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The Attorney-Client Privilege: Does It Really Have Life Everlasting?

By Richard C. Wydick*

Introduction

Thanks to prominent newspaper headlines in the summer of 1998, members of the American public may now think that the secrets they share with their lawyers will remain secret forever and ever. The truth is not quite that simple. In Swidler & Berlin v. United States,¹ the United States Supreme Court did say that the attorney-client privilege continues to live after the client dies, but the Court did not say how long it lives, nor did the Court mention that the privilege lives longer in some places than in others.

Swidler & Berlin made headlines, not because of public thirst for knowledge about the attorney-client privilege, but because the cast of characters included first lady Hillary Clinton, special prosecutor Kenneth Starr, and Vincent Foster, a White House lawyer who committed suicide in the middle of an investigation of supposed wrongdoing at the White House. In May 1993, someone ordered the firing of seven employees of the White House travel office.² The firing provoked congressional and other investigations, and Vincent Foster (a former law partner of Hillary Clinton) was the White House lawyer assigned to ride herd on the investigations.³

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² See id. at 2083.
On a Sunday morning in the summer of 1993, Vincent Foster went to the home of attorney James Hamilton, a partner in the private law firm of Swidler & Berlin, to seek legal representation in connection with the travel office matter. At the outset, Foster asked Hamilton whether their conversation would be privileged, and Hamilton assured him that it would be. During their meeting, Hamilton took several pages of handwritten notes. The word "privileged" is one of the first items to appear in these notes. Nine days after this meeting, Foster committed suicide.

In 1995, Starr started investigating whether certain people had lied or obstructed justice in the earlier investigations of the travel office matter. At Starr's request, a federal grand jury subpoenaed Hamilton's three pages of handwritten notes. Hamilton and his law firm asserted the attorney-client privilege on behalf of their deceased client, Vincent Foster. The district court examined the handwritten notes in camera and concluded that the attorney-client privilege protected them from disclosure.

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6 See Swidler & Berlin, 118 S. Ct. at 2083.

7 See id.

8 See id.

9 See id. Prosecutor Starr's investigation of the travel office matter never resulted in charges being filed against anyone. See Marcus & Schmidt, supra note 3, at A1. In presenting the Monica Lewinsky matter to the House Judiciary Committee, Starr said this about his travel office investigation:

Let me add a few brief words about the Travel Office matter. This phase of work arose out of investigations by others of the 1993 firings of Billy Dale and six career co-workers. We do not anticipate that any evidence gathered in that investigation will be relevant to the committee's current task. The President was not involved in our Travel Office investigation.

As to the status of that investigation, it was on hold for quite a while, in part because of litigation. The investigation is not terminated, but we expect to announce any decisions and actions soon.


10 See Swidler & Berlin, 118 S. Ct. at 2083.

11 See id.

12 See In re Sealed Case, 124 F.3d 230, 231 (D.C. Cir. 1997), rev'd by Swidler & Berlin, 118 S. Ct. 2081. The district court also held that the handwritten notes were protected under the work-product doctrine, see id. at 236, but this Article does not consider that part of the case.
Prosecutor Starr appealed, and the Court of Appeals for the District of Columbia Circuit reversed. The court of appeals said there should be a new exception to the attorney-client privilege, an exception that would open a client's privileged material to discovery in a criminal case if the client is dead and if the material's “relative importance” to the criminal case is “substantial.” To decide what is “substantial” and what is not, a judge would consider whether the privileged material bears on a “significant aspect” of the criminal case and whether there is a scarcity or an abundance of other reliable evidence on that aspect of the case.

The Supreme Court reversed the court of appeals, rejecting that court’s newly-minted exception to the attorney-client privilege and holding that lawyer Hamilton’s handwritten notes were protected by the privilege even after client Foster’s death. Chief Justice Rehnquist wrote the majority opinion, which was joined by five other Justices. A dissenting opinion, written by Justice O’Connor and joined by Justices Scalia and Thomas, argued in favor of the position taken by the court of appeals.

Part I of this Article discusses the Supreme Court’s decision in Swidler & Berlin, particularly the role of empirical evidence in the decision. Part II discusses a significant issue that the Court did not decide—how long after the client’s death should the attorney-client privilege remain alive?

I. THE SUPREME COURT’S DECISION IN SWIDLER & BERLIN

A. Federal Rule of Evidence 501

In order to understand what the Supreme Court did and did not decide in Swidler & Berlin, one can start with Federal Rule of Evidence 501, the rule that governs privileges in federal court proceedings. Roughly paraphrased, Rule 501 tells federal judges to apply state privilege law in diversity of citizenship cases, where state law supplies the rule of decision. In all other cases—such as federal criminal cases and federal civil cases not based on diversity jurisdiction—Rule 501 requires federal judges to apply the common law of privilege, as interpreted by federal courts in the “light of reason and experience.”

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13 See id. at 231.
14 See id. at 235.
15 See id.
17 See id. at 2088-91 (O’Connor, J., dissenting).
18 See FED. R. EVID. 501.
19 Id.
The drafters of the Federal Rules of Evidence did not plan it that way. The drafters proposed a comprehensive set of privilege rules that would have replaced the common law of privilege and would have applied in all federal court proceedings, even those based on diversity jurisdiction. The proposed rules codified privileges for attorney-client communications, psychotherapist-patient communications, communications to clergy members, spousal testimony, political votes, trade secrets, state secrets, identity of informers, and certain required reports that are privileged by statute. When the Supreme Court sent the Federal Rules of Evidence to Congress, the privilege provisions proved to be highly controversial. Because the controversy threatened to hold up the entire project, Congress decided to jettison all of the drafters’ proposed privilege provisions and to substitute present Rule 501 in their place.

Swidler & Berlin arose out of a federal criminal investigation, namely, Starr’s investigation of the travel office matter. Therefore, under Rule 501, the applicable privilege law was the common law as interpreted by the federal courts in the “light of reason and experience.” Notice the uncommon freedom this gives a federal judge. The judge need not struggle to discover the intent of the legislators who wrote a statute, nor the intent of the framers of the Constitution. The judge need not follow the law of a state or foreign jurisdiction. Rather, the judge is unleashed, free to make law—the federal common law of privilege—and constrained only by sound policy and the doctrine of stare decisis.

B. The Common Law Precedents

Chief Justice Rehnquist began the majority’s analysis in Swidler & Berlin by noting that the attorney-client privilege is one of the oldest

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22 See S. REP. NO. 93-1277, supra note 20, at 7053; MUELLER & KIRKPATRICK, supra note 20, § 5.3, at 337
24 FED. R. EVID. 501.
recognized privileges. He then offered the traditional utilitarian justification for the privilege: it promotes full, truthful communication between clients and their attorneys. This free communication allows attorneys to give their clients better legal advice and legal service, which in turn creates the greatest good for everyone involved in the administration of justice.

The Chief Justice next pointed out that the common law cases uniformly either hold or assume that the attorney-client privilege lives on after the client dies. Likewise, he noted, commentators uniformly

25 See Swidler & Berlin v. United States, 118 S. Ct. 2081, 2084 (1998). Under modern law, the privilege exists only for the benefit of the client, not for the benefit of the attorney. For example, California law allows the attorney to claim the privilege, but only on behalf of the client. See CAL. EVID. CODE §§ 912, 953-955 (West 1995). Also, the attorney cannot waive the privilege without authorization by the client. See id. From time to time, members of the legal profession have suggested that attorneys get more benefit from the privilege than clients do. The most famous was Jeremy Bentham. See Jeremy Bentham, Rationale of Judicial Evidence, Specially Applied to English Practice, in 7 THE WORK OF JEREMY BENTHAM 472-76 (Bowring ed., 1843). More recently, Professor Daniel Fischel has argued that the attorney-client privilege and the associated ethics rules about confidentiality shield guilty people, harm innocent people, and give lawyers an unwarranted competitive advantage over comparable professionals, thus allowing lawyers to charge bloated legal fees. See Daniel R. Fischel, Lawyers and Confidentiality, 65 U. CHI. L. REV 1 (1998). Doubtless Professor Fischel enjoyed hearing lawyers howl when something like the attorney-client privilege was granted to certified public accountants in tax cases. See I.R.C. § 7525(a) (West Supp. 1998); Mark Thompson, A Taxing Matter: Lawyers are Bracing for Competition from Accounting Firms, CAL. LAW., Oct. 1998, at 17

26 See Swidler & Berlin, 118 S. Ct. at 2084.

27 See Upjohn Co. v. United States, 449 U.S. 383, 389 (1981), where the Court spelled out the utilitarian line of reasoning as follows:

[The purpose of the attorney-client privilege] is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interest in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client.

Id. Briefly stated, classical utilitarianism holds that the best course of action in a given situation is the one that creates the greatest total good for all persons who are affected by the action. See JOHN STUART MILL, UTILITARIANISM 24-26 (Samuel Getheritz ed., Bobbs-Merrill Co. 1971); JAMES RACHELS, THE ELEMENTS OF MORAL PHILOSOPHY 90-103 (1986).

28 See Swidler & Berlin, 118 S. Ct. at 2084-86.
acknowledge the general rule that the privilege survives the client’s death.\textsuperscript{29} The most frequently used exception to the general rule is the poorly named “testamentary” exception, which makes the privilege inapplicable to a communication to or from a now-deceased client in a dispute between parties who both claim an interest through that client, either by testate or intestate succession or by an inter vivos transfer.\textsuperscript{30} The existence of the testamentary exception is itself proof that the privilege survives the client’s death; if the privilege did not survive, the exception would be not be needed.

Prosecutor Starr tried using the testamentary exception as a building block in his argument for a new exception that would apply when the client is dead and when the privileged information is needed in a criminal investigation.\textsuperscript{31} If the public interest in settling estates accurately is enough to trump the privilege, Starr argued, then surely the public interest in investigating crimes is also enough to do the same.\textsuperscript{32} In rejecting this argument, Chief Justice Rehnquist pointed out that the purpose of the testamentary exception is to carry out the deceased client’s intent.\textsuperscript{33} The client would presumably want the attorney to reveal the confidential information to ensure that the client’s wishes are accurately carried out.\textsuperscript{34} In contrast, there is no reason to suppose that revealing the confidential


\textsuperscript{30} See UNIF. R. EVID. 502(d)(2); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 131.

\textsuperscript{31} See Swidler & Berlin, 118 S. Ct. at 2085-86; Brief for the United States at 17-18, Swidler & Berlin (No. 97-1192), available in 1998 WL 271193.

\textsuperscript{32} See Brief for the United States at 17-18, Swidler & Berlin (No. 97-1192), available in 1998 WL 271193.

\textsuperscript{33} See Swidler & Berlin, 118 S. Ct. at 2085-86.

\textsuperscript{34} See MUELLER & KIRKPATRICK, supra note 20, § 5.24, at 428, 429.
information to further a criminal investigation would carry out the client’s intent.\(^5\)

The Supreme Court also rejected the court of appeals’ idea of using a balancing test that would override a deceased client’s attorney-client privilege only if the requested material’s “relative importance” in a criminal case is “substantial.”\(^6\) In earlier cases, the Court has stressed the importance of predictability and certainty in the law of privilege.\(^7\) When a client is deciding whether to tell her lawyer the truth, she cannot predict whether the information will later become relevant in a criminal case rather than a civil one, nor can she predict whether the information will become relatively important rather than utterly insignificant.\(^8\) As the Court said in an earlier case, “[a]n uncertain privilege is little better than no privilege at all.”\(^9\)

C. The Shortage of Empirical Evidence

In the majority opinion, the Chief Justice conceded that some highly respected commentators have favored curtailing the privilege after the client’s death—some by simply ending the privilege at the client’s death, and others by creating a rule that after the client’s death the privilege can be overridden for compelling reasons.\(^10\)

\(^{35}\) See Swidler & Berlin, 118 S. Ct. at 2086.


\(^{38}\) See Swidler & Berlin, 118 S. Ct. at 2087

\(^{39}\) Upjohn, 449 U.S. at 393.

\(^{40}\) See 1 MCCORMICK ON EVIDENCE, supra note 29, § 94, at 349-50 (arguing that the privilege should end at the client’s death); MUELLER & KIRKPATRICK, supra note 20, § 5.26, at 431-32 (advocating the post-death overriding of the privilege in extreme cases, such as a dead client’s confession to a murder that is charged to a criminal defendant); WOLFRAM, supra note 29, § 6.3, at 255-56 (questioning the need for continuing the privilege after the client’s death); 24 WRIGHT & GRAHAM, supra note 21, § 5498, at 483-84 (arguing that the privilege should end with the client’s death, or at least when the client’s estate is settled). The Restatement of the Law Governing Lawyers suggests creating a new exception to the privilege. The new exception would permit a court to override the privilege of a deceased client when the communication “bears on a litigated issue of pivotal significance.” RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 127(d) (Proposed Final Draft No. 1, 1996). Subsection (d) concedes that “no court or
The positions of all these respected commentators have one feature in common: they are not based on empirical evidence. Rather, they are based on what could charitably be described as "appeals to reason" or uncharitably as "ipse dixit." Consider the McCormick treatise as an example. It argues that the attorney-client privilege should end with the death of the client, and it asserts: "This could not to any substantial degree lessen the encouragement for free disclosure which is the purpose of the privilege." Dean McCormick provides no authority, empirical or otherwise, for the quoted sentence.

Chief Justice Rehnquist was troubled by what he perceived as a shortage of empirical evidence either to prove or disprove that a client will be less likely to tell her lawyer the truth if the communication is not privileged after the client's death. He mentioned this point once during the oral argument and twice in the majority opinion. Ultimately, the Chief legislature" has recognized such an exception. Id.

41 *Ipse dixit* means roughly: it's so because I say so. For a higher quality definition, see BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 468 (2d ed. 1995).

42 1 MCCORMICK ON EVIDENCE, supra note 29, at 350.

43 The argument and the quoted sentence are from Dean McCormick's own pen, almost entirely unaltered by the faithful scholars who have revised and expanded the McCormick treatise after his death. See CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF EVIDENCE § 98, at 199, 200 (1954).


Another thing it shows is the woeful dearth of any empirical research in the legal profession, because the kind of questions that Justice Breyer and some of the rest of us asked, you know, if lawyers were polled as to how they treated client confidences, and people asked prosecutors, we would have a much better idea of how to decide this case than someone writes a law review article and says, here's what I think.

Id.

45 See Swidler & Berlin, 118 S. Ct. at 2087 n.4, 2088. The empirical evidence that was closest to the point at hand was a ground-breaking study by Professor Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351 (1989). Zacharias's article was not directly on point because it concerned the attorney's ethical duty of confidentiality rather than the attorney-client privilege, involved civil litigation only, and was devoted to broader questions about confidentiality rather than the narrow issue of how long the attorney-client privilege ought to last. Nonetheless, Professor Zacharias's findings do offer some general support for Starr's position. Professor Zacharias found, for example, that clients are generally poorly informed
Justice used the commentators' own trick to deal with the lack of empirical evidence—he simply stated his position with gusto, leaving the unconvinced to disprove it if they can:

Despite the scholarly criticism, we think there are weighty reasons that counsel in favor of posthumous application [of the attorney-client privilege]. Knowing that communications will remain confidential even after death encourages the client to communicate fully and frankly with counsel. 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 that it vanishes altogether. Clients may be concerned about reputation, civil liability, or possible harm to friends or family. Posthumous disclosure of such communications may be as feared as disclosure during the client's lifetime.46

D. Empirical Evidence and the Autonomy Justification for the Attorney-Client Privilege

If we depend solely on the utilitarian justification for the attorney-client privilege,47 then we should indeed be troubled by the shortage of

about the scope of the attorney's duty of confidentiality; about half the clients in the study said they would withhold information from an attorney if there were no firm duty of confidentiality, but half of that half believed incorrectly that the present duty of confidentiality is absolute and unrestricted. See id. at 380-81. Almost 30% of the clients in the study claimed that in the past they had given information to an attorney that they would not have given without a guarantee of confidentiality, but some of those may have relied, not on a guarantee, but on a general sense that lawyers are fairly honorable people. See id. If confidentiality rules are thought to promote forthrightness from clients, then one would expect lawyers to inform clients accurately about the rules at an early stage of the attorney-client relationship. Nonetheless, Professor Zacharias found that more than 20% of the lawyers in the study almost never so inform their clients, and that nearly 60% do so less than half the time. See id. at 382. Clients do seem to learn about confidentiality from somewhere, perhaps television, but only about one-third of them get it right. Over 40% think confidentiality is broader than it really is, and over 25% think it is narrower than it really is. See id. at 383. Worse yet, over 70% of the lawyers studied admitted that they tell clients "'only generally that all communications are confidential.'" Id. at 386. Only 28% of the lawyers questioned told their clients that the duty of confidentiality has exceptions. See id.

46 Swadler & Berlin, 118 S. Ct. at 2086.
47 See supra notes 26-27 and accompanying text.
empirical evidence about whether the candor of attorney-client communications would or would not be lessened if the privilege were curtailed at the client’s death. The attorney-client privilege has an additional justification, one not mentioned in the Chief Justice’s opinion for the majority. Professor David Louisell laid the first stones of the additional justification over forty years ago. Louisell suggested that Wigmore, despite his extraordinary contributions to evidence law, did lawyers a disservice by stressing utilitarian justifications for the attorney-client privilege and the other main communications privileges, virtually ignoring other possible justifications.

Louisell argued that these communications privileges are not mere exclusionary evidence rules that prevent courts from getting to the truth. There are some things, he wrote, that are: “even more important to human liberty than accurate adjudication. One of them is the right to be left by the state unmolested in certain human relations.” Explaining further, he wrote: “Primarily [the communications privileges] are a right to be let alone, a right to unfettered freedom, in certain narrowly prescribed relationships, from the state’s coercive or supervisory powers and from the nuisance of its eavesdropping.”

Subsequent writers have expanded and refined Louisell’s formulation, and some have shifted from Louisell’s emphasis on the right to be let alone to an emphasis on the broader concept of human autonomy—the freedom to control one’s own life and destiny. Most recently, Professor Edward Imwinkelried has published a preliminary sketch of the autonomy rationale he is developing in his forthcoming revision of the privilege volume of the Wigmore treatise. Imwinkelried parts company with Louisell by pointing

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49 See id. at 111-12. Louisell regarded the main communications privileges as attorney-client, priest-penitent, husband-wife, and to a lesser extent physician-patient. See id. at 107-08.
50 See id. at 101, 110-11.
51 Id. at 110.
52 Id. at 110-11.
54 See Frankel, supra note 29, at 53-55.
55 See Edward Imwinkelried, The Rivalry Between Truth and Privilege: The Weakness of the Supreme Court’s Instrumental Reasoning in Jaffee v. Redmond,
out that privacy (the "right to be let alone," as Louisell put it) is not itself an ultimate value or an ultimate moral good—penitents and spouses and clients and patients all want privacy, but so do burglars and terrorist revolutionaries. Autonomy, in contrast, is an ultimate moral good in our society, and it is linked to privacy and the law of privilege in the following way. In order to be autonomous, a person must sometimes form a relationship of trust with another person. Suppose, for example, that X's life is punctuated by periods of deep depression, during which X cannot function as a fully autonomous person. Suppose that X can overcome his condition only by forming a trusting relationship with someone who has special training in psychotherapy, religion, or medicine. But suppose X is willing to form that trusting relationship only under conditions of privacy, in which X can share information about himself with assurance that it will not be disclosed to outsiders. If the law provides a communications privilege for this relationship, the privilege helps to make X autonomous by enabling him to make better life choices without surrendering his independence. Here is how Professor Imwinkelried distinguishes this line of argument from the traditional utilitarian line: "The linchpin of this line of argument is the positive theory of freedom. The theory is a normative proposition rather than an empirical hypothesis. As such, the theory is tested by examining its consistency with liberal democratic theory rather than by subjecting it to experimentation or scientific investigation."

E. How the Autonomy Justification Relates to the Court's Decision in Swidler & Berlin

We have seen previously that Chief Justice Rehnquist was troubled by what he perceived to be a shortage of empirical evidence about the effect that curtailing the attorney-client privilege would have on the level of candor in attorney-client communications. However, if the attorney-client privilege is viewed as a tool to further human autonomy, then a court does

56 Louisell, supra note 48, at 110.
57 See Imwinkelried, supra note 55, at 984-85.
58 See id. at 985-86.
59 See id.
60 Id. at 988.
61 See supra text accompanying notes 44-46.
not need empirical evidence when it considers a proposed change in privilege law. It can make an ordinary policy judgment about how much human autonomy it wants to promote.

In effect, that is precisely what Chief Justice Rehnquist did in the majority opinion in *Swidler & Berlin*. Take a second look at the passage in which the Chief Justice stated the majority’s position:

> Despite the scholarly criticism, we think there are weighty reasons that counsel in favor of posthumous application [of the attorney-client privilege]. Knowing that communications will remain confidential even after death encourages the client to communicate fully and frankly with counsel. 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 that it vanishes altogether. Clients may be concerned about reputation, civil liability, or possible harm to friends or family. Posthumous disclosure of such communications may be as feared as disclosure during the client’s lifetime.\(^6\)

In other words, empirical evidence or not, a living client’s present concern about what may happen to his reputation, friends, and family after he dies is an important interest that the law ought to protect. Even without empirical evidence that the lack of a privilege might deter the client from making the communication, conferring privilege protection is consistent with the positive theory of freedom. In short, the majority opinion in *Swidler & Berlin* makes sense as an autonomy decision even though it lacks empirical support from a utilitarian standpoint.

II. HOW LONG SHOULD THE ATTORNEY-CLIENT PRIVILEGE STAY ALIVE AFTER THE CLIENT DIES?

In *Swidler & Berlin*, the Court resolved two narrow issues. First, it decided that under the federal common law of privilege,\(^6\) the attorney-

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\(^6\) By “federal common law of privilege,” I mean the version of the common law that a federal court applies in a nondiversity case—the body of law that Federal Rule of Evidence 501 calls “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.” *FED. R. EVID. 501*, *see supra* text accompanying notes 18-24.
client privilege lives on after the client’s death. Second, it held that attorney Hamilton’s three pages of handwritten notes about his confidential conversation with deceased client Vincent Foster were protected by the privilege and did not have to be produced for use in prosecutor Starr’s criminal investigation.

The Court did not decide some other issues that are interesting but that did not need to be decided in order to dispose of the case at hand. First, it did not decide anything whatsoever about the attorney-client privilege in a case governed by state privilege law—either a case pending in a state court or a case pending in a federal court because of diversity of citizenship.

Second, in cases governed by the federal common law of privilege, the Court did not decide how long the attorney-client privilege should stay alive after the client dies.

A. The Distinction Between the Attorney-Client Privilege and the Attorney’s Ethical Duty to Safeguard the Client’s Confidential Information

In considering how long the attorney-client privilege ought to endure after the client dies, we must distinguish between the attorney-client privilege and its sister doctrine, the attorney’s ethical duty to safeguard the client’s confidential information.

1. The Ethical Duty

Ethical obligations prohibit an attorney from voluntarily using or disclosing information concerning the client that is not generally known and that the attorney acquires in the course of representing the client. For example, it is the ethical duty, not the attorney-client privilege, that prevents an attorney from telling a friend juicy bits of confidential information about a client.

The ethical duty covers more kinds of information than does the attorney-client privilege. The privilege protects only confidential communications between an attorney and a client, or their respective agents, made

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64 See Swidler & Berlin, 118 S. Ct. at 2088.
65 See id.
66 See FED. R. EVID. 501, see supra text accompanying notes 18-24.
67 See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 111-12 (Proposed Final Draft No. 1, 1996); see also MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(a) (1998).
for the purpose of giving legal service to or getting legal service for the client. The ethical duty, on the other hand, covers not only confidential communications that are covered by the privilege, but also any other information concerning the client—from whatever source—that the attorney acquires in the course of representing the client and that is not generally known.

The ethical duty has a number of exceptions, one of which permits an attorney to reveal a client’s confidential information when doing so is required by law. An attorney who violates his or her ethical duty is subject to discipline by the bar and may also be liable to the client for injuries caused by the violation.

The ethical duty of confidentiality lasts as long as the attorney possesses the client’s confidential information. It lasts beyond the end of both the attorney’s representation of the client and the client’s death. A part of the attorney’s ethical duty is to take proper care of the client’s files (both current and closed files), to destroy systematically closed files that are no longer needed, and to arrange for proper disposition of the client’s files if the attorney dies, gets sick, retires, or is disciplined. Without citing any case law or other authority, the Restatement allows a lawyer to cooperate with reasonable efforts by outsiders to get information about a

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68 See Restatement (Third) of the Law Governing Lawyers §§ 118-22.
69 See id. § 111.
70 See id. §§ 113-17A.
71 See id. § 115. Thus, when the attorney is called as a witness, and the court correctly rules that a particular communication is not covered by the attorney-client privilege and must therefore be disclosed, the attorney does not breach her ethical duty by obeying the court’s order and disclosing the communication. However, if there is reason to doubt the correctness of the court’s ruling, the attorney may—and sometimes must—take appropriate steps to test the court’s ruling. See id. § 115 cmt. b.
73 See Restatement (Third) of the Law Governing Lawyers § 112 cmt. a; see also Restatement (Third) of the Law Governing Lawyers § 71 (Tentative Draft No. 8, 1997) (detailing civil liability of lawyer to client).
75 See id.
76 See id.
client for "public purposes, such as historical research" when there is no "material risk" to a client's finances, reputation, or similar interests.  

2. The Attorney-Client Privilege

In contrast to the attorney's ethical duty to safeguard confidences, the attorney-client privilege is a rule of evidence law. The attorney-client privilege limits the power of a government tribunal to use the twin tools of coercion—the subpoena power and the contempt sanction—to force people to produce a certain kind of evidence. That certain kind of evidence is evidence about a confidential communication between an attorney and a client, or their respective agents, for the purpose of giving legal service to or getting legal service for the client.

Strictly speaking, the attorney-client privilege applies only to situations in which a governmental tribunal seeks to compel someone to give evidence. Thus it is a narrower doctrine than the ethical duty to safeguard a client's confidential information. We sometimes loosely say that an attorney who reveals a client's confidential information in a gossipy lunchtime conversation with a friend has violated the attorney-client privilege, but that is not accurate. The attorney-client privilege does not apply to voluntary disclosure over the lunch table; it applies only to disclosure under government compulsion. The attorney who gossips with a friend over lunch has not violated the privilege; he has betrayed the ethical duty to safeguard the client's confidential information.

Distinguishing between the ethical duty and the privilege is helpful when it comes to deciding how long after a client's death the privilege

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77 Id. § 112 cmt. h. The Reporter's Note to comment h suggests the need to create a legal clearance procedure that would balance the public's interest in historical and other research against the confidentiality interests of the client or the client's successors. See id.

78 See, e.g., UNIF. R. EVID. 502; RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 118, 135.

79 Absent a privilege, the public has a right to every person's evidence. See Branzburg v. Hayes, 408 U.S. 665, 688 (1972); see also CAL. EVID. CODE § 911 (West 1995). Thus, if no privilege applies, a government tribunal can use its subpoena power and contempt sanction to compel a person either to give the evidence or to go to jail. See, e.g., 18 U.S.C. § 401 (1994); 28 U.S.C. § 1826 (1998); FED. R. CIV. P 45(a).

80 See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 118, 135.
should last. The distinction reminds us that setting the duration of the privilege at something short of eternity would not produce chaos. The nation's lawyers would not rush into the streets, scattering the files of dead clients hither and yon. They would not entertain us on television talk shows with the truth about the rich, famous, and recently deceased. If the privilege were to expire short of eternity, the only consequence would be that courts and other governmental tribunals could compel a witness who knows the content of a formerly privileged communication to reveal it in a legal proceeding to which it is relevant.

B. Rational Choices for the Duration of the Attorney-Client Privilege

In deciding what to set as the duration of the attorney-client privilege, we have at least four rational choices:

1. Lifetime of the Client

As noted above, the Swidler & Berlin decision rejects this choice for cases that are governed by the federal common law of evidence. The majority opinion conceded, however, that ending the privilege at the client's death is not a frivolous idea. Indeed some of the keenest minds in the field of evidence law have advocated it, including Judge Learned Hand, Harvard evidence professor Edmund M. Morgan, and treatise author Charles T. McCormick of the University of Texas. My research reveals, however, that it is not the law of any state, nor is it the common law of England.

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81 See supra Part I.
84 See id. at 138, 157
85 See Mccormick, supra note 43, § 98, at 200; see also 1 Mccormick on Evidence, supra note 29, § 94, at 348-50.
86 I have found no state case to support the proposition that the attorney-client privilege ends when the client dies. The English common law position is stated infra note 87
This choice reflects the position of the English common law\textsuperscript{87} and some of the twenty-four states\textsuperscript{88} in the United States that have not adopted a modern privilege rule.\textsuperscript{89} When the client dies, the privilege goes on and on, like the Energizer bunny. Moreover, nobody needs to claim the privilege, because in these states the privilege applies automatically, unless the client waived it or authorized somebody to waive it for him.

One example is \textit{Hitt v. Stephens},\textsuperscript{90} where all of the heirs of Mr. and Mrs. Hitt, both of whom were long since dead, sued to recover the Hitts' estate files from the lawyer who handled the Hitts' estates. Mr. Hitt's estate had closed forty years before the suit was filed, and Mrs. Hitt's estate had closed thirteen years before the suit was filed. The lawyer refused to deliver the estate files to the heirs, and the heirs brought a timely\textsuperscript{91} replevin action against him. The opinion in the case does not explain why the heirs wanted the estate files. We can only speculate: perhaps the heirs wanted to track down an obscure piece of family history, perhaps they were searching for a missing asset, or perhaps they suspected the lawyer of skullduggery. Likewise the opinion does not divulge why the lawyer refused to turn over the files voluntarily. Perhaps the files included unsavory information about Mr. and Mrs. Hitt, perhaps the Hitts had told their lawyer unflattering things about their relatives, perhaps the lawyer had lost or destroyed the

\textsuperscript{87} The English common law position is captured in the maxim “once privileged, always privileged,” meaning that a privileged communication remains privileged forever unless the client waives the privilege or authorizes it to be waived. See, e.g., Bullivant v. Attorney-General for Victoria, [1901] L.R.-A.C. 196, 206 (1901) (opinion of Lord Lindley). See also Lord Taylor of Gosforth's historical review of privilege law in \textit{R v. Derby Magistrates' Court, ex parte B}, 4 All E.R. 526, 537-41 (1995).

\textsuperscript{88} The twenty-four states 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.


\textsuperscript{91} The court held that the replevin action was timely on the theory that the plaintiffs first discovered that they had a cause of action when the lawyer refused to turn the estate files over to them. See id. at 277
files and was embarrassed to say so, or perhaps the lawyer had handled the Hitts' estates improperly and wanted to keep it a secret. In any event, the court held that the estate files were protected by the attorney-client privilege, that the privilege survived the death of Mr. and Mrs. Hitt, that after their death nobody could waive the privilege for them, that no exception to the privilege applied to the case, and that the plaintiffs were not entitled to recover the estate files.

3. An Arbitrary Period Set by Statute

Giving the privilege eternal life and making it automatic (rather than requiring it to be claimed by an appropriate person) can cause mischief, as it would in Hitt v. Stephens, above, if the lawyer were using it to protect himself rather than his dead clients. To avoid this risk, a legislature could set an arbitrary period for the life of the privilege, such as seven years after the client's death or fifty years after the client's death. Simon Frankel suggested this idea but rejected it as more trouble than it would be worth. My research has not discovered any jurisdiction that has implemented this alternative.

4. The Closing of the Client's Estate

I believe that in at least twenty-five of the fifty states, the evidence rules that codify the attorney-client privilege ought to be interpreted as terminating the privilege at the closing of the deceased client's estate. The following paragraphs explain how both the plain meaning and the legislative background of the rules support this interpretation.

Twenty-six of the fifty states have adopted modern attorney-client privilege rules, meaning an evidence rule or statute patterned on the American Law Institute's ("A.L.I.") Model Code of Evidence, the original


93 See Frankel, supra note 29, at 72-73 n.151.

94 The twenty-six states are Alabama, Alaska, Arkansas, California, Delaware, Florida, Hawaii, Idaho, Kansas, Kentucky, Louisiana, Maine, Mississippi, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Vermont, and Wisconsin.

95 MODEL CODE OF EVID. § 209(c) (1942).
Uniform Rules of Evidence, Federal Rule of Evidence 503, which the Supreme Court approved but Congress deleted, or the revised Uniform Rules of Evidence, which were based on the enacted Federal Rules of Evidence plus the privilege rules that Congress deleted. In all twenty-six of these states, the attorney-client privilege is not eternal, and it does not come into play automatically. Instead, the privilege arises only when it is properly claimed by a person who is entitled to do so.

a. The Plain Meaning of the Rules in Twenty-Five States

In twenty-five of the twenty-six states, when the client is a natural person (rather than a corporation or other entity) and is deceased, the person who can claim the privilege is the deceased client’s "personal representative." Further, in all twenty-five of these states, the person who

96 UNIF. R. EVID. 26(1) (1953).
97 FED. R. EVID. 503 (deleted), reprinted in 24 WRIGHT & GRAHAM, supra note 21, Rejected Rule 503, at 37
99 See, for example, Kentucky’s Rule 503, KY. REV. STAT. ANN. § 422A.0503 (Miche 1992), discussed infra text accompanying notes 102-04.
100 The one exception is Louisiana. See LA. CODE EVID. ANN. art. 506 (West 1995), which was patterned on UNIF. R. EVID. 502. Uniform Rule 502(c) says: "The privilege may be claimed by the client, the client’s guardian or conservator, [or] the personal representative of a deceased client" Id. Louisiana took that phrase out and substituted the following in its place: "The privilege may be claimed by the client, the client’s agent or legal representative." LA. CODE EVID. ANN. art. 506(D). The legislative history and case law yield no clue about the derivation or intended meaning of the added term "client’s agent," but the Louisiana State Law Institute’s comment k to art. 506 does explain the term “legal representative” as follows: “To conform to Louisiana terminology the phrase ‘legal representative’ was substituted for the phrase ‘guardian or conservator, or by his personal representative if he is deceased’ The term ‘legal representative’ is defined in Code of Civil Procedure Article 5251.” Id. art. 506(D) cmt. k. The cited definition states: “‘Legal representative’ includes an administrator, provisional administrator, administrator of a vacant succession, executor, dative testamentary executor, tutor, administrator of the estate of a minor child, curator, receiver, liquidator, trustee, and any officer appointed by a court to administer an estate under its jurisdiction.” LA. CODE CIV. PROC. ANN. art. 5251(10) (West 1998). My research has produced no further legislative guidance or case law to explain whether the Louisiana drafters were simply trying to translate Uniform Rule 502 into terms that fit Louisiana’s legal system, or whether they actually wanted to broaden the category of people who can claim the privilege on behalf of a dead client.
was the lawyer at the time of the confidential communication can claim the privilege on behalf of the client. Kentucky Rule of Evidence ("K.R.E.") 503 is typical and provides a good example. After defining the key terms such as "client" and "lawyer," K.R.E. 503 states the basic privilege rule: "A client has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made for the purpose of facilitating the rendition of professional legal services to the client."

The rule then states who is entitled to claim the privilege, as follows:

The privilege 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. The person who was the lawyer at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the client.

When lawyers use the term "personal representative" in a carefully drafted document, such as a statute or rule of court, they ordinarily (though not invariably) do so as a term of art meaning "executor or administrator"—the person appointed by a will or a court to handle a dead person's estate and related affairs. When the personal representative has finished this work, the supervising court closes the estate and discharges the personal representative. Thus, the plain meaning of the evidence rules in twenty-five states, exemplified by K.R.E. 503, suggests that when the deceased client's estate closes, and the personal representative is dis-

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101 The lawyer cannot, of course, claim the privilege on the client's behalf if the client has waived the privilege or instructed the lawyer not to claim it. In most of the twenty-six states, the lawyer's authority to claim the privilege on the client's behalf is expressed in language similar to this: "The 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." UNIF R. EVID. 502.


103 Id. § 422A.0503(2).

104 Id. § 422A.0503(3) (emphasis added).

105 See UNIF. PROBATE CODE § 1-201(36) (1993); GARNER, supra note 41, at 655; DAVID MELLINKOFF, MELLINKOFF'S DICTIONARY OF AMERICAN LEGAL USAGE 221, 481 (1992); 32 WORDS & PHRASES 541-48 (1956), 290-92 (1998-99 Supp.).

charged, the privilege ends because there is nobody left to claim it. But what about the lawyer? Shouldn’t the lawyer still be able to claim the privilege? The answer ought to be “no.” The evidence rules in all twenty-five states make clear that the lawyer can claim the privilege only on behalf of the client. While the client is alive, the lawyer’s ability to claim the privilege is derived from the client. After the client dies, the lawyer’s ability is derived from the personal representative; when the personal representative ceases to exist, the lawyer’s ability to claim the privilege should also cease to exist.

b. The Legislative Background of the Rules in Twenty-Five States

The legislative background of the attorney-client privilege rules in the twenty-five states under consideration also supports the interpretation that the privilege ends when the dead client’s estate closes. All of these rules are the great-grandchildren of the A.L.I. Model Code of Evidence. The Reporter of the Model Code was Harvard evidence professor Edmund M. Morgan. If Morgan had had his way, he would have ended the attorney-client privilege upon the death of the client. That would have been too great a departure from the then-existing state law, however, so he and his Advisory Committee drafted Model Code of Evidence section 209, which provides that when the client is a natural person, the “holder” of the attorney-client privilege is “the client, while alive and not under guardianship, or the guardian of an incompetent client, or the personal representative of a deceased client.” This language was chosen because the drafters

107 See, e.g., KY. REV STAT. ANN. § 422A.0503(3).
108 This line of reasoning is sketched out in 21 WRIGHT & GRAHAM, supra note 21, § 5498, at 485-86, and is adverted to in RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 127 cmt. c, reporter’s note (Proposed Final Draft No. 1, 1996). Further, such reasoning is clearly at the root of the Law Revision Commission’s Comment to CAL. EVID. CODE § 954 (West 1995), which explains that the lawyer can claim the privilege on behalf of the client only if there is a “holder” (a person entitled to claim the privilege) in existence. “Hence,” the Comment says, “the privilege ceases to exist when the client’s estate is finally distributed and his personal representative is discharged.” Id. § 954 cmt., see also infra note 121.
109 MODEL CODE OF EVID. (1942).
110 See Morgan, supra note 83, at 138, 157
111 MODEL CODE OF EVID. § 209(c)(i). The A.L.I. membership debate about section 209 clearly shows that the drafters were using “personal representative” as a term of art meaning “executor or administrator.” See Morgan, supra note 83, at 152-58; see also supra text accompanying note 105.
viewed the privilege as something personal to the client, not as a feature of the property that the client passes on to her survivors. The objective was to avoid disputes among the client's survivors, some of whom might wish to assert the privilege and others of whom might wish to waive it. The natural consequence of section 209 is that the privilege ends when the estate closes and the personal representative is discharged.

During the debate on section 209 before the A.L.I. membership, Judge Learned Hand tried to get it amended so that the attorney-client privilege would end when the client dies. He made a formal motion to that effect, but the motion was defeated. Shortly thereafter, a group of ultraconservative A.L.I. members tried to push section 209 in the opposite direction by amending it to say that after the client's death the privilege could be claimed, not only by the personal representative, but also by any heir or any devisee of real property. That motion was defeated also. Thus, the legislative background of Model Code of Evidence section 209—the great-grandfather of the attorney-client privilege rules in the twenty-five states in question—pretty clearly indicates that the privilege was intended to end at the closing of the deceased client's estate.

Just as a great-grandfather's curly hair can be passed down from one generation to the next, the role of the personal representative in the attorney-client privilege has been passed down from the Model Code through all the successive generations of evidence law projects. The Model Code was reworked and improved in the original version of the Uniform Rules of Evidence promulgated in 1953, and the personal representa-

112 See Morgan, supra note 83, at 137-38.
113 See id. Professor Morgan offered an illustration. Suppose client C owns Blackacre and Whiteacre. C has confidential communications about Blackacre with one attorney, and confidential communications about Whiteacre with a different attorney. C's will devises Blackacre to his son B and Whiteacre to his daughter W. The will also appoints C's friend E as his executor. Who can claim the privilege after C dies? B and W jointly? Either B or W? B as to Blackacre, and W as to Whiteacre? Morgan's answer, and the answer given in section 209, is that only E can claim the privilege: E is C's "personal representative," and the privilege is personal to C, not a feature of the property that passes to B and W. See id.

114 See id. at 143-44.
115 See id. at 152, 154.
116 See id. at 156-58.
117 See id. at 158.
118 See Prefatory Note to the Original 1974 Rules of Evidence, 13A UNIF. LAWS ANN. 3 (1994) [hereinafter Prefatory Note]. These uniform laws were approved by the National Conference of Commissioners on Uniform State Laws at the annual
tive's role in the attorney-client privilege was not significantly changed. The California Law Revision Commission used the Uniform Rules as a starting point when they drafted the California Evidence Code, and they too left the personal representative's role substantively unchanged. The California Law Revision Commission did add one new feature: the Commission stated explicitly what was only implicit in the Model Code and the Uniform Rules—when the client has died, the estate has been closed, and the personal representative has been discharged, the lawyer can no longer claim the privilege. In short, the privilege ends when the client’s estate closes.

The next generation came along in the 1960s, when work began on what ultimately became the Federal Rules of Evidence. The drafting conference in 1974.

119 See Unif. R. Evid. 26(1) (1953), reprinted in JAMES F. BAILEY III & OSCAR M. TRELLES II, THE FEDERAL RULES OF EVIDENCE LEGISLATIVE HISTORIES AND RELATED DOCUMENTS 161, 179 (1980) (“The [attorney-client] privilege may be claimed by the client in person or by his lawyer, or if incompetent, by his guardian, or if deceased, by his personal representative.”).

120 See CAL. EVID. CODE § 953(c) (West 1995) (providing that when the client is dead, the holder of the privilege becomes the client’s personal representative).

121 See id. §§ 953(c), 954(c) and accompanying Law Revision Commission Comments. Chief Justice Rehnquist cited this California material in a footnote to the Swidler & Berlin majority opinion. He seemed to suggest that California’s position is out in left field and that no other state has emulated California. See Swidler & Berlin v. United States, 118 S. Ct. 2081, 2085 n.2 (1998). With all respect, the Chief Justice missed the point. California’s position is the same as the Model Code’s position in 1942 and the Uniform Rules’ position in 1953; the only difference is that California explained what it was doing rather than leaving it to implication. I have looked carefully and cannot find any case law—from California or any of the other twenty-four states with privilege rules descended from the Model Code—that discusses what happens to the privilege after the client’s estate closes. In the absence of case law, the plain meaning and legislative background of the rules are the only guideposts. Notice that Chief Justice Rehnquist’s footnote was not necessary to the decision in the case. The appellate record in Swidler & Berlin did not include the fact that Vincent Foster’s estate was still in probate in Arkansas when Starr tried to obtain the privileged notes and when the case was heard in the Supreme Court, but one of the Justices drew out that fact during the oral argument. See Transcript of Oral Argument, at 10, Swidler & Berlin (No. 97-1192), available in 1998 WL 309279. Thus, Swidler & Berlin does not decide, even under the federal common law of privilege, whether the attorney-client privilege does or does not stay alive after the client’s estate closes.

122 See Prefatory Note, supra note 118.
committee used the Uniform Rules, the Kansas Code (which was based entirely on the Uniform Rules), and the California Evidence Code as guidelines for its work. When the drafters reached the attorney-client privilege, they followed the well-worn path: the client’s personal representative was given the same role as in the Model Code, the original Uniform Rules, the California Evidence Code, and the Kansas Code. After Congress adopted the Federal Rules of Evidence, minus the privilege rules, the Commissioners on Uniform State Laws revised the Uniform Rules in 1974 to make them conform to the newly adopted Federal Rules. The Commissioners did, however, restore the privilege rules that Congress had jettisoned. Thus, the present version of the Uniform Rules of Evidence includes Rule 502 on the attorney-client privilege; like all of its predecessors, Uniform Rule 502 gives the familiar role to the deceased client’s personal representative. The same, of course, is true of all the state attorney-client privilege rules that have been adopted since 1974 and have been based on either deleted Federal Rule of Evidence 503 or Uniform Rule of Evidence 502.

C. Why Should We Care About the Duration of the Attorney-Client Privilege After the Client’s Death?

Why should we care how long the attorney-client privilege lasts after the client dies? If the Supreme Court majority was correct in Swidler & Berlin that at least some clients are very concerned about what happens to their reputations, their families, and their friends after they die, then we ought to care whether the privilege lasts for eternity or only for a few years until the client’s estate closes. At present in the United States, geography makes a substantial difference. In some states, the privilege lasts only for a few years, while in others it lasts forever.

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123 See, e.g., FED. R. EVID. 103(a) advisory committee’s note (citing Kansas law, California law, and the Uniform Rules).
124 See FED. R. EVID. 503(c) (deleted), reprinted in 24 WRIGHT & GRAHAM, supra note 21, Rejected Rule 503, at 37, 38.
125 See supra text accompanying notes 20-23.
126 See Prefatory Note, supra note 118.
127 See UNIF. R. EVID. 502.
128 The states in question are those listed supra note 94, less California and Kansas, which based their privilege rules on the 1953 version of the Uniform Rules, and less Louisiana because of the uncertainty expressed supra note 100.
Swidler & Berlin tells us that, in a case governed by the federal common law of privilege, the privilege remains intact after the client dies, but the Court did not decide how long it lasts.\textsuperscript{130} Swidler & Berlin reminds us that an uncertain privilege is nearly as bad as no privilege at all.\textsuperscript{131} When a client needs to confide in her lawyer, is she likely to know what state's law will apply when some zealous litigant goes after her confidential information? Can she predict that the issue will arise in a federal question case rather than a diversity case or a state court case? If her lawyer is conscientious and tries to caution her about the duration of the privilege before she divulges the confidential information,\textsuperscript{132} will the lawyer have anything but guesswork to go on? Probably not, at least until the law on this subject becomes more settled. Until then, it is probably best to err on the side of caution and to assume that the privilege will end when the client's estate is settled. The lawyer should also remember that total accuracy in a cautionary statement of this kind will produce so much detail that the client will not be able to understand it. The lawyer must obviously use common sense in tailoring the caution to the client and the situation. The following is an example of an informally-worded warning that can be cut down or expanded to fit the particular situation. It combines the attorney-client privilege and the ethical duty to preserve confidences, and it attempts to strike a workable compromise between accuracy and befuddlement.

I will keep in confidence what you are about to tell me, subject to five limitations. I may reveal what you are about to tell me in these five situations: 1) if revealing it will prevent someone's death or serious bodily injury;\textsuperscript{133} 2) if revealing it will prevent you from using my legal services

\textsuperscript{130} I do not mean to suggest that the Court ought to have reached that issue, which was clearly unnecessary to dispose of the case at hand. \textit{See supra} note 121.

\textsuperscript{131} \textit{See} Swidler & Berlin, 118 S. Ct. at 2087.

\textsuperscript{132} Surely a good lawyer should attempt to do this. \textit{See} MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.4(b) (1998) (expressing the duty to explain a matter to the extent reasonably necessary to permit the client to make informed decisions); Lee Ann Pizzimenti, \textit{The Lawyer's Duty to Warn Clients About Limits on Confidentiality}, 39 CATH. U. L. REV 441 (1990); \textit{see also} THOMAS L. SHAFFER & ROBERT F COCHRAN, JR., LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY 40-54 (1994) (concerning lawyer's general moral responsibility to client).

\textsuperscript{133} \textit{Compare} MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b) (1998), \textit{with} RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 132 (Proposed Final Draft No. 1, 1996) (stating an exception to the attorney-client privilege for future crime or fraud), \textit{and} RESTATEMENT (THIRD) OF THE LAW GOVERNING
to commit a crime or fraud that will cause major financial harm to someone;\textsuperscript{134} 3) if I get into a dispute with you or someone else about my duties to you or your duties to me;\textsuperscript{135} 4) if you have died, and I am asked some types of questions about your will or your property transfers during your lifetime;\textsuperscript{136} or 5) if you have died and your estate has already been settled, and I am asked in court to reveal things you have told me in confidence.


\textsuperscript{135} Compare Model Rules of Professional Conduct Rule 1.6(b)(2) (1998) (creating an exception to ethical duty concerning claims of breach of duties running between attorney and client), with Restatement (Third) of the Law Governing Lawyers § 133(1) (Proposed Final Draft No. 1, 1996) (stating an exception to privilege concerning breach of attorney-client duties), and id. §§ 116, 117 (stating exceptions to the ethical duty concerning attorney self-protection and compensation disputes).

\textsuperscript{136} See Restatement (Third) of the Law Governing Lawyers § 131 (stating an exception to the privilege when decedent's communications are at issue in disputes between two people who both claim through the deceased client in either testamentary or inter vivos transactions).