

*QUID LEGES SINE MORIBUS VANAE PROFICIENT: A
BALANCING APPROACH TO THE POSTMORTEM
APPLICATION OF THE ATTORNEY-CLIENT PRIVILEGE*

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I. INTRODUCTION

There are many controversial issues within the legal system—matters that have been debated time and time again in an effort to reach the “correct” answer. The nature of our system allows the law to develop over time, adapting to new circumstances, new problems, and new obstacles. In some ways, the evolutionary nature of our law is comforting, providing hope that what one sees as wrong will someday be corrected. However, this evolution happens slowly, often spanning decades, and some individuals just do not have the time to wait.

Lee Wayne Hunt is one of those individuals. Mr. Hunt is currently serving a prison sentence for two murders that another man admitted to committing.¹ However, that admission is protected by the attorney-client privilege, a legal rule that allows communications between an attorney and a client involving legal advice or assistance to remain confidential unless the client permits the attorney to divulge the communications.² In 1986, Jerry Cashwell confessed to his attorney, Staple Hughes, that he had murdered Roland and Lisa Matthews, the same two murders for which Mr. Hunt was convicted.³ In 2007, four years after the death of his client, Mr. Hughes attempted to testify about his client’s

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¹ John Solomon, *The End of a Failed Technique—But Not of a Prison Sentence*, WASH. POST, Nov. 18, 2007, at A15.

² 81 AM. JUR. 2D *Witnesses* § 325 (2014).

³ Solomon, *supra* note 1, at A15.

admission in an effort to secure a new trial for Mr. Hunt.⁴ However, the judge cautioned Mr. Hughes that he would be reported to the state bar if he disclosed information that is protected by the attorney-client privilege.⁵ Despite this warning, Mr. Hughes testified at the hearing about the admission his now-deceased client made twenty-two years earlier.⁶ The judge ultimately held that the evidence was not compelling enough to merit a new trial, despite its probative value, and Mr. Hunt remains in prison to this day.⁷ Mr. Hughes later reflected on his reaction to this difficult experience:

The only consequence for me is the bitterness and anger I feel over Mr. Hunt. . . . I go home, have a glass of wine, work in the yard. And there's a guy sitting in a prison camp two counties away, and my feeling is he's going to be there for the rest of his life.⁸

As of 2014, Mr. Hunt has been in prison for *twenty-eight years* for a crime he did not commit.⁹ “And you shall know the truth, and the truth shall make you free,”¹⁰ unless of course the truth is protected by the attorney-client privilege.

Alton Logan also spent many years waiting for our laws to bend towards justice. In 1982, Mr. Logan was convicted of the murder of a McDonald's security guard in Chicago and sentenced to life-in-prison.¹¹ In 2008, after Mr. Logan had served *twenty-six years* in prison, “new” information became available that proved Mr. Logan was in fact innocent.¹² However, there is some question as to whether this information can be fairly characterized as new. Attorneys Dale Coventry and Jamie Kunz knew that Mr. Logan was

⁴ Adam Liptak, *When Law Prevents Righting a Wrong*, N.Y. TIMES, May 4, 2008, at 4; Solomon, *supra* note 1, at A15.

⁵ Liptak, *supra* note 4, at 4 (internal quotation marks omitted).

⁶ *Id.* (“I’ve never, ever, ever before violated a client’s confidence, never . . . [b]ut [my client is] dead. My disclosure can’t hurt him and I have to weigh that disclosure against the continuing harm [to Mr. Hunt].” (internal quotation marks omitted)).

⁷ Solomon, *supra* note 1, at A15.

⁸ Liptak, *supra* note 4, at 4 (internal quotation marks omitted). The disciplinary complaint against Mr. Hughes was eventually dismissed in a confidential opinion. *Id.*

⁹ See *Offender Public Information: Lee W. Hunt*, N.C. DEP’T OF PUB. SAFETY, <http://webapps6.doc.state.nc.us/opi/viewoffender.do?method=view&offenderID=0197893&searchLastName=Hunt&searchFirstName=Lee&searchGender=M&listurl=pagelistoffendersearchresults&listpage=1> (last visited Nov. 7, 2014); *Evidence of Injustice: FBI’s Bullet Lead Analysis Used Flawed Science to Convict Hundreds of Defendants*, CBS NEWS (Nov. 16, 2007), <http://www.cbsnews.com/news/evidence-of-injustice/>.

¹⁰ *John* 8:32 (New King James) (internal quotation marks omitted).

¹¹ *26-Year Secret Kept Innocent Man in Prison*, CBS NEWS (Mar. 6, 2008), <http://www.cbsnews.com/news/26-year-secret-kept-innocent-man-in-prison/>.

¹² *Id.*

innocent even before he was sentenced.¹³ They knew this because one of their clients, Andrew Wilson, admitted to them that he had murdered the security guard.¹⁴ As their client, Mr. Wilson enjoyed the benefits of attorney-client privilege, which presented Mr. Coventry and Mr. Kunz with a difficult dilemma: morality required them to speak out, but the law required their silence.¹⁵ In response to repeated questions about why he did not divulge Mr. Wilson's admission, Mr. Coventry noted that he could not have done so without potentially exposing his client to criminal liability, and even if he had tried, the disclosure of privileged information would likely not have been allowed in court.¹⁶ Fortunately, after years of effort, Mr. Coventry and Mr. Kunz were able to convince Mr. Wilson to allow them to disclose his admission following his death, which occurred in 2007.¹⁷ Mr. Wilson's consent allowed his admission to come into court as evidence of Mr. Logan's innocence, resulting in Mr. Logan's release from prison in May 2008.¹⁸ Upon release, Mr. Logan remarked: "I never stopped giving up hope. I've always believed that one day is gone—somebody's gonna come forth and tell the truth. But I didn't know when All I wanted was the truth. All I want is the truth."¹⁹

While these two stories seem unbelievable, they are hardly the only two instances where the attorney-client privilege protected the

¹³ *Id.* Mr. Coventry even attended Mr. Logan's sentencing hearing in which the jury considered the death penalty. *Id.* ("It was just creepy. Knowing I was looking at the jurors thinking, 'My God, they're going to decide to kill the wrong guy.'" (internal quotation marks omitted)). Ironically, if Mr. Logan had been sentenced to death, Mr. Coventry would have been permitted to divulge his client's confession to prevent the sentence from being carried out. *See id.* However, the law provided no means for Mr. Coventry to divulge the confession merely to prevent Mr. Logan from spending his life in prison. *See id.* Mr. Coventry observed that "[m]orally there's very little difference and [we] were torn about that, but in terms of the canons of ethics, there is a difference, you can prevent a death . . ." *Id.* (internal quotation marks omitted). However, according to Mr. Logan, "[t]here is no difference between life in prison and a death penalty. None whatsoever. Both are a sentence of death . . ." *Id.* (internal quotation marks omitted).

¹⁴ *Id.*

¹⁵ *Id.* The gravity of this dilemma was not lost on Mr. Coventry, who recognized that a layperson would surely believe that if you know someone is innocent, you have to say something. *Id.* ("[T]he vast majority of the public apparently believes that, but if you check with attorneys or ethics committees or you know anybody who knows the rules of conduct for attorneys, it's very, very clear—it's not morally clear—but we're in a position to where we have to maintain client confidentiality, just as a priest would or a doctor would. It's just a requirement of the law. The system wouldn't work without it . . ." (internal quotation marks omitted)).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* (internal quotation marks omitted).

confidences of a client rather than ensuring that the truth came out at trial. Like Mr. Hunt and Mr. Logan, Bill Macumber was also convicted for murders that another man admitted to committing.²⁰ In 1975, Ernest Valenzuela admitted to attorney Thomas O'Toole that he had committed the murders for which Mr. Macumber was charged.²¹ After Mr. Valenzuela's death, Mr. O'Toole requested to testify about his client's admission at Mr. Macumber's trial, but the trial judge denied his request, citing the attorney-client privilege.²² Mr. Macumber was found guilty, sentenced to life in prison, and was not released until he served *thirty-seven years*.²³ The Arizona Justice Project, an organization dedicated to advocating for wrongfully convicted individuals, filed multiple motions questioning the judge's refusal to hear the testimony of Mr. O'Toole before its efforts were finally successful.²⁴

There are likely many attorneys across the country that must battle every day with the conflict between their legal obligation to preserve their client confidences and their moral obligation to ensure a just outcome is reached.²⁵ Is such a conflict necessary? Is it not the purpose of the rules of evidence to further the search for the truth?²⁶ Our legal system has been built on the age-old maxim "that it is better that ninety-nine . . . offenders should escape, than

²⁰ Abby Rogers, *Innocent Man Spent 37 Years in Jail Due to a Galling Technicality*, BUS. INSIDER (Jan. 26, 2013), <http://www.businessinsider.com/bill-macumber-case-legal-technicalities-2013-1>.

²¹ *Id.*

²² *Id.* Abby Rogers, the author of this article, was taken aback, as most laypeople are, by the judge's decision to deny O'Toole's testimony. *Id.* ("[W]e were shocked that a dead man's rights would supersede those of a living man who was fighting for his life.")

²³ *Id.*

²⁴ *Id.* The motions filed by the Arizona Justice Project also questioned the forensic evidence used to convict Mr. Macumber. Richard Ruelas, *Arizona Man Convicted in 1962 Murders Freed*, AZCENTRAL (Nov. 9, 2012), <http://www.azcentral.com/news/articles/20121107-macumber-arizona-1962-killings.html>. For a more thorough discussion of Mr. Macumber's case, see *infra* note 68.

²⁵ This debate has begun to leave the legal realm and attract the attention of the public, who struggle with the idea that a legal technicality could prevent a truthful admission from coming to light. For instance, in an episode of the popular television program *Law & Order: Special Victims Unit*, an attorney knew that her client had committed a murder for which an innocent man was convicted twenty years earlier. *Law and Order: Special Victims Unit: Confidential* (NBC television broadcast Mar. 10, 2010). Despite "always [hoping] that the law would catch up with [her client]," the attorney kept her client's confidence until his death, at which time she came forward with the information, leading to the innocent man's exoneration. *Id.* Disregarding his personal criticism of the attorney's twenty-year silence, Detective Elliot Stabler conceded that "[t]he law doesn't always guarantee justice," to which the attorney responded, "but this time I did." *Id.*

²⁶ *Swidler & Berlin v. United States*, 524 U.S. 399, 411 (1998) (O'Connor, J., dissenting) (citing *Funk v. United States*, 290 U.S. 371, 381 (1933)).

that one innocent man should be condemned.”²⁷ Should a system premised on this principle tolerate such injustice? This note argues that it should not and advocates for the adoption of a balancing approach to the postmortem application of the attorney-client privilege in criminal cases. Where a client, now deceased, has admitted to committing a crime for which another has been wrongfully charged or convicted, and the evidence is unavailable through other means, the court should be permitted to balance the deceased client’s interests in confidentiality against the wrongfully charged or convicted individual’s interest in exoneration and society’s interest in ascertaining the truth. Where the balance favors disclosure of the confession, the court should permit disclosure of this otherwise confidential information.

Part II of this note will discuss the genesis, purpose, and application of the attorney-client privilege, including many of the exceptions to the privilege that currently exist. Part III will discuss the arguments put forward against adopting a balancing approach to the postmortem application of the attorney-client privilege. Part IV will discuss the arguments—based in case law, legal commentary, and ethics rules—in favor of this approach. Finally, Part V will propose a framework for applying the balancing approach—including four threshold requirements that must be met before the interests involved are balanced.

II. THE PURPOSE AND APPLICATION OF THE ATTORNEY-CLIENT PRIVILEGE

The attorney-client privilege is one of the oldest recognized rules governing confidentiality.²⁸ It is the only privilege recognized by every state in the country, though application of the privilege can vary state by state.²⁹ Its genesis “is found in the Fifth Amendment privilege against self-incrimination, the Sixth Amendment right to counsel, and the Due Process Clause of the Fourteenth Amendment.”³⁰

The privilege protects communications between an attorney and a client that a client made in confidence “for the purpose of securing

²⁷ THOMAS STARKIE, *A PRACTICAL TREATISE OF THE LAW OF EVIDENCE* 757 (1860).

²⁸ 8 JOHN HENRY WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 2290 (John T. McNaughton ed., rev. ed. 1961).

²⁹ 81 AM. JUR. 2D *Witnesses* § 329 (2014).

³⁰ *Id.* § 328.

legal advice or assistance.”³¹ As a result, an attorney cannot disclose privileged information in court without the client’s permission.³² *Upjohn Co. v. United States*³³ is often cited to explain the purpose of the privilege:

[The Privilege] encourage[s] full and frank communication between attorneys and their clients and thereby promote[s] broader public interests 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.³⁴

The privilege plays an integral role in our legal system, ensuring that an attorney is able to adequately represent his or her client’s interests—something that would be impossible if the attorney was not fully informed of those interests by the client.

However, there are circumstances where information that is protected by the attorney-client privilege can be disclosed without the consent of the client—that is, the privilege is not absolute.³⁵ For instance, the privilege can be waived following a client’s death where litigation regarding the client’s estate arises between the client’s heirs.³⁶ The “crime-fraud” exception permits an attorney to disclose otherwise privileged information where the client sought the attorney’s counsel in the effectuation of a future or ongoing crime or fraud.³⁷ Exceptions also exist where the communications sought were between two parties presenting a common defense,³⁸ and where an attorney seeks to defend against a charge of legal malpractice filed by the client.³⁹ Furthermore, exceptions have been recognized where a public official has allegedly engaged in criminal

³¹ *Id.* § 325.

³² *Id.* § 334.

³³ *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

³⁴ *Id.* at 389.

³⁵ See EDNA SELAN EPSTEIN, *THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE* 391–92 (4th ed. 2001) (discussing each exception to attorney-client privilege currently recognized).

³⁶ *Id.* at 392.

³⁷ *Id.* at 416.

³⁸ *Id.* at 457. This exception arises in situations where two individuals are represented for a single matter by the same legal counsel and prohibits either of those individuals from asserting the privilege against the other in subsequent litigation that relates to that matter. *Id.*

³⁹ *Id.* at 460. This exception is justified by the fact that the main issue in a legal malpractice case is the attorney-client relationship itself. *Id.* It recognizes that an attorney cannot defend his or her own conduct during the representation of a client without revealing facts regarding the client’s interests, which provide the foundation for the advice given. *Id.*

conduct and was advised by a government attorney,⁴⁰ or where an overriding public policy demands disclosure.⁴¹

In addition to these exceptions, the American Bar Association's Model Rules of Professional Conduct permit an attorney to "reveal information relating to the representation of a client"⁴² where it is necessary: (1) "to prevent reasonably certain death or substantial bodily harm;"⁴³ (2) to prevent the client from causing substantial financial or property injury to another through the commission of a crime or fraud in which the lawyer's services are or were being used;⁴⁴ (3) to prevent, mitigate, or rectify a substantial financial or property injury the client has caused another through the commission of a crime or fraud in which the lawyer's services are or were being used;⁴⁵ (4) "to secure legal advice about the lawyer's compliance with the [Model] Rules;"⁴⁶ (5) to establish a claim or defense on the lawyer's behalf in actions between the client and the

⁴⁰ *Id.* at 458–59. "No privilege will attach if there is a grand jury inquiry as to a public official's possible criminal conduct when a government attorney, rather than a privately retained attorney, has advised the government official." *Id.* This exception is justified by the need to balance "competing policy concerns," such as the need for "openness of government so that the people remain ultimately in control of the conduct of the government" and the importance of maintaining the confidentiality of government communications. *Id.* at 459. It recognizes that government attorneys "must first and foremost be alert to the interests of the public, *their foremost client.*" *Id.* (emphasis added). A government attorney's primary obligation "is to uphold the public trust in the lawful conduct of the government's affairs," and protecting communications between government attorneys and public officials "necessarily work[s] against these paramount principles and pose[s] the risk that matters of public interest will be hidden from public view." *Id.*

⁴¹ *Id.* at 464–65 (discussing the case of *Jacqueline F.*, in which an attorney was permitted to violate privilege to disclose the location of his client who was illegally in possession of a child for whom he was at the time embroiled in a custody dispute). However, disclosure will not be permitted where "lesser public policy concerns are implicated" and efforts to expand the public policy exception typically fail. *Id.* at 464; *see, e.g., Elliott Assocs., L.P. v. Republic of Peru*, 176 F.R.D. 93, 99 (S.D.N.Y. 1997), *rev'd on other grounds*, 194 F.3d 363 (2d Cir. 1999) (rejecting application of the public policy exception where a defendant attempted to secure the addresses of individuals whom he would have liked to add as additional defendants from those individuals' attorney); *Potamkin Cadillac Corp. v. Karmgard*, 420 N.Y.S.2d 104, 109 (Civ. Ct. 1979) (rejecting application of the public policy exception where a judgment creditor sought the address of a debtor from an attorney who had previously represented the debtor).

⁴² As discussed above, the attorney-client privilege applies to confidential communications between a lawyer and client that relates to legal advice or assistance. 81 AM. JUR. 2D *Witnesses* § 325 (2014). American Bar Association Model Rule 1.6 applies to "information relating to the representation of a client," and is therefore a significantly broader protection for clients because it "applies not only to matters communicated in confidence [to the attorney] by the client," which would likely be protected by the attorney-client privilege, "but also to all information relating to the representation, whatever its source." MODEL RULES OF PROF'L CONDUCT r 1.6(b)(1) & cmt. 3 (2014).

⁴³ *Id.* at r 1.6(b)(1).

⁴⁴ *Id.* at r 1.6(b)(2).

⁴⁵ *Id.* at r 1.6(b)(3).

⁴⁶ *Id.* at r 1.6(b)(4).

lawyer, to defend against criminal charges or civil claims involving the lawyer's conduct, or to respond to allegations regarding the lawyer's representation of the client;⁴⁷ (6) "to comply with other law or a court order;"⁴⁸ or (7) to resolve issues involving potential conflicts of interests.⁴⁹ The Rules of Professional Conduct in most states allow disclosure in similar circumstances.⁵⁰

The attorney-client privilege is an old and essential feature of our judicial system, allowing for effective communication between an attorney and a client. However, it can also be an impediment to the search for the truth, the primary focus of a trial. Therefore, the privilege should be construed in a manner that properly balances the importance of the rights that the privilege protects and the information it hides from the public eye.

III. APPLYING THE ATTORNEY-CLIENT PRIVILEGE REGARDLESS OF WHETHER THE CLIENT IS DECEASED

A. *The Purpose of the Privilege is of Paramount Importance*

Supporters of applying the privilege regardless of whether the client is living or deceased argue that the privilege's purpose—promoting full and frank communication between attorneys and their clients—is superior to all others in the legal system.⁵¹ They further argue that the potential for postmortem disclosure would discourage the client from "communicat[ing] fully and frankly with counsel" out of fear that confidential information would come to light following his or her death.⁵² They argue that the entire reason the privilege was created was to ensure that clients feel free to

⁴⁷ *Id.* at r. 1.6(b)(5).

⁴⁸ *Id.* at r. 1.6(b)(6).

⁴⁹ *Id.* at r. 1.6(b)(7).

⁵⁰ *See, e.g.*, ALA. RULES OF PROF'L CONDUCT r. 1.6(b) (2014); ARK. RULES OF PROF'L CONDUCT r. 1.6(b) (2014); CAL. RULES OF PROF'L CONDUCT r. 3-100(b) (2014); DEL. RULES OF PROF'L CONDUCT r. 1.6(b) (2014); HAW. RULES OF PROF'L CONDUCT r. 1.6(b) (2014); IDAHO RULES OF PROF'L CONDUCT r. 1.6(b) (2014); ILL. RULES OF PROF'L CONDUCT r. 1.6(b)–(c) (2014); IND. RULES OF PROF'L CONDUCT r. 1.6(b) (2014); ME. RULES OF PROF'L CONDUCT r. 1.6(b) (2014); MISS. RULES OF PROF'L CONDUCT r. 1.6(b) (2014); NEV. RULES OF PROF'L CONDUCT r. 1.6(b) (2014); N.H. RULES OF PROF'L CONDUCT r. 1.6(b) (2014); N.J. RULES OF PROF'L CONDUCT r. 1.6(b)–(d) (2014); N.Y. RULES OF PROF'L CONDUCT r. 1.6 (2014); N.C. RULES OF PROF'L CONDUCT r. 1.6(d) (2014); N.D. RULES OF PROF'L CONDUCT r. 1.6 (2014); OHIO RULES OF PROF'L CONDUCT r. 1.6(b) (2014); OR. RULES OF PROF'L CONDUCT r. 1.6(b) (2014); PA. RULES OF PROF'L CONDUCT r. 1.6(c) (2014); VT. RULES OF PROF'L CONDUCT r. 1.6(b)–(c) (2014); WYO. RULES OF PROF'L CONDUCT r. 1.6(b) (2014).

⁵¹ Swidler & Berlin v. United States, 524 U.S. 399, 407 (1998).

⁵² *Id.*

communicate honestly with their attorneys because a fair trial could not truly be afforded if the client's attorney was not fully informed of the client's case.⁵³ Therefore, "extraordinarily high value must be placed on the right of every citizen to obtain the thoughtful advice of a fully informed attorney concerning legal matters."⁵⁴

In the situation in which a deceased client confessed to a crime for which another person was convicted, supporters of applying the privilege regardless of whether the client is living or deceased note that, though the client's admission to his or her attorney may be the only means of acquiring the evidence sought, that evidence would most likely not have been disclosed if the client had not felt free to communicate fully and honestly with his or her attorney in the first place.⁵⁵

B. Federal and State Precedent Does Not Support Postmortem Disclosure

Nearly every court that has been faced with the postmortem application of the attorney-client privilege has held that the privilege survives the death of the client and can only be waived by the client, his or her representative, or if a legal exception applies.⁵⁶ Several state high courts and the United States Supreme Court have applied the attorney-client privilege after the death of the

⁵³ See 81 AM. JUR. 2D *Witnesses* § 328 (2014).

⁵⁴ *In re John Doe Grand Jury Investigation*, 562 N.E.2d 69, 71 (Mass. 1990).

⁵⁵ *Swidler & Berlin*, 524 U.S. at 408 ("[T]he loss of evidence admittedly caused by the privilege is justified in part by the fact that without the privilege, the client may not have made such communications in the first place.").

⁵⁶ See, e.g., *id.* at 410 ("It has been generally, if not universally, accepted, for well over a century, that the attorney-client privilege survives the death of the client . . ."); *Hitt v. Stephens*, 675 N.E.2d 275, 278 (Ill. App. Ct. 1996) ("The privilege exists, and persists even after death, in order that the client may 'confide freely and fully in his or her attorney, without fear that confidential information will be disseminated to others.'" (quoting *People v. Knuckles*, 650 N.E.2d 974, 976 (Ill. 1995))); *Mayberry v. State*, 670 N.E.2d 1262, 1267 n.5 (Ind. 1996) (holding that the privilege survives the death of the client and can only be waived by the conduct of the client or his or her representative (citing *Buuck v. Kruckeberg*, 95 N.E.2d 304, 308 (Ind. Ct. App. 1950))); *In re John Doe Grand Jury Investigation*, 562 N.E.2d at 70 (citations omitted) (noting that attorney-client privilege survives the death of the client and can only be waived by the client or the administrator of his or her estate); *McCaffrey v. Estate of Brennan*, 533 S.W.2d 264, 267 (Mo. Ct. App. 1976) ("The attorney-client relationship with respect to the attorney's preparation of a will survives the death of the client and bars testimony of the attorney where, as here, one of the parties asserts a claim adverse to the interests of the client's estate. The privilege may be claimed by the personal representative of a deceased client." (citation omitted)); *Clark v. Second Judicial Dist. Court*, 692 P.2d 512, 514 (Nev. 1985) (noting that the privilege survives the death of the client and an exception applies where the dispute is between individuals claiming "through" or "under" the client, but not where the dispute is between the client's estate and a "stranger").

client, without alteration, even in criminal proceedings.⁵⁷

For instance, in *Swidler & Berlin v. United States*,⁵⁸ the preeminent federal authority on the postmortem application of the attorney-client privilege, the United States Supreme Court noted that the attorney-client privilege is one of the oldest privileges in existence,⁵⁹ that there was little to no precedent in support of a balancing approach,⁶⁰ and that there is no evidence demonstrating that such an approach would not have a chilling effect on speech.⁶¹ In response to the argument that by confining application of the balancing test to criminal cases the chilling effect on client disclosure would be minimal, the Court noted that no precedent supports the idea that the privilege applies differently in civil or criminal cases, and often a client may not know whether information he or she discloses to his or her attorney may be relevant to a civil or criminal matter at some time in the future.⁶² Despite the rulings under *United States v. Nixon*⁶³ and *Branzburg v. Hayes*⁶⁴ that privileges should be strictly construed when they stand in the way of the truth,⁶⁵ the Court cautioned that those rulings concerned the creation of new privileges, rather than one of the

⁵⁷ *Swidler & Berlin v. United States*, 524 U.S. 399, 404 (citing *State v. Macumber*, 544 P.2d 1084, 1086 (Ariz. 1976); *In re John Doe Grand Jury Investigation*, 562 N.E.2d at 69–70; *State v. Doster*, 284 S.E.2d 218, 219 (S.C. 1981)).

⁵⁸ Chief Justice Rehnquist wrote the Court's opinion in which Justices Stevens, Kennedy, Souter, Ginsberg, and Breyer joined. *Swidler & Berlin*, 524 U.S. 399 at 401. Justice O'Connor wrote the dissenting opinion, in which Justices Scalia and Thomas joined. *Id.* at 411. The case arose in the context of an investigation into whether various individuals had made false statements, obstructed justice, or committed other crimes during the Office of Independent Counsel's investigation of the firing of employees of the White House Travel Office in 1993. *Id.* at 401. The Deputy White House Counsel at the time of the firings, Vincent M. Foster, Jr., met with an attorney of Swidler & Berlin to discuss legal representation for the potential investigations that were likely to follow the firings. *Id.* James Hamilton, the attorney with Swidler & Berlin, met with Mr. Foster for approximately two hours and took hand-written notes of their discussion, including the word "[p]rivileged" as one of the first entries. *Id.* at 401–02. Mr. Foster committed suicide nine days later. *Id.* at 402. The Office of the Independent Counsel subpoenaed Mr. Hamilton and Swidler & Berlin for those hand-written notes, which Mr. Hamilton claimed were protected by attorney-client privilege and the work product privilege. *Id.*

⁵⁹ *Id.* at 403 ("The 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.'" (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981))).

⁶⁰ See *Swidler & Berlin*, 524 U.S. at 403–04.

⁶¹ See *id.* at 410.

⁶² *Id.* at 408–09.

⁶³ *United States v. Nixon*, 418 U.S. 683 (1974), *superseded by statute*, FED. R. EVID. 104(a), *as recognized in* *Bourjaily v. United States*, 483 U.S. 171, 177 (1987).

⁶⁴ *Branzburg v. Hayes*, 408 U.S. 665 (1972).

⁶⁵ See *Nixon*, 418 U.S. at 710; *Branzburg*, 408 U.S. at 710.

oldest recognized privileges in existence.⁶⁶ Ultimately, the *Swidler & Berlin* Court refused to allow the disclosure of the confidential information involved.⁶⁷

The states have also been somewhat active in this area. In *State v. Macumber*, the Supreme Court of Arizona was faced with the postmortem application of the attorney-client privilege in a criminal case and rejected a balancing approach.⁶⁸ In 1990, the Supreme Judicial Court of Massachusetts also declined to apply a balancing approach to the postmortem application of the attorney-client privilege,⁶⁹ rejecting the Commonwealth's argument "that the interests of justice require that the privilege be overridden."⁷⁰ Finally, in 2003 the Supreme Court of North Carolina rejected the State's argument "that in the interest of justice a trial court has the inherent authority to hear the State's petition and to apply a balancing test to determine by in camera review whether any disclosure should be made."⁷¹ After thoroughly discussing the holdings in *Cohen v. Jenkintown Cab Co.*,⁷² *Swidler & Berlin*,⁷³ and

⁶⁶ *Swidler & Berlin*, 524 U.S. at 410.

⁶⁷ *Id.* at 411.

⁶⁸ See *State v. Macumber*, 544 P.2d 1084, 1086 (Ariz. 1976). In *Macumber*, the defendant was found guilty of two counts of first degree murder. *Id.* at 1085. On appeal, the defense alleged that it was not Macumber who committed the murders but a third party. *Id.* at 1086. Two attorneys were willing to testify that a former client of theirs, who was now deceased, confessed to the two murders during the attorneys' representation of him in a prior, unrelated murder case. *Id.* The two attorneys consulted the Committee on Ethics of the State Bar prior to coming forward, and the committee issued an informal opinion "that the privilege of attorney-client did not apply to prevent them from disclosing the information to the defense, prosecution, and court." *Id.* at 1087 (Holohan, J., concurring). However, on appeal, the court's majority refused to admit the information into evidence, holding that it was privileged. *Id.* at 1086.

⁶⁹ *In re John Doe Grand Jury Investigation*, 562 N.E.2d 69, 71-72 (Mass. 1990).

⁷⁰ *Id.* at 69. In this case, the late Charles Stuart became a suspect in the investigation of the murder of Carol DiMaiti Stuart and Christopher Stuart. *Id.* at 69. The Commonwealth of Massachusetts sought the disclosure of a two-hour communication between Stuart and his attorney, John Dawley, which took place the day before Stuart's death. *Id.* The administratrix of Stuart's estate, Dorothy Stuart, was unsure as to whether she had the right to waive privilege on behalf of Stuart but stated that she would not exercise such right even if she had it. *Id.*

⁷¹ *In re Miller*, 584 S.E.2d 772, 778 (N.C. 2003). In *In re Miller*, the State requested that the court compel the disclosure of a communication between Derrill H. Willard and his attorney, Richard T. Gammin, which occurred shortly before Mr. Willard committed suicide. *Id.* at 777. Mr. Willard was suspected to have poisoned Dr. Eric Miller and likely consulted Attorney Gammin about the criminal investigation. *Id.* The trial court ruled in favor of disclosure but stayed the decision and allowed the defendant to immediately appeal it. See *id.* at 777-78, 782 ("The State's and the public's interest in determining the identity of the person or persons responsible for the death of Eric Miller outweigh the public interest in protecting . . . the attorney-client privilege.").

⁷² See *id.* at 783.

⁷³ *Cohen v. Jenkintown Cab. Co.*, 357 A.2d 689 (Pa. Super. Ct. 1976); see *In re Miller*, 584

John Doe,⁷⁴ the North Carolina Supreme Court rejected a balancing approach, refused to permit disclosure of the confidential information involved, and cautioned against the use of balancing tests generally.⁷⁵

C. The Prevailing Rules of Professional Conduct Prohibit Postmortem Disclosure

The rules of professional conduct in the vast majority of states do not permit postmortem disclosure by an attorney of “information relating to the representation of a client.”⁷⁶ The American Bar Association’s Model Rules of Professional Conduct specify in Rule 1.6(b) under what circumstances such information, which often includes information protected by the attorney-client privilege,⁷⁷ may be revealed.⁷⁸ Rule 1.6(b)(1) does not permit disclosure of confidential information to prevent wrongful incarceration but permits disclosure “to prevent reasonably certain death or substantial bodily injury,”⁷⁹ and the vast majority of states follow this approach.⁸⁰ Massachusetts and Alaska are the only states that

S.E.2d at 783.

⁷⁴ See *In re Miller*, 584 S.E.2d at 784.

⁷⁵ *Id.* at 785 (citing *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 367 S.E.2d 609, 617 (N.C. 1988)).

⁷⁶ See, e.g., ALA. RULES OF PROF’L CONDUCT r. 1.6 (2014); ARK. RULES OF PROF’L CONDUCT r. 1.6 (2014); DEL. RULES OF PROF’L CONDUCT r. 1.6 (2014); HAW. RULES OF PROF’L CONDUCT r. 1.6 (2014); IDAHO RULES OF PROF’L CONDUCT r. 1.6 (2014); ILL. RULES OF PROF’L CONDUCT r. 1.6 (2014); IND. RULES OF PROF’L CONDUCT r. 1.6 (2014); MISS. RULES OF PROF’L CONDUCT r. 1.6 (2014); NEV. RULES OF PROF’L CONDUCT r. 1.6 (2014); N.H. RULES OF PROF’L CONDUCT r. 1.6 (2014); N.J. RULES OF PROF’L CONDUCT r. 1.6 (2014); N.D. RULES OF PROF’L CONDUCT r. 1.6 (2014); OHIO RULES OF PROF’L CONDUCT r. 1.6 (2014); OR. RULES OF PROF’L CONDUCT r. 1.6 (2014); PA. RULES OF PROF’L CONDUCT r. 1.6 (2014); VT. RULES OF PROF’L CONDUCT r. 1.6 (2014); WYO. RULES OF PROF’L CONDUCT r. 1.6 (2014).

⁷⁷ See *supra* note 42.

⁷⁸ MODEL RULES OF PROF’L CONDUCT r. 1.6(b) (2013); see *supra* notes 42–49 and accompanying text.

⁷⁹ MODEL RULES OF PROF’L CONDUCT r. 1.6(b)(1). Arguably, the ABA rule can be interpreted to permit disclosure to prevent an innocent person from serving a significant prison term, but it has not been applied in such a way. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 66 illus. 2 (2000) (“Serious bodily harm . . . includes life-threatening illness and injuries and the consequences of events such as imprisonment for a substantial period . . .”). Ironically, the moment a wrongfully convicted person is sentenced to death, an attorney can disclose information that would have been confidential if the person was sentenced to life in prison instead. See MODEL RULES OF PROF’L CONDUCT r. 1.6(b)(1).

⁸⁰ See CAL. RULES OF PROF’L CONDUCT r. 3-100(b) (2014); HAW. RULES OF PROF’L CONDUCT r. 1.6(b)(1) (2014); IDAHO RULES OF PROF’L CONDUCT r. 1.6(b)(2) (2014); ILL. RULES OF PROF’L CONDUCT r. 1.6(c) (2014); MISS. RULES OF PROF’L CONDUCT r. 1.6(b)(1); NEV. RULES OF PROF’L CONDUCT r. 1.6(b)(1) (2014); N.J. RULES OF PROF’L CONDUCT r. 1.6(b)(1) (2014); N.Y. RULES OF PROF’L CONDUCT r. 1.6(b)(1) (2014); OHIO RULES OF PROF’L CONDUCT r. 1.6(b)(1) (2014); ORE. RULES OF PROF’L CONDUCT r. 1.6(b)(2) (2014); PA. RULES OF PROF’L CONDUCT r. 1.6(c)(1)

allow an attorney to disclose otherwise confidential information to prevent the wrongful incarceration of another.⁸¹

D. The Creation of New Exceptions Could Erode the Attorney-Client Privilege Over Time

Due to the high value they place on upholding the privilege's purpose, supporters of applying the privilege regardless of whether the client is deceased are concerned that the creation of a new postmortem balancing approach to the attorney-client privilege would have a chilling effect on a client's willingness to communicate with his or her attorney.⁸² Despite the myriad of exceptions to the attorney-client privilege that already exist,⁸³ they caution that this "no harm in one more exception' rationale could contribute to the general erosion of the privilege, without reference to common law principles or 'reason and experience.'"⁸⁴

An exception which calls for the balancing of factors, like the one advocated in this note, is especially worrisome to supporters of applying the privilege regardless of whether the client is deceased because a balancing approach could be applied inconsistently.⁸⁵ In rejecting a postmortem balancing approach to the privilege, the Supreme Court of North Carolina stated that:

A strict balancing test involving the attorney-client privilege, in the context of the present case after the client's death, subjects the client's reasonable expectation of nondisclosure to a process without parameters or standards, with an end result no more predictable in any case than a public opinion poll, the weather over time, or any athletic contest. Such a test, regardless of how well intentioned and conducted it may be, or how exigent the circumstances, would likely have, in the immediate future and over time, a corrosive effect on the privilege's traditionally stable application and the corresponding expectations of clients. Moreover, the

(2014); VT. RULES OF PROF'L CONDUCT r. 1.6(b)(1) (2014).

⁸¹ ALASKA RULES OF PROF'L CONDUCT r. 1.6(b)(1)(C) (2014); MASS. RULES OF PROF'L CONDUCT r. 1.6(b)(1) (2014).

⁸² *Swidler & Berlin v. United States*, 524 U.S. 399, 410 (1998) ("While the arguments against the survival of the privilege are by no means frivolous, they are based in large part on speculation—thoughtful speculation, but speculation nonetheless—as to whether posthumous termination of the privilege would diminish a client's willingness to confide in an attorney. In an area where empirical information would be useful, it is scant and inconclusive.").

⁸³ For a discussion of these exceptions, see *supra* notes 35–41 and accompanying text.

⁸⁴ *Swidler & Berlin*, 524 U.S. at 410.

⁸⁵ *In re Miller*, 584 S.E.2d 772, 785 (N.C. 2003).

proposed factors to be “balanced” are not capable of precise discernment or application in this case, or any case, and seem to add little to an assessment of whether the privilege should be waived.⁸⁶

E. Conclusion

The attorney-client privilege is a pivotal part of our system of justice, ensuring that a client can fully and frankly communicate with his or her attorney, which in turn helps ensure that the client receives adequate representation—a constitutional imperative. The weight of precedent, grounded in case law, statutes, and ethical rules, support the notion that the privilege survives, and is unaltered by, the death of the client. Supporters of applying the privilege regardless of whether the client is living or deceased argue that this is essential because the threat of postmortem disclosure would discourage the client from confiding in his or her attorney, thereby jeopardizing the attorney’s ability to provide adequate representation for his or her client.

IV. A BALANCING APPROACH TO THE POSTMORTEM APPLICATION OF THE ATTORNEY-CLIENT PRIVILEGE

A. The Purpose of the Privilege is Subordinate to the Interests of Justice

As discussed above, the fundamental purpose of the attorney-client privilege is to encourage full and frank communication between attorney and client.⁸⁷ However, that purpose is not superior to all others in our legal system. The United States Supreme Court has “long recognized that ‘the fundamental basis upon which all rules of evidence must rest—if they are to rest upon reason—is their adaptation to the successful development of the truth.’”⁸⁸ Privileges “contravene the fundamental principle that ‘the public . . . has a right to every man’s evidence.’”⁸⁹ Therefore,

⁸⁶ *Id.* (citing *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 367 S.E.2d 609, 617 (N.C. 1988)).

⁸⁷ See *supra* note 34 and accompanying text.

⁸⁸ *Swidler & Berlin*, 524 U.S. at 411 (O’Connor, J., dissenting) (quoting *Funk v. United States*, 290 U.S. 371, 381 (1933)).

⁸⁹ *Trammel v. United States*, 445 U.S. 40, 50 (1980) (quoting *United States v. Bryan*, 339 U.S. 323, 331 (1950)) (noting that this fundamental principle has been recognized for over three centuries).

privileges “must be strictly construed and accepted ‘only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the *normally predominant principle* of utilizing all rational means for ascertaining truth.’”⁹⁰ This deference to the importance of ascertaining the truth, the Supreme Court wrote, “is nowhere more profoundly manifest than in our view that ‘the twofold aim [of criminal justice] is that guilt shall not escape *or innocence suffer*.’”⁹¹

Though supporters of applying the attorney-client privilege regardless of whether the client is deceased are correct in arguing that the privilege’s fundamental purpose is to encourage full and frank communication, they fail to recognize that this purpose is subordinate to the overarching purpose of our judicial system—ascertaining the truth so that justice can be done. The privilege was intended to give way under certain circumstances, recognizing that a client’s right to adequate representation is important, but not as important as ensuring that a just outcome is reached.

Of course, this raises the question of under what “circumstances” the purpose of the attorney-client privilege should give way to the “normally predominant principle of utilizing all rational means for ascertaining truth”?⁹² Celebrated evidence commentators Mueller and Kirkpatrick advocate that the privilege should give way “where

⁹⁰ *Trammel*, 445 U.S. at 50 (emphasis added) (quoting *Elkins v. United States*, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting)). For instance, the Court has held that even communications between the President and his advisors, though normally privileged, may give way under some circumstances. *United States v. Nixon*, 418 U.S. 683, 709 (1974), *superseded by statute*, FED. R. EVID. 104(a), *as recognized in* *Bourjaily v. United States*, 483 U.S. 171, 177 (1987) (“The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence.”). Justices O’Connor, Scalia, and Thomas even postulated that privileges rooted in the Constitution could be waived under some circumstances. *Swidler & Berlin*, 524 U.S. at 411 (O’Connor, J., dissenting) (“In light of the heavy burden that they place on the search for truth, ‘evidentiary privileges in litigation are not favored, and even those rooted in the Constitution must give way in proper circumstances.’” (citing *Nixon*, 418 U.S. at 708–10) (quoting *Herbert v. Lando*, 441 U.S. 153, 175 (1979))). The American Bar Association also recognizes the importance of applying the privilege narrowly. See The ABA Task Force on the Attorney-Client Privilege, *Report of the American Bar Association’s Task Force on the Attorney-Client Privilege*, 60 BUS. LAW. 1029, 1032 (2005) (“Importantly, the privilege has been designed to apply only in the general class of cases where its purposes are strongly served.”). “The attorney-client privilege should be construed narrowly, or strictly construed, because it reduces the amount of information discoverable during the course of a lawsuit and impedes full and free discovery of the truth.” 81 AM. JUR. 2d *Witnesses* § 329 (2014). “The attorney-client privilege is at the expense of the full and free discovery of the truth, and for that reason applies only where necessary to achieve its purpose.” *Id.*

⁹¹ *Nixon*, 418 U.S. at 709 (alteration in original) (emphasis added) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)).

⁹² *Trammel*, 445 U.S. at 50 (1980) (quoting *Elkins*, 364 U.S. at 234 (Frankfurter, J., dissenting)).

extreme injustice would be done,” such as where “a deceased client has confessed to criminal acts that are later charged to another.”⁹³ The authors of *McCormick on Evidence* also acknowledge that “[i]t is difficult to imagine that the privilege would survive such a set of facts.”⁹⁴ Allowing a wrongfully convicted individual to suffer in prison so that the secrets of a deceased client can remain protected is a travesty that our legal system should not tolerate. In circumstances such as this, the important purpose of the privilege—to encourage full and frank communication between attorney and client—must give way to the overarching purpose of our legal system—the ascertainment of the truth. As one commentator observed:

The criminal justice system performs a vital role in preventing crime and punishing lawbreakers, but the system’s power encompasses the ability to incarcerate people, thereby denying them constitutionally protected freedom. Inherent in the exercise of this awesome power is the dangerous proposition that innocent people, wrongfully convicted, may be sent to jail and deprived of their fundamental liberties. This result is always far worse than depriving any other protections that our judicial system assures—especially the “questionable” injury to the attorney-client privilege.⁹⁵

If the client’s interests are minimal, for instance, because of his or her death, the importance of the privilege’s purpose is substantially reduced. As Justice O’Connor noted: “A privilege should operate . . . only where ‘necessary to achieve its purpose,’ and an invocation of the attorney-client privilege should not go unexamined ‘when it is shown that the interests of the administration of justice can only be frustrated by [its] exercise.’”⁹⁶

Those concerned about a balancing approach to the postmortem application of the privilege are right that the death of a client does not automatically preclude the client from any harm. A deceased client’s reputation could be tarnished or his or her estate affected by

⁹³ CHRISTOPHER B. MUELLER & LAIRD, C. KIRKPATRICK, EVIDENCE § 5.26, at 373 (3rd ed. 2003) (“[S]urely the [third party’s] need for evidence sometimes outweighs the interest in preserving the confidences.”).

⁹⁴ MCCORMICK ON EVIDENCE § 94, at 584 (Kenneth S. Broun ed., 7th ed. 2013).

⁹⁵ Jason Greenberg, Comment, *Swidler & Berlin v. United States . . . and Justice for All?*, 80 B.U. L. REV. 939, 958 (2000).

⁹⁶ *Swidler & Berlin v. United States*, 524 U.S. 399, 412 (1998) (O’Connor J., dissenting) (quoting *Fisher v. United States*, 425 U.S. 391, 403 (1976); *Cohen v. Jenkintown Cab. Co.*, 357 A.2d 689, 693 (Pa. Super. Ct. 1976)).

postmortem admissions of guilt, which in turn could detrimentally affect his or her heirs.⁹⁷ However, “it is surely true that the risk of post-death revelation [of privileged materials] will typically trouble the client less than pre-death revelation. The question is how much less, and the answer seems likely to depend on the context.”⁹⁸ For instance, in *Cohen v. Jenkintown Cab Co.*, the deceased client left behind no estate that could be affected by litigation.⁹⁹ Furthermore, the disclosure of the information in court could not further damage the client’s reputation because the information was publicly disclosed by his attorney in an earlier deposition.¹⁰⁰ Therefore, the client had *absolutely no interest* that could be detrimentally affected by the disclosure:

It is for the protection and security of clients that their attorneys at law or counsel are restrained from giving evidence of what they have had communicated and [e]ntrusted to them in that character; so that legal advice may be had at any time by every man who wishes it in regard to his case, whether it be bad or good, favorable or unfavorable to him, without the risk of being rendered liable to loss in any way, or to punishment, by means of what he may have disclosed or [e]ntrusted to his counsel. *But where it is impossible that the rights or the interests of the client can be affected by the witness’s giving evidence of what came to his knowledge by his having been counsel and acted at the time as attorney or counsel at law, the rule has no application whatever, because the reason of it does not exist.*¹⁰¹

Cohen is obviously an extreme example, but it clearly shows that there are instances where a client simply cannot be detrimentally affected by postmortem disclosure. Though the client’s property and reputational interests could be affected, these concerns appear trivial when weighed against a living defendant’s “vital interest” in defending against a criminal charge.¹⁰²

⁹⁷ *In re Miller*, 584 S.E.2d 772, 790 (N.C. 2003).

⁹⁸ *In re Sealed Case*, 124 F.3d 230, 233 (D.C. Cir. 1997).

⁹⁹ *Cohen*, 357 A.2d at 693. Because Mr. Guise had no estate, it could not be joined as a third party defendant. *Id.* Therefore, only the assets of Mrs. Cohen and Jenkintown Cab Co. would be affected by the outcome of the case. *See id.* at 690.

¹⁰⁰ *Id.* The court noted that the confession was not a “scandalous and impertinent matter” and Mr. Guise’s death precluded his prosecution for perjury. *Id.* at 693 (“In any event, evidence such as we have here, so obviously relevant to the plaintiff’s claim, may not be considered so scandalous and impertinent as to bar its admission at trial.” (citing *Burden v. Burden*, 124 F. 250, 255 (N.D.N.Y. 1903))).

¹⁰¹ *Cohen*, 357 A.2d at 692 (quoting *Hamilton v. Neel*, 7 Watts 517, 522 (Pa. 1838)).

¹⁰² *State v. Macumber*, 544 P.2d 1084, 1088 (Ariz. 1976) (Holohan J., concurring) (“I

B. Application of a Balancing Approach by the Courts

Some argue that postmortem disclosure is a clear violation of the law, and legally they are correct. As noted above, the vast majority of states apply the privilege in the same manner regardless of whether the client is living or deceased.¹⁰³ However, several state courts have addressed the issue at length and five different approaches have developed.¹⁰⁴ The first approach allows the deceased client's privilege to be passed on to his or her heirs.¹⁰⁵ The second approach allows the privilege to survive the death of the client, but the privilege ends when the client's estate is fully distributed and his or her personal representative is discharged.¹⁰⁶ The third approach, considered "the extreme minority viewpoint," holds that the privilege ceases completely with the death of the client.¹⁰⁷ The fourth approach considers the attorney-client privilege to be an absolute privilege—that is, the death of the client has no effect on the scope of the privilege's application.¹⁰⁸ Finally, the fifth approach to the postmortem application of attorney-client privilege calls for a balancing of the interests involved to determine if disclosure should be permitted.¹⁰⁹

In *Cohen v. Jenkintown Cab Co.*, a 1976 Pennsylvania Superior Court case, the court balanced the interests involved and concluded that "[t]he privilege exists only to aid in the administration of justice, and when it is shown that the interests of the administration of justice can only be frustrated by the exercise of the privilege, the trial judge may require that the communication be

believe that the constitutional right of the accused to present a defense should prevail over the property interest of a deceased client in keeping his disclosures private.").

¹⁰³ See *supra* note 76 and accompanying text.

¹⁰⁴ *People v. Vespucci*, 745 N.Y.S.2d 391, 395 (Cnty. Ct. 2002).

¹⁰⁵ *Id.* (citing *Walton v. Van Camp*, 283 S.W.2d 493, 499 (Mo. 1955)). This approach seems particularly popular in the Midwest. See, e.g., *Mayberry v. State*, 670 N.E.2d 1262, 1267 n.5 (Ind. 1996); *Buuck v. Kruckeberg*, 95 N.E.2d 304, 3087 (Ind. App. 1950).

¹⁰⁶ *Vespucci*, 745 N.Y.S.2d at 395. This approach is particularly popular on the west coast. See, e.g., CAL. EVID. CODE § 954 editors' note (West 2014); OR. REV. STAT. ANN. § 40.225(3) (West 2014); *Rittenhouse v. Superior Court*, 1 Cal. Rptr. 2d 595, 597 n.2, 599 (Cal. Ct. App. 1991).

¹⁰⁷ *Vespucci*, 745 N.Y.S.2d at 395 (citing *Swidler & Berlin v. United States*, 524 U.S. 399, 411 (1998) (O'Connor, J., dissenting)). Though this approach has been roundly rejected as applied to individuals, it may be followed where a corporation sells all of its assets and is not absorbed into a new corporate entity. *Vespucci*, 745 N.Y.S.2d at 395–96 (citing *Ramada Franchise Sys. v. Hotel of Gainesville Assoc.*, 988 F. Supp. 1460, 1464 (N.D. Ga. 1997)).

¹⁰⁸ *Vespucci*, 745 N.Y.S.2d at 396; *State v. Doster*, 284 S.E.2d 218, 219 (S.C. 1981).

¹⁰⁹ *Vespucci*, 745 N.Y.S.2d at 396; see, e.g., *In re Sealed Case*, 124 F.3d 230, 234–35 (D.C. Cir. 1997); *In re John Doe Grand Jury Investigation*, 562 N.E.2d 69, 72 (Mass. 1990) (Nolan, J., dissenting); *Cohen v. Jenkintown Cab Co.*, 357 A.2d 689, 692 (Pa. Super. Ct. 1976).

disclosed.”¹¹⁰

Cohen is not alone in this approach. In *People v. Vespucci*, the State of New York was faced with the postmortem application of the attorney-client privilege.¹¹¹ The *Vespucci* court first discussed the importance of the attorney-client privilege, quoting the famous line in *Upjohn Co.*,¹¹² but noted that “as is the case with all privileges, it is also an impediment to the truth seeking process, in that it denies factfinders access to information of material relevance,” and “[d]ue to this limitation of access to information, any codification of the attorney-client privilege is to be *strictly construed*.”¹¹³ Noting that precedent exists in New York for the fourth (absolute privilege) and fifth (balancing test) approaches, the court elected to apply both and held that the communications were not admissible under either the

¹¹⁰ *Cohen* 327 A.2d at 693–94. In 1969, Mrs. Cohen was crossing a street and was hit by a motor vehicle, causing severe bodily injury that required extensive hospitalization and surgery. *Id.* at 690. A driver for Jenkintown Cab Co., Mr. Guise, who later died, helped Mrs. Cohen and reported to the police that he had observed the accident and Mrs. Cohen had been struck by a hit-and-run vehicle. *Id.* The driver later repeated that Mrs. Cohen had been struck by a hit-and-run vehicle at an insurance arbitration hearing, which helped Mrs. Cohen recover \$30,000 from insurance carriers. *Id.* It was then suspected that Mr. Guise’s statement was a fabrication and that he hit Mrs. Cohen while acting within the scope of his employment. *Id.* Mrs. Cohen requested that Mr. Gross, an attorney with whom Mr. Guise consulted prior to testifying at the arbitration hearing, disclose information he had gained during that consultation. *Id.* at 691. Mr. Gross initially refused to divulge the information, but subsequently disclosed that Mr. Guise had admitted to having hit Mrs. Cohen with his car. *Id.*

¹¹¹ *Vespucci*, 745 N.Y.S.2d at 392. In *Vespucci*, defendant Amerigo Vespucci was charged with two counts of second degree murder for the death of Richard Hogan. *Id.* Another defendant, Dennis J. Carney, was also indicted for the same offense, but his indictment was dismissed with leave to re-present. *Id.* After dismissal of Mr. Carney’s indictment, the court file was sealed and no efforts were made to re-present the indictment to the grand jury. *Id.* Mr. Carney was represented by attorney Edward Galison. *Id.* During the course of his representation of Mr. Carney, Mr. Carney admitted to Mr. Galison that he had killed Richard Hogan. *See id.* at 393. Furthermore, Mr. Galison learned from Dorreen Ferranti, the mother of Mr. Carney’s child, that Mr. Carney had repeatedly claimed credit for killing Richard Hogan. *Id.* Mr. Carney died in 1991. *Id.* at 392. After learning of the charges against Mr. Vespucci in 2001, Mr. Galison was directed by a Supreme Court Justice to seek the advice of Roy Simon, an expert in legal ethics and professor at Hofstra Law School, who informed Mr. Galison that he should obtain an opinion from the Nassau County Bar Association Committee on Professional Ethics prior to taking any action. *Id.* at 393. The committee advised Mr. Galison that he should inform both Mr. Vespucci’s attorney and the Assistant District Attorney that he possessed potentially exculpatory information. *Id.* However, the committee cautioned that “he was prohibited by attorney-client privilege from revealing the information, unless it was the result of a direct order of the court.” *Id.*

¹¹² *Id.* at 394 (“The 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.’”(quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981))).

¹¹³ *Vespucci*, 745 N.Y.S.2d at 394 (emphasis added) (citing *Madden v. Creative Servs.*, 646 N.E.2d 780, 783 (N.Y. 1995)).

absolute privilege or the balancing approach.¹¹⁴ However, it is important to note that the court declined to adopt either approach at the expense of the other, leaving room for the application of both the absolute privilege and balancing approaches when applying the attorney-client privilege after the death of the client in the State of New York.

In *Morales v. Portuondo*,¹¹⁵ a New York Federal District Court judge acknowledged that the attorney-client privilege survives the death of the client and cannot be waived by the attorney, but he concluded that “a defendant in a criminal case may nonetheless be entitled to introduce the evidence if its exclusion would render his trial fundamentally unfair.”¹¹⁶ Though the judge did not explicitly endorse a balancing approach, he did weigh the fact that the client had been dead for four years and the allegedly innocent individuals had served thirteen years in prison for a crime that the client had committed.¹¹⁷ “Under these *remarkable circumstances*, the attorney-client privilege must not stand in the way of the truth.”¹¹⁸ Interestingly, though the result seems to contradict the holding of the United States Supreme Court in *Swidler & Berlin*, the case has been left undisturbed for the last fourteen years.

In *State v. Macumber*, the Supreme Court of Arizona rejected a balancing approach to the postmortem application of the attorney-client privilege.¹¹⁹ However, in a concurring opinion Justice Holohan was concerned with whether application of the privilege in the case ran afoul of the defendant’s constitutional right to due process, noting that “[t]he problem of balancing competing interests, privilege versus a proper defense, is a difficult one, but the balance

¹¹⁴ *Vespucci*, 745 N.Y.S.2d at 397. In applying the balancing approach, the court weighed the interests of Mr. Carney against the interests of society and those of the wrongfully convicted individual. *Id.* at 398. The court found that a legal connection with the murder *could* have affected Mr. Carney’s daily life; *could* expose Mr. Carney’s estate, if he had one, to liability; and *could* detrimentally affect Mr. Carney’s reputation. *Id.* However, the court found these concerns unpersuasive, especially when one considers that Mr. Carney committed suicide ten years earlier after killing two innocent people. *See id.* Furthermore, the court held that the need for the communication between Mr. Carney and Mr. Galison was substantially diminished by the fact that the information was also available through the testimony of Ms. Ferranti. *Id.* at 398.

¹¹⁵ *Morales v. Portuondo*, 154 F. Supp. 2d 706 (S.D.N.Y. 2001). In 1998, defendants Jose Morales and Ruben Montalvo were convicted of murder for which another man, Jesus Fornes, admitted to committing. *Id.* at 709–710. Fornes died in 1997 from an unrelated incident. *Id.* at 710. After Fornes’s death, two of the individuals to whom Fornes had confessed, a priest and a Legal Aid attorney, came forward and disclosed what Fornes had said to them. *Id.*

¹¹⁶ *Id.* at 730.

¹¹⁷ *Id.* at 731.

¹¹⁸ *Id.* (emphasis added).

¹¹⁹ *See State v. Macumber*, 544 P.2d 1084, 1086 (Ariz. 1976).

always weighs in favor of achieving a fair determination of the cause."¹²⁰ In concluding that the privilege should have been waived, Justice Holohan noted that the death of the client precludes criminal liability, and therefore the interests of the deceased client are property interests only, while the defendant had a "vital interest" in defending against a charge of first degree murder.¹²¹

In 1990, the Supreme Judicial Court of Massachusetts also rejected the balancing approach.¹²² However, Judge Nolan disagreed with the majority's opinion, arguing that "[u]nder the [majority's] analysis, there is no 'safety valve,' no mechanism by which the attorney-client privilege may ever be overridden by the court in the interests of justice."¹²³ Judge Nolan believed "the court should adopt a limited exception to the privilege in those cases where the interests of the client are so insignificant and the interests of justice in obtaining the information so compelling, that the administration of justice is better served through waiver."¹²⁴

The *Swidler & Berlin* majority is the preeminent federal authority on the postmortem application of the attorney-client privilege but has been criticized by many.¹²⁵ The majority's unwillingness to accept a balancing approach to the postmortem application of the privilege seemingly contradicts its holdings in *Elkins*, *Trammel*, and *Nixon* that the scope of privileges should be construed narrowly and give way when the probative value of the information sought outweighs the justifications for the privilege.¹²⁶ Rather than recognize the importance of the information being sought, the majority placed its weight behind the *speculative* chilling effect such an approach could have on a client's willingness

¹²⁰ *Id.* at 1088 (Holohan, J., concurring) (emphasis added). Justice Holohan further noted that the importance of the defendant's ability to present a defense may, in some circumstances, outweigh a claim of privilege. *Id.* (citing *Roviaro v. United States*, 353 U.S. 53, 60–61 (1957)). "A state's rules of evidence cannot deny an accused's right to present a proper defense." *Macumber*, 544 P.2d at 1088 (citing *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973)).

¹²¹ *Macumber*, 544 P.2d at 1088.

¹²² *In re John Doe Grand Jury Investigation*, 562 N.E.2d 69, 71–72 (Mass. 1990).

¹²³ *Id.* at 73 (Nolan, J., dissenting). In balancing the competing interests involved, Judge Nolan found that the client's death meant that the disclosure could not affect his daily affairs, the client left behind no estate that could be affected by disclosure, and the client's reputation was already greatly tarnished and could not be significantly affected by disclosure. *Id.* Judge Nolan concluded that "balancing the relevant public harms" in this case presented a "compelling example of a case in which the societal interest in preserving the privilege would yield to disclosure." *Id.*

¹²⁴ *Id.* at 72.

¹²⁵ See, e.g., Greenberg, *supra* note 95, at 957.

¹²⁶ See *supra* notes 88–91 and accompanying text.

to communicate with counsel.¹²⁷ However, the thoughtful dissent of Justice O'Connor, which was joined by Justices Scalia and Thomas, zealously advocated for a balancing of interests in the postmortem application of the privilege.¹²⁸

C. Support for Postmortem Disclosure Exists in Ethics Rules and Commentary

Support for applying the privilege differently based on whether the client is living or deceased is not confined to case law. Though most states follow some form of Rule 1.6 of the ABA Model Rules of Professional Conduct, which does not permit an attorney to disclose "information relating to the representation of a client" to prevent wrongful incarceration,¹²⁹ Massachusetts and Alaska allow an attorney to disclose otherwise confidential information to prevent the wrongful incarceration of another, regardless of whether the attorney's client is living or deceased.¹³⁰

In response to the negative reaction of the public to cases such as Alton Logan's, the ABA Criminal Justice Section's Ethics, Gideon & Professionalism Committee drafted a proposed amendment to Rule 1.6 of the Model Rules of Professional Conduct to allow disclosure in these types of situations.¹³¹ The proposal would amend Rule 1.6 as follows: "(c) A lawyer may reveal information relating to the representation of a deceased client to the extent the lawyer reasonably believes necessary to prevent or rectify the wrongful conviction of another."¹³² The proposal was accompanied by the following comment:

Paragraph (c) recognizes the important societal interest in preventing and rectifying wrongful convictions, including both convictions of factually innocent individuals and

¹²⁷ *Swidler & Berlin v. United States*, 524 U.S. 399, 410 (1998). "A rule requiring occasional disclosure in this setting would not seriously undercut the utilitarian basis of the privilege, which emphasizes the importance of candor between client and lawyer in securing adequate legal representation." MUELLER & KIRKPATRICK, *supra* note 93, § 5.26, at 373.

¹²⁸ *Swidler & Berlin*, 524 U.S. at 412 (O'Connor, J., dissenting).

¹²⁹ See *supra* notes 42–50 and accompanying text.

¹³⁰ ALASKA RULES OF PROF'L CONDUCT r. 1.6(b)(1)(c) (2014) ("A lawyer may reveal a client's confidence or secret to the extent the lawyer reasonably believes necessary . . . to prevent reasonably certain . . . wrongful execution or *incarceration* of another." (emphasis added)); MASS. RULES OF PROF'L CONDUCT r. 1.6(b)(1) (2014) ("A lawyer may reveal [confidential information] . . . to prevent the wrongful execution or *incarceration* of another . . ." (emphasis added)).

¹³¹ Peter A. Joy & Kevin C. McMunigal, *Confidentiality and Wrongful Incarceration*, 23 CRIM. JUST. 46, 46 (2008).

¹³² *Id.*

convictions resulting from procedural improprieties. The interests underlying the confidentiality obligation are usually paramount in the case of living clients because clients will not be as forthcoming if there is a risk that their confidences will be disclosed during their lifetimes. However, the *societal interest in disclosure may be paramount when the client is deceased*, particularly when the client's reputation and estate will not be prejudiced by disclosure.¹³³

In 2010, the New York City Bar Association Committee on Professional Conduct proposed a similar amendment to Rule 1.6(b)(1) of New York's Rules of Professional Conduct.¹³⁴ Noting that Rule 1.6(b)(1) allows an attorney to violate confidentiality to prevent "reasonably certain death or substantial bodily harm," the committee proposed to "go one step further and . . . permit the disclosure of a client's confidential information to prevent or rectify the conviction of an innocent person—but only after the death of the client who imparted the confidential information."¹³⁵

Mueller and Kirkpatrick have also advocated for an exception to the attorney-client privilege in these circumstances.¹³⁶ Furthermore, they argue that the creation of an exception in this context would not have a chilling effect on a client's willingness to candidly communicate with counsel.¹³⁷ Finally, the American Law Institute has also recommended limiting the privilege "when the communication 'bears on a litigated issue of pivotal significance' and has suggested that courts 'balance the interest in confidentiality against any exceptional need for the communication.'"¹³⁸ They also noted that "such disclosure would do little to inhibit clients from

¹³³ *Id.* at 46–47.

¹³⁴ N.Y. CITY BAR, COMM. ON PROF'L RESPONSIBILITY, PROPOSED AMENDMENT TO RULE OF PROFESSIONAL CONDUCT 1.6—AUTHORIZING DISCLOSURE OF CONFIDENTIAL INFORMATION OF DECEASED CLIENTS 1 (2010), available at <http://www.nycbar.org/pdf/report/uploads/20071914-ProposedAmendmenttoRuleofProfessionalConduct1.6.pdf>.

¹³⁵ *Id.*

¹³⁶ MUELLER & KIRKPATRICK, *supra* note 93, § 5.26, at 373 (3rd ed. 2003) ("[I]f a deceased client has confessed to criminal acts that are later charged to another, surely the latter's need for evidence sometimes outweighs the interest in preserving the confidences.").

¹³⁷ *Id.* ("A rule requiring occasional disclosure in this setting would not seriously undercut the utilitarian basis of the privilege, which emphasizes the importance of candor between client and lawyer in securing adequate legal representation. Few clients are focused on what will happen sometime after the death that everyone expects but few anticipate in an immediate or definite sense.").

¹³⁸ Swidler & Berlin v. United States, 524 U.S. 399, 415 (O'Connor, J., dissenting) (quoting RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 127 cmt. d (1996)).

confiding in their lawyers.”¹³⁹

D. The Attorney-Client Privilege Can Be, and Has Been, Molded Over Time

Despite what many argue, the attorney-client privilege is not clearly defined and its application is not static. Federal Rule of Evidence 501 states that the privilege is governed by the common law and applies “as interpreted by United States courts in the light of reason and experience.”¹⁴⁰ This has been interpreted to mean that the federal courts are vested with the power to alter the privilege over time, allowing it to adapt to new circumstances.¹⁴¹ Congress was presented with several proposals to codify the attorney-client privilege but rejected each of them, “manifest[ing] an affirmative intention not to freeze the law of privilege.”¹⁴² The courts retained the power to limit the scope of the privilege where necessary to ensure that justice is served. The United States Supreme Court has exercised its discretion to control the evolution of the privilege and, as discussed above, many exceptions to the privilege currently exist.¹⁴³ The existence of these exceptions dispels any notion that the privilege is absolute.¹⁴⁴ Though the importance of the attorney-client privilege is great, these exceptions recognize that certain circumstances warrant the disclosure of otherwise privileged information despite the potential for “eroding” the purpose of the privilege.¹⁴⁵ The unique circumstances presented

¹³⁹ RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 127 cmt. d.

¹⁴⁰ FED. R. EVID. 501.

¹⁴¹ *Trammel v. United States*, 445 U.S. 40, 47 (1980) (citing *Wolfe v. United States*, 291 U.S. 7, 12 (1934)); *see also* *Univ. of Pa. v. EEOC*, 493 U.S. 182, 189 (1990) (noting the flexibility Rule 501 allows to develop rules of privilege).

¹⁴² *Trammel*, 445 U.S. at 47; *see* 120 CONG. REC. 40,891 (1974) (statement of Rep. Hungate); S. REP. NO. 93-1277, at 7053 (1974); H.R. REP. NO. 93-650, at 7082 (1973). According to the Senate Report regarding the adoption of Federal Rule of Evidence 501 in 1975, Rule 501 “should be understood as reflecting the view that the recognition of a privilege based on a confidential relationship . . . should be determined on a case-by-case basis.” S. REP. NO. 93-1277, at 7059. Representative Hungate also noted that the adoption of Federal Rule of Evidence 501 was to “provide the courts with the flexibility to develop rules of privilege on a case-by-case basis.” 120 CONG. REC. 40,891 (statement of Rep. Hungate).

¹⁴³ *See generally* EPSTEIN, *supra* note 35, at 391–92 (discussing each exception to attorney-client privilege currently recognized).

¹⁴⁴ *See, e.g., In re Sealed Case*, 124 F.3d 230, 234 (D.C. Cir. 1997); *In re John Doe Grand Jury Investigation*, 562 N.E.2d 69, 72 (Mass. 1990); *Swidler & Berlin v. United States*, 524 U.S. 399, 414 (1998) (O’Connor, J., dissenting).

¹⁴⁵ “Exceptions to the attorney-client privilege should be made only when the reason for disclosure outweighs the potential chilling of essential communications.” 81 AM. JUR. 2D *Witnesses* § 329 (2004).

where a client confesses to a crime for which another was wrongfully charged or convicted surely justify the creation of a limited exception where the client has died and the interests in favor of disclosure outweigh the interests of the deceased client.

E. Conclusion

The purpose of the attorney-client privilege is important, however that purpose is subordinate to our justice system's search for the truth. The attorney-client privilege was meant to be strictly construed and disregarded where the privilege does nothing more than upset the pursuit of the truth. Though the majority of judicial precedent does not support a balancing approach to the postmortem application of the privilege, some courts have applied a balancing approach and many legal commentators support its adoption. Exceptions to the privilege exist for a myriad of circumstances, dispelling any notion that the privilege is absolute. Therefore, the addition of another exception, confined to criminal cases in which the privileged information could secure the freedom of a wrongfully charged or convicted individual, would not substantially frustrate the privilege's application or purpose.

V. GUIDANCE FOR APPLYING THE BALANCING APPROACH

As the discussion above demonstrates, the "proper" application of attorney-client privilege after the death of the client is a matter of substantial debate. It is clear that the privilege can, at times, stand in the way of the core function of our judicial system—ascertaining the truth. However, the privilege is also an essential feature of the system, ensuring that clients can freely and fully communicate with their attorneys, which in turn allows the attorneys to adequately represent client interests. In light of these competing considerations, this note recommends that the courts adopt a balancing approach to the postmortem application of the privilege in criminal cases in which a deceased client has admitted to committing a crime for which a third party has been charged or convicted. This limited exception acknowledges the importance of the privilege but recognizes that the client's death substantially decreases his or her own interests, while the potential for criminal liability substantially increases the interests of the living individual. However, prior to balancing the interests involved, this note recommends that four threshold requirements be met, thereby reducing the scope and potential chilling effect of the exception.

First, the balancing approach should be confined to criminal cases. Individuals faced with potential criminal liability have a substantial interest in presenting an adequate defense because a conviction could result in the loss of the individual's freedom and possibly even his or her life. Furthermore, a criminal conviction carries with it a stigma that follows the individual even after he or she has completed his or her sentence. A past criminal conviction can detrimentally affect an individual's ability to secure employment, obtain adequate housing, or exercise his or her right to vote. The interests involved when criminal liability is possible are far greater than the property interests of those facing civil liability alone.

Second, the balancing approach should be confined to cases where the deceased client has admitted to committing a crime for which another has been charged or convicted. In these extreme cases the interests of the wrongfully convicted or charged individual are inevitably very high. Prior to conviction, they have a substantial interest in presenting an adequate defense. Postconviction, they have an even greater interest in securing their personal freedom and clearing their name. Furthermore, constraining the balancing approach to these types of cases guarantees that the information sought is of material importance to the case, further confining the application of the balancing approach.¹⁴⁶

Third, the information sought must be unavailable through alternative means. The disclosure of information that a client believed to be confidential is no small matter and should only be resorted to when necessary. The availability of alternative sources of evidence greatly lessens society's and the wrongfully convicted individual's interest in the information. Therefore, the balancing approach should not be triggered unless the confidential information sought is the sole source available.

Finally, the balancing approach should not be conducted unless the client is deceased.¹⁴⁷ This is obviously implied in this note's recommendation as to how to deal with the postmortem application of the attorney-client privilege, but the importance of the death of

¹⁴⁶ For instance, in *In re Miller*, the case did not involve the disclosure of privileged information so that an innocent person could be exonerated, but to ascertain who killed Dr. Miller. *In re Miller*, 584 S.E.2d 772, 777 (N.C. 2003). Though that is a worthy cause, the balancing approach advocated in this note would not be applicable in that situation because the information sought would not be used to overturn or prevent a wrongful conviction.

¹⁴⁷ This threshold requirement differentiates this proposal from the rules adopted in Massachusetts and Alaska, which do not require the death of the client. See *supra* note 130 and accompanying text.

the client deserves some discussion. As noted above, the death of a client precludes the client from criminal liability, leaving only his or her property and reputation affected. If the death of the client was not a prerequisite to the balancing of interests, clients could face criminal liability for statements they supposedly made in confidence. This threat of criminal liability would clearly have a detrimental effect on a client's willingness to communicate with his or her attorney because any admission the client made to his or her attorney could be disclosed if another person were ever charged with the crime. In those circumstances, the client's disclosure to his or her attorney would be the functional equivalent of a confession in court. In order to preserve the important purpose of the privilege, the balancing approach recommended in this note must not be permitted unless the client is deceased.

Once these threshold requirements are met, a court should consider the deceased client's interests, including whether the disclosure would likely lead to liability for the client's estate and whether disclosure would blacken the memory of the deceased client. If the judge determines that those interests are outweighed by society's interest in ascertaining the truth or the interests of the wrongfully charged or convicted individual, the judge should order an *in camera* review of the privileged information. Then, equipped with additional knowledge of what the confidential information is, the judge should once again balance the interests involved to ensure that the balance still weighs in favor of disclosure. If so, the privileged information should be disclosed.

Finally, a court cannot conduct this balancing approach unless an attorney voluntarily comes forward with privileged information. Under this approach, the decision of whether or not to disclose privileged information to prevent a wrongful conviction is within the discretion of the attorney—disclosure is not mandatory. In considering whether or not to come forward, the attorney should consider several factors, including: (1) the deceased client's wishes, (2) the damage disclosure will cause the deceased client's reputation or property interests, (3) the likelihood that wrongful conviction will occur if the information is not disclosed, (4) the probative value of the information, (5) the likelihood that the information would be admissible in court,¹⁴⁸ and (6) the ongoing harm to the wrongfully

¹⁴⁸ The likelihood that these statements would be admissible in court deserves some discussion. When an attorney attempts to testify about his or her client's admission to prove that the defendant is innocent, the testimony would be considered hearsay. *See* FED. R. EVID. 801(e). However, a deceased client's admission would likely be admissible as a statement

charged or convicted individual. Making disclosure discretionary supplements the “protective” aspects of the threshold requirements by providing another buffer against disclosure. The attorney possessing the privileged information is best suited to consider the factors above and determine whether disclosing the information will have a beneficial effect.

Case law demonstrates that uncertainty exists in the legal community on this issue. Some courts take a strict absolute privilege approach, applying the privilege in the same manner regardless of whether the client is living or deceased, while others find room for a limited exception in certain circumstances. Limiting the application of the balancing approach to criminal cases in which a now deceased client confessed to a crime for which another person was wrongfully charged or convicted is a pragmatic compromise that properly balances the overarching goal of the criminal justice system—ascertaining the truth so that justice can be done—and the purpose of the privilege. It accepts the importance of the privilege while acknowledging that the type of situation described here is so abhorrent and so threatens the integrity and legitimacy of our legal system that application of the privilege in this context does nothing more than stand in the way of justice.

VI. CONCLUSION

Our legal system’s primary goal is to ascertain the truth so that justice is done. The rules governing that system have been designed to further the pursuit of the truth so that the court can make fair and informed decisions. There is no cause more important than ensuring a just outcome.

No circumstance is more unjust than where an innocent person is incarcerated for a crime he or she did not commit. Not only does such a circumstance deny that person his or her freedom, including contact with spouses, children, parents, friends, and other loved ones, it stigmatizes the person as a criminal, a label that will follow that person even after he or she is released. The mere possibility of such a situation supports the adoption of a narrow exception to the

against interest:

A statement that . . . a reasonable person in the [client’s] position would have made only if the person believed it to be true because, when made, it was so contrary to the [client’s] proprietary or pecuniary interest . . . to expose the [client] to civil or criminal liability . . . [is admissible in court] if the [client] is unavailable as a witness.

Id. at R. 804(b)(3). Obviously, the client’s death makes him or her unavailable as a witness.
Id.

attorney-client privilege, one that would provide an appropriate safety valve for situations in which the privilege does little more than stand in the way of the pursuit of truth and a just outcome.

The balancing approach advocated here would only be applied where a deceased client previously confessed to a crime for which another was wrongfully charged or convicted, and the confession is the only source of that evidence. These threshold requirements limit the scope of the exception, protecting the important role of the privilege in encouraging full and frank communication with counsel while also respecting the considerable rights of those wrongfully accused. This balancing approach has support in the law, in the ethical views of bar organizations, and in the writings of legal commentators. The application of an absolute attorney-client privilege in this context is an example of a rule that gives law a bad name, allowing a legal technicality to stand in the way of the pursuit of justice. *Quid leges sine moribus vanae proficiunt.*¹⁴⁹ A system so dependent on its perceived legitimacy as the basis for its power cannot, and should not, tolerate such blatant injustice.

¹⁴⁹ “Of what avail are empty laws without (good) morals.”