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SUPREME COURT OF THE UNITED STATES

No. 97–1192

SWIDLER & BERLIN AND JAMES HAMILTON, PETITIONERS *v.* UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[June 25, 1998]

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioner, an attorney, made notes of an initial interview with a client shortly before the client's death. The Government, represented by the Office of Independent Counsel, now seeks his notes for use in a criminal investigation. We hold that the notes are protected by the attorney-client privilege.

This dispute arises out of an investigation conducted by the Office of the Independent Counsel into whether various individuals made false statements, obstructed justice, or committed other crimes during investigations of the 1993 dismissal of employees from the White House Travel Office. Vincent W. Foster, Jr., was Deputy White House Counsel when the firings occurred. In July, 1993, Foster met with petitioner James Hamilton, an attorney at petitioner Swidler & Berlin, to seek legal representation concerning possible congressional or other investigations of the firings. During a 2–hour meeting, Hamilton took three pages of handwritten notes. One of the first entries

in the notes is the word "Privileged." Nine days later, Foster committed suicide.

In December 1995, a federal grand jury, at the request of the Independent Counsel, issued subpoenas to petitioners Hamilton and Swidler & Berlin for, *inter alia*, Hamilton's handwritten notes of his meeting with Foster. Petitioners filed a motion to quash, arguing that the notes were protected by the attorney client privilege and by the work product privilege. The District Court, after examining the notes *in camera*, concluded they were protected from disclosure by both doctrines and denied enforcement of the subpoenas.

The Court of Appeals for the District of Columbia Circuit reversed. *In re Sealed Case*, 124 F. 3d 230 (1997). While recognizing that most courts assume the privilege survives death, the Court of Appeals noted that holdings actually manifesting the posthumous force of the privilege are rare. Instead, most judicial references to the privilege's posthumous application occur in the context of a well recognized exception allowing disclosure for disputes among the client's heirs. *Id.,* at 231–232. It further noted that most commentators support some measure of posthumous curtailment of the privilege. *Id.,* at 232. The Court of Appeals thought that the risk of posthumous revelation, when confined to the criminal context, would have little to no chilling effect on client communication, but that the costs of protecting communications after death were high. It therefore concluded that the privilege was not absolute in such circumstances, and that instead, a balancing test should apply. *Id.,* at 233–234. It thus held that there is a posthumous exception to the privilege for communications whose relative importance to particular criminal litigation is substantial. *Id.,* at 235. While acknowledging that uncertain privileges are disfavored, *Jaffee* v. *Redmond,* 518 U. S. 1, 17–18 (1996), the Court of Appeals determined that the uncertainty introduced by its

balancing test was insignificant in light of existing exceptions to the privilege. 124 F. 3d, at 235. The Court of Appeals also held that the notes were not protected by the work product privilege.

The dissenting judge would have affirmed the District Court's judgment that the attorney client privilege protected the notes. *Id.,* at 237. He concluded that the common–law rule was that the privilege survived death. He found no persuasive reason to depart from this accepted rule, particularly given the importance of the privilege to full and frank client communication. *Id.,* at 237.

Petitioners sought review in this Court on both the attorney client privilege and the work product privilege.[1] We granted certiorari, 523 U. S. __ (1998), and we now reverse.

The attorney client privilege is one of the oldest recognized privileges for confidential communications. *Upjohn Co.* v. *United States,* 449 U. S. 383, 389 (1981); *Hunt* v. *Blackburn,* 128 U. S. 464, 470 (1888). 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." *Upjohn, supra,* at 389. The issue presented here is the scope of that privilege; more particularly, the extent to which the privilege survives the death of the client. Our interpretation of the privilege's scope is guided by "the principles of the common law . . . as interpreted by the courts . . . in the light of reason and experience." Fed. Rule Evid. 501; *Funk* v. *United States,* 290 U. S. 371 (1933).

The Independent Counsel argues that the attorney–client privilege should not prevent disclosure of confidential communications where the client has died and

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[1]Because we sustain the claim of attorney-client privilege, we do not reach the claim of work product privilege.

the information is relevant to a criminal proceeding. There is some authority for this position. One state appellate court, *Cohen* v. *Jenkintown Cab Co.*, 238 Pa. Super. 456, 357 A. 2d 689 (1976), and the Court of Appeals below have held the privilege may be subject to posthumous exceptions in certain circumstances. In *Cohen*, a civil case, the court recognized that the privilege generally survives death, but concluded that it could make an exception where the interest of justice was compelling and the interest of the client in preserving the confidence was insignificant. *Id.,* 462–464, 357 A.2d, at 692–693.

But other than these two decisions, cases addressing the existence of the privilege after death– most involving the testamentary exception– uniformly presume the privilege survives, even if they do not so hold. See, *e.g., Mayberry* v. *Indiana*, 670 N. E. 2d 1262 (Ind. 1996); *Morris* v. *Cain*, 39 La. Ann. 712, 1 So. 797 (1887); *People* v. *Modzelewski*, 611 N. Y. S. 2d 22, 203 A. 2d 594 (1994). Several State Supreme Court decisions expressly hold that the attorney-client privilege extends beyond the death of the client, even in the criminal context. See *In re John Doe Grand Jury Investigation*, 408 Mass. 480, 481–483, 562 N. E. 2d 69, 70 (1990); *State* v. *Doster*, 276 S.C. 647, 650–651, 284 S. E. 2d 218, 219 (1981); *State* v. *Macumber*, 112 Ariz. 569, 571, 544 P. 2d 1084, 1086 (1976). In *John Doe Grand Jury Investigation*, for example, the Massachusetts Supreme Court concluded that survival of the privilege was "the clear implication" of its early pronouncements that communications subject to the privilege could not be disclosed at any time. 408 Mass., at 483, 562 N. E. 2d, at 70. The court further noted that survival of the privilege was "necessarily implied" by cases allowing waiver of the privilege in testamentary disputes. *Ibid.*

Such testamentary exception cases consistently presume the privilege survives. See, *e.g., United States* v. *Osborn*, 561 F. 2d 1334, 1340 (CA9 1977); *DeLoach* v. *Myers*, 215

Ga. 255, 259–260, 109 S. E. 2d 777, 780–781 (1959); *Doyle* v. *Reeves*, 112 Conn. 521, 152 A. 882 (1931); *Russell* v. *Jackson*, 9 Hare. 387, 68 Eng. Rep. 558 (V.C. 1851). They view testamentary disclosure of communications as an exception to the privilege: "[T]he general rule with respect to confidential communications . . . is that such communications are privileged during the testator's lifetime and, also, after the testator's death unless sought to be disclosed in litigation between the testator's heirs." *Osborn*, 561 U. S., at 1340. The rationale for such disclosure is that it furthers the client's intent. *Id.,* at 1340, n. 11.[2]

Indeed, in *Glover* v. *Patten,* 165 U. S. 394, 406–408 (1897), this Court, in recognizing the testamentary exception, expressly assumed that the privilege continues after the individual's death. The Court explained that testamentary disclosure was permissible because the privilege, which normally protects the client's interests, could be impliedly waived in order to fulfill the client's testamentary intent. *Id.,* at 407–408 (quoting *Blackburn* v. *Crawfords,* 3 Wall. 175 (1866), and *Russell* v. *Jackson, supra*).

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[2]About half the States have codified the testamentary exception by providing that a personal representative of the deceased can waive the privilege when heirs or devisees claim through the deceased client (as opposed to parties claiming against the estate, for whom the privilege is not waived). See, *e.g.,* Ala. Rule Evid. 502 (1996); Ark. Code Ann. §16–41–101, Rule 502 (Supp. 1997); Neb. Rev. Stat. §27 503, Rule 503 (1995). These statutes do not address expressly the continuation of the privilege outside the context of testamentary disputes, although many allow the attorney to assert the privilege on behalf of the client apparently without temporal limit. See, *e.g.,* Ark. Code Ann. §16–41–101, Rule 502(c) (Supp. 1997). They thus do not refute or affirm the general presumption in the case law that the privilege survives. California's statute is exceptional in that it apparently allows the attorney to assert the privilege only so long as a holder of the privilege (the estate's personal representative) exists, suggesting the privilege terminates when the estate is wound up. See Cal. Code Evid. Ann. §§954, 957 (West 1995). But no other State has followed California's lead in this regard.

The great body of this caselaw supports, either by holding or considered dicta, the position that the privilege does survive in a case such as the present one. Given the language of Rule 501, at the very least the burden is on the Independent Counsel to show that "reason and experience" require a departure from this rule.

The Independent Counsel contends that the testamentary exception supports the posthumous termination of the privilege because in practice most cases have refused to apply the privilege posthumously. He further argues that the exception reflects a policy judgment that the interest in settling estates outweighs any posthumous interest in confidentiality. He then reasons by analogy that in criminal proceedings, the interest in determining whether a crime has been committed should trump client confidentiality, particularly since the financial interests of the estate are not at stake.

But the Independent Counsel's interpretation simply does not square with the caselaw's implicit acceptance of the privilege's survival and with the treatment of testamentary disclosure as an "exception" or an implied "waiver." And the premise of his analogy is incorrect, since cases consistently recognize that the rationale for the testamentary exception is that it furthers the client's intent, see, *e.g., Glover, supra*. There is no reason to suppose as a general matter that grand jury testimony about confidential communications furthers the client's intent.

Commentators on the law also recognize that the general rule is that the attorney-client privilege continues after death. See, *e.g.,* 8 Wigmore, Evidence §2323 (McNaughton rev. 1961); Frankel, The Attorney-Client Privilege After the Death of the Client, 6 Geo. J. Legal Ethics 45, 78–79 (1992); 1 J. Strong, McCormick on Evidence §94, p. 348 (4th ed. 1992). Undoubtedly, as the Independent Counsel emphasizes, various commentators have criticized this rule, urging that the privilege should

be abrogated after the client's death where extreme injustice would result, as long as disclosure would not seriously undermine the privilege by deterring client communication. See, *e.g.,* C. Mueller & L. Kirkpatrick, 2 Federal Evidence §199, at 380–381 (2d ed. 1994); Restatement (Third) of the Law Governing Lawyers §127, Comment *d* (Proposed Final Draft No. 1, Mar. 29, 1996). But even these critics clearly recognize that established law supports the continuation of the privilege and that a contrary rule would be a modification of the common law. See, *e.g.,* Mueller & Kirkpatrick*, supra,* at 379; Restatement of the Law Governing Lawyers*, supra,* §127, Comment *c*; 24 C. Wright & K. Graham, Federal Practice and Procedure §5498, p. 483 (1986).

Despite the scholarly criticism, we think there are weighty reasons that counsel in favor of posthumous application. 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.

The Independent Counsel suggests, however, that his proposed exception would have little to no effect on the client's willingness to confide in his attorney. He reasons that only clients intending to perjure themselves will be chilled by a rule of disclosure after death, as opposed to truthful clients or those asserting their Fifth Amendment privilege. This is because for the latter group, communications disclosed by the attorney after the client's death purportedly will reveal only information that the client

himself would have revealed if alive.

The Independent Counsel assumes, incorrectly we believe, that the privilege is analogous to the Fifth Amendment's protection against self-incrimination. But as suggested above, the privilege serves much broader purposes. Clients consult attorneys for a wide variety of reasons, only one of which involves possible criminal liability. Many attorneys act as counselors on personal and family matters, where, in the course of obtaining the desired advice, confidences about family members or financial problems must be revealed in order to assure sound legal advice. The same is true of owners of small businesses who may regularly consult their attorneys about a variety of problems arising in the course of the business. These confidences may not come close to any sort of admission of criminal wrongdoing, but nonetheless be matters which the client would not wish divulged.

The contention that the attorney is being required to disclose only what the client could have been required to disclose is at odds with the basis for the privilege even during the client's lifetime. In related cases, we have said that the loss of evidence admittedly caused by the privilege is justified in part by the fact that without the privilege, the client may not have made such communications in the first place. See *Jaffe*, 518 U. S., at 12; *Fisher* v. *United States,* 425 U. S. 391, 403 (1976). This is true of disclosure before and after the client's death. Without assurance of the privilege's posthumous application, the client may very well not have made disclosures to his attorney at all, so the loss of evidence is more apparent than real. In the case at hand, it seems quite plausible that Foster, perhaps already contemplating suicide, may not have sought legal advice from Hamilton if he had not been assured the conversation was privileged.

The Independent Counsel additionally suggests that his proposed exception would have minimal impact if confined

to criminal cases, or, as the Court of Appeals suggests, if it is limited to information of substantial importance to a particular criminal case.[3] However, there is no case authority for the proposition that the privilege applies differently in criminal and civil cases, and only one commentator ventures such a suggestion, see Mueller & Kirkpatrick*, supra,* at 380–381. In any event, a client may not know at the time he discloses information to his attorney whether it will later be relevant to a civil or a criminal matter, let alone whether it will be of substantial importance. Balancing *ex post* the importance of the information against client interests, even limited to criminal cases, introduces substantial uncertainty into the privilege's application. For just that reason, we have rejected use of a balancing test in defining the contours of the privilege. See *Upjohn*, 449 U. S., at 393; *Jaffee, supra,* at 17–18.

In a similar vein, the Independent Counsel argues that existing exceptions to the privilege, such as the crime-fraud exception and the testamentary exception, make the impact of one more exception marginal. However, these exceptions do not demonstrate that the impact of a posthumous exception would be insignificant, and there is little empirical evidence on this point.[4] The established

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[3]Petitioner, while opposing wholesale abrogation of the privilege in criminal cases, concedes that exceptional circumstances implicating a criminal defendant's constitutional rights might warrant breaching the privilege. We do not, however, need to reach this issue, since such exceptional circumstances clearly are not presented here.

[4]Empirical evidence on the privilege is limited. Three studies do not reach firm conclusions on whether limiting the privilege would discourage full and frank communication. Alexander, The Corporate Attorney Client Privilege: A Study of the Participants, 63 St. John's L. Rev. 191 (1989); Zacharias, Rethinking Confidentiality, 74 Iowa L. Rev. 352 (1989); Comment, Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine, 71 Yale L. J. 1226 (1962). These articles note that clients are

exceptions are consistent with the purposes of the privilege, see *Glover*, 165 U. S., at 407–408; *United States* v. *Zolin,* 491 U. S. 554, 562–563 (1989), while a posthumous exception in criminal cases appears at odds with the goals of encouraging full and frank communication and of protecting the client's interests. A "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."

Finally, the Independent Counsel, relying on cases such as *United States* v. *Nixon*, 418 U. S. 683, 710 (1974), and *Branzburg* v. *Hayes*, 408 U. S. 665 (1972), urges that privileges be strictly construed because they are inconsistent with the paramount judicial goal of truth seeking. But both *Nixon* and *Branzburg* dealt with the creation of privileges not recognized by the common law, whereas here we deal with one of the oldest recognized privileges in the law. And we are asked, not simply to "construe" the privilege, but to narrow it, contrary to the weight of the existing body of caselaw.

It has been generally, if not universally, accepted, for well over a century, that the attorney-client privilege survives the death of the client in a case such as this. While

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often uninformed or mistaken about the privilege, but suggest that a substantial number of clients and attorneys think the privilege encourages candor. Two of the articles conclude that a substantial number of clients and attorneys think the privilege enhances open communication, Alexander, *supra*, at 244–246, 261, and that the absence of a privilege would be detrimental to such communication, Comment, 71 Yale L. J., *supra,* at 1236. The third article suggests instead that while the privilege is perceived as important to open communication, limited exceptions to the privilege might not discourage such communication, Zacharias, *supra,* at 382, 386. Similarly, relatively few court decisions discuss the impact of the privilege's application after death. This may reflect the general assumption that the privilege survives– if attorneys were required as a matter of practice to testify or provide notes in criminal proceedings, cases discussing that practice would surely exist.

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.

Rule 501's direction to look to "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" does not mandate that a rule, once established, should endure for all time. *Funk* v. *United States*, 290 U. S. 371, 381 (1933). But here the Independent Counsel has simply not made a sufficient showing to overturn the common law rule embodied in the prevailing caselaw. Interpreted in the light of reason and experience, that body of law requires that the attorney client privilege prevent disclosure of the notes at issue in this case. The judgment of the Court of Appeals is

Reversed.