

Is Confidentiality Really Forever

Even if the Client Dies or Ceases to Exist?

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Many readers have heard of Lizzie Borden, tried and acquitted of the 1892 murder in Massachusetts of her father and stepmother. The case even inspired a rhyme:

Lizzie Borden took an axe
And gave her mother forty whacks.
When she saw what she had done
She gave her father forty-one.

What you may not know is that Lizzie Borden's lead attorney's law firm continues to this day to maintain her client files in a confidential manner. In contrast, the trove of notes kept by another attorney on the defense team were discovered by his grandson, who willed the client materials to the local Massachusetts historical society, making them generally accessible some 100 years after the murder trial.

Which is the right result? Does client confidentiality live forever? What if the client is an entity rather than an individual? Should public figures be treated differently from ordinary private citizens after death? Should there be some point in time—50 or 100 years—when the right to confidentiality expires? Who will enforce the privilege once all the participants are dead? These questions have important implications for attorneys, law firms, and corporate entities. But they are also questions of importance to librarians whose libraries might be given papers that were

protected by the attorney-client privilege, represented work product, or were the subject of an attorney's ethical obligation to protect the confidentiality of client matters.

The Privilege

The attorney-client privilege survives the death of the client, the U.S. Supreme Court held more than a decade ago in *Swidler & Berlin v. United States*, 524 U.S. 399 (1998). *Swidler* arose in the course of the early Whitewater inquiry involving then-President Bill Clinton's firing of White House Travel Office employees. Vince Foster, the deputy White House counsel, had sought legal advice from James Hamilton, an attorney in private practice. Nine days after consulting with Hamilton, Foster committed suicide. The independent counsel investigating President Clinton caused a grand jury to issue a subpoena for Hamilton's handwritten notes. The Court ruled that the attorney-client privilege survived Foster's death; therefore, Hamilton's notes did not have to be produced. The Court's ruling was based on a review of the common law as interpreted by the courts in the light of reason and experience, as the Federal Rules of Evidence direct. The Court noted that nearly every state acknowledges the survival of the privilege after the death of the client, with exceptions generally limited to disclosures necessary to carry

out the intent of the client regarding settlement of his or her estate. But *Swidler* did not address work-product protections or ethical obligations of confidentiality, and the decision left unanswered a series of questions, the following among them:

What if the client is, or was, a corporation? Should the *Swidler* decision guide a defunct corporate client's privilege?

At some point in time, should the privilege expire? Should it matter if the case was newsworthy or that the client was a public figure?

Who may assert a deceased client's privilege long after the estate is settled and after the attorney has died? What risks does a recipient or discoverer of a deceased client's files take in making them public?

The general traditional common-law rule is that the attorney-client privilege is forever. The protection covers communications between a client and his or her attorney in connection with the provision of legal advice. As long as such communications were originally confidential, the client, and the attorney acting on behalf of the client, can object to any discovery of this information.

Even though the privilege frustrates some truth-seeking interests, the Supreme Court has held it immune, at least in the *Swidler* scenario, to post-death balancing tests. The most recognized purpose of the privilege is to encourage clients to confide all salient facts to their attorneys in order to permit attorneys to advise clients properly. The idea is that in the absence of such an unfettered exchange of information, justice would be frustrated. The *Swidler* Court reasoned that a post-death privilege was necessary to induce clients to communicate fully with their attorneys. "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." *Id.* at 407.

A number of states have addressed the issue of the survival of the attorney-client privilege, either through legislation or court rulings. Some also have articulated an exception that can be invoked by the executor of an estate in order to gain clarification of the deceased client's testamentary intentions. This exception is considered minimally discouraging to clients who seek confidentiality in their communications with attorneys because it is used only to clarify and further the interests of the client in settlement of the client's estate. Courts have been reluctant to extend these executory powers when the motive is shown to be inconsistent with the client's interests.

In Massachusetts, for example, the Supreme Judicial Court held in *In the Matter of a John Doe Grand Jury Investigation*, 408 Mass. 480 (1990), that the privilege survived the death of the client. That case involved an effort to obtain information from the attorney for a murder suspect who had committed suicide. A grand jury was investigating the highly publicized murder of Carol Stuart and Christopher Stuart, the wife and

son of the suspect, Charles Stuart. (Charles Stuart originally had accused an African American man of being the murderer, a charge that created racial tensions in Boston.) Prior to committing suicide, Charles Stuart consulted with an attorney, and the Commonwealth sought to subpoena that attorney to testify before the grand jury. The court rejected this request and held that, because the administratrix of Charles Stuart's estate (his mother) refused to waive the privilege, it survived his death. Four years later, in *District Attorney for the Norfolk District v. Magraw*, 417 Mass. 169 (1994), the court held that a Massachusetts probate court had the authority to remove a husband as the executor of his late wife's estate because the husband was using that position against the interest of his wife to refuse to waive the attorney-client privilege for communications between his wife and her divorce lawyer in an apparent effort to thwart an investigation of the husband, who was suspected of murdering his wife.

In 2002, in North Carolina, the widow executrix and the attorney for Derril H. Willard disagreed about whether to waive Mr. Willard's attorney-client privilege after Mr. Willard's suicide. Mr. Willard had been the subject of an investigation into the murder of the husband of a woman alleged to have been having an affair with Mr. Willard. When Willard's widow sought to reopen his estate in order to exercise her statutory authority to waive the privilege for estate settlement purposes, the North Carolina Supreme Court, in *In re Miller*, 357 N.C. 316 (2003), found that her true purpose was not to effectuate the goals of the estate but to uncover information relevant to the murder investigation. The court held that Ms. Willard had no statutory executor authority for such a waiver of privilege but suggested that her husband's will might have given his executrix a broader power to waive his attorney-client privilege. If this type of testamentary direction for broad management of the deceased's privilege were recognized for an executrix, presumably that power would nonetheless cease upon the closing of the estate.

Additional protection for confidential information can be found in the work-product doctrine and the ethical rules, although the purposes of these protections are distinct from the purposes of the privilege and therefore subject to different justifications for their duration.

Work Product and Ethics

In 1947, the Supreme Court recognized the work-product doctrine in *Hickman v. Taylor*, 329 U.S. 495 (1947), as a common-law principle that prevents the legal profession from "performing its functions either without wits or on wits borrowed from the adversary." This form of confidentiality protects the attorney's materials prepared in anticipation of litigation or trial. The purpose of the work-product doctrine overlaps with that of the privilege but also encourages efficient law practice so that lawyers can

make notes and collect facts relevant to litigation strategies without fear that adversaries would "live by the wits of an adversary." The work-product doctrine is both narrower than the attorney-client privilege, because it relates only to litigation preparation, and broader, because it covers the attorney's work product and not just his or her communications with a client. Whether work product survives the death of the client was not answered by the *Swidler* Court because resolution of the post-death privilege question made that work-product analysis unnecessary. To the extent that an attorney's notes reveal client communications, the *Swidler* approach might be applied in the work-product context. However, the question of the impact of the attorney's death on work-product protection is unanswered by *Swidler* and largely unaddressed by state courts or by scholars. While some of the language of *Hickman* describes work product as a form of intellectual property right of the attorney, the limitation of its scope to the representation of a particular client in anticipation of litigation is much narrower than that applied to the attorney-client privilege. This focus could well support a finding that the settlement of the dispute, and, even more so, the death of the litigants, could extinguish the protection of the doctrine.

The Rules of Professional Conduct generally are interpreted as protecting posthumous client confidences and all material relating to the representation of a client. The American Bar Association's Model Rule of Professional Conduct 1.6 and similar state bar rules prohibit attorneys from disclosing information relating to their representation of a client without the client's consent. A number of state bar opinions indicate that the ethical obligation to client confidentiality survives the death of the client. The purposes of the ethical rules on confidentiality overlap with goals of the attorney-client privilege and of work-product protection but also are said to be broader, in that they support the reputation of the legal profession. To the extent that the ethical obligation is seen as creating a duty to a client, the analysis that the privilege survives the death of the client would also suggest that counsel's ethical obligations support the same result.

Ethical obligations are one of the reasons that Lizzie Borden's lead lawyer's client files continue to be kept locked away and confidential by the law firm he established more than a century ago. When attorneys at the firm considered sharing the files in the early 1980s for use in a symposium on the Lizzie Borden trial, they received a private letter from the Massachusetts Board of Bar Overseers advising the firm that its ethical obligations included the duty to protect the confidentiality of the files and even general information about the type of materials within those files.

Corporations, like individuals, enjoy an attorney-client privilege. In *Upjohn Co. v. United States*, 449 U.S. 383 (1981), the Supreme Court recognized that the privilege applies to entities and that the client is the entity itself and not its constituents (directors, officers, and employees, among others). Therefore,

communications between such individuals and counsel may be privileged, but the privilege, including the power to waive it, belongs to the entity alone.

The life span of a corporation may be much longer than that of an individual client, but when that “life” comes to an end, should the attorney-client privilege also end for the corporate client? The Supreme Court has held that former directors, officers, or employees are not permitted to assert the corporation’s privilege, even as to discussions made by those persons in conversations with an attorney giving legal advice to the corporation. Consequently, these individuals should already be on notice that they have no personal claims to the corporation’s privilege. However, courts have provided a range of conclusions in considering whether a dissolved corporation should retain the privilege. Some conclude that the privilege does not survive the death of a corporation, but others hew to the concept that the privilege should survive because the risk of chilling client-attorney communications and a resulting diminution in compliance with the law are the same for corporate and personal clients. Attorney Michael Riordan wrote in a law review article entitled “The Attorney-Client Privilege and the ‘Posthumous’ Corporation—Should the Privilege Apply?,” 34 *Tex. Tech L. Rev.* 237, 258 (2003), that in spite of the paucity of law on the topic, the best analysis is that privilege is “of a personal nature and will not apply to an artificial entity, such as the defunct corporation. . . .”

Expiration of Privilege

One of the catalysts for the argument about the post-death survival of the privilege is the situation in which a library is offered materials that were discovered in the estate of an attorney or of a client. This happened in the *Borden* case. While the law firm of one of Borden’s attorneys is still asserting the privilege and the ethical commitment to protecting client confidentiality, the family of another Borden attorney donated his trial journals written during the trial to a local historical society. The historical society curator, it was reported, did not seek the files of the law firm that has consistently refused to divulge them because Borden had reportedly paid an unprecedented \$25,000 for that representation and was entitled to her confidentiality. But is whether payment was made a proper test? (It is not for claims of privilege made during counsel’s life.) It also is not clear whether the second Borden attorney’s materials include privileged communications, although the materials do at least appear to include attorney work product from the trial.

As for the first attorney, what if his firm had dissolved at some time over the past century and the files had been offered to a law school library? Sometimes such papers simply find their way to a survivor who is unfamiliar with the confidentiality issues and may have no interest in claiming authority to waive privilege

or work-product protection, or in considering the attorney’s ethical obligations. Disclosures in these circumstances might be considered inadvertent waivers. But could the law firm still holding Lizzie Borden files have made such an offer without violating ethical rules? Should the library accept those files no matter who donates them? Should those files be maintained as a closed part of a library collection with the hope that a day will come when privilege would have some kind of expiration date? Or should the library make its own judgment about the balance between interests in access to historical information and support for attorney-client confidentiality? If so, what factors should it use in determining how long the attorney-client confidentiality should be protected?

Most questions about the posthumous privilege arise soon after the client’s death and relate to the client’s estate or to a request for exposure of attorney-client materials as evidence pertaining to criminal defendants and access to exculpatory evidence in civil actions. Within the context of litigation, the *Swidler* Court and some state courts have specifically rejected the balancing of privilege with these sorts of competing interests. These types of issues were contemplated by the American Law Institute, which proposed considerations to support exceptions to attorney-client privilege after the client’s death. Justice O’Connor raised much the same arguments for exceptions to privilege after the client’s death in her dissent in *Swidler*.

Because the library donation question occurs generally outside the context of confidential material being sought as evidence in a legal proceeding, courts have not had much opportunity to consider this situation. Libraries have for some years struggled to balance their missions of access to information with respect for the confidentiality of donated materials that might be protected by attorney-client privilege, work-product protection, or an attorney’s ethical obligations. Library access to attorney-client material after the death of one or more of these persons or entities would serve other broader goals that compete with attorney-client confidentiality interests, societal and individual goals such as freedom of speech, pursuit of the truth, transparency in government and the justice system, and access to history.

Professor Akiba J. Covitz wrote in “Providing Access to Lawyers’ Papers: The Perils . . . and the Rewards,” 20 *Legal Reference Services Q.* 151 (2001), about the process of developing guidelines for Yale libraries whose collections include donated papers of attorneys who were themselves of national interest and whose clients were of significant cultural or historical interest. Covitz suggested that 50 years was long enough for such materials to languish and that permission from a donor or the donor’s executor could suffice for a receiving library to allow access to attorney-client materials. He described a working policy of preventing access for 50 years after the date of the material itself as a reasonable balance of interests. Covitz posed the question,

“Fifty years after a file has ceased to be active in any way whatsoever, what, beyond a better understanding of various moments, figures, and places in history, can be impacted by opening up these files?” Covitz compared this approach with that of the law firm still protecting Lizzie Borden’s client files and suggested that while some attorneys perceive the attorney-client confidentiality as sacrosanct, that doesn’t mean that “lawyers seeking to play a broader socially and historically useful role cannot in good faith and conscience allow reasonable access to old client files closed more than fifty years in the past.”

A number of other related privacy or confidentiality interests have an expiration date, so the attorney-client privilege, work-product protection, and ethical confidentiality obligations might borrow from some of these other areas of the law to address competing interests. Some options include:

A default expiration date for privilege could be the life of the individual client, plus 70 years (similar to the laws protecting an individual creator’s copyright). This intellectual property approach also might be applied to the attorney’s work product.

The privilege could expire upon the death of the client, similar to the dominant rule for privacy torts, which generally do not all survive death, although some familial privacy is recognized.

The privilege could expire 50 years after the death of the client, similar to the coverage of privacy rules under the Health Insurance Portability and Accountability Act for individually identifiable health information.

The privilege could expire by the date of the document, plus 72 years to mirror the current Census model for the expiration of confidentiality in personally identifying data.

Contracts, even model contracts, might be developed along the lines of evolving approaches to managing social media data, such as Facebook profiles, after the death of the customer. Client permission secured in this way could cover privilege and ethical confidentiality obligations.

Of course, accepting any of these options would mean agreeing that the privilege somehow expires after a certain length of time.

It is one thing to state unequivocally that the privilege does or does not survive death. But there are related practical questions. Who will enforce the privilege 50, 75, or 100 years hence, when the relevant actors and their immediate executors and heirs are all dead and the law firm is defunct? If the privilege is breached, so what—who will complain and who can be held liable or responsible for any wrongful actions? Will these situations be assessed as inadvertent waiver of the confidentiality interests, with no party available to be held responsible for any arguable damage to the reputation of the client?

If, as some states provide, the executor of an estate may assert the deceased client’s privilege or seek testamentary waiver of the deceased person’s attorney-client privilege, what happens

when that executor completes his or her duties and is released from the role of settling the estate? Most states continue to support the idea that the privilege survives the death of the client, but the logistics of vesting that privilege in someone else and of enforcing it make for murky territory, as was noted in the Massachusetts and North Carolina cases discussed above.

Could particular heirs be designated as recipients of a surviving attorney-client privilege? Might those heirs further bequeath that inherited privilege on through the generations, or could some kind of rule against perpetuities be invoked for a privilege that takes on qualities of a property right?

From a practical point of view, attorneys need to be aware of and consider these issues with their clients. Should all files containing confidential communications be destroyed after a certain length of time (with client permission, of course)? What about electronic records such as email? Should corporate counsel be charged with the task of purging corporate records after the company’s demise? If so, when is it safe to do so and who will pay for this work?

So where do we go from here? Obviously, we do not have ready answers and do not necessarily agree on the proper outcome. To serve the interests of history, it can be argued that there should be some point in time, perhaps 50 years after death of the client, when the privilege and even work-product protection and ethical obligations of confidentiality would expire. But this delayed expiration still poses significant concerns for those individuals and entities who, in their lifetimes, never wanted their secrets disclosed, even to others generationally removed. Would imposing some outside cutoff date cause clients to limit disclosures to their attorneys, the concern that the *Swidler* Court wanted to address? As for entities, on balance it appears that they, too, might require long-term assurances of confidentiality to induce them to converse freely in the process of securing legal counsel. But, again, how long is sufficient? What obligations do attorneys have to discuss these issues with their clients and what affirmative measures should they take during the course of the representation or at its conclusion? These are difficult questions that the courts and entities governing the ethics of attorneys will continue to consider as historians and others push against the presumption that attorney-client confidentiality is forever. ■