saying the purpose of the privilege is to promote “full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.” *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

25. 1 MCCORMICK, *supra* note 14, § 87 at 314.

closure, “the apprehension of compelled disclosure by the legal adviser must be removed; hence, the law must prohibit such disclosure except on the client’s consent.”²⁶

The attorney-client privilege has not been without its opponents. As early as 1827, Jeremy Bentham adamantly opposed the privilege on the basis that it only protected the guilty.²⁷ He opined that an innocent person would have nothing to fear if his attorney was forced to testify regarding their conversations.²⁸ This simplistic approach seems antithetical to the American system of justice and its goal of ensuring legal counsel to everyone, including the guilty.²⁹ It also ignores the difficult problem civil cases present where guilt or fault may be shared by more than one party.³⁰

Unlike Bentham, modern critics do not attack the very idea of the privilege, but focus their criticism on the privilege’s efficacy in achieving candor between the client and the attorney.³¹ “Critics . . . commonly assert that people typically know little or nothing about their privilege and that even if they did, the knowledge would rarely alter their communication behavior.”³² Many critics demand empirical evidence to justify the privilege.³³ Those making this demand are often dismayed at the poor response from the academic community in pursuing such research.³⁴ However, “such evidence may prove undemonstrable by the reason of the privilege itself.”³⁵ This lack

26. 8 WIGMORE, *supra* note 12, § 2291.

27. *See id.* (quoting Bentham’s arguments).

28. *Id.*

29. Bentham was quite unsympathetic to the guilty.

If it be your object not to find the prisoner guilty, there cannot be a better way than refusing to hear the person who is most likely to know of his guilt, if it exist. The [attorney-client privilege] rule is perfectly well adapted to its end: but is that end the true end of procedure? This question surely requires no answer.

Id.

30. *Id.* Bentham argued that doing away with the privilege would only deter the guilty from seeking legal counsel because the innocent would know they would have nothing to fear if their attorney was forced to testify regarding their conversations. *Id.* However, Wigmore points out that in civil cases there is “no hard and fast line between guilt and innocence” and even if there was “it does not happen that all the acts and facts on one side have been wholly right and lawful and all of those on the other side wholly wrong and unlawful.” *Id.* Because of these mixtures of right and wrong a person would not always be able to confidently confide in an attorney with no fear of disclosure. *Id.*

31. *See* 1 MCCORMICK, *supra* note 14, § 87 at 315. (“[N]one can deny the privilege’s unfortunate tendency to suppress the truth, and it has commonly been urged that it is only the greater benefit of increased candor which justifies the continuation of the privilege.”)

32. *Developments in the Law—Privileged Communications* (pt. II. Modes of Analysis: The Theories and Justifications of Privileged Communications), 98 HARV. L. REV. 1471, 1474 nn.19-20 (1985) [hereinafter *Modes of Analysis*].

33. Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351, 353 n.7 (1989). *See also Modes of Analysis, supra* note 32, at 1474 (“The most frequent and most powerful attack simply challenges the notion that existing privileges actually encourage communications.”).

34. Zacharias, *supra* note 33, at 353-54.

35. 1 MCCORMICK, *supra* note 14, § 87 at 315.

of research may stem from the difficulty of proving the privilege's effectiveness, or a feeling that the issues are more theoretical than real.³⁶ In light of the few studies that have been conducted on this topic, a court would be reluctant to curtail the privilege on the basis of empirical research alone.³⁷ The American Law Institute suggests an exception curtailing the privilege after the client's death would probably require legislation.³⁸

Modern Status of the Privilege

1. Policy Justifications

The primary justification of the privilege is the utilitarian justification.³⁹ This rationale protects evidence covered by the privilege "on the grounds that the overall system of justice will actually function more effectively if clients have the protection of the privilege."⁴⁰ Accordingly, the privilege protects not just clients individually, but society generally.⁴¹ Most importantly, since the focus is on the benefits that accrue to society, the justification avoids the difficult balancing of competing individual concerns that may arise when someone seeks information protected by the privilege.⁴² Rather than concern itself with which individual concern should receive priority, a court is able to say society's interest in the privilege is superior to any individual's interest.

The lack of empirical evidence proving the privilege promotes full and frank communication has led some commentators to justify the privilege on other grounds.⁴³ "A rationale increasingly espoused by commentators is that privileges are a recognition by society of the importance of privacy in certain relationships, so that regardless of 'necessity,' confidentiality will be protected."⁴⁴ This emerging rationale (hereinafter the privacy theory) has gained some support among commentators, but has received little recognition from courts.⁴⁵

36. Zacharias, *supra* note 33, at 353 n.8.

37. See, e.g., Swidler & Berlin v. United States, 118 S. Ct. 2081, 2087 n.4 (1998) (noting that the empirical evidence on the privilege is limited and inconclusive).

38. RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 127 cmt. d (Proposed Final Draft No. 1, 1996) (saying that a compelling argument can be made for an exception to the privilege in cases where the protected communication "bears substantially upon an issue of pivotal significance for a claim or defense of a party.").

39. See *supra* notes 24-26 and accompanying text.

40. Frankel, *supra* note 24, at 51.

41. *Id.*

42. See *Modes of Analysis*, *supra* note 32, at 1474.

43. Frankel, *supra* note 24, at 53. See also *Modes of Analysis*, *supra* note 32, at 1480.

44. EDNA SELAN EPSTEIN & MICHAEL M. MARTIN, THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE 5 (2 ed. 1989).

45. 1 MCCORMICK, *supra* note 14, § 87 at 315-16 (saying this rationale has "achieved only very

Unlike the utilitarian justification, which focuses on the benefits to society in general, the privacy rationale focuses on the individual's right to privacy.⁴⁶ Privacy is viewed as a necessary component of personal autonomy and an end in itself.⁴⁷ Because of the importance of this right, a compelled disclosure of information entrusted to the attorney is viewed as inherently wrong.⁴⁸ Some commentators, anxious to avoid balancing societal and individual concerns, have espoused the privacy rationale, claiming the rights of the individual are the paramount concern to be protected.⁴⁹

Others argue these two justifications can be combined to give greater support to the privilege.⁵⁰ Some have suggested the privacy rationale is a supplemental justification which responds to the limitations of the utilitarian rationale.⁵¹ Others have suggested the two theories can be "seen as different views of a common justification for the privilege."⁵² Despite the apparent compatibility of the theories, courts have generally treated the two justifications as mutually exclusive.⁵³ "At the present time it seems most realistic to describe the attorney-client privilege as supported in part by its traditional utilitarian justification, and in part by the integral role it is perceived to play in the adversary system itself."⁵⁴

2. Cases—Extent of Privilege Recognized

Of the few United States Supreme Court cases that have construed the attorney-client privilege, *Hunt v. Blackburn*, *Glover v. Patten*, and *Upjohn Co. v. United States* are notable.⁵⁵ The earliest of these cases, *Hunt v. Black-*

little recognition in the courts as a supporting, much less a sufficient, justification for the attorney-client privilege." See also Frankel, *supra* note 24, at 53 n.41 (contending that judicial opinions rarely discuss the privacy rationale).

46. See Frankel, *supra* note 24, at 53-54.

47. See *Modes of Analysis*, *supra* note 32, at 1481.

48. *Id.*

49. See *Developments in the Law—Privileged Communications* (pt. III. Attorney-Client Privilege), 98 HARV. L. REV. 1501, 1504 (1985) ("The non-utilitarian theorists argue for expansion of the privilege, focusing on the rights that the privilege protects and abandoning caution concerning the cost of fully protecting those rights.")

50. See *id.* (arguing the utilitarian and non-utilitarian justifications can be incorporated into one broad framework). See also *Modes of Analysis*, *supra* note 32, at 1484 (contending that the two theories are compatible and share similar methodologies).

51. *Modes of Analysis*, *supra* note 32, at 1484.

52. Frankel, *supra* note 24, at 55.

53. See *Modes of Analysis*, *supra* note 32, at 1484 ("[B]ecause they [courts] accept one of two false dichotomies: (1) the dichotomy between justifications that advance collective interests and justifications that protect individual interest, or (2) the dichotomy between instrumental and noninstrumental rationales. Because both dichotomies ultimately collapse, it is possible to reconcile the traditional justification with the privacy rationale and to encompass both rationales within a full utilitarian framework.")

54. 1 MCCORMICK, *supra* note 14, § 87 at 316.

55. See *Hunt v. Blackburn*, 128 U.S. 464 (1888); *Glover v. Patten*, 165 U.S. 394 (1897); *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

burn, involved a title dispute over certain property.⁵⁶ In that case the defendant sought to suppress testimony by her attorney, claiming the attorney-client privilege barred his testimony on matters relating to her allegations that he had misled and misadvised her.⁵⁷ The Supreme Court recognized the purpose of the privilege as being founded “upon the necessity . . . of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure.”⁵⁸

In *Glover v. Patten*, the Supreme Court addressed several questions regarding an estate, one of which was whether or not the communications made by the deceased to her lawyer were privileged.⁵⁹ The Court ruled “in a suit between devisees under a will, statements made by the deceased to counsel respecting the execution of the will or other similar documents, are not privileged.”⁶⁰ The Court recognized “such communications might be privileged if offered by third persons to establish claims against the estate.”⁶¹ Again the Supreme Court recognized the purpose of the privilege, saying:

[I]t is out of regard to the interest of justice, which cannot be upholden, and to the administration of justice, which cannot go on without the aid of men skilled in jurisprudence, in the practice of the courts, and in those matters affecting rights and obligations which form the subject of all judicial proceedings. If the privilege did not exist at all, every one would be thrown upon his own legal resources. Deprived of all professional assistance, a man would not venture to consult any skillful person, or would only dare to tell his counselor half his case.⁶²

In the midst of adopting this testamentary exception to the privilege, the Court stated “[t]hat the privilege does not in all cases terminate with the death of the party, I entertain no doubt.”⁶³

In *Upjohn Company v. United States*, the Supreme Court addressed the

56. 128 U.S. 464 (1888).

57. *Id.* at 470.

58. *Id.*

59. 165 U.S. 394, 406 (1897).

60. *Id.*

61. *Id.*

62. *Id.* at 406-07 (quoting Lord Brougham in *Greenough v. Gaskell*, 39 Eng. Rep. 618, 621 (Ch. 1833)).

63. *Id.* 407 (quoting Vice Chancellor Turner in *Russell v. Jackson*, 68 Eng. Rep. 558, 560 (V.C. 1851)). This comment is particularly curious in light of the Supreme Court’s assertion in *Swidler* that the *Glover* court expressly assumed the privilege continued after the client’s death. See *Swidler & Berlin v. United States*, 118 S. Ct. 2081, 2085 (1998).

scope of the attorney-client privilege in the corporate context.⁶⁴ In holding the “control group” test⁶⁵ too narrowly construed the privilege,⁶⁶ the Court made several observations regarding the attorney-client privilege. First, the Court reinforced its earlier statement of the purpose of the privilege saying “[i]ts purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of the law and administration of justice.”⁶⁷ Secondly, the Court emphasized the importance of certainty in allowing “the attorney and client . . . to predict with some degree of certainty whether particular discussions will be protected.”⁶⁸ Finally, the Court made the observation that “the privilege only protects disclosure of communication; it does not protect disclosure of the underlying facts by those who communicated with the attorney.”⁶⁹

Exceptions to the Privilege

Generally, the exceptions to the attorney-client privilege have been limited to discreet areas. Exceptions arise in cases where a client seeks legal advice to further a plan to commit a crime or tort (crime-fraud exception) and cases where a communication is relevant to an issue between parties who assert competing claims through the same deceased client regarding estate matters (testamentary exception).⁷⁰ Other exceptions apply to a few specific situations.⁷¹ Outside of these narrow exceptions the attorney-client

64. 449 U.S. 383 (1981).

65. The control group test limits protection of the attorney-client privilege to those officers and agents who are responsible for directing the company's actions in response to legal advice. *See id.* at 390.

66. *Id.* at 390-97.

67. *Id.* at 389.

68. *Id.* 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.”).

69. *Id.* at 395.

The protection of the privilege extends only to communications and not to facts. A fact is one thing and a communication concerning the fact is an entirely different thing. The client cannot be compelled to answer the question, “What did you say or write to the attorney?” but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney.

Id. at 395-96 (quoting *Philadelphia v. Westinghouse Elec. Corp.*, 205 F. Supp. 830, 831 (E.D. Pa. 1962)).

70. UNIF. R. EVID. 502(d) (amended 1986), 13A U.L.A. 519-20 (1994).

71. *Id.* Those situations are: (1) cases involving a communication relevant to an issue of breach of duty by the lawyer to his client or by the client to his lawyer; (2) cases involving a communication relevant to an issue concerning an attested document of which the lawyer is an attesting witness; (3) cases where a communication is relevant to a matter of common interest between two or more clients if made by any of them to a lawyer whom they have retained in common when offered in an action between any of such clients; and (4) cases involving a communication between a public officer or agency and its lawyers unless the communication concerns a pending investigation, claim, or action and the court determines that disclosure will seriously impair the ability of the public officer or agency to proc-

privilege has a tendency to suppress the truth finding process.⁷² For this reason the court of appeals in this case suggested the need for confidentiality and the need for the privileged information should be balanced.⁷³

PRINCIPAL CASE

The district court reviewed, *in camera*, the notes James Hamilton had made. The court concluded the notes were protected from disclosure by the attorney-client privilege and the work product doctrine.⁷⁴ The court of appeals reversed, finding the district court read both privileges too broadly.⁷⁵ In a two to one decision, the three judge panel held the attorney-client privilege should be qualified in certain criminal cases where the need for the information outweighed the deceased client's confidentiality interests.⁷⁶

The court noted the limited number of cases recognizing the attorney-client privilege after the client's death in cases other than testamentary exception cases.⁷⁷ The court stated that the few cases which do deal with the operation of the privilege after the client's death give very little explanation for their decisions.⁷⁸ The court asserted, citing only the opinions of commentators,⁷⁹ there would be little chilling effect on a client's candor if the privilege is curtailed in certain criminal matters.⁸⁰ The court also noted the

ess the claim or conduct a pending investigation, litigation, or proceeding in the public interest. *Id.*

72. See 1 MCCORMICK, *supra* note 14, § 87. See also EPSTEIN & MARTIN, *supra* note 44, at 5 (noting that the attorney-client privilege should be strictly construed because the privilege itself is an exception to the general principle of full disclosure).

73. See *In re Sealed Case*, 124 F.3d 230, 233 (D.C. Cir. 1997).

74. *Id.* at 231.

75. *Id.*

76. *Id.* at 234.

77. *Id.* at 231. The court reported one commentator's finding that 95% of cases examined involving the application of the attorney-client privilege after the client's death were testamentary disputes. *Id.* (citing Frankel, *supra* note 24, at 58 n.65).

78. *Id.* at 232. Those who favor an eternal duration for the privilege seldom do much by way of justifying this in terms of policy. 24 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5498 (1986).

79. *In re Sealed Case*, 124 F.3d at 232 (noting that other than Wigmore, most commentators "support some measure of post-death curtailment."). See, e.g., 24 WRIGHT & GRAHAM, *supra* note 78, § 5498 ("One would have to attribute a Pharaoh-like concern for immortality to suppose that the typical client has much concern for how posterity may view his communications."); RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 127 cmt. d (Proposed Final Draft No. 1, 1996) ("Permitting disclosure of a decedent's confidential communications in such an exceptional case would do little to inhibit clients from confiding in their lawyers."); See also 1 MCCORMICK, *supra* note 14, § 94 at 350 ("This [terminating the privilege at death] could not to any substantial degree lessen the encouragement for free disclosure which is the purpose of the privilege."); 2 MUELLER & KIRKPATRICK, *supra* note 23, § 199 ("Few clients are much concerned with what will happen sometime after the death that everyone expects but few anticipate in an immediate or definite sense.").

80. *In re Sealed Case*, 124 F.3d at 233.

cost of protecting communications after death is high.⁸¹

The dissent found no reason to depart from the common law, saying traditional justifications were persuasive enough to sustain the privilege beyond the client's death.⁸² The dissent claimed an uncertain privilege is little better than no privilege at all,⁸³ and the privilege would be undermined if its application was contingent upon a judge's evaluation at an unascertainable time in the future.⁸⁴

The Supreme Court, in a six to three decision, reversed the court of appeals and held the notes at issue were protected by the attorney-client privilege.⁸⁵ The Court noted that only two cases held the attorney-client privilege did not survive the death of the client.⁸⁶ The Court said "[t]he great body of caselaw supports, either by holding or considered dicta, the position that the privilege does survive in a case such as the present one."⁸⁷ The Court placed the burden of proof on the independent counsel to prove that "reason and experience" require the attorney-client privilege to be limited in this case.⁸⁸

Before concluding the independent counsel failed to meet this burden, the Court addressed several arguments. The Court first attacked the argument analogizing the proposed exception in criminal cases to the testamentary exception by saying the testamentary exception furthered the intent of the client while the proposed criminal exception did not.⁸⁹ In response to the independent counsel's proposition that allowing the attorney to testify would only reveal information that would have been obtained by a grant of immunity to the client while he was alive, the Court said the privilege is broader than the Fifth Amendment protection against self-incrimination.⁹⁰ Additionally, the Court dismissed the argument that the privilege results in a

81. *Id.* The court of appeals also discussed the work product privilege, but the Supreme Court did not reach this issue. *Swidler & Berlin v. United States*, 118 S. Ct. 2081, 2084 n.1 (1998).

82. *In re Sealed Case*, 124 F.3d at 238-39 (Tatel, J., dissenting).

83. *Id.* at 239 (citing *Upjohn Co. v. United States* 449 U.S. 383, 393 (1981)).

84. *Id.* at 240.

85. *Swidler & Berlin v. United States*, 118 S. Ct. 2081, 2083 (1998).

86. *Id.* at 2084. The two courts which have held that the attorney-client privilege should not prevent disclosure of communication by a deceased client were the lower court in the principal case and a Pennsylvania state appellate court. *See In re Sealed Case*, 129 F.3d 637, 232 n.1 (D.C. Cir. 1997); *Cohen v. Jenkintown Cab Co.*, 357 A.2d 689 (Pa. Super. Ct. 1976). In *Cohen*, the court found that the interests of justice required the disclosure of a deceased cabdriver's communication to his attorney admitting liability for the plaintiff's injury. *See Cohen*, 357 A.2d at 689.

87. *Swidler*, 118 S. Ct. at 2084.

88. *Id.* at 2085 (citing FED. R. EVID. 501: "[T]he privilege of a witness . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.").

89. *Id.* at 2085-86.

90. *Id.* at 2086.

loss of evidence by saying the loss of evidence is more apparent than real because, without the privilege, the communication probably would not have been made.⁹¹

The Court used the utilitarian policy justification for the privilege by citing the *Upjohn* case. The Court found “[t]he privilege is intended to encourage ‘full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice.’”⁹² The Court also set forth three reasons to justify the posthumous application of the privilege: (1) knowing communications will remain confidential even after death encourages the client to communicate fully and frankly with counsel; (2) while the fear of disclosure and the consequent withholding of information from counsel may be reduced if disclosure is limited to posthumous disclosure in a criminal context, it seems unreasonable to assume it vanishes altogether; and (3) clients may be concerned about reputation, civil liability, or possible harm to friends or family.⁹³

The Court discounted commentators’ views to the contrary, stating the need to encourage full disclosure was a strong enough reason to justify the survival of the privilege beyond the client’s death.⁹⁴ Finally, the Court refused to reach the issue of whether an exception should be made in cases where a defendant’s constitutional rights were implicated, asserting that such exceptional circumstances did not exist in this case.⁹⁵

Conversely, the dissent concluded that although the attorney-client privilege normally survives the death of the client, “a criminal defendant’s right to exculpatory evidence . . . may, where the testimony is not available from other sources, override a client’s posthumous interest in confidentiality.”⁹⁶ The dissent reached this conclusion by first contending that all rules of evidence must be adapted to the successful development of truth.⁹⁷ The dissent noted that “[a] privilege should operate . . . only where ‘necessary to achieve its purpose.’”⁹⁸ The dissent said the interests of the client are greatly diminished at death while the cost of recognizing an absolute posthumous

91. *Id.* at 2087.

92. *Id.* at 2084. (quoting *Upjohn Co. v. United States* 449 U.S. 383, 389 (1981)).

93. *Id.* at 2086.

94. *Id.*

95. *Id.* at 2087 (acknowledging Swidler & Berlin’s concession that exceptional circumstances implicating a criminal defendant’s constitutional rights might warrant breaching the privilege).

96. *Id.* at 2088 (O’Connor, J., dissenting). The dissent also stated that a compelling law enforcement need for information may override the client’s posthumous interests. *Id.* Justices Scalia and Thomas joined the dissent.

97. *Id.*

98. *Id.* at 2088 (quoting *Fisher v. United States*, 425 U.S. 391, 403 (1976)).

privilege are very high.⁹⁹ Next, the dissent asserted that current exceptions to the privilege are not necessarily consistent with encouraging full and frank communication, but they demonstrate the privilege is inapplicable under certain circumstances in order to safeguard the proper functioning of the adversary system.¹⁰⁰ Finally, the dissent pointed out that the common law does not specifically provide that the attorney-client privilege remains absolute after the death of the client.¹⁰¹

ANALYSIS

The Court's decision may appear to be the only logical resolution of this case, especially in light of the common law presumption that the privilege survives the client's death. However, misconceptions regarding the protections of the attorney-client privilege cast doubt on the contention that altering the privilege would discourage full and frank communications by clients.¹⁰² These misconceptions suggest the extent of the privilege should be re-evaluated.¹⁰³

The Court's opinion raises several important issues. Perhaps the most surprising element of the opinion is the lack of precedent addressing the posthumous application of the privilege. Secondly, while the privacy rationale behind the privilege is receiving increasing attention by commentators, the Court's avoidance of that policy justification deserves attention.

Lack of Clear Precedent

Swidler marked the first time the Supreme Court specifically held the

99. *Id.* at 2089.

100. *Id.* at 2090.

101. *Id.* (noting also that the majority acknowledges that most cases merely presume that the privilege survives). "[T]he common law authority for the proposition that the privilege remains absolute after the client's death is not a monolithic body of precedent." *Id.* The dissent also pointed out that opinions directly dealing with the posthumous application of the privilege are rare. *Id.* Those that do directly deal with this topic do not typically give detailed reasoning, but rather conclude that the survival of the privilege is implied by cases construing the testamentary exception. *Id.*

102. A 1962 Yale Law Journal study on the importance and effect of attorney-client privilege rules revealed "widespread misinformation concerning privileges." Zacharias, *supra* note 33, at 377. In particular, the Yale study showed that a significant percentage of the laypersons thought that lawyers, if questioned in court, would have an obligation to reveal confidences. *Id.* at 377-78 n.123. More recently, Zacharias conducted a survey of attorneys and laypersons that also revealed "widespread misunderstanding among clients as to the nature of confidentiality and its scope." *Id.* at 381. This study found that half of the clients who relied on confidentiality wrongly assumed that the governing standard was absolute. *Id.* at 381 n.144.

103. Zacharias warns against placing too much emphasis on either his study or the Yale study as they are not intended to represent the country as a whole. *Id.* at 379. Perhaps the existence of misconceptions about the privilege indicate that lawyers do a poor job of accurately informing clients of the privilege. Therefore, a question remains as to whether these misconceptions demonstrate that clients do not rely on confidentiality or whether these misconceptions are merely the product of poor counseling by attorneys.

attorney-client privilege survives the death of the client. What was once thought to be a settled area of the law was suddenly questioned by the court of appeals. In reversing the court of appeals, the Court was unable to cite cases of binding precedent on this particular issue. Instead, the Court could only cite the "presumption" of the common law to support its position. In fact, the Court relied on the opinions of commentators to support its contention that such was the common law rule.¹⁰⁴

Just as the view of the common law has been presumed for many years, the effect of the privilege in encouraging candor has also been assumed with little or no empirical evidence to support such a claim. Intuitively, the policy of encouraging candor in the attorney-client relationship makes sense, but allowing such an expansive privilege to obstruct the truth finding process seems untenable when there is no conclusive empirical evidence to prove the effectiveness of the privilege.¹⁰⁵ The Court's decision did not attempt to pacify the concerns of those who doubt the effectiveness of the privilege in encouraging candor and seemed unconcerned that there is no empirical evidence to support the policy behind the privilege.¹⁰⁶ Faced with this lack of empirical evidence on the effectiveness of the privilege, the Court was forced to rely on tradition and reason to uphold the privilege in this case.

Despite these criticisms, the Court took this opportunity to formally hold and express what the common law has assumed for many years. The attorney-client privilege has become an integral part of our legal system and has generally been viewed as protecting communications even beyond the client's death. Any other holding by the Court may have severely disrupted American jurisprudence. Furthermore, "although the benefits attributable to privileges are difficult to estimate, there is little reason to assume that they are necessarily small."¹⁰⁷ Instead of leaping to conclusions, the Court took the position that the facts of this case were insufficient to overturn the

104. *Swidler*, 118 S. Ct. at 2086 (citing 8 WIGMORE, *supra* note 12, § 2323; Frankel, *supra* note 24, at 78-79; 1 MCCORMICK, *supra* note 14, § 94 at 348). The court then noted that the commentators who argue for abrogation of the rule beyond the client's death recognize that such action would be a modification to the common law. *Id.* (citing 2 MUELLER & KIRKPATRICK, *supra* note 23, § 199; RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 127 cmt. c (Proposed Final Draft No. 1, 1996); 24 WRIGHT & GRAHAM, *supra* note 78, § 5498).

105. Conversely, most practitioners undoubtedly have encountered clients who have expressly relied on assurances of confidentiality before disclosing certain information. Additionally, the lack of empirical evidence failed to convince the majority that the impact of another exception to the privilege would be insignificant. *See Swidler*, 118 S. Ct. at 2088 n.4 (noting the limited empirical evidence on the privilege and that the studies do not reach firm conclusions on whether limiting the privilege would discourage full and frank communication). *See also Zacharias*, *supra* note 33, at 353-54 (reporting the conclusions of a 1962 Yale study and his own study of Tompkins County, New York).

106. *See Modes of Analysis*, *supra* note 32, at 1474 (contending that empirical critiques are generally overstated).

107. *Id.*

common law rule.¹⁰⁸ While the dissent perceived a weighty need that justified breaching the privilege in this case, the majority conservatively refused to take such a large leap from tradition.

Avoidance of Privacy Justification

The Court took this opportunity to reaffirm the utilitarian policy justification of the attorney-client privilege. In light of the growing support the privacy rationale has gained among commentators, one must question why the Supreme Court avoided this justification. The avoidance of the privacy justification becomes particularly apparent when one considers the amount of coverage the respondent devoted to the issue in its brief.¹⁰⁹ In particular, the petitioners claimed “many people feel strongly that there is a zone of privacy that should be respected even after death.”¹¹⁰

The Court may have avoided the privacy justification in order to protect the attorney-client privilege from challenges by criminal defendants. If a criminal defendant seeks exculpatory information from a deceased’s attorney, the privacy justification would force the Court to choose between the defendant’s constitutional rights and the deceased’s right to privacy. In such a case, a criminal defendant’s right to exculpatory evidence may trump a decedent’s right to privacy. Since the privacy rationale focuses on the right of the individual, the existence of the privilege may once again be threatened as the quest for truth seeks to prevail over any obstacles.¹¹¹ “Although privacy helps to preserve liberty, this very liberty allows the invasion of that of others.”¹¹² A court using the privacy rationale would be forced to balance competing individual rights, thereby relegating the privilege to protecting inconsequential communications.¹¹³

Conversely, when the Court uses the utilitarian rationale, such balancing of rights is probably unnecessary. Several courts have prevented a criminal defendant from accessing privileged information by justifying the

108. *Swidler*, 118 S. Ct. at 2088.

109. See Brief for Petitioners at 10, *Swidler & Berlin v. United States*, 118 S. Ct. 2081 (1998) (No. 97-1192) (noting first the utilitarian justifications of the privilege, but then arguing the privacy and reputation concerns of the client). “There are many public people who feel, with considerable justification, that there is some information as to which the claims of privacy outweigh the claims of history.” *Id.* at 17. “These people [who reach an age at which thoughts of mortality intrude]—as well as others who are suicidal or engaged in hazardous lifestyles—are entitled to consult an attorney in confidence.” *Id.* at 18-19.

110. *Id.* at 18.

111. A rationale which focuses only on the rights of the individual may meet the same problems that the oath and honor justification faced. See *supra* notes 13-16 and accompanying text.

112. *Modes of Analysis*, *supra* note 32, at 1483.

113. See Frankel, *supra* note 24, at 69 (criticizing the court in *Cohen v. Jenkintown Cab Co.*, 357 A.2d 689 (Pa. Super. Ct. 1976) for breaching the attorney-client privilege).

privilege using traditional utilitarian arguments.¹¹⁴ In these cases, the criminal defendant's rights have been subverted to society's interest in ensuring candor in the attorney-client relationship. By using the utilitarian rationale, the Court may avoid the balancing of individual interests and instead can hold the benefits to society outweigh the cost of concealing evidence. "[B]y relying exclusively on the interests of people not involved in the litigation, the justification frees itself of any taint associated with permitting particular individuals to hide inculpatory information."¹¹⁵

Swidler's *Impact on Wyoming Practitioners*¹¹⁶

The Wyoming practitioner should realize the *Swidler* decision is not binding on the Wyoming Supreme Court.¹¹⁷ In fact, the Wyoming court refused to apply the attorney-client privilege beyond the client's death in one particular case.¹¹⁸ While the holding of *Kump* may be limited to the particularly egregious facts of that case, the court relied heavily on public policy in defining the extent of the privilege.¹¹⁹ In particular, the court said attorney-

114. See *In re John Doe Grand Jury Investigation*, 562 N.E.2d 69 (Mass. 1990) (holding that the attorney-client privilege should not be overridden in a case where the state sought to force the deceased's attorney to reveal communications that may have pertained to the deceased's involvement in the death of two individuals); *State v. Doster*, 284 S.E.2d 218 (S.C. 1981) (upholding the trial judge's determination that statements made by a deceased police informant to an attorney were protected by the attorney-client privilege and were therefore unavailable to the criminal defendant to prove an entrapment defense). The Massachusetts court stated that "[t]he social good derived from the proper performance of the functions of lawyers acting for client . . . outweighs the harm that may come from the suppression of the evidence." *In re John Doe*, 562 N.E.2d at 70 (quoting *Commonwealth v. Goldman*, 480 N.E.2d 1023 (Mass. 1985)). Likewise, the South Carolina court stated that "[t]he privilege is based upon a public policy that the best interest of society is served by promoting a relationship between the attorney and the client whereby utmost confidence in the continuing secrecy of all confidential disclosures made by the client within the relationship is maintained." *Doster*, 284 S.E.2d at 219.

115. *Modes of Analysis*, *supra* note 32, at 1473-74 (noting that "considering only extrinsic social policy, the justification elevates the interest advanced by privileges to the same plane as the societal interest in ascertaining the truth."). But see *supra* note 44 and accompanying text (saying that the privacy rationale would conceal attorney-client communications regardless of necessity). Epstein also contends that the privacy rationale gets away from balancing confidentiality and truth. EPSTEIN & MARTIN, *supra* note 44, at 4-5.

116. This section is not intended to be a comprehensive analysis on how the Wyoming Supreme Court will define the privilege under state law. It is included in this note to remind the Wyoming practitioner to use caution when describing the scope of the attorney-client privilege under Wyoming law.

117. Under Wyoming law, the attorney client privilege is governed by the principles of common law except as otherwise required by statute. WYO. R. EVID. 501. Under Wyoming statute, the following shall not testify in certain respects:

An attorney or a physician concerning a communication made to him by his client or patient in that relation, or his advice to his client or patient. The attorney or physician may testify by express consent of the client or patient, and if the client or patient voluntarily testifies the attorney or physician may be compelled to testify on the same subject.

WYO. STAT. ANN. § 1-12-101(a)(i) (Michie 1997).

118. See *State v. Kump*, 301 P.2d 808 (Wyo. 1956) (refusing to allow a husband accused of murdering his wife to assert the attorney-client privilege to suppress the testimony of the wife's lawyer.)

119. *Id.* at 815.

client communications are excluded on grounds of public policy that depend on the facts in each particular case.¹²⁰ Furthermore, the court said “[w]e can conceive of no public policy which would exclude the communications such as are involved in this case.”¹²¹

CONCLUSION

The Court’s holding is limited to finding the independent counsel did not prove a case compelling enough to make an exception to the attorney-client privilege. The Court validated the common law presumption that the attorney-client privilege was applicable after the client’s death. In doing so, the Court made the proper decision to refuse to upset the privilege. The Court affirmed the application of the privilege beyond the client’s death in ordinary cases, but left the door open to hear a case which addresses the criminal constitutional rights issue. For now, the attorney-client privilege remains safe from intrusions that may occur after the client’s death.

While the privilege may be subject to future attacks from a criminal defendant, the Court reinforced the position that the privilege has in our legal system by stressing the utilitarian justification and the benefits the privilege produces for society. By choosing the utilitarian justification rather than the privacy rationale, the Court has enabled itself to avoid the balancing of competing individual rights in future cases. Despite this, a case arising with greater interests at stake may more easily upset the privilege. It is apparent three justices would be in favor of breaching the privilege where a criminal defendant sought exculpatory information. Since the majority refused to address that issue, such a challenge will have to wait for another day.

CLINT LANGER

120. *Id.*

121. *Id.*