Foster - Attorney-Client Privilege

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October Term 1997

Issued to: Craig S. Lerner

Counsel in No. 97-1192 Date 6/8/98

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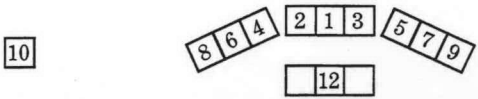

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19011DP–7–94

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Supreme Court of the
United States

October Term, 1997

HEARING LIST

For June 8, 1998

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HON. JOHN PAUL STEVENS, Associate Justice, Sixth and Seventh Circuits.

HON. SANDRA DAY O'CONNOR, Associate Justice, Ninth Circuit.

HON. ANTONIN SCALIA, Associate Justice, Fifth Circuit.

HON. ANTHONY M. KENNEDY, Associate Justice, Eleventh Circuit.

HON. DAVID H. SOUTER, Associate Justice, First and Third Circuits.

HON. CLARENCE THOMAS, Associate Justice, Eighth Circuit.

HON. RUTH BADER GINSBURG, Associate Justice, Second Circuit.

HON. STEPHEN BREYER, Associate Justice, Tenth Circuit.

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6. Appropriate attire for counsel is conservative business dress. If formal attire is worn, it should conform with custom.

WILLIAM K. SUTER, *Clerk.*

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HEARING LIST

Monday, June 8, 1998

No. 97–1192. *Swidler & Berlin and James Hamilton* v. *United States*

Certiorari to the C. A. for the District of Columbia Circuit.

For petitioners: James Hamilton, Washington, D. C.

For respondent: Brett M. Kavanaugh, Associate Counsel, Washington, D. C.

(1 hour for argument.)

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CERT PETITION

No. ———

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

SWIDLER & BERLIN AND JAMES HAMILTON,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, when a client dies, the attorney-client privilege in a criminal proceeding is no longer absolute, but is subject to a balancing test that requires the attorney to produce evidence of privileged communications with the client if they "bear on a significant aspect" of the case "as to which there is a scarcity of reliable evidence."

2. Whether, as a matter of law, an attorney's handwritten notes taken during an initial interview with a client do not receive the virtually absolute work product protection otherwise afforded to an attorney's "mental impressions," because at this stage the lawyer "has not sharply focused or weeded the materials" and exercised professional judgment as to what to record.

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PARTIES TO THE PROCEEDING

The parties to the proceeding in the Court of Appeals were Swidler & Berlin, James Hamilton and the United States of America.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

No. ———

SWIDLER & BERLIN AND JAMES HAMILTON,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

PETITION FOR WRIT OF CERTIORARI

Swidler & Berlin and James Hamilton petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia in this case.

OPINIONS BELOW

The majority opinion of the court of appeals and a redacted version of the dissenting opinion are reported at 124 F.3d 230 and are printed in full at Pet. App. 1a-26a. The court's order on petition for rehearing, and the opinion dissenting from denial of rehearing (Pet. App. 27a-32a), are reported at 129 F.3d 637. The district court issued a separate opinion for each of the two subpoenas involved. The opinions, which are identical except for the docket numbers and caption, are not reported and are printed at Pet. App. 33a-42a and 43a-53a.

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JURISDICTION

The court of appeals entered its judgment on August 29, 1997. The court entered the order denying a petition for rehearing on November 21, 1997. Petitioners invoke the jurisdiction of this Court under 28 U.S.C. 1254(1).

RULES INVOLVED

Rule 501 of the Federal Rules of Evidence and Rule 26(b)(3) of the Federal Rules of Civil Procedure appear at Pet. App. 54a-56a.

STATEMENT

On July 11, 1993, in the midst of intense public controversy about the White House Travel Office, White House Deputy Counsel Vincent Foster met with Washington, D.C., attorney James Hamilton to discuss possible legal representation. Before the conversation began, Mr. Foster asked Mr. Hamilton if the conversation was privileged and received assurance that it was. Pet. App. 41a. They then spoke for two hours, during which Mr. Hamilton took three pages of notes. Pet. App. 31a. Nine days later, Mr. Foster committed suicide.

On December 4, 1995, a federal grand jury, at the request of Independent Counsel, issued subpoenas to Mr. Hamilton and his law firm, Swidler & Berlin, seeking Mr. Hamilton's handwritten notes of this conversation. Mr. Hamilton and his firm filed motions to quash or modify. The district court (Chief Judge Penn) inspected the notes *in camera*. He found that "one of the first notations on the [notes] is the word: 'Privileged,' so it is obvious that . . . Foster . . . viewed . . . the notes of that conversation as privileged." Pet. App. 41a. He also found that the notes were prepared in anticipation of litigation and "reflect the mental impressions of the lawyer." Pet. App. 42a. The district court thus concluded that both the attorney-client and work product privileges barred disclosure. Pet. App. 42a.

The Court of Appeals for the District of Columbia Circuit reversed. Recognizing that "the communications at issue would be covered by the [attorney-client] privilege if the client were still alive," the court concluded that "the client's death calls for a qualification of the privilege." Pet. App. 2a. The "qualification" created by the court permits "post-death use [of the otherwise privileged communication] in criminal proceedings" where the prosecutor convinces the trial court that the "relative importance [of the communication] is substantial." Pet. App. 10a. In his briefs to the court of appeals, Independent Counsel had not advocated such a balancing process.

The court of appeals reasoned that the prospect of post-death revelation in the criminal context will trouble a client less than in the civil context, because after death "criminal liability will have ceased altogether" while civil liability "characteristically continues." Pet. App. 6a. The court recognized that a concern for survivors might stir a desire to protect the estate from civil liability, but did not discuss whether the same concern might foster an interest in protecting the living from criminal penalties. Pet. App. 6a. The court also "doubted" that the client's concerns for post-death reputation would be "very powerful; and against them the individual may even view history's claims to truth as more deserving." Pet. App. 7a.

As to the other side of the balance, the court concluded that the client's death heightens the prosecutor's need for otherwise privileged communications. The court concluded that "unavailability through death, coupled with the non-existence of any client concern for criminal liability after death, creates a discrete realm (use in criminal proceedings after death of the client)" where the privilege should give way upon the prosecutor's showing of need. Pet. App. 7a-8a.

The court of appeals also held that the notes were not protected by the work product privilege. The court recognized prior decisions holding that attorney interviews

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conducted "as part of a litigation-related investigation" receive heightened work product protection even as to factual material, because "the facts elicited necessarily reflected a focus chosen by the lawyer." Pet. App. 13a. However, the court concluded that the present case is different because "the interview was a preliminary one initiated by the client. Although the lawyer was surely no mere potted palm, one would expect him to have tried to encourage a fairly wide-ranging discourse from the client, so as to be sure that any nascent focus on the lawyer's part did not inhibit the client's disclosures." Pet. App. 13a. Because of the court's conclusive presumption that, at this stage, the lawyer "has not sharply focused or weeded the materials," it concluded that the notes did not deserve the "super-protective envelope" normally afforded opinion work product. Pet. App. 13a-14a.

Judge Tatel dissented. While conceding that concern for surviving friends and family or posthumous reputation "may not influence *every* decision to confide potentially damaging information to attorneys," Judge Tatel concluded that "these concerns very well may affect *some* decisions, particularly by the aged, the seriously ill, the suicidal, or those with heightened interests in their posthumous reputations." Pet. App. 23a (emphasis in original). Judge Tatel argued that, after the court's decision, such persons will not talk candidly with a lawyer after they receive the advice the court's opinion now requires lawyers to give:

> I cannot represent you effectively unless I know everything. I will hold all our conversations in the strictest of confidence. *But when you die, I could be forced to testify—against your interests—in a criminal investigation or trial, even of your friends or family, if the court decides that what you tell me is important to the prosecution.* Now, please tell me the whole story.

Pet. App. 20a (emphasis in original). Judge Tatel concluded that the court's decision "strikes a fundamental

blow to the attorney-client privilege and jeopardizes its benefits to the legal system and society." Pet. App. 26a.

The court of appeals denied Appellees' petition for rehearing *in banc*, with two dissents as to the attorney-client privilege issue (Judges Tatel and Ginsburg).[1] Pet. App. 28a. The dissent emphasized that Independent Counsel had offered no "evidence" that abrogating the attorney-client privilege after death will not chill client communications with attorneys. Pet. App. 31a. Such evidence, the dissent argued, is required to overturn the common law rule that the privilege survives death—a rule resting on the proposition that it is necessary to promote candid client disclosures.

Judge Tatel also dissented on the work product issue. He disagreed with the court's conclusive presumption that attorney notes taken at an initial client interview do not reflect the attorney's mental impressions because the lawyer does not "sharply focus[] or weed[]" the words of a client at an initial session. Pet. App. 30a. Instead, Judge Tatel argued, "lawyers bring their own judgment, experience, and knowledge of the law to conversations with clients." *Id.* "Whether courts can require production of attorney work product should turn not on the stage of representation or who initiates a meeting, but on whether the attorney's notes are entirely factual, or whether they instead represent the 'opinions, judgment, and thought processes of counsel'." Pet. App. 31a (citation omitted). Judge Tatel found that Mr. Hamilton had "created only three pages of notes" from a two-hour conversation, and that the notes "bear the markings of a lawyer focusing the words of his client; he underlined certain words, placing both checkmarks and question marks next to certain sections." *Id.* Consequently, Judge Tatel concluded, "[t]he notes clearly represent the opinions, judgment, and thought processes of counsel," the same conclusion the district court had reached. *Id.*

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[1] Judges Sentelle and Garland did not participate.

REASONS FOR GRANTING THE WRIT

The court of appeals' decision on attorney-client privilege is important and warrants this Court's review because it denies persons who expect to die soon—whether because of advanced age, illness, suicide, or a dangerous life-style—the right to consult attorneys in confidence about criminal matters that threaten friends, associates, family or their own reputations. The decision thus defeats the fundamental purpose of the privilege, which is to encourage full and frank communication between attorneys and clients and thereby promote observance of law and the administration of justice. The decision also conflicts with several state decisions denying posthumous disclosure of attorney-client communications in criminal cases, as well as with decisions of the Ninth Circuit and various state courts reaching the same conclusion in civil contexts. And the decision conflicts with the determination of many state legislatures that the privilege survives death.

The court of appeals' decision is wrong because it erroneously assumes that persons facing death do not care whether their friends, associates, family, or their own reputations are harmed by disclosures after death. This assumption wars with the fact that people write wills, establish trusts, buy life insurance and burial plots, establish foundations, endow chairs, and write memoirs—actions evincing concern for what happens to the well-being of others and their own reputations following death. The decision also is at odds with the decisions of this Court disparaging balancing tests and other standards that result in uncertain privileges. And it ignores the "reason and experience" (which must be considered under Federal Evidence Rule 501) exemplified by state court opinions and legislative pronouncements that are virtually unanimous in recognizing that the privilege remains intact after the client's death.

The court's decision on the work-product privilege will encourage attorneys not to take notes at initial client or

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witness interviews, thereby damaging the quality of legal representation with no offsetting benefit to the administration of justice. The decision conflicts with decisions of this Court and several courts of appeals that accord the highest degree of work product protection to attorney notes containing factual statements where the manner of recordation reflects the attorney's selection and judgment. The decision is wrong because it presumes that attorneys at initial client interviews do not exercise professional judgment in determining what client statements to record and how to record them—a notion belied by the experience of seasoned practicing attorneys.

For these reasons, this Court should grant review on both issues.

1. The Attorney-Client Issue

a. Every year, hundreds of thousand of Americans learn that they have a life-threatening illness.[2] Many of these people may wish to talk to an attorney about matters with criminal implications. Yet under the court of appeals' decision they do so at peril because, after they die, prosecutors who show need for the evidence can obtain access to their attorneys' notes. The decision imposes the same impediment on the elderly, the suicidal, those engaged in hazardous lifestyles, and others concerned about mortality. It defies reason and experience to assume that many of these people do not care about disclosures that might harm others or their own reputation after death. By denying the full protections of the attorney-client privilege to such people, the decision discrimi-

[2] In 1993, some 665,000 persons died of cancer or as a consequence of HIV infection. U.S. Department of Commerce, *Statistical Abstract of the United States 1996* (1996), at 96. Given the nature of these diseases, it seems likely that most of these persons were aware for some period of time that they were likely to die soon. The American Cancer Society estimates that there were 1.3 million new cancer cases in 1996. *Id.* at 145.

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nates against the aged, the diseased, and the distraught—against society's most vulnerable.

The decision's damaging effect is not ameliorated by the court's attempt to limit disclosure to "the discrete zone of criminal litigation" (Pet. App. 8a). A client's concern for family, friends and associates surely will extend to their potential criminal as well as civil liabilities. A dying person may be troubled far more by a loved one's possible incarceration that by some civil sanction. Especially given the increasing utilization of criminal law as a means of commercial and ethical regulation, a client who believes that death is a not-too-distant possibility will be loath to speak to a lawyer about troubles involving friends, family or close associates if advised that confidentiality evaporates upon his or her demise.

Nor will the client be reassured by the court of appeals' statement that disclosure is limited to statements whose "relative importance is substantial" (Pet. App. 10a). "Making the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege." *Jaffee v. Redmond*, 116 S.Ct. 1923, 1932 (1996) (patient-therapist privilege). Under the court's balancing test, the trial judge is most likely to perceive a need for privileged information in precisely those situations where the client would be most concerned about the criminal ramifications of disclosure on family, friends or associates. At the least, such a balancing test renders the attorney-client privilege uncertain, and "[a]n uncertain privilege is little better than no privilege at all." *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981). Surely, uncertainty of this sort will chill attorney-client communications.[3]

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[3] The record demonstrates that Mr. Foster, had he not been assured the conversation was privileged, would not have confided in Mr. Hamilton and the notes at issue would not exist. Pet. App. 41a. Considering that the conversation occurred just nine days before

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There is no merit to the court of appeals' argument that the privilege already is so beset with exceptions that one more will make little difference. Pet. App. 8a-10a. The court cited the so-called "crime-fraud" exception, but for this exception to apply "the client must have made or received the otherwise privileged communication with the intent to further an unlawful or fraudulent act." *In re Sealed Case*, 107 F.3d 46, 49 (D.C. Cir. 1997). A client will know whether he or she consults an attorney to further a criminal or fraudulent scheme. For clients lacking such intent, advice that an improper purpose could destroy confidentiality will not undermine candor. The same cannot be said of advice that the privilege may perish with death when the client is elderly, severely ill, or suicidal.

There is, moreover, a basic flaw in the argument that one more exception to the privilege should not be unduly injurious, given those that exist. Despite the extant exceptions, the attorney-client privilege still is vital to our system of justice. All citizens—including the elderly and seriously ill—still have a right to talk to an attorney in confidence. The courts still have a paramount interest in assuring that clients tell their attorneys the whole truth. Most attorneys still take seriously their professional obligation to preserve confidences. Contrary to the panel's conclusion, in most circumstances "belief in an absolute attorney-client privilege" is not, and should not be, "illusory." (Pet. App. 8a) The court of appeals' reasoning can only further a progressive erosion of the privilege, for each added exception fuels the argument that yet one more can do little additional harm.

b. There is a conflict between the court of appeals' decision on attorney-client privilege and the holdings of other federal and state courts.

Mr. Foster took his own life, he likely also would have been reluctant to confide had he been informed that the conversation was privileged *unless you die.*

The decision conflicts with the holdings of seven states in criminal cases.[4] This Court has stressed the importance of uniformity between federal and state court decisions on privilege issues, because "any State's promise of confidentiality would have little value" if the client is aware that the confidential communication may be revealed in federal court. *Jaffee v. Redmond*, 116 S.Ct. 1923, 1930 (1996).

The court of appeals' decision also conflicts with decisions of the Ninth Circuit[5] and 13 states[6] holding that the attorney-client privilege survives the client's death in

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[4] The following decisions excluded from criminal proceedings evidence of communications between a deceased person and that person's attorney: *Mayberry v. Indiana*, 670 N.E.2d 1262 (Ind. 1996); *In re a John Doe Grand Jury Investigation*, 562 N.E.2d 69 (Mass. 1990); *People v. Modzelewski*, 611 N.Y.S.2d 22 (N.Y. App. Div. 1994); *Arizona v. Macumber*, 544 P.2d 1084, 1086 (Ariz. 1976), *cert. denied*, 439 U.S. 1006 (1978); *People v. Pena*, 198 Cal. Rptr. 819, 829 (Cal. Ct. App. 1984); *Cooper v. State*, 661 P.2d 905, 907 (Okla. Crim. App. 1983); *South Carolina v. Doster*, 284 S.E.2d 218, 220 (S.C.), *cert. denied*, 454 U.S. 1030 (1981).

[5] *United States v. Osborn*, 561 F.2d 1334 (9th Cir. 1977); *Baldwin v. Commissioner of Internal Revenue*, 125 F.2d 812, 815 (9th Cir. 1942). In *Osborn*, the disclosure had criminal implications; the district court had allowed intervenors to claim the Fifth Amendment privilege as to some documents at issue. 561 F.2d at 1336.

[6] *Doyle v. Reeves*, 152 A. 882 (Conn. 1931); *De Loach v. Myers*, 109 S.E.2d 777 (Ga. 1959); *Hitt v. Stephens*, 675 N.E.2d 275 (Ill. App. Ct.), *appeal denied*, 679 N.E.2d 380 (Ill. 1997)); *Estate of Voelker*, 396 N.E.2d 398 (Ind. Ct. App. 1979); *Bailey v. Chicago, Burlington & Quincy R.R. Co.*, 179 N.W.2d 560, 564 (Iowa 1970); *Stegman v. Miller*, 515 S.W.2d 244, 246 (Ky. 1974); *Rich v. Fuller*, 666 A.2d 71, 74-75 (Me. 1995); *McCaffrey v. Estate of Brennan*, 533 S.W.2d 264 (Mo. Ct. App. 1976); *Lennox v. Anderson*, 1 N.W.2d 912 (Neb.), *modified on other grounds*, 3 N.W.2d 645 (Neb. 1942); *Clark v. Second Judicial District Court*, 692 P.2d 512 (Nev. 1985); *Taylor v. Sheldon*, 173 N.E.2d 892, 895 (Ohio 1961); *Miller v. Pierce*, 361 S.W.2d 623, 625 (Tex. Civ. App. 1962); *In re Smith's Estate*, 57 N.W.2d 727 (Wis. 1953).

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civil cases. None of these cases recognizes a distinction between the civil and criminal contexts.

The court of appeals' attempt to limit its decision to criminal cases will not withstand scrutiny. If the court of appeals is correct in holding that a plausible claim of necessity in the criminal context allows posthumous disclosure, scant reason exists to deny posthumous disclosure where a party to civil litigation plausibly claims the evidence is critical. Moreover, disclosures made in the criminal context could be used in related civil matters.

With the exception of one case from a mid-level state appellate court that until now has never been followed,[7] there are only three situations in which the courts have allowed or suggested the propriety of posthumous disclosure of otherwise confidential attorney-client communications in criminal or civil proceedings. Disclosure is allowed in testamentary disputes for the purpose of determining the decedent's intent. Pet. App. 9a. *Glover v. Patten*, 165 U.S. 394, 406-08 (1897); *United States v. Osborn, supra*, 561 F.2d at 1340 n.11. But an exception designed to implement client intent does not support creating another exception to thwart it. Indeed, this Court's decision in *Glover v. Patten*, the leading case on the testamentary exception, is premised on the assumption that, except in the testamentary contexts, the privilege applies and bars disclosure.

Posthumous disclosure also has been allowed where a husband accused of murdering his wife attempts to use the privilege to bar his wife's lawyer from testifying that she told him of threats made by the husband. In those cases, the husband's obvious conflict of interest bars him from asserting the privilege on behalf of his wife.[8] No

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[7] *Cohen v. Jenkintown Cab Co.*, 357 A.2d 689 (Pa. Super. Ct. 1976).

[8] *Arizona v. Gause*, 489 P.2d 830 (Ariz. 1971), *vacated on other grounds*, 409 U.S. 815 (1972); *Wyoming v. Kump*, 301 P.2d 808 (Wyo. 1956).

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such conflict of interest is present in the case at bar.[9]

Finally, there is dicta suggesting that a criminal defendant might have a constitutional right to obtain testimony from a lawyer that his or her deceased client admitted in a privileged conversation committing the crime at issue.[10] Disclosure of a privileged conversation to aid a criminal defendant would be consonant with case law holding that otherwise valid exclusionary rules may be overridden where the evidence is vital to the accused's exercise of his constitutional right to present a defense. *Davis v. Alaska*, 415 U.S. 308 (1974) (public disclosure of juvenile court record of prosecution witness).[11] But the Court need not reach this issue, because Independent Counsel's claim to the attorney notes in this case does not concern a criminal defendant's constitutional right to present evidence that may establish innocence.

c. Rule 501 of the Federal Rules of Evidence provides that a privilege "shall be governed by the principles of the common law," as interpreted in the light of "reason and experience." As described, the only other federal

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[9] In a case where a husband suspected of his wife's murder refused the investigating district attorney's request to waive his wife's attorney-client or psychotherapist-patient privilege, the district attorney successfully petitioned the probate court to remove the husband as executor on the ground that he could not make a disinterested decision as to waiver. *District Attorney v. Magraw*, 628 N.E.2d 24 (Mass. 1994).

[10] *Massachusetts v. Goldman*, 480 N.E.2d 1023, 1029 n.8 (Mass.), *cert. denied*, 474 U.S. 906 (1985); *In re a John Doe Grand Jury Investigation, supra*, 562 N.E.2d at 71. Other courts, however, have refused to negate the privilege despite the asserted needs of criminal defendants. *Mayberry v. Indiana, supra; People v. Modzelewski, supra; Arizona v. Macumber, supra; South Carolina v. Doster, supra.*

[11] *See also, Weinstein's Federal Evidence* (2d ed.) § 412.03[4], citing cases holding that, in certain narrowly defined circumstances in rape prosecutions, constitutional concerns may require admission of evidence concerning the victim's past sexual conduct, despite state laws barring such evidence.

court of appeals holdings on the issue, as well as the overwhelming majority of state court holdings, confirm that the attorney-client privilege survives the client's death.[12] State case law is supported by numerous state statutes providing that the privilege may be claimed after death by the client's personal representative.[13] Obviously, these statutes rest on the assumption that the privilege survives death. "[I]t is appropriate to treat a consistent body of policy determinations by state legislatures as reflecting both 'reason' and 'experience.'" *Jaffee v. Redmond, supra*, 116 S. Ct. at 1930.

The court of appeals argues that, because these statutes are consistent with the notion that the privilege expires when the estate is closed, they involve only testamentary

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[12] Dicta in federal court opinions are to the same effect. *Colonial Gas Co. v. Aetna Casualty & Surety Co.*, 144 F.R.D. 600, 604 (D. Mass. 1992); *Dixson v. Quarles*, 627 F. Supp. 50, 53 (E.D. Mich.), *aff'd mem.*, 781 F.2d 534 (6th Cir. 1985), *cert. denied*, 479 U.S. 935 (1986).

[13] "In general, modern evidence codes reflect the view that the privilege may be asserted by the personal representative of a deceased client (either an executor or administrator)." *Restatement (Third) of the Law Governing Lawyers*, § 127, Comment c (Proposed Final Draft, March 29, 1996). That view also is reflected in the Model Code of Evidence, Rule 209(c)(1), and the Uniform Rules of Evidence, Rule 502(c). *See also* the discussion of state statutes by Judge Tatel in his dissent. Pet. App. 16a-17a. State statutes allowing the personal representative of the deceased to assert the privilege include: Ala. R. Evid., Rule 502; Alaska R. Evid. 503; Ark. Code Ann. § 16-41-101, Rule 502; Cal. Evid. Code § 953; Del. Code Ann., Del. R. Evid. 502; Fla. Stat. Ann. § 90.502; Haw. Rev. Stat. § 626-1, Rule 503; Idaho R. Evid. 502; Kan. Stat. Ann. § 60-426; Ky. R. Evid. 503; La. Code Evid. Ann. art. 506; Me. R. Evid. 502; Miss. R. Evid. 502; Neb. Rev. Stat. § 27-503; Nev. Rev. Stat. § 49.105; N.H. R. Evid. 502; N.J. Stat. Ann. 2A;84A, App. A, N.J. R. Evid. 504; N.M. Stat. Ann., N.M. R. Evid. 11-503; N.D. R. Evid. 502; Oh. Rev. Code Ann. § 2317.02; 12 Okla. Stat. Ann. § 2502; Or. Rev. Stat. § 40.225; S.D. Codified Laws § 19-13-4; Tex. R. Civ. Evid. 503 and Tex. R. Crim. Evid. 503; Vt. Stat. Ann., Vt. R. Evid. 502; Wis. Stat. Ann. § 905.03.

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matters and thus do not indicate that the privilege survives death in a criminal context. Pet. App. 4a. Were the statutes generally so limited, one would expect to find language to that effect in them. But none of these statutes says that it is inapposite as to criminal matters or that the privilege expires when the estate closes. Certainly, the Arkansas statute, which governs Mr. Foster's still-open estate, does not.

d. The privilege's purpose is "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). It misreads human nature to conclude that the typical client cares only about his or her own fate while alive, and thus will talk freely to an attorney despite knowing that the conversation may be used posthumously to damage his or her reputation or used in criminal proceedings against family or close associates. Where the client is elderly, severely ill or has other reasons to believe that death is near, this conclusion is particularly contrary to reason and common experience.

The principal support for the court of appeals' view derives from academic commentators. One text argues that "[o]ne would have to attribute a Pharaoh-like concern for immortality to suppose that the typical client has much concern for how posterity may view his communications." 24 Charles Alan Wright & Kenneth A. Graham, Jr., *Federal Practice and Procedure* § 5498, at 484 (1986). This far too dismissive comment overlooks the fact that many persons adhere to more contemporary, meaningful faiths that place great store in the value of a good name and concern for the well-being of family, friends and neighbors. Such beliefs and cares are hardly a relic of ancient times. Rather, reason and experience tells us that, despite the glib, cynical observations of some commentators, concerns about reputation and others after

death permeate our society, particularly among the aged and ill.

An elderly or terminally-ill person could well seek a lawyer's advice not only about preservation of his or her estate, but also about possible criminal activities of children, a spouse or close associates. But under the court of appeals' decision, such a person could not talk to a lawyer with an assurance of confidence about, for example, the suspected drug involvement of a child. Reason and experience teach that the court of appeals was simply wrong in supposing that, while people have a "motive to preserve their estates" to protect their heirs from economic loss, they do not care at least as much about potential criminal penalties inflicted on loved ones after their death. Pet. App. 6a.

There is also the very real concern that many people have for their own reputations—a concern that does not turn on whether some later proceeding is civil or criminal. The court of appeals expressed "doubt" that an individual's "residual" interest in post-mortem reputation "will be very powerful," suggesting that "the individual may even view history's claims to truth as more deserving." Pet. App. 7a. But anyone familiar with memoirs knows that most people who speak "for history" tend to choose words with extreme care. "Most public servants' memoirs turn out to be self-serving exercises in which their political decisions are retrospectively interpreted in the best possible light." [14] A respected recent memoirist has described how he went through his final draft "with a fine tooth comb" to assure that, while being honest, he would "not, at the same time, be hurtful," because he knew "everything you say will be in print forever." [15] The attorney-

[14] "We Can All Learn from McNamara's Memoirs," New York Times (April 13, 1995) at p. A24.

[15] "Colin Powell Talks About His Family, 'the Producers' and the Making of a Memoir," Chicago Tribune (Aug. 26, 1996) at p. C3. If we may be so bold, we also submit that judges carefully write opinions with a view to the opinions of posterity.

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client privilege is designed to ensure that people, when speaking with counsel, do so with candor and need not edit their statements with a "fine tooth comb." [16]

e. This Court has long recognized that the grand jury's right to "every man's evidence" does not extend to "those persons protected by a constitutional, common-law, or statutory privilege." *Branzburg v. Hayes*, 408 U.S. 665, 708 (1972). Where a privilege is qualified and thus subject to a balancing test, the need for the evidence in particular criminal cases may be a factor considered in the balance. *United States v. Nixon*, 418 U.S. 683, 711-12 (1974); *Branzburg, supra*, 408 U.S. at 708. But there is no precedent for subjecting the absolute privileges

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[16] The conclusion that persons do not care about their post-death reputations and the fate of close associates is disputed by the facts of this case. Mr. Foster was a man who cared deeply about his reputation and the well-being of others. Judge Tatel has quoted from his May 1993 commencement speech about the value of reputation to him. Pet. App. 23a. Both Independent Counsel Fiske and even Independent Counsel Starr (who now generally minimizes the concern for posthumous reputation) concluded that attacks on Mr. Foster's reputation and others could have contributed to the depression that caused him to take his own life. Pet. App. 23a; Report of the Independent Counsel In Re Vincent W. Foster, pp. 8-17 (June 30, 1994) ; Report on the Death of Vincent W. Foster, Jr., by the Office of Independent Counsel In Re: Madison Guaranty Savings & Loan Association, pp. 105-10 (Oct. 10, 1997). Mr. Fiske also relates how Mr. Foster, upset that a colleague was reprimanded in the Travel Office matter, sought instead to take the blame himself. Mr. Foster's now famous note—likely written within hours of his visit to Mr. Hamilton—says, in obvious reference to himself, that in Washington "ruining people is considered sport." The note also complains that "the public will never believe the innocence of the Clintons and their loyal staff." *Id.* at Exhibit 5.

The court of appeals decision disregards Mr. Foster's concerns for his reputation and associates and would disclose notes of a conversation he sought to ensure was privileged. The decision thus is not only, as Judge Tatel said, a "fundamental blow" to the privilege generally, it is also a direct attack on Mr. Foster's wishes and intentions.

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recognized at common law to a balancing test in a criminal cases.[17]

The balancing approach the court of appeals adopted is particularly damaging to the attorney-client privilege because potential violations of the law (including those by persons who survive the client's death) are a frequent subject of attorney-client conversations. To a much greater extent than any other type of privileged communication, attorney-client communications will be chilled and the purpose of the privilege undermined if those communications are subject to disclosure in criminal prosecutions. And as observed, if such communications are admissible in criminal proceedings, confidentiality effectively would be destroyed and little reason would remain to withhold the evidence from civil proceedings. In criminal as well as civil cases, the attorney-client privilege is so important in our system of justice that it "should not yield either before or after the client's death to society's interest, as legitimate as we recognize that interest is, in obtaining every man's evidence." *In re a John Doe Grand Jury Investigation, supra,* 562 N.E.2d at 71.

2. The Work Product Issue

The Court should also grant review of the important work-product privilege issue. In *Upjohn v. United States, supra,* this Court said that "[f]orcing an attorney to disclose notes and memoranda of witnesses' oral statements

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[17] The privilege for marital communications survives death. *Curran v. Pasek,* 886 P.2d 272 (Wyo. 1994); *Merrill v. William Ward Ins. Co.,* 622 N.E.2d 743 (Ohio Ct. App. 1993); *Georgia Int'l Life Ins. Co. v. Boney,* 228 S.E.2d 731 (Ga. Ct. App. 1976). The patient-physician and patient-psychotherapist privileges, while not recognized at common law, have also been held to survive the patient's death. *Leritz v. Koehr,* 844 S.W.2d 583 (Mo. Ct. App. 1993); *Williams v. Kentucky,* 829 S.W.2d 942 (Ky. Ct. App. 1992); *Rittenhouse v. Superior Court,* 1 Cal.Rptr. 2d 595 (Cal. Ct. App. 1991); *Sims v. State,* 311 S.E.2d 161 (Ga. 1984).

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is particularly disfavored because it tends to reveal the attorney's mental processes." 449 U.S. at 399. In so stating, the Court was explaining *Hickman v. Taylor*, 329 U.S. 495 (1947), which accorded work product privilege protection to an attorney's notes of oral statements by a potential witness.

In *Upjohn*, the Court noted a conflict in the circuits on the issue whether, under *Hickman*, "*no* showing of necessity can overcome protection of work product which is based on oral statements from witnesses," or whether "such documents will be discoverable only in a 'rare situation.'" 449 U.S. at 401 (emphasis in original), citing *In re Grand Jury Proceedings*, 473 F.2d 840 (8th Cir. 1973) (absolute protection); and *In re Grand Jury Investigation*, 599 F.2d 1224 (3d Cir. 1979) (disclosure in a "rare situation"). While the Court did not resolve that conflict, the *Upjohn* decision provides no support for the court of appeals' conclusion that an *ordinary* showing of necessity is sufficient to obtain disclosure of attorney notes.

The court of appeals concedes that, where an attorney takes notes of "interviews conducted as part of a litigation-related investigation," the facts elicited "necessarily reflect[] a focus chosen by the lawyer." Pet. App. 13a. The court of appeals also concedes that, in these circumstances, the Fourth and Eleventh Circuit accord the attorney's notes—including factual material—"the virtually absolute protection that the [work product] privilege gives to the attorney's mental impressions." Pet. App. 13a, citing *In re Allen*, 106 F.3d 582, 607-08 (4th Cir.) *rehearing en banc denied*, 199 F.3d 1129 (4th Cir. 1997), *petition for cert. filed*, 66 U.S.L.W. 3298 (U.S. Oct. 10, 1997) (No. 97-642);[18] *Cox v. Administrator, U.S. Steel*, 17 F.3d 1386, 1422 (11th Cir.), *modified on rehearing on other grounds*, 30 F.3d 1347 (11th Cir.),

[18] Certiorari was denied on January 12, 1998, after the filing of the typewritten version of this petition.

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cert. denied, 513 U.S. 1110 (1994). The court of appeals, however, attempted to distinguish these decisions on the ground that the interview in this case was "a preliminary one initiated by the client," and on that basis ruled that factual material in the notes was producible upon a showing that meets the "ordinary Rule 26(b)(3) standard" of necessity and unavailability of alternative evidence. Pet. App. 13a-14a.

The distinction between initial and later interviews is spurious. As Judge Tatel noted, "[n]o lawyer approaches a client's problems with a 'blank slate.' . . . Even at a first meeting, regardless of who initiates it, lawyers bring their own judgment, experience, and knowledge of the law to conversations with clients." Pet. App. 30a.

Mr. Hamilton came to the meeting with Mr. Foster with considerable experience in representing clients in highly-publicized, "political" cases. As many attorneys do, he prepared for the "initial interview"; the record shows that he had read and taken notes on the White House's report on the Travel Office matter that was the subject of the interview. Pet. App. 40a, 41a. He thus was both knowledgeable and focused. To adopt a conclusive presumption that initial interview notes do not reflect the lawyer's mental impressions ignores both the reality of the practice of law and the reality of this case.

As Judge Tatel observed (Pet. App. 31a), the notes themselves demonstrate that Mr. Hamilton exercised his judgment during the interview. "In two hours, he created only three pages of notes," which were not verbatim but contained only what "he thought significant, omitting everything else." The notes, Judge Tatel said, bear various markings ("check marks and question marks") and "clearly represent the opinions, judgments, and thought processes of counsel." *Id.* Chief Judge Penn had reached the same conclusion for the district court. Pet. App. 42a.

The decision of the court of appeals is important and warrants review because it discourages attorneys from taking notes at initial client and witness interviews. It

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conflicts with the Fourth and Eleventh Circuit decisions cited by the court of appeals, as well as the Third and Eighth Circuit decisions cited in *Upjohn*, all of which hold that attorneys' notes of witness interviews are not subject to production on an ordinary showing of necessity. *In re Allen, supra*; *Cox v. Administrator, U.S. Steel, supra*; *In re Grand Jury Proceedings, supra*; and *In re Grand Jury Investigation, supra.* More importantly, the opinion conflicts with *Upjohn.* These decisions cannot be convincingly distinguished on the basis that they did not involve initial client interviews, for the rationale of the court of appeals' opinion applies to both initial client and witness interviews.

The court of appeals' decision also is wrong as a matter of law. The issue is not, as the court of appeals argued, whether the attorney in an initial interview attempts to "encourage a fairly wide-ranging discourse." Pet. App. 13a. Rather, the issue is which portions of that "discourse" the attorney chooses to record and the words the attorney chooses to accomplish this. It is these choices the attorney's notes reflect and the work product privilege protects. *Upjohn v. United States, supra*, 449 U.S. at 399.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Cert Petition Appendix

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued June 20, 1997 Decided August 29, 1997

No. 97-3006

IN RE: SEALED CASE

Consolidated with

No. 97-3007

Appeals from the United States District Court
for the District of Columbia
(No. 95ms00446)
(No. 95ms00447)

Before: WALD, WILLIAMS and TATEL, *Circuit Judges.*

Opinion for the court filed by *Circuit Judge* WILLIAMS.

Dissenting opinion filed by *Circuit Judge* TATEL.

WILLIAMS, *Circuit Judge*: This case arises out of a grand jury investigation into the firing of White House travel office employees. The Office of Independent Counsel obtained grand jury subpoenas for notes of a conversation between a now-deceased White House official and his private attorney. The attorney and his law firm moved in district court to quash the subpoenas, claiming successfully that the notes were protected by the attorney-client privilege and by the work-product privilege. Because we think

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the district court read both privileges too broadly, we reverse and remand for further proceedings.

Attorney-Client Privilege

The attorney-client privilege applies to grand jury proceedings. Fed. R. Evid. 501, 1101(c) & (d). The parties agree that the communications at issue would be covered by the privilege if the client were still alive. The Independent Counsel, however, argues that the client's death calls for a qualification of the privilege. We agree.

Rule 501 provides that "the privilege of a witness . . . shall be governed by the principles of the common law as . . . interpreted by the courts . . . in the light of reason and experience." Fed. R. Evid. 501; see also *Jaffee v. Redmond,* 116 S. Ct. 1923, 1927 (1996). We take this to be a mandate to the federal courts to approach privilege matters in the way that common law courts have traditionally addressed any issue—observing precedent but at the same time trying, where precedents are in conflict or not controlling, to find answers that best balance the purposes of the relevant doctrines.

Courts have generally assumed that the privilege survives death. See Simon J. Frankel, "The Attorney-Client Privilege After the Death of the Client," 6 Geo. J. Legal Ethics 45, 47 (1992) (citing cases). Modern evidence codes often provide that the personal representative of a deceased client may assert the privilege. See Restatement (Third) of the Law Governing Lawyers § 127 Reporter's Note, comment c (Proposed Final Draft, March 29, 1996) ("Restatement"). And courts have applied the privilege after death in both grand jury proceedings and criminal trials. See, e.g., *John Doe Grand Jury Investigation,* 562 N.E.2d 69 (Mass. 1990); *People v. Pena,* 198 Cal. Rptr. 819, 829 (Ct.App.2d 1984); *State v. Doster,* 284 S.E.2d 218 (S.C. 1981).

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Yet most judicial references to the persistence of the privilege after death appear to have occurred only as the prelude to application of a well recognized exception—for disputes among the client's heirs and legatees.[1] See Frankel, *supra*, at 58 n.56 (95% of cases examined (380 out of 400) were testamentary disputes). Thus holdings actually *manifesting* the posthumous force of the privilege are relatively rare. See McCormick on Evidence § 94, at 348 ("the operation of the privilege has in effect been nullified in the class of cases where it would most often be asserted after death."). And such cases as do actually apply it give little revelation of whatever reasoning may have explained the outcome.

The Supreme Court's decision in *Glover v. Patten*, 165 U.S. 394 (1897), is cited for the proposition that the privilege survives death. See, e.g., *Baldwin v. Commissioner of Internal Revenue*, 125 F.2d 812, 814 (9th Cir. 1942). In fact, however, *Glover* is simply a typical case that asserts the general principle of the privilege's survival after death, but finds it inapplicable to disputes among persons "claiming under the client." 165 U.S. at 407. Even the Court's endorsement of the privilege's survival in ordinary circumstances was rather tepid. It observed that "such communications might be privileged if offered by third persons to establish claims against an estate," *id.* at 406, and quoted *Russell v. Jackson*, 9 Hare 387, 393, 68 Eng. Rep. 558, 560 (1851), which stated only that "the privilege does not in all cases terminate with the death of the party," and belongs to "parties claiming under the

[1] The exception applies only when the parties are claiming "through the client," not when a party claims against the estate. Some have justified the exception as furthering the client's intent, while others have explained that in a will contest, the question of who may assert the privilege cannot be resolved without resolving the merits of the claims, and thus it is preferable to permit neither to assert the privilege. See 2 Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence § 197, at 377-78 (2d ed. 1994). As neither justification bears on our analysis, we need not choose between them.

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client as against parties claiming adversely to him." *Id.*, quoted in *Glover*, 165 U.S. at 407. Compare Cal. Evid. Code § 954, comment (1997) ("[T]here is little reason to preserve secrecy at the expense of excluding relevant evidence after the estate is wound up and the representative is discharged."). In short, there is little by way of judicial holding that affirms the survival of the privilege after death, and the framing of the posthumous privilege as belonging to the client's estate or personal representative both suggests that the privilege may terminate on the winding up of the estate and reflects a primary focus on civil litigation.[2]

Although courts often cite as axiomatic the proposition that the privilege survives death, commentators have, with one distinguished exception, generally supported some measure of post-death curtailment. The exception, Wigmore, proclaimed that there was "no limit of time beyond which the disclosures might not be used to the detriment of the client or of his estate." 8 Wigmore on Evidence § 2323, at 630-31 (McNaughton Rev. 1961). But others have sharply criticized his view. The most emphatic statement is that of Wright & Graham, who wrote, "One would have to attribute a Pharaoh-like concern for immortality to suppose that the typical client has much concern for how posterity may view his communications." 24 Charles A. Wright & Kenneth W. Graham, Federal Practice and Procedure: Evidence § 5498, at 484 (1986); see also Restatement § 127, comment d ("Permitting such dis-

[2] Our dissenting colleague evidently reads the provisions allowing the personal representative of the deceased to claim the privilege as implying that the privilege survives death without exception (other than the standard testamentary one). See Dissent at 3. But the inference is far from clear. Vesting the privilege in the personal representative is plainly consistent with its terminating at the winding up of the estate, when its function of protecting the decedent's transmission of his or her property to the intended beneficiaries, free from claims based on statements to counsel, has run its course. Such vesting does not remotely suggest concern over anyone's criminal responsibility.

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closure would do little to inhibit clients from confiding in their lawyers")[3]; 1 McCormick on Evidence § 94, at 350 (4th ed. 1992) (terminating the privilege at death "could not to any substantial degree lessen the encouragement for free disclosure"); 2 Mueller & Kirkpatrick § 19, at 380 ("Few clients are much concerned with what will happen sometime after the death that everyone expects but few anticipate in an immediate or definite sense").

Presumably depending on their confidence in their judgments as to the residual chilling effect on clients commentators have proposed a range of substitute rules. Some have embraced Learned Hand's view that the privilege should not apply at all after death, see, e.g., ALI Proceedings, 1942, quoted in 24 Wright & Graham § 5498, at 485; 1 McCormick on Evidence § 94, at 350, while the American Law Institute has suggested a general balancing test, proposing that

> a tribunal be empowered to withhold the privilege of a person then deceased as to a communication that bears on a litigated issue of pivotal significance. The tribunal could balance the interest in confidentiality against any exceptional need for the communication. The tribunal also could consider limiting the proof or sealing the record to limit disclosure.

Restatement § 127, comment d.

The justification for the attorney-client privilege has largely been an instrumental one, resting on a belief that it greatly facilitates—perhaps is essential to—the provision of legal advice. Such assistance "can only be safely and readily availed of when free from the consequences or the apprehension of disclosure." *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888). In addition, some have

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[3] Drafts of portions of the Restatement (Third) of the Law Governing Lawyers, including § 127, have been tentatively approved by the American Law Institute's Council and membership but have not yet been finally adopted.

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spoken of privacy concerns, see Frankel, *supra*, at 53-54 & nn.41-45 (citing commentators), but it seems fair to say that these have played at best a secondary role. In any event, because the privilege obstructs the truth-finding process, it is, we have said, to be narrowly construed. *In re Grand Jury Investigation of Ocean Transp.*, 604 F.2d 672, 675 (D.C. Cir. 1979).

The object, presumably, is to maximize the sum of the benefits of confidential communications with attorneys and those of finding the truth through our judicial processes. Even if the focus were solely on truth-seeking, dispensing with the privilege altogether would presumably have negative results. Any rule qualifying the privilege may in at least some cases (once it is adopted) cause some clients to confide less in their attorneys; the communication that is stillborn can never be dislclosed. And abrogation of the privilege would clearly impair the provision of legal services. Except to the extent that limits on the privilege *actually* chill the hoped-for communications, however, its application renders judicial proceedings less accurate.

Wright & Graham's supposition that favoring survival of the privilege after death requires imputing a "Pharaoh-like concern" to clients may be a bit of an exaggeration. But it is surely true that the risk of post-death revelation 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. On one side, criminal liability will have ceased altogether. Civil liability, on the other hand, characteristically continues, and the same impulses that drive people to provide for their families in life clearly create a motive to preserve their estates thereafter.[4] In the middle are reputational concerns. To the

[4] The impulse would also apply to a corporation with which a decedent has been involved, but the privilege there would characteristically belong to the corporation. See, e.g., *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596, 611 n.5 (8th Cir. 1977). Thus rules

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extent that concern over reputation arises from an interest in the sort of treatment a person will receive from others —ranging from mundane matters such as extension of credit to more subtle ones such as how one will be greeted at social events—it ends with death. But there are aspects of after-death reputation that will concern a person while alive—the value to surviving family of being related to (say) an honorable and distinguished person, and the value of one's posthumous reputation simpliciter (the pure Pharaoh effect). In the sort of high-adrenalin situation likely to provoke consultation with counsel, however, we doubt if these residual interests will be very powerful; and against them the individual may even view history's claims to truth as more deserving. To the extent, then, that any post-death restriction of the privilege can be confined to the realm of criminal litigation, we should expect the restriction's chilling effect to fall somewhere between modest and nil.

The costs of protecting communications after death are high. Obviously the death removes the client as a direct source of information; indeed, his availability has been conventionally invoked as an explanation of why the privilege only slightly impairs access to truth. American Bar Association's Committee on the Improvement of the Law of Evidence, quoted in 8 Wigmore § 2299, at 579. Thus the fewer, and the more questionable the remaining sources (e.g., because of witnesses' interest or bias), the greater the relative value of what the deceased has told his lawyer. Although witness unavailability alone would not justify qualification of the privilege, we think that unavailability through death, coupled with the non-existence of any client concern for criminal liability after death,

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regarding termination of the privilege on the biological death of the client are largely irrelevant. For a discussion of the privilege and organizational successors, see 24 Wright & Graham § 5499; 2 Mueller & Kirkpatrick § 200; see also *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343 (1985) (corporate bankruptcy trustee controls and therefore may waive the privilege).

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creates a discrete realm (use in criminal proceedings after death of the client) where the privilege should not automatically apply. We reject a general balancing test in all but this narrow circumstance.

In rejecting two rather ambiguous limitations for privileges—the so-called "control-group" qualification of the attorney-client privilege, *Upjohn Co. v. United States*, 449 U.S. 383 (1981), and a "balancing" test for the psychotherapist-patient privilege, *Jaffee v. Redmond*, 116 S. Ct. 1923 (1996)—the Supreme Court observed, "An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." *Upjohn*, 449 U.S. at 393; *Jaffee*, 116 S. Ct. at 1932. Accordingly, to the extent that the commentators may be read as urging some sort of generalized balancing test for posthumous limitations of the privilege, we disagree. We thus embrace the arguments for such an exception only within the discrete zone of criminal litigation. While we believe that a case-by-case balancing is appropriate *within* that realm, we see no basis for any further exception (apart of course from the long-established exception for litigation among those claiming under the decedent).

Even such a discrete exception, of course, complicates what the lawyer must tell an anxious client about the confidentiality of a prospective conversation. But in assessing that incremental complication, we recognize that even now any belief in an absolute attorney-client privilege is illusory. See Edna S. Epstein, The Attorney-Client Privilege and the Work-Product Doctrine 3 (1997) ("Many communications that clients and lawyers mistakenly believe are privileged in fact are not."). First, even communications made in confidence in the search for legal advice are unprotected if they relate to future illegality (the "crime-fraud exception"). See Wright & Graham § 5501. The dissent contends that a client can be certain whether his communications will fall under the crime-

fraud exception, but this underestimates its slipperiness. We have acknowledged that "there may be rare cases . . . in which the attorney's fraudulent or criminal intent defeats a claim of privilege even if the client is innocent," *In re Sealed Case,* 107 F.3d 46, 49, n.2 (D.C. Cir. 1997), citing *In re Impounded Case (Law Firm),* 879 F.2d 1211, 1213-14 (3d Cir. 1989), which indeed applies the exception in the face of client innocence. And the exception applies not only to crimes and fraud, but to other intentional torts. See *In re Sealed Case,* 754 F.2d 395, 399 (D.C. Cir. 1985) (applies to "crime, fraud or other misconduct"); see also *Irving Trust Co. v. Gomez,* 100 F.R.D. 273, 277 (S.D.N.Y. 1983) (communications unprotected where client who wrongfully deprived another of use of his bank funds reasonably should have known that such conduct constituted "fraud or any other intentional tort"); *Diamond v. Stratton,* 95 F.R.D. 503, 505 (S.D.N.Y. 1982) (no protection where communication in furtherance of intentional infliction of emotional distress).

There is also the ubiquitous exception for litigation between persons claiming under the decedent—although in many contexts (including most imaginable conversations about the White House travel office firings) the improbability of its application would be readily apparent at the outset of the client-lawyer communication. Although this exception is sometimes justified as reflecting the decedent's likely intent, see note 1 *supra,* it does not perfectly track that idea; a decedent might want to provide for an illegitimate child but at the same time much prefer that the relationship go undisclosed. Further, in some states the privilege does not survive the winding up of an estate, Cal. Evid. Code § 954, and in others it may not do so, see Restatement § 127, Reporter's Note, comment c; 24 Wright & Graham § 5498, at 485.[5] Finally, even courts

[5] The record reveals nothing of the status of the decedent's estate in this case, and the Independent Counsel makes no claim based on its status.

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applying the privilege to bar statements of a decedent from a criminal trial have acknowledged that a defendant might in some cases have a constitutional right to offer statements that exonerate him. *John Doe Grand Jury Investigation*, 562 N.E.2d at 71-72 (privilege survives death except where mandated by constitutional considerations); *State v. Doster*, 284 S.E.2d 218, 220 (S.C. 1981) (court upholds exclusion of communications, saying that the defendant was denied not the right to establish his defense but merely "the license to fish into privileged communications"). Compare *Davis v. Alaska*, 415 U.S. 308, 319 (1974) (state interest in anonymity for juvenile offender cannot trump defendant's right of confrontation).

While some of these exceptions are within the client's control, that cannot be said of all. Thus a lawyer who tells his client that the expected communications are absolutely and forever privileged is oversimplifying a bit. (Given the likely impatience of the client with what may seem legalistic detail, the oversimplification may be justifiable; we need not say.) Accordingly the incremental uncertainty introduced by this exception is hardly devastating. And admission of an exception limited to post-death use in criminal proceedings produces none of the murkiness that persuaded the Court in *Upjohn* and *Jaffee* to reject the limitations proposed there.

Even in the realm of criminal proceedings (including grand jury proceedings), this exception should apply only to communications whose relative importance is substantial. Thus, the statements must bear on a significant aspect of the crimes at issue, and an aspect as to which there is a scarcity of reliable evidence. Where there is an abundance of disinterested witnesses with unimpaired opportunities to perceive an unimpaired memory, there would normally be little basis for intrusion on the intended confidentiality. This should limit release to contexts where not only is the risk of chilling effect slight but

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keeping the communications secret would be quite costly. Cf. *In re Sealed Case*, 116 F.3d 550, 577 (D.C. Cir. 1997) (need shown where "it is likely that the subpoenaed materials contain important evidence and . . . this evidence, or equivalent evidence, is not practically available from another source").

Review by the district court *in camera* may play a role in application of this exception. Where the proponent has offered facts supporting a good faith reasonable belief that the materials may qualify for the exception (a standard plainly met here by the Independent Counsel), the district court should in its sound discretion examine the communications to see whether they in fact do. See *United States v. Zolin*, 491 U.S. 554, 570-72 (1989). To the extent that the court finds an interest in confidentiality, it can take steps to limit access to these communications in a way that is consonant with the analysis justifying relaxation of the privilege.[6] See 2 Mueller & Kirkpatrick § 199, at 380-81.

Work-Product Privilege

The work-product privilege created by *Hickman v. Taylor*, 329 U.S. 495 (1947), may in some cases protect more material than the attorney-client privilege, because it "protects both the attorney-client relationship and a complex of individual interests particular to attorneys that their clients may not share." *In re Sealed Case*, 676 F.2d 793, 809 (D.C. Cir. 1982). The "opinions, judgments, and thought processes of counsel" are generally protected, and the person seeking them must show extraordinary justification. *Id.* at 809-10. For relevant, nonprivileged facts, however, their being embodied in work product

[6] In considering the interest in confidentiality, the court may in appropriate circumstances protect innocent third parties from disclosure as well. Here, of course, Federal Rule of Criminal Procedure 6(e)'s provision of secrecy for grand jury proceedings gives additional protection.

merely shifts the standard presumption in favor of discovery, so that they are discoverable where the person seeking discovery satisfies the standard of Rule 26(b)(3) of the Federal Rules of Civil Procedure, which requires a showing of "substantial need" and "the inability to obtain the substantial equivalent of the information . . . from other sources without 'undue hardship.'" *Id.* at 809 n.59 (identifying that language as an expression of *Hickman's* "adequate reasons" formula).[7]

The district court found that the notes were protected by the work-product privilege because they "reflect the mental impressions" of the attorney. In *Upjohn Co. v. United States,* 449 U.S. 383 (1981), the Court observed that "[f]orcing an attorney to disclose notes and memoranda of witnesses' oral statements is particularly disfavored because it tends to reveal the attorney's mental processes." *Id.* at 399. But the Court did not decide whether factual elements embodied in such notes should be accorded the virtually absolute protection that the privilege gives to the attorney's mental impressions. *Id.* at 401. Indeed, its reasoning seems to presuppose that such notes are analytically divisible; in refraining from formulation of a specific test, the Court said that the notes in question represented *either* communications protected by the attorney-client privilege (which was applicable, in contrast to the present case) *or* mental impressions protected by work-product privilege. *Id.*; see also *United States v. Paxson,* 861 F.2d 730, 736 (D.C. Cir. 1988) (noting that *Upjohn* did not formulate a test for factual matter embodied in lawyer's notes on conversations with

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[7] Because of this apparent identity between the common law standard and that of Rule 26(b)(3), it appears to make little difference whether Federal Rule of Civil Procedure 81(a)(3) merely makes Rule 26 applicable to the procedure of litigation over grand jury subpoenas or also defines the substance of the privilege. See *In re Sealed Case,* 676 F.2d at 808 n.49.

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witnesses and finding in the case before it no "strong showing" of necessity).

In *In re Sealed Case,* 856 F.2d 268 (D.C. Cir. 1988), a party asked Securities and Exchange Commission lawyers on deposition for their *recollections* of witness interviews. Citing *Upjohn,* 449 U.S. at 401-02, we said that "[a]s the work product sought here is based on oral statements from witnesses, a far stronger showing is required than the 'substantial need' and 'without undue hardship' standard applicable to discovery of work-product protected documents and other tangible things." *Sealed Case,* 856 F.2d at 273. And in *Allen v. McGraw,* 106 F.3d 582, 607-08 (4th Cir. 1997), the court upheld the privilege as to the *contested* portion of an attorney's memo of an interview, observing that those portions "tend[ed] to indicate the focus of [the lawyer's] investigation, and hence, her theories and opinions regarding this litigation." See also *Cox v. Administrator, U.S. Steel,* 17 F.3d 1386, 1422 (11th Cir. 1994).

All three of the above cases involved interviews conducted as part of a litigation-related investigation. (Our *Sealed Case,* 858 F.2d 268, in addition involves unrecorded recollections of interviews and was thus not within the coverage of Rule 26(b)(3). Accordingly, as *Allen* reasoned, the facts elicited necessarily reflected a focus chosen by the lawyer. Here the interview was a preliminary one initiated by the client. Although the lawyer was surely no mere potted palm, one would expect him to have tried to encourage a fairly wide-ranging discourse from the client, so as to be sure that any nascent focus on the lawyer's part did not inhibit the client's disclosures.

Accordingly, unless the general possibility that purely factual material may reflect the attorney's mental processes (either in questioning or in recording) is enough to shroud all lawyers' notes in the super-protective envelope

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reserved by Rule 26(b)(3) for "mental impressions," we think such material should be reachable when true necessity is shown. Where the context suggests that the lawyer has not sharply focused or weeded the materials, the ordinary Rule 26(b)(3) standard should apply.

Our brief review of the documents reveals portions containing factual material that could be classified as opinion only on a virtually omnivorous view of the term. We cannot therefore accept the district court's conclusion that they are protected in their entirety.

* * *

We reverse and remand the case to the district court to reexamine the documents in light of this opinion. The documents may be redacted so that the grand jury receives only those portions that are protected by neither the attorney-client nor the work-product privilege.

So ordered.

TATEL, *Circuit Judge,* dissenting: * Offered no persuasive reason to depart from the common law's posthumous protection of the attorney-client privilege and appreciating its importance in encouraging "full and frank communication" by clients with their lawyers, I would affirm the distirct court's judgment that the privilege protects the attorney's notes of his conversation with his now-deceased client. I therefore need not consider whether the notes are attorney work product.

I

Finding its first expression in the courts of Elizabethan England, *see* 8 WIGMORE, EVIDENCE § 2290 (McNaughton rev. 1961), and accepted in the courts of the United States from the earliest days of the republic, *see, e.g., Chirac v. Reinicker,* 24 U.S. 280, 294 (1826), the attorney-client privilege is the oldest privilege for confidential communications known to the common law. Extending well beyond protecting the interests of clients, the privilege "encourage[s] full and frank communication between attorneys and their clients and thereby promte[s] broader public interests in the observance of law and administration of justice." *Upjohn Co. v. United States,* 449 U.S. 383, 389 (1981). Fully informed lawyers participating in the legal system as officers of the court sharpen the adversary process, thus improving the quality of judicial decisionmaking and the development of the law. By encouraging individuals to consult lawyers and disclose to them candidly and fully, the attorney-client privilege also allows the nation's legal profession to help individuals understand their legal obligations and facilitate their voluntary compliance with them. Such voluntary compliance is particularly important to a free society which neither has nor should want sufficient law enforce-

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* In order to preserve the secrecy of the grand jury proceedings, selected portions of this dissent have been deleted from the published opinion.

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ment resources to search out and punish every violation of every law. *See id.; see also Trammel v. United States,* 445 U.S. 40, 51 (1980); *In the Matter of a John Doe Grand Jury Investigation,* 562 N.E.2d 69, 70 (Mass. 1990).

The attorney-client privilege recognizes that sound legal advice does not "spring from lawyers' heads as Athena did from the brow of Zeus," *In re Sealed Case,* 737 F.2d 94, 99 (D.C. Cir. 1984), but instead depends "upon the lawyer's being fully informed by the client." *Upjohn,* 449 U.S. at 389. Although on occasion the attorney-client privilege can "ha[ve] the effect of withholding relevant information from the fact-finder," *Fisher v. United States,* 425 U.S. 391, 403 (1976), courts sustain the privilege in individual cases to accomplish its larger systemic benefits —the greater law compliance and fairer judicial proceedings resulting from the "sound legal advice [and] advocacy" the privilege promotes. *Upjohn* at 389.

Like the spousal, priest-penitent, and psychotherapist-patient privileges, the attorney-client privilege is " 'rooted in the imperative need for confidence and trust.' " *Jaffee v. Redmond,* 116 S. Ct. 1923, 1928 (1996) (quoting *Trammel,* 445 U.S. at 51). As the Supreme Court recognized more than a century ago, the assistance of counsel "can only be safely and readily availed of when free from the consequences or the apprehension of disclosure." *Hunt v. Blackburn,* 128 U.S. 464, 470 (1888). Because individuals frequently seek legal counsel concerning embarrassing, disgraceful, or criminal conduct, "the mere possibility of disclosure" of communications about such subjects may "impede development of the confidential relationship," *Jaffee,* 116 S. Ct. at 1928, thereby eroding the substantial benefits to the justice system afforded by well-informed legal counsel. Lawyers who have represented clients in sensitive matters know the key words to full disclosure:

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> I cannot represent you effectively unless I know everything. I will hold all our conversations in the strictest of confidence. Now, please tell me the whole story.

Since at least the mid-nineteenth century, the common law has protected the attorney-client privilege after a client's death. *See, e.g., Hart v. Thompson's Executor*, 15 La. 88, 93 (1840) (upholding privilege after client's death); SIMON GREENLEAF, 1 TREATISE ON THE LAW OF EVIDENCE 310 (1850) (privilege not affected by death of client). Other than in testamentary disputes, for which there exists a well-established and independently justified exception not applicable to the case before us, *see, e.g., Glover v. Patten*, 165 U.S. 394, 406-08 (1897), both state and federal courts have consistently followed the common law rule, whether the privilege is claimed in civil litigation, *see e.g., United States v. Osborn*, 561 F.2d 1334 (9th Cir. 1977); *Baldwin v. Commissioner of Internal Revenue*, 125 F.2d 812, 814 (9th Cir. 1942); *People v. Pena*, 198 Cal. Rptr. 819, 828 (Cal. Ct. App. 1984); *Lamb v. Lamb*, 464 N.E.2d 873, 877 (Ind. Ct. App. 1984); *Bailey v. Chicago, Burlington & Quincy R.R. Co.*, 179 N.W.2d 560, 564 (Iowa 1970), or in criminal proceedings, *see, e.g., State v. Macumber*, 544 P.2d 1084, 1086 (Ariz. 1976); *John Doe Grand Jury Investigation*, 562 N.E.2d at 72; *People v. Modzelewski*, 611 N.Y.S.2d 22, 23 (N.Y. App. Div. 1994); *Cooper v. State*, 661 P.2d 905, 907 (Okla. 1983); *State v. Doster*, 284 S.E.2d 218, 219 (S.C. 1981); *see also* 8 WIGMORE, EVIDENCE § 2323 & n.2 (citing additional cases). Incorporated in the model codes of evidence, *see id.* § 2292 n.2 (quoting Uniform Rule of Evidence § 26(1)); MODEL CODE OF EVIDENCE, Rule 209(c)(i) (1942), adopted by the Supreme Court's Advisory Committee, *see* 1 MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE 521 (discussing Standard 503), and codified by at least twenty state legislatures, *see, e.g.*, GREGORY P. JOSEPH & STEPHEN A. SALZBURG, EVIDENCE IN AMERICA: THE FEDERAL RULES IN THE STATES

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§ 24.2 (1992) (citing 19 state codes); CAL. EVID. CODE § 953 (West 1995), the common law rule admits "no exception" that outside the testamentary context, the attorney-client privilege survives the client's death. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 127 cmt. d (Proposed Final Draft No. 1, 1996); *see also id.* (citing additional authorities); EDNA S. EPSTEIN, THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE 234 (3d ed. 1997) ("The duration of the privilege, once it attaches, persists unless the lawyer is released by the client. Upon the death of the client, no release is possible. Hence death should seal the lawyer's lips forever.").

Although rarely articulated, the rationale underlying the common law rule makes sense. By preserving the privilege after the client's death, the law ensures that the privacy afforded those who confide in counsel extends to those who would otherwise take their secrets to the grave. The common law rule thus encourages individuals to seek legal advice, bringing the benefit of such consultation to themselves, the legal system, and society. *See Fisher*, 425 U.S. at 403 ("As a practical matter, if the client knows that damaging information could more readily be obtained from the attorney following disclosure than from himself in the absence of disclosure, the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice."). As Wigmore explains:

> The subjective freedom of the client, which it is the purpose of the privilege to secure . . ., could not be attained if the client understood that, when the relation ended or even after the client's death, the attorney could be compelled to disclose the confidences, for there is no limit of time beyond which the disclosures might not be used to the detriment of the client or of his estate.

8 WIGMORE, EVIDENCE § 2323.

II

Justifiably unwilling to embrace the Independent Counsel's call for wholesale abrogation of the privilege in federal criminal cases after a client's death, the court today adopts a balancing test under which posthumous availability of the privilege turns on an ex post facto assessment of the evidence's importance, a test that neither party to this litigation advocates and that, notwithstanding protestations to the contrary, Maj. Op. at 3-4, represents a dramatic departure from the common law rule. The court cites no cases supporting its new rule, relying instead on views of commentators never accepted by any court or legislature. *See, e.g.*, 24 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5498 (1986 & Supp. 1997); Maj. Op. at 4-5. The court sees particular significance in a draft revision of the Restatement (Third) of the Law Governing Lawyers supporting a posthumous exception to the common law rule. Maj. Op. at 5. The Restatement, however, candidly acknowledges that "no court or legislature has adopted" such an exception. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 127, cmt. d (Proposed Final Draft No. 1, 1996). The court also observes that the common law rule is most often stated in cases involving the testamentary exception and that "holdings actually *manifesting* the posthumous force of the privilege are relatively rare." Maj. Op. at 3. These observations prove nothing. Such holdings appear rarely not because judicial recognition of a posthumous privilege is "tepid," *id.* at 3, but because situations where the attorney-client privilege is challenged after a client's death occur rarely. Most significantly, in all but one reported case where the attorney-client privilege was challenged after a client's death, courts have upheld the privilege, even where the result denied critical information to the trier of fact. *See, e.g., John Doe Grand Jury Investigation*, 562 N.E.2d at 72 (attorney could not be compelled

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to testify about what deceased client told him prior to committing suicide, even though the testimony might have brought an end to murder investigation); *Macumber*, 544 P.2d at 1068 (trial court properly excluded testimony of two attorneys that a person other than the defendant had confessed to them of committing the murder for which defendant was tried); *see also* Simon J. Frankel, *The Attorney-Client Privilege After the Death of the Client*, 6 GEO. J. LEGAL ETHICS 45, 65 (1992). *But see Cohen v. Jenkintown Cab Co.*, 357 A.2d 689, 693 (Pa. Super. Ct. 1976) (where testimony sought did not contain "scandalous and impertinent matter which would serve to blacken the memory" of the deceased client, and where need for testimony is "clearly established," court could compel attorney to testify).

There is a very good reason why no case law supports my colleague's new balancing test: unless clients know before consulting their lawyers exactly what information the privilege protects—knowledge denied by the court's balancing test—few will confide candidly and fully. After this decision, lawyers will have to add an important caveat to what they advise their clients about confidentiality:

> I cannot represent you effectively unless I know everything. I will hold all our conversations in the strictest of confidence. *But when you die, I could be forced to testify—against your interests—in a criminal investigation or trial, even of your friends or family, if the court decides that what you tell me is important to the prosecution.* Now, please tell me the whole story.

Because clients so advised will not know whether their confidences will be protected, they will be less likely to disclose sensitive or potentially inculpatory information. "If the purpose of the attorney-client privilege is to be served," said the Supreme Court in *Upjohn*, "the attorney and client must be able to predict with some degree of

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certainty whether particular discussions will be protected." *Upjohn,* 449 U.S. at 393. As the Court put it, "[a]n uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." *Id.* Consistent with this reasoning, federal courts uniformly hold that where applicable, the attorney-client privilege, unlike qualified privileges, *see, e.g., In Re Sealed Case,* 116 F.3d 550 (D.C. Cir. 1997) (dealing with executive privilege and requiring specific demonstration of evidence's importance to grand jury investigation and unavailability from other sources), cannot be overridden by a showing of need. *See, e.g., Admiral Ins. Co. v. United States Dist. Ct. for the Dist. of Ariz.,* 881 F.2d 1486, 1494 (9th Cir. 1989) (conditional protection of work product doctrine "cannot logically be extended to support an unavailability exception to the attorney-client privilege"); *In re Grand Jury Subpoena,* 599 F.2d 504, 510 (2d Cir. 1979) (attorney-client privilege is unqualified); MURL A. LARKIN, FEDERAL TESTIMONIAL PRIVILEGES § 2.01, at 2-7 to 2-8 (citing cases and noting that "once the privilege has been held applicable, information protected thereunder may not be the subject of compelled disclosure regardless of the need or good cause shown"). For the same reasons and citing *Upjohn,* the Supreme Court, in the case of the psychoanalyst privilege, rejected a balancing test which, like the one the court adopts today, turned in large part on the importance of the information sought by the prosecution: "Making the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege." *Jaffee,* 116 S. Ct. at 1932.

My colleagues characterize the absolute nature of the attorney-client privilege as "illusory." Maj. Op. at 8. Pointing to the testamentary exception and to the well-accepted proposition that statements relating to future il-

legality find no protection in the attorney-client privilege, they suggest that their new exception, limited to criminal proceedings after the client's death, will likewise not weaken the privilege. Both the testamentary exception and the exclusion of statements of future criminality, however, differ significantly from the balancing test the court adopts today. In those two situations, clients know up front with certainty that the statements they make are unprotected by the privilege. Beyond those two clear situations, clients and their lawyers cannot predict whether a client's statement might some day relate to a criminal investigation, much less whether a court applying my colleagues' balancing test will subsequently decide that the information "bear[s] on a significant aspect of the crimes at issue." *Id.* at 10. Because of this uncertainty, the court's balancing test produces precisely the same "murkiness that persuaded the Court in *Upjohn* and *Jaffee* to reject the limitations proposed there." *Id.* at 10.

The court believes its balancing test will not damage the attorney-client privilege because people are generally indifferent to the effect posthumous disclosures of confidences could have on their reputations. This assumption of the unimportance of posthumous reputation, however, runs counter to the rationale underlying the common law rule. *See* Frankel, *The Attorney-Client Privilege After the Death of the Client* at 61-63 & n.91. It also defies both common sense and experience. From Andrew Carnegie's libraries to Henry Ford's foundation, one need only count the schools and universities, academic chairs and scholarships, charitable foundations, research institutes, and sports arenas—even Acts of Congress—bearing the names of their founders, benefactors, or authors to understand that human beings care deeply about how posterity will view them. Evidence of concern for surviving friends and family likewise abounds: people write wills, convey property, buy life insurance, invest for their children's education, and make guardianship arrangements to protect the interests of

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loved ones. Prominent public officials restrict access to their papers to protect reputations. Of course, such concerns may not influence *every* decision to confide potentially damaging information to attorneys. But because these concerns very well may affect *some* decisions, particularly by the aged, the seriously ill, the suicidal, or those with heightened interests in their posthumous reputations, I cannot accept the court's assumption that the attorney-client relationship will not suffer if the privilege is limited after a client's death. I agree with the Supreme Judicial Court of Massachusetts: "to disclose information given to [an attorney] by a client in confidence, even though such disclosure might be limited to the period after the client's death, would in many instances . . . so deter the client from 'telling all' as to seriously impair the attorney's ability to function effectively." *John Doe Grand Jury Investigation,* 562 N.E.2d at 71.

The facts of the present case vividly illustrate the value a person can place on reputation. As the Independent Counsel acknowledges, *see* Appellant's Br. at 10 n.4, his predecessor, Independent Counsel Robert Fiske, found that the Travel Office matter caused Foster distress and may have contributed to his decision to take his own life. Appellee's Br. at 22 (citing Report of the Independent Counsel In Re Vincent W. Foster, Jr. 10-14 (June 30, 1994)). Revealing the value he placed on personal reputation, Foster told law students in a commencement address shortly before his death: "There is no victory, no advantage, no fee, no favor which is worth even a blemish on your reputation for intellect and integrity. . . . The reputation you develop for intellectual and ethical integrity will be your greatest asset or your worst enemy." *Id.* Foster committed suicide nine days after confiding in his attorney. Although I concede that no single case can prove the utility of maintaining the privilege beyond a client's death, this case seems a particularly inappropriate one in which to abrogate the common law's posthumous protection of the attorney-client privilege.

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The court suggests that because it limits its balancing test to criminal cases and because criminal liability ceases with death, its test will not chill client communications with their lawyers. Maj. Op. at 6-7. But clients often reveal to their lawyers much more than information about their own criminal liability: they may disclose information that could expose friends, family, or business associates to criminal culpability—which does not terminate with the client's death—as well as information that could damage their own reputations. The possible release of such information could chill the attorney-client relationship just as seriously as the release of information about the client's own criminal liability.

The court claims that unless the privilege terminates at the client's death, information will be lost that could have been sought from the client while alive. *Id.* at 7. The common law rule, however, long ago determined that the benefits the legal system gains through recognizing the privilege posthumously outweigh whatever damage might flow from denying information to the factfinder in a particular case. Further balancing on a case by case basis will undermine the privilege. Moreover, if limiting the scope of the privilege deters "full and frank" attorney-client communication, as the common law assumes, who can say that in the absence of the privilege information later sought in criminal proceedings would have been shared with counsel in the first place? As the Supreme Court explained in the psychotherapist privilege context, "[w]ithout a privilege, much of the desirable evidence to which litigants . . . seek access . . . is unlikely to come into being." *Jaffee*, 116 S. Ct. at 1929; *see also* Salzburg, *Privileges and Professionals: Lawyers and Psychiatrists*, 66 VA. L. REV. 597, 610 (1980) ("The privilege creates a zone of privacy in which an attorney and client can create information that did not exist before and might not exist otherwise.") Clients will be particularly reluctant to share critical information with their lawyers in cases where both the client's death and the possibility of crim-

FOIA # none (URTS 16306) DocId: 70105074 Page 58

inal investigation are foreseeable. Perhaps this is such a case, for at oral argument, the deceased's lawyer told us:

> I am not sure of a lot of things in life. I am not certain of why Mr. Foster took his own life, even though I think it's because of the taxing of his reputation and his fear about the trial of this investigation. . . . But I am totally certain, I am totally certain of one thing . . . If I had not assured Mr. Foster that our conversation was a privileged conversation, we would not have had that conversation *and there would be no notes that are the subject of the situation today*. (Emphasis added.)

Nor can I see any way to limit the Court's "information loss" argument to cases in which the client has died. Witnesses unable to remember facts, incompetent to testify, or beyond the court's process likewise deny relevant information to the factfinder. Yet neither the Independent Counsel nor this court suggests that we abrogate the attorney-client privilege to fill in these evidentiary gaps. The unavailability of a witness likewise does no greater harm to the factfinding process than an available witness who testifies inaccurately. Again, no one would suggest that we call upon attorneys to corroborate or correct their clients' every statement. The reason is simple: accepting that some information may be lost to a factfinder, we insulate the attorney-client relationship from the prospect of these intrusions in order to promote the " 'confidence and trust,' " *Jaffee*, 116 S. Ct. at 1928 (quoting *Trammel*, 445 U.S. at 51), necessary for the relationship to work and to afford society its benefits. *See Admiral Insurance Co.*, 881 F.2d at 1494 ("Any inequity in terms of access to information is the price the system pays to maintain the integrity of the privilege."). Neither the court nor the Independent Counsel has offered any convincing reason why a client's death should be treated differently than these other circumstances.

At the end of its discussion of the attorney-client privilege, the court suggests that district courts could protect

clients' interests by ordering that their lawyers' testimony be kept confidential. Maj. Op. at 10. But evidence essential to the prosecution's case at trial cannot ultimately remain confidential. In any event, the privilege's fundamental purpose is to encourage clients to share information with their lawyers, not to maintain the information's confidentiality. Qualified promises of confidentiality—"Don't worry, if I am compelled to reveal what you tell me, the court will make sure that no one hears it other than the U.S. Attorney and the federal grand jury"—are unlikely to encourage worried clients to make candid and full disclosures to their attorneys.

III

The court's decision too readily dismisses the continuing vitality of the common law rule in the states. "It is appropriate to treat a consistent body of policy determinations by state legislatures as reflecting both 'reason' and 'experience.'" *Jaffee*, 116 S. Ct. at 1930 (quoting *Funk v. United States*, 290 U.S. 371, 376-81 (1933)). The fact that the common law's posthumous recognition of the privilege outside testamentary disputes appears to have been embraced by every state that has codified the privilege—and remains the law in those that have not—counsels against casting it aside simply because the Independent Counsel and a few commentators question its usefulness. That the common law rule was likewise adopted by the Supreme Court's Advisory Committee, as well as by the committees who drafted the Model Code of Evidence and the Uniform Rules of Evidence, reinforces the conclusion that "'reason' and 'experience'" support posthumous protection of the attorney-client privilege. *Id.*; *Citibank, N.A. v. Andros*, 666 F.2d 1192, 1195 & n.6 (8th Cir. 1981) (Supreme Court Proposed Federal Rule of Evidence 503(c) useful "as a source for defining the federal common law of attorney-client privilege").

Because the court's balancing test strikes a fundamental blow to the attorney-client privilege and jeopardizes its benefits to the legal system and society, I respectfully dissent.

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APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Filed November 21, 1997

No. 97-3006

IN RE: SEALED CASE

Consolidated with
No. 97-3007

Appeals from the United States District Court
for the District of Columbia
(No. 95ms00446; No. 95ms00447)

BEFORE: EDWARDS, *Chief Judge*; WALD, SILBERMAN, WILLIAMS, GINSBURG, SENTELLE, HENDERSON, RANDOLPH, ROGERS, TATEL and GARLAND, *Circuit Judges*.

On Appellees' Suggestion
for Rehearing *In Banc*

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ORDER

Appellees' Suggestion for Rehearing *In Banc* and the response thereto have been circulated to the full court. The taking of a vote was requested. Thereafter, a majority of the judges of the court in regular active service did not vote in favor of the suggestion. Upon consideration of the foregoing, it is

ORDERED that the suggestion be denied.

A statement of *Circuit Judge* TATEL dissenting from the denial of rehearing *in banc*, in which *Circuit Judge* GINSBURG joins with respect to the issue of attorney-client privilege, is attached.

Circuit Judges SENTELLE and GARLAND did not participate in this matter.

TATEL, *Circuit Judge*, with whom GINSBURG, *Circuit Judge*, joins with respect to the issue of attorney-client privilege, dissenting from the denial of rehearing *in banc*: Dramatically departing from the common law rule that protects the attorney-client privilege after a client's death, and threatening the vitality of that privilege, this case raises issues of exceptional importance worthy of *in banc* consideration. *See* FED. R. APP. P. 35(a)(2). The case especially warrants *in banc* review because the consequences of the court's new balancing test will extend far beyond federal criminal cases in the District of Columbia. Clients involved in civil or criminal proceedings anywhere in the country have no way of knowing whether information they share with their lawyers might someday become relevant to a federal criminal investigation in Washington, D.C. As the Supreme Court noted regarding the psychotherapist privilege, "any State's promise of confidentiality would have little value if the patient were aware that the privilege would not be honored in a federal court." *Jaffee v. Redmond*, 116 S. Ct. 1923, 1930 (1996).

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As I pointed out in my dissent, the common law rule has been incorporated in the Uniform Rules of Evidence and the Model Code of Evidence, adopted by the Supreme Court's Advisory Committee, and codified by at least twenty state legislatures. *In re Sealed Case*, 124 F.3d 230, 238 (D.C. Cir. 1997) (Tatel, J., dissenting). The Independent Counsel cites two cases that have abrogated the privilege after a client's death, but neither is relevant here. In both *State v. Gause*, 489 P.2d 830 (Ariz. 1971), and *State v. Kump*, 301 P.2d 808 (Wyo. 1956), courts held that an accused husband could not invoke the privilege on behalf of his dead wife to bar his wife's lawyer from testifying, a situation quite different from this case where the attorney himself has invoked the privilege on behalf of his deceased client. As the court in *Gause* said, "the privilege is that of the client and must be claimed by the client or someone authorized by law to do so on the client's behalf." *Gause*, 489 P.2d at 834. Until this court's decision, only one reported case—a never-cited opinion of a mid-level Pennsylvania appellate court—actually supported posthumous abrogation of the privilege when asserted by the lawyer in a nontestamentary dispute. *Cohen v. Jenkintown Cab Co.*, 357 A.2d 689 (Pa. Super. Ct. 1976).

According to the Independent Counsel, empirical support is "nonexistent" for the proposition that abrogating the attorney-client privilege after the client's death will chill client communication. Opposition of the United States to Appellees' Petition for Rehearing With Suggestion for Rehearing In Banc at 12. But because the Independent Counsel himself urges overturning the common law rule, and because that rule rests on the proposition that preserving the attorney-client privilege after the client's death is necessary to promote client disclosure, the Independent Counsel bears the responsibility of producing evidence to the contrary. In place of such evidence, he offers only his opinion that "any hypothesized chilling effect would be minimal," *id.*, citing only this court's opinion that it "ex-

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pect[s]" its balancing test's "chilling effect to fall somewhere between modest and nil," *Sealed Case*, 124 F.3d at 233. Without convincing evidence that abrogating the privilege will do no harm to client communications, this court should not abandon centuries of common law.

Invoking a parade of horribles not before us, the Independent Counsel claims that injustice will result if courts cannot abrogate the attorney-client privilege after the client's death. While in some cases the privilege will deny information to the trier of fact, it does so in order to promote a broader and more important value—encouraging the free flow of information from client to lawyer. The common law long ago determined that the benefits gained by recognizing the privilege posthumously outweigh whatever damage might flow from denying information to the trier of fact in any particular case. *Id.* at 241 (Tatel, J., dissenting).

Petitioner also seeks rehearing *in banc* with respect to the court's work product ruling. *Id.* at 235-37. Because drawing a precise line between fact and opinion work product is a difficult and sensitive question with serious implications for the attorney-client relationship, and because I think the court has drawn the line in the wrong place, this issue also warrants *in banc* review.

The court's conclusion that because the interview was "preliminary" and "initiated" by the client, the lawyer may not have "sharply focused or weeded" the words of the client, *id.* at 236, reflects a view of the lawyer's role very different from my own experience. No lawyer approaches a client's problems with a "blank slate." Appellee's Petition for Rehearing With Suggestion for Rehearing En Banc at 14. Even at a first meeting, regardless of who initiates it, lawyers bring their own judgment, experience, and knowledge of the law to conversations with clients. Of course lawyers may want to encourage wide-ranging discussions at first meetings, but they do so in order to draw out and

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record information they think might be important. Unless they take verbatim notes, the questions they ask and those facts they write down reflect their own views about what is important to their client's case. Whether courts can require production of attorney work product should turn not on the stage of representation or who initiates a meeting, but on whether the attorney's notes are entirely factual, or whether they instead represent the "opinions, judgments, and thought processes of counsel." *In re Sealed Case*, 676 F.2d 793, 809 (D.C. Cir. 1982).

The notes in this case demonstrate quite clearly that the lawyer actively exercised his judgment when interviewing his client. In two hours, he created only three pages of notes. Far from taking verbatim notes, the lawyer obviously wrote down what he thought was significant, omitting everything else. The notes bear the markings of a lawyer focusing the words of his client; he underlined certain words, placing both checkmarks and question marks next to certain sections. The notes clearly represent the opinions, judgments, and thought processes of counsel.

After this decision, no lawyer will risk having his notes end up before a grand jury because of a judicial finding that he had not "sharply focused or weeded" the words of the client; lawyers will simply stop taking notes at early, critical meetings with clients. Not only will this damage the ability of lawyers to represent their clients but in the end there will be no notes for grand juries to see. Similar consequences, of course, may flow from the court's new attorney-client privilege balancing test; advised that their disclosures might be unprotected after death, clients may simply not talk candidly. As the Supreme Court noted in the psychotherapist privilege context, "[w]ithout a privilege, much of the desirable evidence to which litigants . . . seek access . . . is unlikely to come into being." *Jaffee*, 116 S. Ct. at 1929. This court's two new holdings—one chilling client disclosure, the other chilling lawyer note-

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taking—will damage the quality of legal representation without producing any corresponding benefits to the fact-finding process.

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APPENDIX C

[Filed Jan. 7, 1997]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Misc. No. 95-446 JGP
(UNDER SEAL)

IN RE GRAND JURY No. 95-1
Subpoena *duces tecum* to
SWIDLER & BERLIN

ORDER

The Memorandum Order filed in this matter on December 16, 1996 is corrected to reflect the following change in the caption: "IN RE GRAND JURY NO. 95-2" in place of "IN RE GRAND JURY NO. 95-1."

SO ORDERED

[Jan. 4, 1997]

/s/ John Garrett Penn
JOHN GARRETT PENN
Chief Judge

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[Filed Dec. 16, 1996]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Misc. No. 95-446 JGP
(UNDER SEAL)

IN RE GRAND JURY NO. 95-1
Subpoena *duces tecum* to
SWIDLER & BERLIN

MEMORANDUM ORDER

This matter comes before the Court of the Motion To Quash Or Modify Grand Jury Subpoena. Actually, there are two subpoenas, one issued to James Hamilton, an attorney, and the other to Hamilton's law firm, Swidler & Berlin.[1] This litigation arises out of the so-called "Whitewater" investigation being conducted by Independent Counsel Kenneth Starr. As a part of that investigation, the Independent Counsel is also investigating the circumstances surrounding the death of Vincent Foster, who served as Deputy White House Counsel. Also pending before the Court are the Motions To Intervene, filed by Lisa Foster, Mr. Foster's widow, and Sheila Anthony, Mr. Foster's sister. The Court will grant the motions to intervene.

Very briefly, the underlying facts are as follows: On the evening of July 20, 1993, Vincent Foster was found dead of a gunshot wound in Fort Marcy Park, Virginia. On the following day, the Foster family retained Hamilton and Swidler & Berlin to represent them.[2] Hamilton Affidavit,

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[1] A separate matter and case number have been assigned for each case.

[2] The family members represented include Foster's wife, Lisa Foster, his children, Vincent, Laura and John Brugh Foster, his

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¶ 3. The movants assert that "[a]fter extensive investigations, the United States Park Police, the Department of Justice, Independent Counsel Robert Fiske,[3] and Senate Banking Committee, among others, concluded that he [Vincent Foster] had committed suicide in Fort Marcy Park." Hamilton Affidavit, ¶ 1.

Hamilton states that he was retained to represent the family because of his experience in litigation and civil, criminal and Congressional investigations, "particularly those involving highly-publicized matters." He asserts that he was not retained because of any expertise in probate, estate or business law. In considering the pending motions, the Court accepts those representations. He goes on to state that "from the outset" he and the law firm anticipated that litigation "could well occur in various forms." See Hamilton Affidavit, ¶¶ 18-32. Hamilton states that in the course of his representation of the family, he has spoken to "numerous persons, conducted substantial legal research, engaged in litigaton, and communicated our views in writing to various government bodies." Hamilton Affidavit, ¶ 17. He goes on to state that "[t]hroughout our representation we have on many occasions made notes of our conversations with third parties, our conversations with our clients, our internal firm conferences and analysis and our research, observations and analysis. These notes embody our mental impressions, conclusions, opinions, theories, thought processes, selection of topics of importance, and strategies. In our view, they are not only work product, but in many instances they are core work product." Hamilton Affidavit, ¶ 17. The movants contend that counsel anticipated that "litigation could result from overreaching investigations," that there might be Freedom

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mother, Alice Mae Foster, his sisters, Sharon Bowman and Sheila Anthony, and Beryl Anthony, Sheila Anthony's husband. Hamilton Affidavit, ¶ 3.

[3] Mr. Fiske was succeeded as Independent Counsel by Kenneth Starr.

of Information Act (FOIA) litigation "regarding Mr. Foster's now-famous note," that family members and their lawyers could become witnesses in litigation and in other proceedings, that litigation could result against family members "if they misspoke in giving evidence," and that counsel anticipated "litigation by the family to protect the family's privacy interests, redress defamation, or remedy misuses of Mr. Foster's name and image."

The movants argue that the subpoenas are unreasonable and oppressive and should be quashed or modified because they seek materials protected by the work product doctrine and the attorney-client and common interest privileges.

After the motions to quash were filed, the Court required the movants to furnish the contested documents to the Court for its *in camera* review. The Court also required the movants to file a privilege log identifying the date, author, addressee and description of the documents and the privilege claimed for each document. The movants filed a privilege log and then an amended privilege log. The movants claim a privilege for all documents under the work product doctrine. With respect to a few documents, they claim, in addition to work product, attorney-client privilege, common interest privilege, or both.

As may be expected, the Independent Counsel has a much different view of the subpoenaed documents. He notes that the subpoenas were issued as part of Independent Counsel's grand jury investigation into possible criminal violations involving the death of Mr. Foster and to determine whether individuals made false statements or obstructed justice in connection with the investigation into the firing of employees of the White House Travel Office in May 1993. The Independent Counsel disputes the movants' claim that the work product doctrine is applicable under the acts in this matter based upon his contention that the grand jury "ordinarily" has a right to obtain "all" relevant non-privileged evidence and further because the

documents were not prepared in anticipation of litigation. Independent Counsel goes on to argue that even if a document was prepared in anticipation of litigation, that alone will not exempt it from production to the grand jury. He argues that a balancing test must be applied to determine whether disclosure is nevertheless warranted. Independent Counsel also argues against invocation of attorney-client privilege and the comman interest rule. Finally, the Independent Counsel draws a distinction between documents relating to conversations *before* the death of Vincent Foster and those documents created *after* his death.

The Court will now turn to a discussion of those privileges as they relate to the subject documents.

I

The most important issue raised in this document request is whether the documents sought by the Independent Counsel are protected from production under the work product doctrine. Any discussion of that doctrine or privilege must begin with the decision in *Hickman v. Taylor*, 329 U.S. 495, 76 S.Ct. 385 (1947). There, the Supreme Court observed:

> Historically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients. In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion of opposing parties and their counsel. Proper preparation of a clients's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests.

> *This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways*—aptly though roughly termed by the Circuit Court of Appeals in this case (153 F.2d 212, 223) as the "Work product of the lawyer." Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. And the interests of the clients and the cause of justice would be poorly served.
>
> We do not mean to say that all written materials obtained or prepared by an adversary's counsel with an eye toward litigation are necessarily free from discovery in all cases. Where relevant and non-privileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's cases, discovery may properly be had.

329 U.S. at 510-11, 67 S.Ct. A 393-94 (emphasis this Court's). Thirty-four years later, the Supreme Court reaffirmed the "strong public policy" underlying the work product doctrine in *United States v. Nobles,* 422 U.S. 225, 95 S.Ct. 2160 (1975). *Upjohn Company v. United States,* 449 U.S. 383, 398, 101 S.Ct. 677, 686 (1981).

The Court of Appeals for this Circuit has made clear that the work product doctrine applies to matters pending before a federal grand jury. *In re Sealed Case*, 308 U.S. App.D.C. 69, 29 F.3d 715 (1994). Moreover, that case is instructive because the court noted:

> In rejecting the appellant's assertion of the privilege, the district court indicated that the privilege was inapplicable because no grand jury investigation had commenced at the time. We disagree. The work

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> product privilege protects any material obtained or prepared by a lawyer *"in the course of his legal duties, provided that the work was done with an eye toward litigation."* Even though the grand jury investigation had not begun when the Lawyer met with the appellant and prepared his file, he may well have had an eye toward litigation.

308 U.S.App.D.C. at 72, 29 F.3d at 718 (citations omitted, emphasis this Court's). The court went on to state: "In determining whether the materials in the Lawyer's files arre protected by the work product privilege, 'the testing question is whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation." *Id.* (citation omitted).

Although the movants resisted the preparation of a privilege log, the Court required them to submit a privilege log to the Court and Independent Counsel. After reviewing the privilege log, Independent Counsel advised the Court and the movants that the "the log has enabled us to cull out documents that we do not need or that are, in our view privileged. We thus are able to focus our argument to this Court on particular classes of documents."

II

Before addressing the documents now identified by the Independent Counsel based on the privilege log, the Court finds that all of the documents were prepared in anticipation of or with an eye toward litigation. This finding is based upon the affidavit of Mr. Hamilton and the Court's *in camera* review of the documents. The Court also observes that general experience in matters of this nature cannot help but lead all but the most unsophisticated person to conclude that there would be an investigation into the facts and circumstances of Mr. Foster's death and that

an eager media would seek to obtain materials which the family may wish to hold private. Moreover, political reality makes very clear that the matter would be subject to grand jury investigation, Congressional hearings and intense public scrutiny. It can hardly be doubted that, as Mr. Hamilton has stated, the material was collected with an eye toward litigation in one form or another.

After reviewing the privilege log, the Independent Counsel identified specific documents he wanted produced. The Court concludes that, with respect to those documents not so identified, the Independent Counsel has withdrawn his request for their production. As has the Independent Counsel, the Court will identify the documents by their "Bates" number or numbers. The Court will now discuss the documents in the order identified by Independent Counsel in his opposition to the motion.

Documents 2774-2883.

Independent Counsel has requested Documents 2774-2882. Document 2774-2802 is the White House Travel Office Management Review which contains handwritten notes and notations in the form of comments and under linings made by James Hamilton. Movants assert a work product privilege and describe the document as: "Handwritten notes on 7/2/93 White House Travel Office Management Review Report made in anticipation of meeting with Vincent Foster concerning possible representation." The Court finds that this document, as described in the privilege log, should be exempt from disclosure to the grand jury. It contains notes and underlining which represent the mental impressions of the attorney. Although this document was prepared before Mr. Foster's death, the Court concludes that Foster was consulting Hamilton as an attorney and possibly to represent him. Finally in applying the balancing test for this document, the Court finds nothing in the document which would suggest that the grand jury's need for the document outweighs the privilege. This document need not be produced.

* * * *

[Two paragraphs of this opinion at this point are still under seal. They have no impact on this case. We have lodged with the Clerk 10 unredacted copies of this opinion.]

* * * *

With respect to Hamilton's meeting with Foster on July 11, 1993, the Independent Counsel seeks documents 2774-2882. Document 2774-2802 is the White House Travel Office Management Review which contains some handwritten notations in the form of comments and underlining made by James Hamilton. The Court finds that the movants have properly asserted work product with respect to this group of documents. Certainly there was a concern about the implications of certain actions and decisions of the White House Counsel and Mr. Hamilton reviewed the documents with this in mind. The notations and underlined portions of the document is evidence of Hamilton mental impressions.

Documents 490-492, 528-30, 569-71.

These documents are described in the privilege log as "[h]andwritten notes regarding conversation with Vincent Foster about possible representation." Movants claim work product and the attorney-client privilege. The three documents appear to be copies of the same document. Hamilton is the author of the notes. The Court concludes that the notes are privileged. They were made at a time when Hamilton met with Foster to discuss possible representation of Foster. It appears clear that Foster spoke with Hamilton as an attorney and a review of the notes supports that finding. Moreover, one of the first notations on the document is the word: "Privileged," so it is obvious that the parties, Hamilton and Foster, viewed this as a privileged conversation and the notes of that conversation as privileged, both under the attorney-client privilege and as work product. These notes and others that are discussed are a demonstration of why "it is essential

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that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel." *Hickman v. Taylor*, 329 U.S. at 510, 67 S.Ct. at 393. The written notes reflect the mental impressions of the lawyer and there is nothing in the record which suggests that any need by the grand jury trumps the privileges. The documents need not be produced.

* * * *

[12 paragraphs of this opinion at this point are still under seal. They have no impact on this case. We have lodged with the Clerk 10 unredacted copies of this opinion.]

* * * *

In sum, the Court concludes that the documents are privileged for the reasons stated above and further, that in applying a balancing test, the need of the grand jury does not outweigh the privileges asserted.

The Court has reviewed the remaining documents, including those no longer requested by the Independent Counsel, and concludes that they are privileged for the reasons stated in the privilege log.

It is hereby

ORDERED that the motions to intervene filed by Lisa Foster and Sheila Anthony are granted, and it is further

ORDERED that the motion to quash or modify grand jury subpoena is denied in part and granted in part; the motion to quash the subpoena is denied, and the motion to modify is granted in that, consistent with this Memorandum Order, Swidler & Berlin is not required to produce the documents described in the privilege log.

[Dec. 16, 1996]

/s/ John Garrett Penn
JOHN GARRETT PENN
Chief Judge

APPENDIX D

[Filed Jan. 7, 1997]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Misc. No. 95-447 JGP
(UNDER SEAL)

IN RE GRAND JURY No. 95-2
Subpoena *duces tecum* to
JAMES HAMILTON

ORDER

The Memorandum Order filed in this matter on December 16, 1996 is corrected to reflect the following change in the caption: "IN RE GRAND JURY NO. 95-2" in place of "IN RE GRAND JURY NO. 95-1."

SO ORDERED

[Jan. 4, 1997]

/s/ John Garrett Penn
JOHN GARRETT PENN
Chief Judge

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[Filed Dec. 16, 1996]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Misc. No. 95-447 JGP
(UNDER SEAL)

IN RE GRAND JURY NO. 95-1
Subpoena *duces tecum* to
JAMES HAMILTON

MEMORANDUM ORDER

This matter comes before the Court on the Motion To Quash Or Modify Grand Jury Subpoena. Actually, there are two subpoenas, one issued to James Hamilton, an attorney, and the other to Hamilton's law firm, Swidler & Berlin.[1] This litigation arises out of the so-called "Whitewater" investigation being conducted by Independent Counsel Kenneth Starr. As a part of that investigation, the Independent Counsel is also investigating the circumstances surrounding the death of Vincent Foster, who served as Deputy White House Counsel. Also pending before the Court are the Motions To Intervene, filed by Lisa Foster, Mr. Foster's widow, and Sheila Anthony, Mr. Foster's sister. The Court will grant the motions to intervene.

Very briefly, the underlying facts are as follows: On the evening of July 20, 1993, Vincent Foster was found dead of a gunshot wound in Fort Marcy Park, Virginia. On the following day, the Foster family retained Hamilton

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[1] A separate matter and case number have been assigned for each case.

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and Swidler & Berlin to represent them.[2] Hamilton Affidavit, ¶ 3. The movants assert that "[a]fter extensive investigations, the United States Park Police, the Department of Justice, Independent Counsel Robert Fisks [3], and the Senate Banking Committee, among others, concluded that he [Vincent Foster] had committed suicide in Fort Marcy Park." Hamilton Affidavit, ¶ 1.

Hamilton states that he was retained to represent the family because of his experience in litigation and civil, criminal and Congressional investigations, "particularly those involving highly-publicized matters." He asserts that he was not retained because of any expertise in probate, estate or business law. In considering the pending motions, the Court accepts those representations. He goes on to state that "from the outset" he and the law firm anticipated that litigation "could well occur in various forms." *See* Hamilton Affidavit, ¶¶ 18-32. Hamilton states that in the course of his representation of the family, he has spoken to "numerous persons, conducted substantial legal research, engaged in litigation, and communicated our views in writing to various government bodies." Hamilton Affidavit, ¶ 17. He goes on to state that "[t]houghout our representation we have on many occasions made notes of our conservations with third parties, our conservations with our clients, our internal firm conferences and analysis and our research, observations and analysis. These notes embody our mental impressions, conclusions, opinions, theories, thought processes, selection of topics of importance, and strategies. In our view,

---

[2] The family members represented include Foster's wife, Lisa Foster, his children, Vincent, Laura and John Brugh Foster, his mother, Alice Mae Foster, his sisters, Sharon Bowman and Sheila Anthony, and Beryl Anthony, Sheila Anthony's husband. Hamilton Affidavit, ¶ 3.

[3] Mr. Fiske was succeeded as Independent Counsel by Kenneth Starr.

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they are not only work product, but in many instances they are core work product." Hamilton Affidavit, ¶ 17. The movants contend that counsel anticipated that "litigation could result from overreaching investigations," that there might be Freedom of Information Act (FOIA) litigation "regarding Mr. Foster's now-famous note," that family members and their lawyers could become witnesses in litigation and in other proceedings, that litigation could result against family members "if they misspoke in giving evidence," and that counsel anticipated "litigation by the family to protect the family's privacy interests, redress defamation, or remedy misuses of Mr. Foster's name and image."

The movants argue that the subpoenas are unreasonable and oppressive and should be quashed or modified because they seek materials protected by the work product doctrine and the attorney-client and common interest privileges.

After the motions to quash were filed, the Court required the movants to furnish the contested documents to the Court for its *in camera* review. The Court also required the movants to file a privilege log identifying the date, author, addressee and description of the documents and the privilege claimed for each document. The movants filed a privelege log and then an amended privilege log. The movants claim a privilege for all documents under the work product doctrine. With respect to a few documents, they claim, in addition to work product, attorney-client privilege, common interest privilege, or both.

As may be expected, the Independent Counsel has a much different view of the subpoenaed documents. He notes that the subpoenas were issued as part of Independent Counsel's grand jury investigation into possible criminal violations involving the death of Mr. Foster and to determine whether individuals made false statements or obstructed justice in connection with the investigation into the firing of employees of the White House Travel Office

in May 1993. The Independent Counsel disputes the movants' claim that the work products doctrine is applicable under the facts in this matter based upon his contention that the grand jury "ordinarily" has a right to obtain "all" relevant non-privileged evidence and further because the documents were not prepared in anticipation of litigation. Independent Council goes on to argue that even if a document was prepared in anticipation of litigation, that alone will not exempt it from production to the grand jury. He argues that a balancing test must be applied to determine whether disclosure is nevertheless warranted. Independent Counsel also argues against invocation of attorney-client privilege and the common interest rule. Finally, the Independent Counsel draws a distinction between documents relating to conversations *before* the death of Vincent Foster and those documents created *after* his death.

The Court will now turn to a discussion of those privileges as they relate to the subject documents.

I

The most important issue raised in this document request is whether the documents sought by the Independent Counsel are protected from production under the work product doctrine. Any discussion of that doctrine or privilege must begin with the decision in *Hickman v. Taylor*, 329 U.S. 495, 76 S.Ct. 385 (1947). There, the Supreme Court observed:

> Historically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients. In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion of opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant

> from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests. *This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways*—aptly though roughly termed by the Circuit Court of Appeals in this case (153 F.2d 212, 223) as the "Work product of the lawyer." Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. And the interests of the clients and the cause of justice would be poorly served.
>
> We do not mean to say that all written materials obtained or prepared by an adversary's counsel with an eye toward litigation are necessarily free from discovery in all cases. Where relevant and nonprivileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's cases, discovery may properly be had.

329 U.S. at 510-11, 67 S.Ct. A 393-94 (emphasis this Court's). Thirty-four years later, the Supreme Court reaffirmed the "strong public policy" underlying the work product doctrine in *United States v. Nobles*, 422 U.S. 225, 95 S.Ct. 2160 (1975). *Upjohn Company v. United States*, 449 U.S. 383, 398, 101 S.Ct. 677, 686 (1981).

The Court of Appeals for this Circuit has made clear that the work product doctrine applies to matters pending

before a federal grand jury. *In re Sealed Case*, 308 U.S. App.D.C. 69, 29 F.3d 715 (1994). Moreover, that case is instructive because the court noted:

> In rejecting the appellant's assertion of the privilege, the district court indicated that the privilege was inapplicable because no grand jury investigation had commenced at the time. We disagree. The work product privilege protects any material obtained or prepared by a lawyer *"in the course of his legal duties, provided that the work was done with an eye toward litigation."* Even though the grand jury investigation had not begun when the Lawyer met with the appellant and prepared his file, he may well have had an eye toward litigation.

308 U.S.App.D.C. at 72, 29 F.3d at 718 (citations omitted, emphasis this Court's). The court went on to state: "In determining whether the materials in the Lawyer's files are protected by the work product privilege, 'the testing question is whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation." *Id* (citation omitted).

Although the movants resisted the preparation of a privilege log, the Court required them to submit a privilege log to the Court and Independent Counsel. After reviewing the privilege log, Independent Counsel advised the Court and the movants that the "the log has enabled us to cull out documents that we do not need or that are, in our view privileged. We thus are able to focus our argument to this Court on particular classes of documents."

II

Before addressing the documents now identified by the Independent Counsel based on the privilege log, the Court finds that all of the documents were prepared in anticipa-

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tion of or with an eye toward litigation. This finding is based upon the affidavit of Mr. Hamilton and the Court's *in camera* review of the documents. The Court also observes that general experience in matters of this nature cannot help but lead all but the most unsophisticated person to conclude that there would be an investigation into the facts and circumstances of Mr. Foster's death and that an eager media would seek to obtain materials which the family may wish to hold private. Moreover, political reality makes very clear that the matter would be subject to grand jury investigation, Congressional hearings and intense public scrutiny. It can hardly be doubted that, as Mr. Hamilton has stated, the material was collected with an eye toward litigation in one form or another.

After reviewing the privilege log, the Independent Counsel identified specific documents he wanted produced. The Court concludes that, with respect to those documents not so identified, the Independent Counsel has withdrawn his request for their production. As has the Independent Counsel, the Court will identify the documents by their "Bates" number or numbers. The Court will now discuss the documents in the order identified by Independent Counsel in his opposition to the motion.

Documents 2774-2883.

Independent Counsel has requested Documents 2774-2882. Document 2774-2802 is the White House Travel Office Management Review which contains handwritten notes and notations in the form of comments and under linings made by James Hamilton. Movants assert a work product privilege and describe the document as "Handwritten notes on 7/2/93 White House travel Office Management Review Report made in anticipation of meeting with Vincent Foster concerning possible representation." The Court finds that this document, as described in the privilege log, should be exempt from disclosure to the grand jury. It contains notes and underlining which rep-

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resent the mental impressions of the attorney. Although this document was prepared before Mr. Foster's death, the Court concludes that Foster was consulting Hamilton as an attorney and possibly to represent him. Finally in applying the balancing test for this document, the Court finds nothing in the document which would suggest that the grand jury's need for the document outweighs the privilege. This document need not be produced.

* * * *

[Two paragraphs of this opinion at this point are still under seal. They have no impact on this case. We have lodged with the Clerk 10 unredacted copies of this opinion.]

* * * *

With respect to Hamilton's meeting with Foster on July 11, 1993, the Independent Counsel seeks documents 2774-2882. Document 2774-2802 is the White House Travel Office Management Review which contains some handwritten notations in the form of comments and underlining made by James Hamilton. The Court finds that the movants have properly asserted work product with respect to this group of documents. Certainly there was a concern about the implications of certain actions and decisions of the White House Counsel and Mr. Hamilton reviewed the documents with this in mind. The notations and underlined portions of the document is evidence of Hamilton mental impressions.

Documents 490-492, 528-30, 569-71.

These documents are described in the privilege log as "[h]andwritten notes regarding conversation with Vincent Foster about possible representation." Movants claim work product and the attorney-client privilege. The three documents appear to be copies of the same document. Hamilton is the author of the notes. The Court concludes that the notes are privileged. They were made at a time when Hamilton met with Foster to discuss possible representation of Foster. It appears clear that Foster spoke

with Hamilton as an attorney and a review of the notes supports that finding. Moreover, one of the first notations on the document is the word: "Privileged," so it is obvious that the parties, Hamilton and Foster, viewed this as a privileged conversation and the notes of that conversation as privileged, both under the attorney-client privilege and as work product. These notes and others that are discussed are a demonstration of why "it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel." *Hickman v. Taylor*, 329 U.S. at 510, 67 S.Ct. at 393. The written notes reflect the mental impressions of the lawyer and there is nothing in the record which suggests that any need by the grand jury trumps the privileges. The documents need not be produced.

* * * *

[12 paragraphs of this opinion at this point are still under seal. They have no impact on this case. We have lodged with the Clerk 10 unredacted copies of this opinion.]

* * * *

In sum, the Court concludes that the documents are privileged for the reasons stated above and further, that in applying a balancing test, the need of the grand jury does not outweigh the privileges asserted.

The Court has reviewed the remaining documents, including those no longer requested by the Independent Counsel, and concludes that they are privileged for the reasons stated in the privilege log.

It is hereby

ORDERED that the motions to intervene filed by Lisa Foster and Sheila Anthony are granted, and it is further

ORDERED that the motion to quash or modify grand jury subpoena is denied in part and granted in part; the motion to quash the subpoena is denied, and the motion to modify is granted in that, consistent with this Memo-

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randum Order, Swidler & Berlin is not required to produce the documents described in the privilege log.

/s/ John Garrett Penn
JOHN GARRETT PENN
Chief Judge

[Dec. 16, 1996]

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APPENDIX E

RULES OF CIVIL PROCEDURE

Rule 26. General Provisions Governing Discovery; Duty of Disclosure

* * * *

(b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

* * * *

(3) Trial Preparation: Materials. Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the

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person may move for a court order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

* * * *

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APPENDIX F

RULES OF EVIDENCE

Rule 501. General Rule

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

(Pub.L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1933.)

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No. 97-192

In The Supreme Court of the United States

October Term, 1997

Swidler & Berlin and James Hamilton,
Petitioners,

v.

United States of America,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the attorney-client privilege under Fed. R. Evid. 501 authorizes disclosure of information "whose relative importance is substantial" in federal criminal proceedings after the client's death.

2. Whether the work product doctrine authorizes disclosure of an attorney's notes of an interview with a witness who is deceased and therefore unavailable.

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PARTIES TO THE PROCEEDING

The parties to the proceeding are the United States, represented in this criminal investigation by the Independent Counsel in re: Madison Guaranty Savings & Loan Association, *see* 28 U.S.C. § 594(a); James Hamilton; and the law firm Swidler & Berlin.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-1192

SWIDLER & BERLIN AND JAMES HAMILTON,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals and a redacted version of the dissent are reported at 124 F.3d 230 and printed in full in Petitioners' Appendix (Pet. App. 1a-26a). The court's order on petition for rehearing is reported at 129 F.3d 637 (Pet. App. 27a-32a). The district court's two substantively identical opinions (one for each of the two subpoenas at issue) are unreported (Pet. App. 34a-42a and 44a-53a).

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JURISDICTION

The judgment of the court of appeals was entered on August 29, 1997. The court denied a petition for rehearing on November 21, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

1. On August 5, 1994, pursuant to the application of Attorney General Reno under 28 U.S.C. § 592(c), the United States Court of Appeals for the District of Columbia Circuit, Division for the Purpose of Appointing Independent Counsels (Special Division), appointed Kenneth W. Starr as Independent Counsel to represent the United States in investigating particular matters regarding President and Mrs. Clinton, Whitewater Development Corp., and Madison Guaranty Savings & Loan. *In re Madison Guaranty Savings & Loan Association* (D.C. Cir. Spec. Div. Aug. 5, 1994). In March and April 1996, acting under 28 U.S.C. §§ 593(c)(1) and 594(e), the Attorney General and the Special Division authorized the Office of the Independent Counsel to investigate whether particular individuals had made false statements or committed other federal crimes during various government investigations of the firings of White House Travel Office employees.

2. On May 19, 1993, the White House fired seven employees of the White House Travel Office. In response to criticism of the firings, the White House conducted an internal management review, issued a report, and reprimanded four White House officers and employees. On July 2, 1993, the Supplemental Appropriations Act of 1993, Pub. L. 103-50, was enacted, which required the General Accounting Office to review the firings.

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3. On Sunday, July 11, 1993, James Hamilton, an attorney with the Washington, D.C., law firm of Swidler & Berlin, met with Deputy White House Counsel Vincent W. Foster, Jr. Mr. Foster, a former partner of Hillary Rodham Clinton's at the Rose Law Firm in Little Rock, Arkansas, had been involved in the process leading up to the Travel Office firings, although he had not been reprimanded. The July 11 conversation related to Mr. Hamilton's possible representation of Mr. Foster with respect to congressional or other investigations of the Travel Office matter. At the meeting, Mr. Hamilton took three pages of notes, which are at issue in this case. Pet. App. 31a.

On July 20, 1993, nine days after meeting with Mr. Hamilton, Mr. Foster was found dead in Fort Marcy Park in suburban Virginia. A series of official investigations ensued, all of which have concluded that Mr. Foster had killed himself by gunshot in Fort Marcy Park.

4. There is no dispute that Mr. Foster would have been an important witness in this Office's investigation of whether particular individuals made false statements or committed other federal crimes during investigations of the Travel Office firings. Because Mr. Foster is deceased, this Office has attempted, consistent with traditional and standard law enforcement practice, to obtain evidence of Mr. Foster's knowledge of the matter through any oral statements or writings he may have made. The notes taken by Mr. Hamilton during his meeting with Mr. Foster on July 11, 1993, regarding the Travel Office matter are highly relevant to this Office's investigttion.

5. On December 4, 1995, at a time when this Office was investigating Mr. Foster's death, the grand jury

subpoenaed Mr. Hamilton's notes and other documents. Petitioners (Mr. Hamilton and his law firm, Swidler & Berlin) moved to quash or modify the subpoena. On order of the district court, Mr. Hamilton produced a privilege log on July 9, 1996. On July 16, 1996, this Office identified and sought various documents listed on that log, including the notes of the 1993 conversation with Mr. Foster. In resisting the subpoena, Mr. Hamilton argued, first, that the notes were protected by the attorney-client privilege, which he contended applies even after the client's death; and, second, that they were protected by the work product doctrine.

On December 16, 1996, the district court granted Mr. Hamilton's motion in relevant part without specifically addressing whether attorney-client privilege survives the death of the client. The court found the notes protected by the attorney-client privilege and work product doctrine.

6. This Office appealed, and the court of appeals reversed. The court noted that in the vast majority of cases addressing the issue—particularly those concerning testator's intent in a will dispute—courts have held the privilege inapplicable. Pet. App. 3a. The court also emphasized that most commentators have "supported some measure of post-death curtailment" of the privilege. Pet. App. 4a. The court pointed out that Wright & Graham have emphatically rejected the suggestion that the privilege should continue to apply after death. So, too, McCormick has argued that the privilege should not apply after death. The court also cited Mueller & Kirkpatrick, who likewise concluded that the privilege should not apply after death. Pet. App. 4a-5a. The court cited Learned Hand's argument that privilege

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should not apply after death. Finally, the court pointed out that the American Law Institute, in the latest draft of the Restatement (Third) of the Law Governing Lawyers, had rejected a perpetual privilege. The court noted that the ALI had suggested "a general balancing test" under which "a tribunal be empowered to withhold the privilege of a person then deceased." Pet. App. 5a.

The court concluded: "The costs of protecting communications after death are high. Obviously the death removes the client as a direct source of information; indeed, his availability has been conventionally invoked as an explanation of why the privilege only slightly impairs access to truth." Pet. App. 7a. On the other side of the balance, the court found that "the risk of post-death relevation will typically trouble the client less" and that a post-death restriction of the privilege to the realm of criminal litigation will likely cause a chilling effect "fall[ing] somewhere between modest and nil." Pet. App. 6a-7a. The court also noted that the individual "may even view history's claims to truth as more deserving." Pet. App. 7a. Because criminal liability ceases at death, the court concluded that modifying the privilege solely in the realm of criminal litigation, and leaving it unaffected in civil litigation, would exert little if any chilling effect on attorney-client communications. *Id.* Following the approach advocated by the Restatement, the court thus defined a narrow, sharply bounded exception, limited (i) to *criminal* proceedings and (ii) to statements of particular importance: "the statements must bear on a significant aspect of the crimes at issue, and an aspect as to which there is a scarcity of reliable evidence." Pet. App. 10a. The court remanded the case to the district court for application of this test to the notes at issue here.

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Turning to the issue of work product, the court distinguished factual information contained in an attorney's notes of an interview with an unavailable witness from the attorney's own evaluations. The court stated that "[o]ur brief review of the documents reveals portions containing factual material" and therefore rejected the district court's conclusion. Pet. App. 14a.

Judge Tatel dissented solely on the question of attorney-client privilege, and "therefore [did] not consider whether the notes are attorney work product." Pet. App. 15a. The court of appeals denied petitioners' suggestion for rehearing en banc. Pet. App. 27a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Indeed, the decision of the court of appeals is the first federal decision addressing the question. The panel's decision comports with the vast majority of decided cases addressing the general question of whether attorney-client privilege fully survives the client's death. It closely tracks the virtually unanimous views advocated by the ALI, by commentators such as McCormick, Wright & Graham, Wolfram, Mueller & Kirkpatrick, and by legal luminaries such as Learned Hand.

Given the novelty of the issue in the federal courts of appeals, and the court of appeals' decision to carefully follow the body of law and commentary, review here is unwarranted, especially inasmuch as the case arises in the midst of an ongoing grand jury investigation.

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I

Preliminarily, we take note of an important prudential consideration: This Court's review would further delay an important grand jury investigation which touches on vital matters of public concern. *The grand jury subpoena was issued over 26 months ago*, yet there still has not been a final judicial resolution. Delay of this magnitude seriously impedes a grand jury investigation. This Court's review—on a narrow issue of first impression with no circuit split—would cause further lengthy delays. Because "extended litigation" impedes the "orderly progress of an investigation," *United States v. Calandra*, 414 U.S. 338, 349 (1974), and "frustrate[s] the public's interest in the fair and expeditious administration of the criminal laws," *United States v. R. Enterprises, Inc.*, 498 U.S. 292, 299 (1991), federal courts attempt to avoid the "protracted interruption of grand jury proceedings," *Calandra*, 414 U.S. at 350.

The dictates of this Court's Rule 10 are clearly not met. There is no circuit split. The decision below does not conflict with any decision of the Supreme Court or any other federal court. Indeed, the decision is the *first* federal case addressing whether the attorney-client privilege applies in federal *criminal* proceedings after the client's death. As the dearth of case law suggests, the issue is exceedingly narrow, and the court of appeals' resolution of it will have no effect on attorney-client privilege in *civil* litigation. The novelty and the narrowness of the issue counsel hesitation before this Court exercises its discretionary certiorari jurisdiction.

1. Before this case, no federal court had ever had occasion to rule on whether the attorney-client priv-

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ilege applies in federal criminal proceedings after the client's death. In attempting to manufacture an inter-circuit conflict, petitioners claim that the decision conflicts with two Ninth Circuit decisions. Pet. 10. Both of those decisions, however, are *civil* cases. The court of appeals in this case stated explicitly that its decision applies solely to *criminal* cases: "We reject a general balancing test in all but this narrow circumstance"—namely, "use in criminal proceedings after death of the client." Pet. App. 8a.

2. The court's decision accords with the vast majority of cases addressing whether the attorney-client privilege survives death outside the context of a federal criminal investigation. The question has arisen most frequently in state decisions. Almost all of the cases have involved disputes over a will. Pet. App. 3a (95% of cases raising the issue have been testamentary disputes). In these testamentary cases, state and federal courts have consistently held that the privilege does *not* survive death. *See id.* The operation of the attorney-client privilege thus has been "nullified in the class of cases where it would most often be asserted after death." *McCormick on Evidence* § 94, at 348 (4th ed. 1992); *see also* 2 Mueller & Kirkpatrick, *Federal Evidence* § 197, at 380 (2d ed. 1994) (privilege "inapplicable" in cases where the communications "are most likely to be sought"). The court's conclusion that the privilege does not automatically apply after the client's death in criminal proceedings follows *a fortiori* from the vast body of case law holding that the privilege does not apply after death in testamentary disputes. As this Court has stated, the need for evidence is "particularly applicable to grand jury proceedings." *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972). That conclusion

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follows as well from the deeply rooted principle that an evidentiary privilege, which "obstructs the truth-finding process," must be "narrowly construed." Pet. App. 6a. Because the attorney-client privilege "has the effect of withholding relevant information from the factfinder, it applies only where *necessary* to achieve its purpose." *Fisher v. United States*, 425 U.S. 391, 403 (1976) (emphasis added). Given that courts have consistently found that it is not necessary to apply the privilege after death in testamentary cases, it logically follows that it is not necessary to apply the privilege after death in criminal cases—circumstances which arise less frequently and present a far more compelling need for evidence.[1]

In the state courts, only a handful of criminal cases have addressed this issue, with several concluding that the privilege does not apply after death. In *State v. Gause*, 489 P.2d 830 (Ariz. 1971), for ex-

[1] Petitioners suggest that any privilege must apply uniformly in all proceedings (civil and criminal), Pet. 11, but that argument flies in the face of settled law. Many privileges are applied in a context-specific manner and carry less weight in criminal proceedings than in other settings. They include, for example, the Executive privilege for Presidential communications, *United States v. Nixon*, 418 U.S. 683, 712 n.19 (1974); the governmental privilege for deliberative processes; the qualified reporter's privilege; and the informer's privilege.

Petitioners' separate suggestion that privileges must be recognized to the same extent in state and federal court, Pet. 10, is likewise contrary to Supreme Court precedent. *See United States v. Gillock*, 445 U.S. 360, 368 (1980) (state evidentiary privilege "which Gillock could assert in a criminal prosecution in state court does not compel an analogous privilege in a federal prosecution"); *Trammel v. United States*, 445 U.S. 40, 49 (1980) (declining to recognize adverse spousal testimony privilege although 24 states did so).

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ample, the defendant was found guilty of murdering his wife and was sentenced to death. The Arizona Supreme Court held that the attorney-client privilege did not require exclusion of statements made by the wife to her attorney before her death. A similar scenario was presented in *State v. Kump*, 301 P.2d 808 (Wyo. 1956). The Wyoming Supreme Court held the statements admissible, stating that "[w]e can conceive of no public policy which would exclude the communications such as are involved in this case." [2] *Id.* at 815. Of the few civil cases outside the testamentary context, the only case with meaningful analysis concluded that the privilege does not survive death. *Cohen v. Jenkintown Cab Co.*, 357 A.2d 689 (Pa. Super. Ct. 1976).

In sum, the cases that have actually decided this privilege issue overwhelmingly accord with the decision of the court of appeals. *See* Pet. App. 3a; *see also* Frankel, *The Attorney-Client Privilege After the Death of the Client*, 6 Geo. J. Leg. Ethics 45, 58 n.65 (1992) (95% of cases arise in testamentary context, where privilege does not apply after death).

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[2] In the three other state supreme court cases that have decided the issue, the courts held that the privilege applies after death, although there were dissents in two of those cases. *See In re John Doe Grand Jury Investigation*, 562 N.E.2d 69, 72 (Mass. 1990) (Nolan, J., dissenting), advocating "limited exception to the privilege . . . where the interests of the client are so insignificant and the interests of justice in obtaining the information so compelling"); *State v. Macumber*, 544 P.2d 1084, 1088 (Ariz. 1976) (Holahan, J. and Cameron, C.J., dissenting) ("When the client died there was no chance of prosecution for other crimes . . . . Opposed to the property interest of the deceased client is the vital interest of the accused in this case in defending himself against the charge of first degree murder.").

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The court of appeals correctly found that "there is little by way of judicial holding that affirms the survival of the privilege after death." Pet. App. 4a. Moreover, the "relatively rare" cases that "do actually apply it give little revelation of whatever reasoning may have explained the outcome." Pet. App. 3a; *see also Frankel* at 57 n.63 ("only a few judicial opinions offer[] any extensive discussion").[3]

3. The court of appeals decision follows the approach advocated by the American Law Institute and the vast majority of commentators. The Restatement of the Law Governing Lawyers states that allowing posthumous disclosure "would do little to inhibit clients from confiding in their lawyers." Restatement (Third) of the Law Governing Lawyers § 127 comment d (March 29, 1996). McCormick opposed continuation of the privilege after death, stating: "[T]o hold that in all cases death terminates the privilege . . . could not in any substantial degree lessen the encouragement for free disclosure which

[3] Petitioners suggest that several evidence codes have held the privilege applies after death in perpetuity. Pet. 13-14. That is incorrect, as the court of appeals explained. Pet. App. 4a n.2, 9a. To begin with, most codes addressing the issue contain a rule that the attorney-client privilege does not apply in testamentary disputes, the very situation in which the issue most often arises. Some state and model codes also indicate that the privilege may be asserted by the personal representative of the client, but as the court stated, "the framing of the posthumous privilege as belonging to the client's estate or personal representative both suggests that the privilege may terminate on the winding up of the estate and reflects a primary focus on civil litigation." Pet. App. 4a. These provisions thus say nothing about the appropriate rule in criminal proceedings in which, unlike in civil proceedings, neither the client nor the client's estate is subject to liability.

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is the purpose of the privilege." McCormick § 94, at 350. Learned Hand also opposed the privilege after death, saying that "a communicant who dies can have no more interests except in a remote way." 19 *ALI Proceedings*, 1942, at 143. The views of Mueller & Kirkpatrick are similar: "Few clients are much concerned with what will happen sometime after the death that everyone expects but few anticipate in an immediate or definite sense." 2 Mueller & Kirkpatrick, *Federal Evidence* § 197, at 380. Wright & Graham concur, stating that "the typical client" would not have "much concern for how posterity may view his communications." 24 Wright & Graham, *Federal Practice and Procedure* § 5498, at 484 (1986). Wolfram also noted the oddity of holding that the privilege does not continue in testamentary cases but that it does in other cases. Wolfram, *Modern Legal Ethics* § 6.3.4, at 256 (1986).

4. The court of appeals decision carefully analyzes and accommodates the competing policy goals of (i) obtaining relevant evidence and (ii) protecting the traditional common-law privileged relationship. On the one hand, application of the privilege after the client's death would have far more serious consequences than application of the privilege before death. After a client's death, there will be "a loss of crucial information because the client is no longer available to be asked what he knows." 24 Wright & Graham § 5498, at 484; *see also* Wolfram at 256 (application after death "in effect gives an expanded scope to the privilege"). As the court of appeals reasoned, the death of the client thus not only eliminates a vital source of information; it also negates a longstanding justification for the attorney-client privilege: that

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the client can be questioned directly about the relevant factual events. Pet. App. 7a.

On the other side of the ledger, the federal attorney-client privilege—which is not a constitutional command but a creature of federal rule—assures the client that certain communications to his attorney cannot be used in federal criminal or civil proceedings. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). The privilege thus tends to encourage full and frank communications from client to attorney and thereby furthers the policy of ensuring that clients receive effective legal advice. The court's decision does not dilute that policy, however, because the client no longer faces criminal liability after his death, when the communications would be disclosed. *See* Pet. App. 6a ("criminal liability will have ceased altogether").

Petitioners respond that a client may be less forthcoming in communications to his attorney, even if assured that they cannot be used against him to impose criminal or civil liability, because of a fear that posthumous disclosure of his communications would adversely affect his reputation or interests of others about whom the client cares. Pet. 8, 15. This argument suffers from a fundamental flaw: The client's interest in his own reputation and in protecting friends and associates from liability cannot justify nondisclosure of information after death because it does not justify nondisclosure of information before death. When the client is alive, *he must testify truthfully as to all facts—regardless of how harmful those facts are to his reputation or to the interests of others. See United States v. Nobles*, 422 U.S. 225, 233 n.7 (1975) ("Testimony demanded of a witness

may be very private indeed").[4] And the client who testifies must disclose the same factual information that he disclosed to his attorney; the attorney cannot stand pat if the client commits perjury.[5] After the client's death, the attorney simply would disclose the same factual information that the client himself would have disclosed had the client been alive. Given this reality, petitioners' argument based on reputation and protecting others has no more force with respect to post-death application of the privilege than it does with respect to the client's duty to testify truthfully when he is alive.

Moreover, the courts have rejected petitioners' chilling-effect argument in testamentary cases—the very situation where the communications disclosed are the most sensitive and personal imaginable. "Estate planning . . . may be based on considerations one would prefer never to reveal." *Hitt v. Stephens*, 675 N.E.2d 275, 279 (Ill. App. 1997). For example, as the court noted here, "a decedent might want to provide for an illegitimate child but at the same time much prefer

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[4] The client can assert the Fifth Amendment privilege but only to protect himself from compelled self-incrimination, not to protect himself from embarrassment or to protect others. Moreover, the client who interposes the Fifth Amendment privilege can be immunized and then must testify truthfully as to all relevant facts.

[5] *See* D.C. Rules of Professional Conduct 3.3(a)(4), (b); Model Rules of Professional Conduct 3.3(a)-(b) & comment 6 to Rule 3.3 ("an advocate must disclose the existence of the client's deception to the court or to the other party" except when client is criminal defendant). By communicating a particular version of facts to his attorney, the client essentially commits himself to that same version of facts if he subsequently testifies.

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that the relationship go undisclosed." Pet. App. 9a. The will-contest situation thus is "the one occasion *above all others* when a client is likely to be moved to silence in conversations with a lawyer if the client becomes aware that disclosures can be made after the client's death." Wolfram at 256 (emphasis added). Yet the courts have consistently held that the need to settle disputes over wills trumps any such interest in reputation or privacy, and that the attorney-client privilege does not apply after death in such cases.[6]

Furthermore, empirical support for petitioners' argument is nonexistent. *See* Frankel at 61 (available empirical evidence "tells us little"); *cf. Branzburg*, 408 U.S. at 693-694 (rejecting First Amendment privilege claims where "[e]stimates of the inhibiting effect of such subpoenas . . . are widely divergent and to a great extent speculative"). Petitioners' many suggestions that Mr. Foster would have wanted to conceal the truth of this matter are speculative at best. As the court of appeals stated, Mr. Foster, like others, might "view history's claims to truth as more deserving." Pet. App. 7a. Moreover, because the court's decision is limited to the criminal context, cases where the situation will arise are so rare—as reflected in the fact that this is the first federal case ever litigated—that any hypothesized chilling effect would be minimal. *See id.* ("To the extent, then, that any post-death restriction of the

[6] Petitioners attempt to explain those cases by suggesting that testators actually intended for attorney-client communications to be disclosed after death. Pet. 11. They are wrong. The court below and the commentators have correctly rejected that *post hoc* rationalization, for it is, in fact, highly unlikely that all testators actually intend that such communications be disclosed. *See* Pet. App. 9a; Wolfram at 256.

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privilege can be confined to the realm of criminal litigation, we should expect the restriction's chilling effect to fall somewhere between modest and nil."); *cf. Nixon*, 418 U.S. at 712 ("we cannot conclude that advisers [to the President] will be moved to temper the candor of their remarks by the infrequent occasions of disclosure" in criminal proceedings). Even if there were a marginal chilling effect in certain cases, this Court has consistently concluded that a marginal chilling effect on a protected constitutional or common-law privilege is outweighed by the interest in obtaining relevant evidence for criminal proceedings.[7]

5. The implications of petitioners' position warrant brief mention. Those implications are best understood by examining the kinds of situations where the issue can arise and has arisen.

Suppose, for example, that a crime has occurred and that there are two suspects, one of whom is now deceased but had previously communicated to an attorney. That suspect's communications to the attorney could exculpate the still-living suspect. Under petitioners' approach, courts could not compel disclosure of that information—despite the manifest injustice that could result. *See State v. Macumber*, 544 P.2d 1084 (presenting those facts).

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[7] *See Nixon*, 418 U.S. at 712 (rejecting Executive privilege claim although Court acknowledges that the President and his advisers need to communicate confidentially); *Branzburg*, 408 U.S. at 693 (rejecting First Amendment privilege claim although "argument that the flow of news will be diminished . . . is not irrational"); *see also University of Pennsylvania v. EEOC*, 493 U.S. 182, 193 (1990) (rejecting First Amendment privilege claim although accepting that "confidentiality is important to proper functioning of the peer review process").

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Similarly, a now-deceased witness might have observed the commission of a crime and discussed it with his attorney. Again, the information provided by the witness could exculpate or inculpate another person, but petitioners' absolutist approach nonetheless could prevent disclosure. *Cf. Cohen v. Jenkintown Cab Co.*, 357 A.2d 689 (presenting similar scenario in civil context).

Or a wife battered by her husband might recount to her attorney the husband's threats to her life. Under petitioners' approach, if the wife were then found beaten to death, the courts could not require disclosure of the information she had communicated to the attorney, despite the manifest injustice that could result. *See State v. Gause*, 489 P.2d 830; *State v. Kump*, 301 P.2d 808 (addressing issue on those facts).

No policy reason justifies these predictable results flowing from petitioners' desired culture of permanent secrecy. These examples of the severe harm that petitioners' proposed secrecy rule would generate illustrate powerfully why the vast majority of courts, the ALI, and respected commentators have rejected it.[8]

II

Petitioners also seek review on the work product issue. The court of appeals concluded that an attor-

[8] Petitioners now, for the first time, apparently are willing to carve out exceptions *ad hoc* for various of these situations to make their drastic position more palatable. Pet. 11-12. But the many exceptions that petitioners allow do no more than expose the hollowness of their legal theory. The only coherent rationale justifying petitioners' tolerance of numerous "exceptions" is that they are not this case. That hardly is a persuasive position.

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ney's notes of an interview with a deceased witness are not protected from disclosure under all circumstances. The federal courts of appeals that have addressed the issue have reached the same conclusion. See *In re John Doe Corp.*, 675 F.2d 482, 492 (2d Cir. 1982); *In re Grand Jury Investigation*, 599 F.2d 1224 (3d Cir. 1979) (requiring production of attorney memoranda of interview with deceased employee). Likewise, the Restatement provides that courts may order production of "notes in redacted form" when the "notes of an interview contain[] both the recollections of the witness and the thoughts of the lawyer who made the notes." Restatement § 138 comment c. Petitioners cite not a single case reaching the contrary conclusion, and their argument has no support in law or policy.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 97-1192

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

SWIDLER & BERLIN AND JAMES HAMILTON,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

CERT STAGE - REPLY BRIEF

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR PETITIONERS

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Introduction

Defending the Court of Appeals decision, Independent Counsel asserts, as did that court (over Judge Tatel's compelling dissent), that the new rule it announced will not chill attorney-client communications. Four major attorney organizations that have filed amicus briefs—the American Bar Association, the American College of Trial Lawyers, The National Association of Criminal Defense Lawyers, and the American Corporate Counsel Association—strongly disagree. These organizations rely not on the views of commentators—as does the Court of Appeals' majority and Independent Counsel—but on the innumerable experiences of thousands of their members, which confirm that the majority's new rule would have a pronounced chilling effect.

The National Hospice Organization also has filed an amicus brief. The members of this organization reason—as does the ABA's Commission on Legal Problems of the Elderly, which supports the ABA's brief—that the majority's opinion effectively discriminates against persons who, anticipating death, wish to consult a lawyer in confidence about criminal matters.

The reason and experience these knowledgeable groups bring to the issue are significant. Federal Rule of Evidence 501 mandates that application of the attorney-client privilege "shall be governed by the principles of the common law as they may be interpreted in the light of reason and experience." Except for a brief citation in "Questions Presented," Independent Counsel ignores this rule. This disregard is not surprising, because the position Independent Counsel supports wars with the experience of seasoned, practicing lawyers. It also conflicts with the reason and experience reflected in virtually all non-testamentary state decisions on the issue, and the twenty-six state statutes which recognize that the privilege survives death. None of these decisions or statutes makes any distinction between civil and criminal matters. As this Court said in *Jaffee v. Redmond*, 116 S.Ct. 1923, 1930 (1996), "it is

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appropriate to treat a consistent body of policy determinations by state legislatures as reflecting both 'reason' and 'experience'."

Independent Counsel ignores this passage from *Jaffee*—indeed, he does not even cite the case—just as he overlooks *Jaffee*'s emphasis on the importance of uniformity between federal and state decisions on privileges issues.[1] He further disregards *Jaffee*'s admonition that "[m]aking the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of [a person's] interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege." *Id.* at 1932. This, of course, is precisely the effect of the after-the-fact balancing test announced by the Court of Appeals' majority, which also is condemned by the observation in *Upjohn Co. v. United States,* 449 U.S. 383, 393 (1981) that "[a]n uncertain privilege . . . is little better than no privilege at all."

Attorney-Client Issue

1. Independent Counsel argues that the issue of posthumous disclosure of client communications in criminal cases is "novel[]" and "narrow." Br. at 7. But the issue is not that "novel." Seven states have held that the privilege survives death in criminal cases.[2] A federal court of appeals (in two cases) and at least 13 state courts have held in civil cases that the privilege survives death, with no suggestion that criminal cases require a contrary rule.[3] Nor is the issue "novel" in the commentaries, which all concede that under the common-law rule—whatever its wisdom (an issue on which commentators

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[1] Otherwise "any State's promise of confidentiality would have little value." *Jaffee,* 116 S.Ct. at 1930.

[2] The cases are cited in the Petition at 10 n.4.

[3] The cases are cited in the Petition at 10 ns.5 and 6. And there are dicta to this effect in other cases, including federal cases. See Petition at 13 n.12.

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split)—the privilege survives death, with no hint that criminal cases are different.

However, the case is "novel" in the sense that, contrary to this Court's admonitions, the lower court adopted a balancing test for an "absolute" privilege. It is especially novel because *no one* (not even the commentators on which Independent Counsel relies) ever has suggested, prior to this case, that it would be rational to bar disclosure of privileged conversations in civil cases after the client's death, but not in criminal cases where the potential consequences are much more severe. And the case is "novel" because the court below has created a new and irrational exception to a well-established rule. Because the rule is important to our legal system and the proposed exception has no rational basis, such "novelty" should argue for, not bar, review.

Nor is the decision below "narrow," even if limited to criminal cases. Innumerable attorney-client discussions involving potential criminal implications occur daily. The decision below affects those conversations, particularly where the client is elderly, ill, or otherwise anticipates death in the near future. Under the decision below, for example, persons who are elderly or seriously ill cannot talk to an attorney in confidence about a child whom they suspect may be dealing in drugs. A decision having an immediate and significant impact on a broad range of everyday occurrences is not "narrow."

2. Echoing the majority (Pet. App. 6a), Independent Counsel says that, after the client dies, "neither the client nor the client's estate is subject to liability" in a criminal proceeding. Br. at 11 n.3. That statement is wrong, for a client's estate may be decimated as a result of criminal proceedings after his or her death. For example, a child's drug activities could lead to civil forfeiture of estate property. *See, United States v. One Parcel of Property at 31-33 York St.*, 930 F.2d 139 (2d Cir. 1991); *cf. Bennis v. Michigan*, 516 U.S. 442 (1996). Moreover, disclosure could cause investigation, prosecution, or conviction of an

heir of the deceased client, which could result in fines or attorney fees that deplete the portion of the estate left to that heir.

3. Independent Counsel relies heavily on the views of certain commentators that the privilege should not survive the client's death. But even the commentators supporting Independent Counsel's view concede that the case law is otherwise. *McCormick on Evidence*, § 94, at 348 (4th ed. 1992) ("The accepted theory is that the protection afforded by the privilege will in general survive the death of the client."); *Restatement (Third) of the Law Governing Lawyers* § 127 comment c (March 29, 1996) ("The privilege survives the death of the client. A lawyer for a client who has died has a continuing obligation to assert the privilege."); [4] Wolfram, *Modern Legal Ethics* § 6.3.4, at 256 (1986) ("In general, courts hold that the death of the client does not end the privilege"); 24 Wright & Graham, *Federal Practice and Procedure* § 5498 at 483 (1986) (conceding that the "common law rule" is as stated by Wigmore—that the privilege, "being intended to secure a confidence on the client's part that no disclosure will be made . . . does not cease . . . upon the death of the client."); 2 Mueller & Kirkpatrick, *Federal Evidence* § 199 at 379 (2d ed. 1994) ("It is generally held that the privilege is not terminated even by the death of the client, although this view has been sharply criticized by commentators.") *Moreover, none of these commentators supports the view that there should be one rule for civil cases and another for criminal cases.*

Other prominent commentators recognize that the privilege survives death and make no call for changing the rule. Hazard and Hodes, *The Law of Lawyering*, § 1.6:101 at 131 (1998); *Weinstein's Federal Evidence*, § 503.32

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[4] After describing the testamentary exception, the Reporter's Note states that, where it does not apply, the cases "routinely hold that the privilege survives." *Restatement, supra,* § 127 Reporter's Note.

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at 503-96 (2d ed. 1997). Some argue forcefully that the rule should not be changed.[5]

4. Independent Counsel argues that posthumous disclosure in criminal cases follows *a fortiori* from the accepted rule of disclosure in testamentary cases.[6] But testamentary disclosure is premised on the purpose of the testimony, which is to implement the client's intent. *Glover v. Patten*, 165 U.S. 394, 408 (1897); *United States v. Osborn*, 561 F.2d 1334, 1340 n.11 (9th Cir. 1977); *Hitt v. Stephens*, 675 N.E.2d 275, 278 (Ill. App. 1997). The theory underlying this limited exception is that "if the decedent could be asked, he would want to waive the privilege so that the lawyer could dispose of the property according to his wishes." Hazard and Hodes, *supra*, § 1.6:101 at 131 n.5.7. To be sure, disclosure in this context may lead to embarrassment or wounded feelings, but the courts have presumed that the client would have wanted his or her testamentary intent fulfilled, even at the cost of hurtful disclosure.

By contrast, disclosure in criminal proceedings about the client's family, friends or associates is not designed to implement the client's intent, and may have more drastic consequences than mere embarrassment or hurt feelings. In that situation, a court cannot presume that, if the "decedent could be asked, he would want to waive the privilege." Hazard and Hodes, *supra*. Accordingly, disclosure in criminal proceedings does not follow *a fortiori* from disclosure in testamentary disputes. Indeed, because the consequence of disclosure in criminal proceedings may

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[5] *See*, 8 Wigmore, *Evidence* § 2323 (McNaughton rev. 1961); Epstein, *The Attorney-Client Privilege and the Work-Product Doctrine* (3d ed. 1997), at 234; Frankel, *The Attorney-Client Privilege After the Death of the Client*, 6 Geo. J. Legal Ethics, 45, 78-79 (1992).

[6] Independent Counsel says repeatedly that the "vast majority" of cases hold that the privilege does not survive death. (*E.g.*, Br. at 6) This is so only if the testator cases are counted; remove them and only one, largely ignored state court case holds this. *Cohen v. Jenkintown Cab Co.*, 357 A.2d 689 (Pa. Super. 1976).

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be so much more injurious than in civil proceedings, *non-disclosure* follows *a fortiori* from the rule that posthumous disclosure is not allowed in civil cases.

5. Citing *State v. Gause* 489 P.2d 830 (Ariz. 1971) and *State* v. *Kump*, 301 P.2d 808 (Wyo. 1956), Independent Counsel suggests (Br. at 9) that these two cases hold, as a general proposition, that "the privilege does not apply after death." This is not so; those cases held that, in the circumstances involved, a husband accused of murdering his wife could not assert her attorney-client privilege where he either had a conflict of interest or lacked authority.[7] Here Independent Counsel does not question the authority of Mr. Hamilton (who also represents the Foster family) to assert the privilege. In so doing, Mr. Hamilton is not only carrying out the intent of Mr. Foster and his family, but also is fulfilling his ethical obligation to protect confidential client disclosures.[8]

The *Gause* and *Kump* cases are significant (as is the *Magraw* case cited in n.7) because they demonstrate that courts will find acceptable means to deal with unjust situations without doing harm to the attorney-client privilege. So also, in the circumstance when a criminal *defendant's* constitutional right to a fair trial is affected by application of the privilege, a court might find a limited solution.[9] But this is not this case. Here a *prosecutor*, not a criminal defendant, seeks to violate the privilege.[10] The

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[7] *See State v. Gause, supra,* 489 P.2d at 834: "Where such a conflict of interest existed . . . the privilege could not be claimed." *See also District Attorney v. Magraw,* 628 N.E.2d 24 (Mass. 1994) (where husband accused of murdering his wife is her executor and refuses to waive her attorney-client and psychotherapist-patient privileges, district attorney may petition the probate court to remove him on ground that he cannot make a disinterested waiver decision).

[8] *See Restatement (Third) of the Law Governing Lawyers* (March 29, 1996) § 127 comment c: "A lawyer for a client who has died has a continuing obligation to assert the privilege."

[9] *See* Petition at 12.

[10] To allow a prosecutor to do so in the name of a grand jury's constitutional right to investigate would throw open the flood gates.

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Court can decide this case without reaching the issue of a defendant's constitutional rights. A ruling here for Petitioners will not produce the parade of horribles conjured up by Independent Counsel. But real harm looms to the privilege—and to the administration of justice that depends on lawyers' obtaining the unvarnished truth from their clients—if the lower court decision is allowed to stand.

6. Independent Counsel disputes that the new rule will make clients less willing to confide in their attorneys. His reasoning is curious; he states that the client's interest in his reputation and in protecting his family and associates cannot justify non-disclosure after death because it does not justify non-disclosure before death. This is so, he says, because the living client must testify truthfully (perhaps under grant of immunity) and the lawyer must disclose his client's deception if he does not.

This argument attacks the basic concept of the privilege—that it permits the client to impart information to his attorney in confidence. By suggesting that the information provided to attorneys necessarily will be disclosed, even if the client lives, Independent Counsel in effect contends that the privilege is meaningless.

But he is wrong. The fact is that the contents of attorney-client communications normally will be kept confidential. While the client must testify truthfully about underlying facts, he is not required to reveal *the content of his conversation* with his attorney. Any seasoned practicing lawyer knows that clients impart many matters to their attorneys besides "facts"—*e.g.*, their fears, doubts, speculations, emotions, theories, intentions, and the like. Such thoughts may never be revealed in testimony, and it generally is accepted that the lawyer must hold them confidential, whether the client lives or dies.

Moreover, while immunity is possible, there may be numerous reasons it will not be given by the government. And while an attorney in some circumstances must dis-

close a client's deception, this will happen rarely and even then disclosure will be limited.[11]

7. Independent Counsel argues that there is no "empirical support" for Petitioners' chilling effect argument (and then goes on to assert, with no support other than the opinion below, that changing the rule would have only a "minimal" effect on client candor). Br. at 15. Judge Tatel's response to this argument is conclusive: "because the Independent Counsel himself urges overturning the common law rule, and because that rule rests on the proposition that preserving the attorney-client privilege after the client's death is necessary to promote client disclosure, the Independent Counsel bears the responsibility of producing evidence to the contrary." Pet. App. 29a.[12]

In *Upjohn,* this Court, without citing "empirical support," drew on "reason and experience" to conclude that a proposed restriction on the privilege as applied to corporations would chill client candor, thus "discouraging the communication of relevant information" to the attorney and making it more difficult for the attorney "to formulate sound advice." 449 U.S. at 391-93. "Reason and experience" (the standard embodied in Rule 501) support the same conclusion here. Experience (including the experience of *amici's* many thousands of members) teaches that possible violations of the law, by friends and associates as well as the client, are a frequent subject of

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[11] *See Model Rules of Professional Conduct,* Rule 3.3 anno.: "Within the bounds of the Rule prohibiting any affirmative misrepresentations, a lawyer need not disclose all the weaknesses in the client's case, nor must the lawyer correct every error of opposing counsel or the court."

[12] In *Branzburg v. Hayes,* 408 U.S. 665 (1972), the argument was that the First Amendment required a news reporter's privilege because of an impermissible chilling effect, but the Court cited the lack of empirical evidence in declining to create such a privilege. 408 U.S. at 693-94. Similarly, a court should decline to denigrate a well-recognized privilege supported by reason and experience in the absence of compelling empirical evidence that the premise underlying the privilege is seriously flawed.

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attorney-client conversations. Similar experience also teaches that people care about what happens after they die, because they, for example, write wills, establish trusts, endow chairs, establish foundations, buy life insurance and burial plots, and write memoirs. And while most people may not "anticipate [death] in an immediate or definite sense," [13] experience teaches that many elderly, severely ill or suicidal people do. Such people have a right to seek confidential legal advice. "Reason and experience" support the conclusion that they would not speak to an attorney in confidence if told their statements would be available to a prosecutor after death.

Work-Product Issue

As to the work product issue, Independent Counsel does not even attempt to justify the court of appeals' extraordinary holding that an attorney's notes of an initial interview are producible "under the ordinary Rule 26(b)(3) standard" because they must be presumed not to contain opinion work product, whose production demands a much higher standard. Pet. App. 13a-14a. Independent Counsel's reticence is understandable because there is a clear conflict between the majority's position that notes of an initial interview with a client may *never* constitute opinion work product and the large number of cases—including *Upjohn* and *Hickman,* which Independent Counsel does not even cite in this regard—which declare that attorney notes are entitled to heightened protection and may never be produced or only produced in the rarest of circumstances. This conflict counsels review by this Court, particularly because the ramifications of the majority's holding are harmful to the practice of law.

Independent Counsel does rely on two court of appeals decisions, but neither is pertinent. One case held that the government had made a sufficient showing of necessity, in light of the witness's death and other factors, to meet the *higher* standard of necessity applicable to opinion work

[13] *See* Independent Counsel Brief at 12, quoting 2 Mueller & Kirkpatrick, *Federal Evidence* § 197, at 380.

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product. *In re Grand Jury Investigation*, 599 F.2d 1224, 1230-32 (3d Cir. 1979). The other case merely reflects a factual determination by the court (not based on a presumption) that the interview notes did not reflect the attorney's opinions. *In re John Doe Corp.*, 675 F.2d 482, 493 (2d Cir. 1982).

Independent Counsel also cites the Restatement's position that factual portions of interview notes may be produced, where redaction is feasible. *Restatement, supra,* § 138 comment c. Moreover, the court of appeals directed redaction of those portions of the notes that are "protected by . . . the work-product privilege." Pet. App. 14a. But this does not salvage the majority's opinion. Even if only the "facts" selected by Mr. Hamilton to record are produced upon an ordinary showing of need, that result still runs counter to the numerous opinions of this Court and other federal courts holding that such a product of an attorney's thought processes is entitled to heightened protection.[14]

Conclusion

The Petition for Certiorari should be granted.[15]

Respectfully submitted,

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February 27, 1998

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[14] Petition at 18-19.

[15] Independent Counsel contends that this Court should deny certiorari to speed the conclusion of his investigations. It appears, however, that his investigations will not end until long after this Court, if it determines to review this case, decides it. Petitioners would not object to expedited treatment for this case.

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4	Bennis v. Michigan	516 US 442 (1996)
5	Berger v. U.S.	295 US 78 (1935)
6	Blackburn v. Crawfords	70 US 175 (1865)
7	Brady v. Maryland	373 US 83 (1963)
8	Branzburg v. Hayes	408 US 665 (1972)
9	Brogan v. U.S.	118 S.Ct 805 (1998)
10	CFTC v. Weintraub	471 US 343 (1985)
11	Chirac v. Reinicker	24 US 280 (1826)
12	Clark v. U.S.	289 US 1 (1933)
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17	Davis v. Alaska	415 US 308 (1974)
18	EPA v. Mink	410 US 73 (1973)
19	Fisher v. U.S.	425 US 391 (1976)
20	Frazier v. Heebe	482 US 641 (1987)
21	FTC v. Grolier	462 US 19 (1983)
22	Garner v. U.S.	424 US 648 (1976)
23	Gertz v. Robert Welch	418 US 323 (1974)

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27	Hickman v. Taylor	329 US 495 (1947)
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29	Hunt v. Blackburn	128 US 464 (1888)
30	Jaffee v. Redmond	116 S.Ct. 1923 (1996)
31	Kalina v. Fletcher	118 S.Ct. 502 (1997)
32	Maness v. Meyers	419 US 449 (1975)
33	Medtronic v. Lohr	518 US 470 (1996)
34	Milkovich v. Lorain Journal Co.	497 US 1 (1990)
35	Moran v. Burbine	475 US 412 (1986)
36	Morrison v. Olson	487 US 654 (1988)
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39	Oregon v. Hass	420 US 714 (1975)
40	Palermo v. U.S.	360 US 343 (1959)
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42	Pennsylvania v. Ritchie	480 US 39 (1987)
43	Robertson v. Wegmann	436 US 584 (1978)
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53	U.S. v. Nixon	418 US 683 (1974)
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55	U.S. v. R. Enterprises	498 US 292 (1991)
56	U.S. v. Scheffer	118 S.Ct 1261 (1998)
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59	U.S. v. Zolin	491 US 554 (1989)
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No. 97-1192

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INDEPENDENT COUNSEL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

SWIDLER & BERLIN AND JAMES HAMILTON,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED DECEMBER 31, 1997
CERTIORARI GRANTED MARCH 30, 1998

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NOTICE

The following items have been omitted in printing this Joint Appendix because they appear on the following pages in the printed Appendix to the Petition for a Writ of Certiorari:

Opinion of the United States District Court for the District of Columbia on subpoena to Swidler & Berlin 33a

Opinion of the United States District Court for the District of Columbia on subpoena to James Hamilton 43a

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Order of the United States Court of Appeals for the District of Columbia Circuit denying rehearing and dissenting opinion of Judges Tatel and Ginsburg 27a

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Sealed Case, Nos. 95-446 and 95-447

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Date	Proceedings
December 4, 1995	Grand Jury Subpoenas to James Hamilton and Swidler & Berlin
December 18, 1995	Motions to Quash or Modify Grand Jury Subpoenas; Memorandum in Support of Motions; Affidavit of Sheila Anthony; Affidavit of James Hamilton
December 26, 1995	Motion of Independent Counsel to Compel Production of Documents and a Privilege Log; Memorandum in Support of Motion
February 5, 1996	Memorandum in Opposition to Independent Counsel's Motion to Compel a Privilege Log and Production of Documents
February 12, 1996	Independent Counsel's Reply to Opposition to Motion to Compel Production of Documents and Privilege Log
February 20, 1996	Sur-Reply to Independent Counsel's Reply to Opposition to Motion to Compel Production of Documents and Privilege Log
June 21, 1996	Order: that by July 1, 1996 all documents responsive to subpoena, except those which are privileged, shall be produced to Independent Counsel; and all documents for which privilege is asserted shall be submitted to the Court for *in camera* review

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Date	Proceedings
July 9, 1996	Privilege Log
July 12, 1996	Amended Privilege Log
July 16, 1996	Independent Counsel Memorandum in Support of Opposition to Motions to Quash or Modify Grand Jury Subpoenas
July 26, 1996	Reply Memorandum in Support of Motions to Quash or Modify Grand Jury Subpoenas; Third Affidavit of James Hamilton
December 16, 1996	Memorandum Order: motions to quash or modify grand jury subpoenas denied in part and granted in part; motions to modify granted and Swidler & Berlin and James Hamilton not required to produce documents described in privilege log
January 15, 1997	United States' Notice of Appeal

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UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

In re Sealed Case, Nos. 97-3006 and 97-3007

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Date	Proceedings
January 27, 1997	Case docketed; Order consolidating cases and setting briefing schedule
March 28, 1997	Brief of Appellant United States; Appellant's Appendix
April 28, 1997	Brief of Appellees Swidler & Berlin and James Hamilton
May 12, 1997	Reply Brief of Appellant United States
June 13, 1997	Letter filed by Appellant advising of additional authorities re attorney-client privilege
June 19, 1997	Letter filed by Appellee submitting James Hamilton's notes of July 11, 1993 for *in camera* Review
June 20, 1997	Oral Argument held before Judges Wald, Williams and Tatel
August 29, 1997	Judgement and Opinion reversing and remanding case to United States District Court; Dissenting Opinion of Judge Tatel
October 8, 1997	Appellees' Petition for Rehearing With Suggestion for Rehearing En Banc
October 27, 1997	Appellant's Response to Petition for Rehearing and Suggestion for Rehearing En Banc

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Date	Proceedings
November 21, 1997	Order Denying Petition for Rehearing; Order Denying Suggestion for Rehearing En Banc; Dissenting Opinion of Judges Tatel and Ginsburg
January 12, 1998	Order unsealing certain record documents, provided certain redactions are made
April 23, 1998	Order granting Appellant's motion to unseal a portion of the record and granting Appellees' alternative request contained in response to Appellant's motion

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Excerpt from Affidavit of James Hamilton executed December 18, 1995 in Sealed Case, U.S. District Court for the District of Columbia, Nos. 95-446 and 95-447.

[The portion of the affidavit printed below has been unsealed in accordance with the Order of the United States Court of Appeals for the District of Columbia Circuit issued April 23, 1998 in *In re Sealed Case,* No. 97-3006. The remainder of the affidavit remains under seal.]

34. On July 11, 1993, Mr. Foster conferred with me regarding the possibility of my being retained by the White House, or perhaps him if I did not represent the White House, in connection with certain matters that had occurred at the White House. He made clear at the outset that this was a "privileged" conversation. From the very beginning of the conversation I understood that I was being considered for retention regarding the investigations Mr. Foster anticipated and any ensuing litigation, which also was probable. In fact, litigation regarding the matter we discussed has occurred. I have notes on this conversation, which contain information provided by Mr. Foster, as well as my mental impressions, observations, conclusions, and plans for action. These notes are my work product and are properly characterized as core work product.

Excerpt from Affidavit of James Hamilton executed July 25, 1996 in Sealed Case, U.S. District Court for the District of Columbia, Nos. 95-446 and 95-447.

[The portion of the affidavit printed below has been unsealed in accordance with the Order of the United States Court of Appeals for the District of Columbia Circuit issued April 23, 1998 in *In re Sealed Case,* No. 97-3006. The remainder of the affidavit remains under seal.]

7. During my privileged meeting with Mr. Foster on July 11, 1993, I discussed with him his need for personal representation as well as my possible representation of the White House.

No. 97-1192

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

SWIDLER & BERLIN and JAMES HAMILTON,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MERITS BRIEF

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QUESTIONS PRESENTED

1. Whether, when a client dies, the attorney-client privilege in a criminal proceeding is no longer absolute, but is subject to a balancing test that requires the attorney to produce evidence of privileged communications with the client if they "bear on a significant aspect" of the case "as to which there is a scarcity of reliable evidence."

2. Whether, as a matter of law, an attorney's handwritten notes taken during an initial interview with a client do not receive the virtually absolute work product protection otherwise afforded to an attorney's "mental impressions," because at this stage the lawyer "has not sharply focused or weeded the materials" and exercised professional judgment as to what to record.

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PARTIES TO THE PROCEEDING

The petitioners are Swidler & Berlin and James Hamilton. The parties to the proceeding in the Court of Appeals were Swidler & Berlin, James Hamilton and the United States of America.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-1192

SWIDLER & BERLIN and JAMES HAMILTON,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The majority opinion of the court of appeals and a redacted version of the dissenting opinion are reported at 124 F.3d 230 and are printed in full text at Pet. App. 1a-26a.[1] The court's order on petition for rehearing, and the opinion dissenting from denial of rehearing (Pet. App. 27a-32a), are reported at 129 F.3d at 637. The district court issued a separate opinion for each of the two subpoenas involved. The opinions, which are iden-

[1] After the opinions were published, the court of appeals entered an order unsealing, among other things, the redacted portions of Judge Tatel's dissent. Order dated January 12, 1998, D.C. Cir. No. 97-3006. Consequently, the appendix to the petition for certiorari (hereinafter Pet. App.), which was filed after the unsealing order, contains an unredacted version of Judge Tatel's dissent.

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tical except for docket numbers and captions, are not reported and are printed (with redactions not relevant here) at Pet. App. 32a-42a and 43a-53a.

JURISDICTION

The court of appeals entered its judgment on August 29, 1997. The court entered an order denying a timely petition for rehearing on November 21, 1997. The petition for certiorari was filed December 31, 1997. The petition was granted March 30, 1998. On April 6, 1998 the Court expedited consideration of this case. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

RULES INVOLVED

Rule 501 of the Federal Rules of Evidence and Rule 26(b)(3) of the Federal Rules of Civil Procedure appear at Pet. App. 54a-56a.

STATEMENT

On July 11, 1993, in the midst of intense public controversy about the White House Travel Office, White House Deputy Counsel Vincent Foster met with Washington, D.C., attorney James Hamilton to discuss his and the White House's possible needs for legal representation. In anticipation of the meeting, Mr. Hamilton read and made notes on a report issued by the White House on the Travel Office matter. Pet. App. 40a. He and Mr. Foster then spoke for two hours, during which Mr. Hamilton took three pages of handwritten notes. Pet. App. 31a. Before the conversation began, Mr. Foster sought and received assurances from Mr. Hamilton that the conversation was privileged. Pet. App. 25a. This is confirmed by Mr. Hamilton's December 18, 1995 Affidavit, which recounted that Mr. Foster "made clear at the outset that this was a 'privileged' conversation." JA 5. Indeed, one of the first entries in the notes is the word "Privileged," reflecting this exchange between them. Pet. App. 41a.

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Mr. Hamilton's Affidavit also states that, in addition to including information provided by Mr. Foster that Mr. Hamilton saw fit to record, the notes contain his "mental impressions, observations, conclusions, and plans for action." JA 5. And as Judge Tatel said, "[t]he notes bear the marking of a lawyer focusing the words of his client; he underlined certain words, placing both check marks and question marks next to certain sections." Pet. App. 31a.

Nine days after the meeting, Mr. Foster committed suicide in Fort Marcy Park in Virginia. Over two years later, on December 4, 1995, a federal grand jury, at the request of Independent Counsel, issued subpoenas to Mr. Hamilton and his law firm, Swidler & Berlin, seeking Mr. Hamilton's notes.

Mr. Hamilton and his firm moved to quash or modify the subpoenas. The district court (Chief Judge Penn) inspected the notes *in camera.* He found that "Hamilton met with Foster to discuss possible representation of Foster," "that Foster spoke with Hamilton as an attorney and [that] a review of the notes supports that finding." Pet App. 41a. He held that "one of the first notations on the [notes] is the word: 'Privileged,' so it is obvious that the parties, Hamilton and Foster, viewed this as a privileged conversation." Pet. App. 41a. He also found that the notes were prepared in anticipation of litigation and "reflect the mental impressions of the lawyer." Pet. App. 42a. The district court concluded that both the attorney-client and work product privileges barred disclosure. Pet. App. 41a, 42a.

The Court of Appeals for the District of Columbia reversed. Recognizing that "[t]he parties agree that the communications at issue would be covered by the [attorney-client] privilege if the client were still alive," the court concluded that "the client's death calls for a qualification of the privilege." Pet. App. 2a. The "qualification" created by the court would permit "post-death

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use [of the otherwise privileged communication] in criminal proceedings" where the prosecutor convinces the trial court that the "relative importance [of the communication] is substantial." Pet. App. 10a. The court declared that the prosecutor is entitled to obtain privileged communications that "bear on a significant aspect of the crimes at issue, and an aspect as to which there is a scarcity of reliable evidence." Pet. App. 10a. On the other hand, "[w]here there is an abundance of disinterested witnesses with unimpaired opportunities to perceive and unimpaired memory, there would normally be little basis for intrusion on the intended confidentiality." *Id.* Independent Counsel in his briefs had not argued for such a balancing process.

The court of appeals reasoned that the prospect of post-death revelation in the criminal context will trouble a client less than in the civil context, because after death "criminal liability will have ceased altogether" while civil liability "characteristically continues." Pet. App. 6a. The court recognized that a concern for survivors might stir a desire to protect the client's estate from civil liability, but did not discuss whether the same concern might foster an interest in protecting the living from criminal penalties. Pet. App. 6a. The court also "doubt[ed]" that the client's concerns for post-death reputation would be "very powerful; and against them the individual may even view history's claims to truth as more deserving." Pet. App. 7a. The court added that, "[t]o the extent . . . that any post-death restriction of the privilege can be confined to the realm of criminal litigation, we should expect the restriction's chilling effect to fall somewhere between modest and nil." Pet. App. 7a.

As to the other side of the balance, the court concluded that the client's death heightens the prosecutor's need for otherwise privileged communications. The court concluded that "unavailability through death, coupled with

the non-existence of any client concern for criminal liability after death, creates a discrete realm (use in criminal proceedings after death of the client)" where the privilege should give way upon the prosecutor's showing of need. Pet. App. 7a-8a.

The court of appeals also held that the notes were not protected by the work product privilege. The court recognized prior decisions holding that attorney interviews conducted "as part of a litigation-related investigation" receive heightened work product protection even as to factual material, because "the facts elicited necessarily reflected a focus chosen by the lawyer." Pet. App. 13a. However, the court concluded that the present case is different because

> the interview was a preliminary one initiated by the client. Although the lawyer was surely no mere potted palm, one would expect him to have tried to encourage a fairly wide-ranging discourse from the client, so as to be sure that any nascent focus on the lawyer's part did not inhibit the client's disclosures.

Id. Because of the court's conclusive presumption that, at this stage, the lawyer "has not sharply focused or weeded the materials," it found that the notes did not deserve the "super-protective envelope" normally afforded opinion work product. Pet. App. 13a-14a. The Court remanded the case to the district court for reexamination of the notes in light of its opinion as to both the attorney-client and work product issues.

Judge Tatel dissented. While conceding that concern for surviving friends and family or posthumous reputation "may not influence *every* decision to confide potentially damaging information to attorneys," Judge Tatel concluded that "these concerns very well may affect *some* decisions, particularly by the aged, the seriously ill, the suicidal, or those with heightened interests in their posthumous reputations." Pet. App. 23a (emphasis in orig-

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inal). Judge Tatel argued that, after the court's decision, such persons will not talk candidly with a lawyer after they receive the advice the court's opinion now requires lawyers to give:

> I cannot represent you effectively unless I know everything. I will hold all our conversations in the strictest of confidence. *But when you die, I could be forced to testify—against your interests—in a criminal investigation or trial, even of your friends or family, if the court decides that what you tell me is important to the prosecution.* Now, please tell me the whole story.

Pet. App. 20a (emphasis in original). Judge Tatel concluded that the court's decision "strikes a fundamental blow to the attorney-client privilege and jeopardizes its benefits to the legal system and society." Pet. App. 26a.

The court of appeals denied rehearing *in banc,* with two judges dissenting as to the attorney-client privilege issue (Judges Tatel and Ginsburg).[2] Pet. App. 28a. The dissent emphasized that Independent Counsel had offered no evidence that abrogating the attorney-client privilege after death will not chill client communications with attorneys. Pet. App. 29a-30a. Such evidence, the dissent argued, is required to overturn the common law rule that the privilege survives death—a rule resting on the proposition that it is necessary to promote candid client disclosures.

Judge Tatel also dissented on the work product issue. He disgreed with the court's conclusive presumption that attorney notes taken at an initial client interview do not reflect the attorney's mental impressions because the lawyer does not "sharply focus[] or weed[]" the words of a client at an initial session. Pet. App. 30a. Instead, Judge Tatel argued, "lawyers bring their own judgment, ex-

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[2] Judges Sentelle and Garland did not participate.

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perience, and knowledge of the law to conversations with clients." *Id.*

> Whether courts can require production of attorney work product should turn not on the stage of representation or who initiates a meeting, but on whether the attorney's notes are entirely factual, or whether they instead represent the "opinions, judgment, and thought processes of counsel."

Pet. App. 31a (citation omitted). In this case, Judge Tatel said, the notes demonstrate that Mr. Hamilton "actively exercised his judgment when interviewing his client," because "[i]n two hours, he created only three pages of notes," in which he "underlined certain words, placing both check marks and question marks next to certain sections." Pet. App. 31a. Consequently, Judge Tatel concluded, "[t]he notes clearly represent the opinions, judgment, and thought processes of counsel," the same conclusion the district court had reached. *Id.*

SUMMARY OF ARGUMENT

1. Persons who expect to die soon—whether because of advanced age, illness, suicide, or a dangerous life-style —have the right to consult attorneys in confidence about criminal matters that threaten friends, associates, family or their own reputations. The court of appeals' decision denies them that right, and thus discriminates against the dying. More broadly, the decision also defeats the fundamental purpose of the privilege, which is to encourage full and frank communication between attorneys and clients and thereby promote observance of law and the administration of justice. In so doing, it potentially will affect adversely, on a daily basis, innumerable conversatons between clients and their attorneys, as amici attorney associations confirm.

The court of appeals erroneously assumes that persons facing death do not care whether their friends, associates, family, or their own reputations are harmed by disclosures

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after death in criminal proceedings. This assumption ignores the fact that people write wills, establish trusts, buy life insurance and burial plots, establish foundations, endow chairs, and write memoirs—actions evincing concern for what happens to the well-being of others and their own reputations following death.

The adverse effect of the court of appeals' decision on client candor is not ameliorated by limiting disclosure to criminal proceedings, and by requiring the prosecution to demonstrate that it needs the evidence. An elderly or ill person may be far more troubled by the prospect of a loved one's suffering a criminal sanction, than by potential civil liabilities that might diminish the family's inheritance. And a case in which the prosecution needs the evidence is exactly the kind of case where the prospect of disclosure would most trouble the client.

Moreover, the court of appeals' balancing test results in substantial uncertainty and "[a]n uncertain privilege is little better than no privilege at all." *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981). Making the promise of confidentiality contingent upon the outcome of an uncertain balancing test "would eviscerate the effectiveness of the privilege." *Jaffee v. Redmond*, 518 U.S. 1, 17 (1996).

Rule 501 of the Federal Rules of Evidence requires federal courts to consider "reason and experience" in interpreting the common-law privileges. The great weight of case law holding that the privilege survives death (except in the testamentary context), as well as the numerous state statutes to the same effect, reflect both "reason" and "experience," which instruct that client candor will be chilled if clients know that the privilege may evaporate after their death.

There is no merit to the court of appeals' argument that the privilege already is so beset with exceptions that one more will do little damage. In particular, the testa-

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mentary exception, which was in large part designed to effectuate the client's intent, should not be relied on to frustrate that intent by permitting testimony that may inflict criminal sanctions on the client's friends, family or associates. Despite the extant exceptions, the attorney-client privilege still is vital to our system of justice. The argument that one more exception can do little harm can lead only to progressive erosion of the privilege.

2. The court of appeals' decision refusing to accord heightened work product protection to the notes was fatally infected by its unsupportable presumption, which Independent Counsel does not defend, that lawyers at initial client interviews do not exercise professional judgment in determining what client statements to record and how to record them. This presumption is belied by the experience of seasoned practicing attorneys, whose views are represented by amici attorney associations, and by the record in this case. Clients typically choose attorneys because of their professional background and experience. Mr. Hamilton brought to the Foster interview extensive experience in highly-publicized, "political" cases. He also had prepared for the interview by reading a recently-issued White House report on the Travel Office matter. During the course of a two-hour interview, he took only three pages of notes, clearly exercising judgment as to what to record. His actions vividly illustrate the unrealistic nature of a presumption that lawyers at initial interviews are simply passive recorders of what clients say.

This Court's leading decisions on the work product privilege have accorded "special protection" to attorney notes of witness interviews, because " 'what [the attorney] saw fit to write down regarding witnesses' remarks' " reflects the attorney's mental impressions, which the privilege is designed to protect. *Upjohn Co. v. United States, supra,* 449 U.S. at 399-400, quoting *Hickman v. Taylor,* 329 U.S. 495, 513 (1947). Redaction does not resolve the issue; it may serve to eliminate the attorney's explicit ex-

pressions of opinion, but disclosure of the "factual" portions of the notes inevitably reveals the attorney's selection of what was "fit to write down."

The court of appeals' erroneous presumption that attorneys do not bring their professional judgment to bear in initial client interviews led it to conclude that the ordinary standard of need under Federal Rule of Civil Procedure 26 should be applied in determining whether the privilege pertains, rather than the heightened standard required by *Hickman* and *Upjohn*. Allowing the prosecution to obtain attorney interview notes based on the ordinary standard of need will destroy the "privileged area within which [the attorney] can analyze and prepare his client's case." *United States v. Nobles*, 422 U.S. 225, 238 (1975). When taking interview notes, an attorney cannot possibly know how a court might view a prosecutor's later assertion of need, and if disclosure hinges on such assertion, both attorney and client would be at peril whenever the attorney takes notes. The inevitable result would be that "much of what is now put down in writing would remain unwritten"—degrading the quality of case preparation and, ultimately, the administration of justice. *Hickman v. Taylor, supra*, 329 U.S. at 511.

ARGUMENT

I. THE PRIVILEGE PROTECTING COMMUNICATIONS BETWEEN CLIENT AND ATTORNEY SURVIVES THE CLIENT'S DEATH.

As Judge Tatel found, and the views of thousands of seasoned lawyers represented by amici attorney associations confirm, the court of appeals' decision strikes a "fundamental blow" to the attorney-client privilege.[3] Indeed, the decision discriminates against the aged, the diseased, and the distraught—against the most vulnerable in our society—by denying them the right to consult a lawyer in

[3] It is also a direct attack on Mr. Foster's desire and intention that the conversation at issue remain privileged.

confidence.[4] Reason and experience, whose consideration Federal Rule of Evidence 501 demands, do not allow this badly flawed decision to stand.

1. The purpose of the attorney-client privilege is "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). The privilege is "rooted in the imperative need for confidence and trust" between client and attorney, without which the client is not likely to reveal facts that may be deeply embarrassing or incriminating. *Trammel v. United States*, 445 U.S. 40, 51 (1980). The attorney must "know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out." *Id.* The privilege thus is "justified . . . by a 'public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth.'" *Jaffee v. Redmond*, 518 U.S. 1, 9 (1996) (*quoting Trammel*, 445 U.S. at 50).

For practicing lawyers, the privilege is vital. "[T]he problem of the guarded half-truths of the reticent client is familiar to [lawyers] in their day-to-day work." 1 *McCormick on Evidence*, § 6 at 353 (4th ed. 1992). Ability to give an unqualified assurance of confidentiality is necessary for the lawyer seeking to persuade a nervous or reluctant client to tell the whole truth. But under the court of appeals' decision, the lawyer cannot give unqualified assurance. Instead, the lawyer must tell the client that "when you die, I could be forced to testify—against your interests—in a criminal investigation or trial, even of your friends or family, if the court decides that what you tell me is important to the prosecution." Pet. App. 20a. For a client who is elderly, severely ill, suicidal or has other reason to expect imminent death, such a statement would

[4] Amicus National Hospice Organization supports Petitioners because the decision discriminates against the dying.

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sound more like a *Miranda* warning than an assurance of confidentiality.

This Court has recognized that "the privilege has the effect of withholding relevant information from the fact-finder." *Fisher v. United States,* 425 U.S. 391, 403 (1976). For that reason, the privilege applies only "where necessary to achieve its purpose." *Id.* But where the purpose of the privilege is implicated, it must be applied in order to "encourage clients to make full disclosure to their attorneys." *Id.* And where the privilege applies, it bars the grand jury from obtaining the privileged information. *Branzburg v. Hayes,* 408 U.S. 665, 688 (1972).

Moreover, the fact-finder's loss is more apparent that real. Because the privilege only protects communications "which might not have been made absent the privilege," *Fisher v. United States, supra,* 425 U.S. at 403, the fact-finder loses access only to a communication that may never have been made without an assurance of confidentiality. "Without a privilege, much of the desirable evidence to which litigants . . . seek access . . . is unlikely to come into being." *Jaffee v. Redmond, supra,* 518 U.S. at 12. "This unspoken 'evidence' will therefore serve no greater truth-seeking function than if it had been spoken and privileged." *Id.*

The facts of this case are vivid illustration of how the privilege creates information, rather than suppressing it. The district court found that "one of the first notations on the [notes] is the word: 'Privileged', so it is obvious that . . . Foster . . . viewed . . . notes of that conversation as privileged." Pet. App. 25a. Indeed, as this notation reflected and Mr. Hamilton's Affidavit confirms, Mr. Foster had asked Mr. Hamilton before the conversation began whether it was privileged and received assurances that it was. Pet. App. 41a. Thus the conversation likely would not have taken place—and there would have been no notes to subpoena—had Mr. Hamilton not given this assurance of confidentiality. JA 5, Pet. App. 25a. The con-

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versation occurred just nine days before Mr. Foster took his own life, and apparently within hours of when he wrote his now famous note stating, in obvious reference to himself, that in Washington "ruining people is considered sport."[5] While we will never know his precise thoughts, it is likely that he would have been reluctant to confide had he been told that the conversation was privileged *unless you die.*

In arguing that the client's death creates a greater need for the information, the court of appeals asserts—contrary to the policy underlying the privilege as well as the case law applying it—that need for the information overcomes the privilege. That argument ignores the fact that the information might well not exist but for the privilege. As Judge Tatel observed, that argument also would justify abrogating the privilege whenever the witness is unavailable for any reason.[6] And it ignores the prevailing federal and state case law recognizing that, where the privilege applies, it is absolute and may not be overcome by a showing of the fact-finder's need. "[I]f a party demonstrates that the attorney-client privilege applies, the privilege affords all communications between attorney and client absolute and complete protection from disclosure." *In re Allen,* 106 F.3d 582, 600, *rehearing in banc denied,* 119 F.3d 1129 (4th Cir. 1997), *cert. denied,* 118 S. Ct. 689 (1998). "Assuming the requisite relationship and confidential communication, the privilege is absolute and disclosure may not be ordered, without regard to relevance, necessity or any particular circumstances peculiar

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[5] Fiske, *Report of the Independent Counsel In Re Vincent W. Foster, Jr.*, pp. 13-14 and Exh. 5 (June 30, 1994).

[6] However, *Valdez v. Winans,* 738 F.2d 1087 (10th Cir. 1984), held in a habeas proceeding that an accused's constitutional rights were not violated when the state trial court sustained a claim of attorney-client privilege to bar testimony by an attorney that her client, rather than the defendant, committed the crime. In that case the client was not dead, but was unavailable to testify because he had invoked the Fifth Amendment.

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to the case." *Gordon v. Superior Court,* 65 Cal. Rptr. 2d 53, 59 (Cal. Ct. App. 1997); *Westinghouse Elec. Corp. v. Republic of Philippines,* 951 F.2d 1414, 1429 (3d Cir. 1991) ("The work-product doctrine recognizes a qualified evidentiary protection, in contrast to the absolute protection afforded by the attorney-client privilege."); *Kujawa v. Manhattan Nat'l Life Ins. Co.,* 541 So.2d 1168, 1169 (Fla. 1989) (attorney-client privilege provides "absolute immunity from disclosure"); *National Sec. Fire & Cas. Co. v. Dunn,* 705 So.2d 605, 608 (Fla. Dist Ct. App. 1997) ("Notwithstanding a litigant's entitlement to work-product material upon a showing of need and undue hardship, the attorney-client privilege is absolute."); *Spectrum Systems Int'l Corp. v. Chemical Bank,* 581 N.E. 2d 1055, 1060 (N.Y. 1991) (attorney-client communications entitled to "absolute immunity" from discovery).

2. There is no basis for the court of appeals' conclusion that the purpose of affording absolute protection to attorney-client communications as to criminal matters evaporates when the client dies. The court of appeals explicitly and wrongly assumes that persons facing death do not care whether their own reputations are harmed by disclosures after death in criminal matters. The court implicitly and wrongly assumes that the dying do not care about the post-death impact of criminal proceedings on their family, friends and associates. These assumptions are contrary to the "reason and experience" that Rule 501 requires the federal courts to consider in interpreting the attorney-client privilege. People write wills, establish trusts, buy life insurance and burial plots, invest in their children's education, establish foundations, endow chairs and write memoirs—actions evincing concern for what happens to the well-being of others and their own reputations following death.

Concern for the well-being of others comports with the finest traditions of our culture and religious heritages. The Bible exhorts us to care for others and to "love your

neighbor as yourself." [7] Our national tradition celebrates those who devoted their lives to serving others. We observe, for example, national holidays on the birthdays of Presidents Washington and Lincoln and Dr. Martin Luther King. Most of us fall short of the standards set by our faiths and our national heroes, but many Americans give generously to charities and exhibit concern for others in their daily lives. And most of us also have family, friends and associates we would not want to harm—before or after our death. To argue that concern for others does not typically extend beyond death is to posit a callous self-centeredness that is inconsistent with common experience.

Nor is it correct to suggest, as does one academic commentator cited by the court of appeals, that ordinary people have no concern for their reputation following death and to disparage any such concern as "Pharaoh-like." Pet. App. 4a, quoting 24 Wright & Graham, *Federal Practice and Procedure* § 5498, at 484 (1986). This far too dismissive comment overlooks the fact that many persons adhering to more contemporary faiths place great store in the value of a good name. Concern for one's own reputation is a value celebrated by the Bible [8] and our culture's great literary works; [9] it is hardly an outdated relic of ancient times. And plainly, "peoples' concern with reputation may well be socially desirable and hence worth encouraging. For if individuals did not care about their name, including after their death, they would likely behave worse—morally and legally—while alive." Frankel, *The Attorney-Client Privilege After the Death of the Client*, 6 Geo. J. Legal Ethics 45, 63 (1992).

Thoughts about how one will be remembered by his family, friends and community, are quite likely to emerge

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[7] *Leviticus* 19:18; *Mark* 12:31.

[8] "A good name is rather to be chosen than great riches." *Proverbs* 22:1.

[9] "The purest treasure mortal times afford [i]s spotless reputation." Shakespeare, *Richard II*, Act I Scene 1.

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shortly before death. Such thoughts could well make a client fearing posthumous disclosure chary about revealing sensitive, personal matters to an attorney.

As Judge Tatel remarked in dissent, this case is a particularly inappropriate one in which to abrogate the posthumous protection of the privilege. Mr. Foster, shortly before his death, gave a law school commencement speech emphasizing the high value he placed on personal reputation. Pet. App. 23a. Indeed, Independent Counsel Starr's report on Mr. Foster's death stressed that his "public persona as a man of integrity, honesty, and unimpeachable reputation was of utmost importance." Starr, *Report of the Office of Independent Counsel on the Death of Vincent W. Foster, Jr.*, at 98 (1997). Independent Counsel Fiske and even Independent Counsel Starr (who now generally minimizes the concern for posthumous reputation) both concluded that attacks on Mr. Foster's reputation and others could have contributed to the depression that caused him to take his own life. *Id.* at pp. 105-10; Fiske, *Report of the Independent Counsel In Re Vincent W. Foster, Jr.*, pp. 8-17 (1994).[10]

The court of appeals expressed "doubt" that an individual's "residual" interest in post-mortem reputation "will be very powerful," suggesting that "the individual may even view history's claims to truth as more deserving." Pet. App. 7a. But anyone familiar with memoirs knows that most people who speak "for history" tend to choose words with extreme care. "Most public servants' memoirs turn out to be self-serving exercises in which their political decisions are retrospectively interpreted in the best possible

[10] Mr. Fiske also relates how Mr. Foster, upset that a colleague was reprimanded in the Travel Office matter, sought instead to take the blame himself. *Id.* at p. 12. Mr. Foster's now famous note—likely written within hours of his visit to Mr. Hamilton—says, in obvious reference to himself, that in Washington "ruining people is considered sport." *Id.* at pp. 13-14 and Exh. 5. The note also complains that "the public will never believe the innocence of the Clintons and their loyal staff." *Id.* at Exh. 5. His concern for both his reputation and the well-being of others is evident.

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light." [11] A respected recent memoirist described how he went through his final draft "with a fine tooth comb" to assure that, while being honest, he would "not, at the same time, be hurtful," because he knew "everything you say will be in print forever." [12] The attorney-client privilege is designed to ensure that persons speak with counsel with candor and do not edit their statements with a "fine tooth comb."

There are many public people who feel, with considerable justification, that there is some information as to which the claims of privacy outweigh the claims of history. Justice Black, on the eve of his death, directed that certain of his Court papers be destroyed, in order to preserve the confidentiality of the Court's deliberations.[13] Some years ago, there was strong criticism of a psychotherapist who released tapes of his sessions with the poet Anne Sexton, 17 years after her suicide, to the writer of a biography published 10 years later.[14] Whether these con-

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[11] "We Can All Learn from McNamara's Memoirs," New York Times (Apr. 13, 1995) at p. A24.

[12] "Colin Powell Talks About His Family, 'the Producers' and the Making of a Memoir," Chicago Tribune (Aug. 26, 1996) at p. C3. If we may be so bold, we also submit that judges carefully write opinions with a view to the opinion of posterity.

[13] Newman, *Hugo Black* 621-622 (1994). Only his conference notes were destroyed. Justice Black explained to his son that "reports by one Justice of another's conduct in the heat of a difference might unfairly and inaccurately reflect history." Wigdor, *The Personal Papers of Supreme Court Justices* 48 (1986).

[14] The therapist who released the tapes was "excoriated" by the president of the American Academy of Psychoanalysis and the chairman of the ethics committee of the American Psychiatric Association. "Dead Poet's Confidences an Open Book," Cleveland Plain Dealer (Sept. 22, 1991), 1991 WL 4521561. Another commentator on the incident, a writer and psychiatrist, stated that "[m]ost authors I know are very invested in what reputation might outlive them." Ablow, "Whose Life Is It, Anyway?; Keeping Confidences Shared in Psychotherapy," Washington Post (Sept. 24, 1991), 1991 WL 2117233. Although the tapes were released with the consent

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cerns are right or wrong is not paramount. What is important is that many people feel strongly that there is a zone of privacy that should be respected even after death. Such feelings would inhibit candor where a person who is elderly, ill or suicidal is told that the privacy of conversations with an attorney may not be respected following death.

The court of appeals cited academic commentators who stated that few clients are much concerned about what will happen after "the death that everyone expects but few anticipate in an immediate or definite sense." Pet. App. 5a, quoting 2 Mueller & Kirkpatrick, *Federal Evidence* § 19, at 380 (1994). But the attorney-client privilege does not exist only for the benefit of young, healthy clients, for whom death may be a remote prospect. While it may be that those who are blessed with the insouciance of youth have no concerns about their passing, those of us burdened by the exigencies of advancing age, infirmity and distress also are entitled to obtain confidential legal advice. Every year, hundreds of thousands of Americans learn that they have a life-threatening illness.[15] Every year, millions of Americans, even those fortunate enough to retain good health, reach an age at which thoughts of mortality intrude. These people—as well as others who are

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of the potet's daughter and literary executor, this commentator compared the therapist who released them to "a priest who, at the family's request, makes available the confessions of a deceased parishioner." *Id. See also,* "Release of Poet's Therapy Tapes Called a Breach of Confidentiality Ethics: Psychiatrist criticized for giving Anne Sexton's biographer access to the recordings, even 17 years after Pulitzer Prize winner's suicide," Los Angeles Times (Aug. 11, 1991), 1991 WL 2245191.

[15] In 1993, some 566,000 persons died of cancer or as a consequence of HIV infection. U.S. Department of Commerce, *Statistical Abstract of the United States 1996*, at 96. Given the nature of these diseases, most of these persons likely were aware for some period of time that they would die soon. The American Cancer Society estimates that there were 1.3 million new cancer cases in 1996. *Id.* at 145.

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suicidal or engaged in hazardous lifestyles—are entitled to consult an attorney in confidence. Indeed, people in the final stages of life frequently feel a particular need to speak with an attorney to put their own affairs in order or to resolve family or business problems. But under the court of appeals' decision, those people may lose their right to do so in confidence.

3. The overwhelming majority of decided cases supports the conclusion that the attorney-client privilege survives the client's death. Seven states have held that the attorney-client privilege survives the death of the client in criminal proceedings.[16] The Ninth Circuit and 19 states have held that the attorney-client privilege survives the client's death in civil cases.[17] The only decision to the

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[16] The following decisions excluded from criminal proceedings evidence of communications between a deceased person and that person's attorney: *Mayberry v. Indiana*, 670 N.E.2d 1262 (Ind. 1996); *In re a John Doe Grand Jury Investigation*, 562 N.E.2d 69 (Mass. 1990); *People v. Modzelewski*, 611 N.Y.S.2d 22 (N.Y. App. Div. 1994); *Arizona v. Macumber*, 544 P.2d 1084, 1086 (Ariz. 1976), *cert. denied*, 439 U.S. 1006 (1978); *People v. Pena*, 198 Cal. Rptr. 819, 829 (Cal. Ct. App. 1984); *Cooper v. Oklahoma*, 661 P.2d 905, 907 (Okla. Crim. App. 1983); *South Carolina v. Doster*, 284 S.E.2d 218, 220 (S.C.), *cert. denied*, 454 U.S. 1030 (1981).

[17] The Ninth Circuit cases are *United States v. Osborn*, 561 F.2d 1334 (9th Cir. 1977) and *Baldwin v. Commissioner of Internal Revenue*, 125 F.2d 812, 815 (9th Cir. 1942). In *Osborn*, the disclosure had criminal implications; the district court had allowed intervenors to claim the Fifth Amendment privilege as to some documents at issue. 561 F.2d at 1336.

State cases holding that the privilege survives in civil proceedings are: *Fox v. Spears*, 93 S.W. 560 (Ark. 1906); *Doyle v. Reeves*, 152 A. 882 (Conn. 1931); *De Loach v. Myers*, 109 S.E.2d 777 (Ga. 1959); *Hitt v. Stephens*, 675 N.E.2d 275 (Ill. App. Ct.), *appeal denied*, 679 N.E.2d 380 (Ill. 1997)); *Estate of Voelker*, 396 N.E.2d 398 (Ind. Ct. App. 1979); *Bailey v. Chicago, Burlington & Quincy R.R. Co.*, 179 N.W.2d 560, 564 (Iowa 1970); *Stegman v. Miller*, 515 S.W.2d 244, 246 (Ky. 1974); *Morris v. Cain*, 1 So. 797, 807-8 (La. 1887); *Tillinghast v. Lamp*, 176 A. 629, 632 (Md. 1935); *Rich v.*

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contrary is from a mid-level state appellate court that until two months ago had never been followed.[18] *None of these cases recognizes a distinction between the civil and criminal contexts.* This Court has stressed the importance of uniformity between federal and state court decisions, because a state promise of confidentiality would have little value if the client is aware that disclosure may be ordered by a federal court. *Jaffee v. Redmond, supra,* 518 U.S. at 13.

State courts, making no disinction between civil and criminal matters, also have held that other similar privileges survive death: the privilege for marital communications,[19] the patient-physician and patient-psychotherapist

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Fuller, 666 A.2d 71, 74-75 (Me. 1995); *McCaffrey v. Estate of Brennan*, 533 S.W.2d 264 (Mo. Ct. App. 1976); *Lorimer v. Lorimer*, 83 N.W. 609 (Mich. 1900); *Lennox v. Anderson*, 1 N.W.2d 912 (Neb.), *modified on other grounds*, 3 N.W.2d 645 (Neb. 1942); *Clark v. Second Judicial District Court*, 692 P.2d 512 (Nev. 1985); *Scott v. Grinnell*, 161 A.2d 179, 183 (N.H. 1960); *Anderson v. Searles*, 107 A. 429, 430 (N.J. 1919); *Taylor v. Sheldon*, 173 N.E.2d 892, 895 (Ohio 1961); *Miller v. Pierce*, 361 S.W.2d 623, 625 (Tex. Civ. App. 1962); *In re Smith's Estate*, 57 N.W.2d 727 (Wis. 1953).

Dicta in federal court opinions are to the same effect. *Colonial Gas Co. v. Aetna Cas. & Sur. Co.*, 144 F.R.D. 600, 604 (D. Mass. 1992); *Dixson v. Quarles*, 627 F. Supp. 50, 53 (E.D. Mich.), *aff'd mem.*, 781 F.2d 534 (6th Cir. 1985), *cert. denied*, 479 U.S. 935 (1986).

[18] *Cohen v. Jenkintown Cab Co.*, 357 A.2d 689 (Pa. Super. Ct. 1976). After the court of appeals' decision in the present case, the Pennsylvania court followed that decision and its own *Cohen* decision in holding that the psychiatrist-patient privilege becomes a qualified privilege after the client's death where "criminal proceedings are conducted in the context of a grand jury investigation to solve the client's murder." *In re Subpoena No. 22*, Mich. No. 80099 of 1996, 1998 WL 86687, at *7 (Pa. Super. Ct. Mar. 2, 1998).

[19] *Curran v. Pasek*, 886 P.2d 272 (Wyo. 1994); *Merrill v. William Ward Ins. Co.*, 622 N.E.2d 743 (Ohio Ct. App. 1993); *Georgia Int'l Life Ins. Co. v. Boney*, 228 S.E.2d 731 (Ga. Ct. App. 1976).

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privileges,[20] and the priest-penitent privilege.[21] These privileges survive death even though it is doubtful that, in most cases, the privileged communications would be chilled by fear of disclosure because the persons making them "have the worry of litigation in the back of their minds." *Jaffee v. Redmond, supra*, 518 U.S. at 24 (Scalia, J., dissenting). By contrast, persons consulting attorneys frequently are concerned about possible litigation (as Mr. Foster was), and it is thus fair to presume that the specter of posthumous disclosure in criminal litigation involving friends, family or associates would deter candor.

State case law holding that the attorney-client privilege survives death is supported by numerous state evidence codes providing that the privilege may be claimed after death by the client's personal representative.[22] These statutes reflect the position taken by the Model Code of Evi-

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[20] *Prink v. Rockefeller Ctr., Inc.*, 398 N.E.2d 517, 520 (N.Y. 1979); *Leritz v. Koehr*, 844 S.W.2d 583 (Mo. Ct. App. 1993); *Williams v. Kentucky*, 928 S.W.2d 942 (Ky. Ct. App. 1992); *Rittenhouse v. Superior Court*, 1 Cal. Rptr. 2d 595 (Cal. Ct. App. 1991); *Sims v. Georgia*, 311 S.E.2d 161 (Ga. 1984); *Jewell v. Holzer Hosp. Found. Inc.*, 899 F.2d 1507, 1513-14 (6th Cir. 1990) (applying Ohio law). *See* 1 *McCormick on Evidence* § 103 at 388 (4th ed.), *Contra*: *In re Subpoena No. 22, supra*, 1998 WL 86687.

[21] *Ryan v. Ryan*, 642 N.E.2d 1028, 1034 (Mass. 1994).

[22] "In general, modern evidence codes reflect the view that the privilege may be asserted by the personal representative of a deceased client (either an executor or administrator)." *Restatement (Third) of the Law Governing Lawyers*, § 127, Comment c (Proposed Final Draft No. 1, March 29, 1996). *See also* the discussion of state statutes by Judge Tatel in his dissent. Pet. App. 17a-18a. State evidence codes allowing the personal representative of the deceased to assert the privilege include: Ala. R. Evid., Rule 502; Alaska R. Evid. 503; Ark. Code Ann. § 16-41-101, Rule 502; Cal. Evid. Code § 953; Del. R. Evid. 502; Fla. Stat. Ann. § 90.502; Haw. Rev. Stat. § 626-1, Rule 503; Idaho R. Evid. 502; Kan. Stat. Ann. § 60-426; Ky. R. Evid. 503; La. Code Evid. Ann. art. 506; Me. R. Evid. 502; Miss. R. Evid. 502; Neb. Rev. Stat. § 27-503; Nev. Rev. Stat. § 49.105; N.H. R. Evid. 502; N.J. Stat. Ann. 2A:84A, App. A,

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dence, Rule 209(c)(1), and the Uniform Rules of Evidence, Rule 502(c).[23] Obviously, these statutes rest on the assumption that the privilege survives death. Rule 501 of the Federal Rules of Evidence provides that "reason and experience" shall govern the interpretation of a privilege and "it is appropriate to treat a consistent body of policy determinations by state legislatures as reflecting both 'reason' and 'experience.'" *Jaffee v. Redmond, supra*, 518 U.S. at 13.[24]

The court of appeals argues that, because state evidence codes are consistent with the notion that the privilege expires when the estate is closed, they involve only testamentary matters and thus do not indicate that the privilege survives death in a criminal context. Pet. App. 4a. Were the statutes generally so limited, one would expect to find language to that effect in them. But none of these statutes says that it is inapposite as to criminal matters or that the privilege expires when the estate closes.

Indeed, the Uniform Rules of Evidence provide not only that the personal representative can claim the privilege,

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N.J. R. Evid. 504; N.M.R. Evid 11-503; N.D. R. Evid. 502; Oh. Rev. Code Ann. § 2317.02; 12 Okla. Stat. Ann. § 2502; Or. Rev. Stat. § 40.225; S.D. Codified Laws § 19-13-4; Tex. R. Civ. Evid. 503 and Tex. R. Crim. Evid. 503; Vt. R. Evid. 502; Wis. Stat. Ann. § 905.03.

[23] This Court's 1972 Proposed Federal Rule of Evidence 503(c) would have maintained the privilege after death. *See* 56 F.R.D. 183, 236, 240 (1972). This Court in *Jaffee* found that the Proposed Rule relating to the psychotherapist privilege supported the position reached in that case. 518 U.S. at 14-15.

[24] State legislative support for the proposition that the attorney-client privilege survives death is far more consistent than the state support for the psychotherapist privilege that this Court found significant in *Jaffee*. 518 U.S. at 14 n.13, 26 (Scalia, J., dissenting). *Jaffee*, of course, recognized a new federal privilege; here we attempt to *preserve* an application of a long-recognized privilege that has been widely accepted by state legislatures and state and federal courts.

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but also that "[t]he person who was the lawyer or the lawyer's representative at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the client." Uniform Rule 502(c). That provision—which on its face applies to any type of proceeding—is also common in state evidence codes,[25] and is found in the Arkansas statute that governs Mr. Foster's still-open estate.[26] Nothing in these statutes indicates that the privilege is limited, following the client's death, to civil proceedings. In *Cooper v. Oklahoma, supra,* 661 P.2d at 907, the court, citing a statute adopting Uniform Rule 502(c), allowed the deceased's attorney to claim privilege when called by the defense in a criminal prosecution.

The court of appeals and Independent Counsel draw their principal support from certain academic commentators. But even the commentators supporting Independent Counsel's view concede that the case law is otherwise. 1 *McCormick on Evidence,* § 94, at 348 (4th ed. 1992) ("The accepted theory is that the protection afforded by the privilege will in general survive the death of the client."); *Restatement (Third) of the Law Governing Lawyers* § 127 comment c (Proposed Final Draft No. 1, March 29, 1996) ("The privilege survives the death of the client. A lawyer for a client who has died has a continuing obligation to assert the privilege.");[27] *Wolfram, Modern Legal Ethics* § 6.3.4, at 256 (1986) ("In general, courts hold that the death of the client does not end the

[25] Of the statutes cited in note 22, a provision allowing the lawyer at the time of the communication to claim the privilege appears in the statutes of Alabama, Alaska, Arkansas, Delaware, Florida, Hawaii, Idaho, Kentucky, Louisiana, Maine, Mississippi, Nebraska, Nevada, New Hampshire, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Vermont and Wisconsin.

[26] Ark. Code Ann. § 16-41-101, Rule 502.

[27] After describing the testamentary exception, the Reporter's Note states that, where this exception does not apply, the cases "routinely hold that the privilege survives." *Restatement, supra,* § 127 Reporter's Note.

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privilege"); 24 Wright & Graham, *Federal Practice and Procedure* § 5498 at 483 (1986) (conceding that the "common law rule" is as stated by Wigmore—that the privilege, "being intended to secure a confidence on the client's part that no disclosure will be made . . . does not cease . . . upon the death of the client."); 2 Mueller & Kirkpatrick, *Federal Evidence* § 199 at 379 (2d ed. 1994) ("It is generally held that the privilege is not terminated even by the death of the client, although this view has been sharply criticized by commentators.") *Moreover, none of these commentators supports the court of appeals' view that there should be one rule for civil cases and another for criminal cases.*

Other prominent commentators argue forcefully that the rule should not be changed. Wigmore asserts:

> The subjective freedom of the client, which it is the purpose of the privilege to secure . . . could not be attained if the client understood that, when the relation ended or even after the client's death, the attorney could be compelled to disclose the confidences, for there is no limit of time beyond which the disclosures might be used to the detriment of the client or of his estate.

See, 8 Wigmore, *Evidence* § 2323 (McNaughton rev. 1961). *See also* Frankel, *The Attorney-Client Privilege After the Death of the Client,* 6 Geo. J. Legal Ethics, 45, 78-79 (1992): "[i]ndividuals do usually care about the dissemination of information about themselves, even after their deaths, and this concern will lead them to confide more fully in attorneys if they know that the privilege will outlive them." Other commentators recognize that the privilege survives death and make no call for changing the rule. Hazard and Hodes, *The Law of Lawyering,* § 1.6:101 at 131 (1998); *Weinstein's Federal Evidence,* § 503.32 at 503-96 (2d ed. 1997); Epstein, *The Attorney-Client Privilege and the Work-Product Doctrine,* at 234 (3d ed. 1997); Rice, *The Attorney-Client Privilege in the United States,* §§ 2.5, 2.6 (1993).

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4. Apparently recognizing the harmful effects of a broad rule allowing posthumous disclosure, the court of appeals attempted to limit the damage by confining disclosure to "the discrete zone of criminal litigation." Pet. App. 8a. But a client's concern for family, friends and associates surely will extend to their potential criminal as well as civil liabilities. An elderly or dying person may be troubled far more by a loved one's possible incarceration than by diminution of an inheritance caused by some civil sanction. Especially given the increasing utilization of criminal law as a means of commercial and ethical regulation, a client who believes that death is a not-too-distant possibility may be loath to speak to a lawyer about criminal problems involving friends, family or criminal associates if advised that confidentiality evaporates upon his or her demise.

The court of appeals attempted to distinguish between criminal liability, which "will have ceased altogether [after death]," and civil liability, which "characteristically continues" and which clients would wish to avoid in order to "preserve their estates [after death]." Pet. App. 6a. But as a practical matter, civil and criminal liability cannot be separated so easily. Disclosures made in the criminal context could be used in related civil matters, and a client's estate may be decimated as a result of criminal proceedings after his or her death. For example, a child's drug activities could lead to civil forfeiture of estate property. *See, United States v. One Parcel of Property, at 31-33 York Street*, 930 F.2d 139 (2d Cir. 1991) (house belonging to mother forfeited because sons used it for drug sales); *cf. Bennis v. Michigan*, 516 U.S. 442 (1996) (automobile partially owned by wife forfeited because husband used it for illegal sexual activities). Moreover, disclosure could cause investigation, prosecution, or conviction of an heir of the deceased client, which could result in fines or attorney fees that deplete the portion of the estate left to that heir.

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Thus, even if the court of appeals were right in its implicit counter-intuitive assumption that clients would care about the economic, but not the criminal, consequences of posthumous disclosure on friends and family, in the real world criminal liability may have severe economic consequences. Moreover, if the court of appeals were correct in holding that a plausible claim of necessity in the criminal context allows posthumous disclosure, scant reason exists to deny it where a party in civil litigation plausibly claims the evidence is critical. Upholding the court of appeals' decision inevitably will lead to deterioration of the privilege in both the criminal and civil spheres.

5. The balancing test fashioned by the court of appeals does not ameliorate the damage inflicted on attorney-client confidentiality. The client is unlikely to be reassured when told that the conversation will be confidential except for statements whose "relative importance" to the prosecutor is "substantial." Pet. App. 10a. "Making the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege." *Jaffee v. Redmond, supra*, 518 U.S. at 17 (1996) (patient-therapist privilege). Under the court of appeals' balancing test, the trial judge is most likely to perceive a need for privileged information in precisely those situations where the client would be most concerned about the criminal ramifications of disclosure on family, friends or associates. At the least, such a balancing test renders the attorney-client privilege uncertain, and "[a]n uncertain privilege is little better than no privilege at all." *Upjohn Co. v. United States, supra*, 449 U.S. at 393.

6. There is no merit to the court of appeals' argument that the privilege already is so beset with exceptions that one more will make little difference. Pet. App. 8a-10a.

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The court cited the so-called "crime-fraud" exception, but for this exception to apply "the client must have made or received the otherwise privileged communication with the intent to further an unlawful or fraudulent act." *In re Sealed Case*, 107 F.3d 46, 49 (D.C. Cir. 1997). In addition, "the client must have carried out the crime or fraud." *Id.*[28] A client will know whether he or she consults an attorney to further a criminal or fraudulent scheme. And a client will know whether he or she, after receiving legal advice, has proceeded to commit a crime or fraud. Clients who are seeking advice in an attempt to comply with the law, or to lessen the consequences of past violation, are unlikely to be deterred from candor by advice that confidentiality may be destroyed by an intent to commit a future crime or fraud, followed by actual commission of the intended wrongdoing. The same cannot be said about an elderly, severely ill or suicidal client who is told that confidentiality will perish with death.

The court of appeals also invoked the "ubiquitous exception for litigation between persons claiming under the decedent" (Pet. App. 9a)—otherwise known as the testamentary exception. But disclosure is allowed in testamentary disputes for the purpose of determining the decedent's intent. *Glover v. Patten*, 165 U.S. 394, 406-08 (1897); *United States v. Osborn, supra*, 561 F.2d at 1340 n.11. "[I]f the decedent could be asked, he would want to waive the privilege so that the lawyer could dispose of the property according to his wishes." Hazard and Hodes, *The Law of Lawyering*, § 1.6:101 at 131 n.5.7 (1998). An exception designed to implement client intent does not support creating another exception to thwart it. Indeed,

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[28] "In other words, the [crime-fraud] exception does not apply even though, at one time, the client had bad intentions. Otherwise, 'it would penalize a client for doing what the privilege is designed to encourage—consulting a lawyer for the purpose of achieving law compliance.'" *In re Sealed Case, supra*, 107 F.3d at 49, quoting *Restatement of the Law Governing Lawyers*, § 142 comment c, at 461 (Proposed Final Draft No. 1, 1996).

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Glover, the leading case on the testamentary exception, is premised on the assumption that, except in that context, the privilege applies after death.

To be sure, as the court of appeals noted, there may be cases where implementation of testamentary intent necessitates disclosure of embarrassing information, such as the existence of an illegitimate child. Pet. App. 9a.[29] But it is fair to presume that the client would have wanted his or her testamentary intent fulfilled, even at the cost of an embarrassing disclosure. By contrast, disclosure in criminal proceedings about the client's family, friends or associates is not designed to implement the client's intent, and may have far more drastic consequences than mere embarrassment or hurt feelings. In that situation, a court cannot presume that, if the "decedent could be asked, he would want to waive the privilege." Hazard and Hodes, *supra*.

Finally, the court of appeals refers to decisions suggesting that criminal defendants in some situations may have a constitutional right to obtain and use as evidence otherwise privileged exonerating statements. Pet. App. 10a, citing dicta in *John Doe Grand Jury Investigation*, *supra*, 562 N.E.2d at 71-72; *South Carolina v. Doster*, *supra*, 284 S.E.2d at 220. There also are decisions by this Court holding that certain privileges created by state statute must yield to a defendant's constitutional right to confront or to obtain exculpatory information.[30] These cases at

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[29] The governing statute in New York creates an exception from the testamentary rule for any privileged communication "which would tend to disgrace the memory of the decedent." N.Y.C.P.L.R. § 4503(b) (McKinney's 1992).

[30] *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987); *Davis v. Alaska*, 415 U.S. 308 (1974). *See also United States v. Scheffer*, 118 S.Ct. 1261, 1264 (1998), where this Court (in a context not involving a privilege) said that exclusion of evidence may be "unconstitutionally arbitrary or disproportionate" where it "has infringed upon a weighty interest of the accused."

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least suggest that courts may be inclined to find appropriate ways to protect a defendant's constitutional rights where privilege is claimed.[31]

But this case involves not a criminal defendant, but a *prosecutor's* attempt to obtain privileged evidence. The Court can decide the present matter without reaching the different issue of a defendant's possible constitutional right to privileged material.[32] If such a right exists, it would reflect our constitutional system's particular concern in avoiding jailing the innocent—a concern that affords criminal defendants unique rights.[33] To allow a prosecutor to break the privilege on the ground that a grand jury's constitutional right to investigate is on a par with possible constitutional rights of a criminal defendant would be a radical, problematic step fraught with unforeseen consequences.

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[31] However, several state cases refused to allow an attorney to testify as to confidential communications from a deceased client, even though the evidence was sought to assist in the defense of a criminal prosecution: *Mayberry v. Indiana*, 670 N.E.2d 1262 (Ind. 1996); *People v. Modzelewski*, 611 N.Y.S.2d 22 (N.Y. App. Div. 1994); *Arizona v. Macumber*, 544 P.2d 1084, 1086 (Ariz. 1976), *cert. denied*, 439 U.S. 1006 (1978); *People v. Pena*, 198 Cal. Rptr. 819, 828-29 (Cal. Ct. App. 1984); *Cooper v. Oklahoma*, 661 P.2d 905, 907 (Okla. Crim. App. 1983); *South Carolina v. Doster*, 284 S.E.2d 218, 220 (S.C.), *cert. denied*, 454 U.S. 1030 (1981). *Compare, Valdez v. Winans*, 738 F.2d 1087 (10th Cir. 1984), discussed at n. 6 *supra*. *But see District Attorney v. Magraw*, 628 N.E.2d 24 (Mass. 1994); *Arizona v. Gause*, 489 P.2d 830 (Ariz. 1971), *vacated on other grounds*, 409 U.S. 815 (1972); and *Wyoming v. Kump*, 301 P.2d 808 (Wyo. 1956) where, because of conflict or lack of authority, courts refused to allow a husband accused of murdering his wife to assert her attorney-client privilege.

[32] *Compare Jaffee, supra*, 518 U.S. at 18.

[33] For example, the prosecution must prove its case beyond a reasonable doubt; the defendant, innocent until proven guilty, may stand mute. The prosecution cannot appeal an acquittal; the defendant may appeal a conviction.

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There is also a basic flaw in the argument that one more exception to the privilege should not be unduly injurious, given those that exist. Despite the extant exceptions, the attorney-client privilege still is vital to our system of justice. All citizens—including the elderly and seriously ill—still have a right to talk to an attorney in confidence. The courts still have a paramount interest in assuring that clients tell their attorneys the whole truth. Most attorneys still take seriously their professional obligation to preserve confidences. Contrary to the court of appeals' conclusion, in most circumstances "belief in an absolute attorney-client privilege" is not, and should not be, "illusory." Pet. App. 8a. The court of appeals' reasoning can only further a progressive erosion of the privilege, as each added exception fuels the argument that yet one more can do little additional harm.

II. ATTORNEY NOTES TAKEN AT AN INITIAL CLIENT INTERVIEW ARE ENTITLED TO THE VIRTUALLY ABSOLUTE WORK PRODUCT PROTECTION AFFORDED AN ATTORNEY'S MENTAL IMPRESSIONS.

The court of appeals' determination that the notes at issue are not protected by the heightened work product standard rests on the apparently conclusive presumption that an attorney, in an initial client interview, is a passive note-taker and exercises no professional judgment in choosing what to record. Even Independent Counsel, in his opposition to the petition for a writ of certiorari, declined to defend this bizarre notion, which is contrary to existing law, the facts of this case, and the experience of the seasoned practicing attorneys whose views are expressed here by amici attorney associations.

1. The work product privilege "shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case." *United States v. Nobles*, 422 U.S. 225, 238 (1975). A

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lawyer preparing a case must "assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference." *Hickman v. Taylor*, 329 U.S. 495, 511 (1947). If materials reflecting the lawyer's thoughts were open to opposing counsel, "much of what is now put down in writing would remain unwritten." *Id.* "Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. . . . And the interests of the clients and the cause of justice would be poorly served." *Id.*[34] "Although the work product doctrine most frequently is asserted as a bar to discovery in civil litigation, its role in assuring the proper functioning of the criminal justice system is even more vital." *United States v. Nobles, supra*, 422 U.S. at 238.

From its adoption in the seminal decision of *Hickman v. Taylor, supra*, the work product privilege has been applied to attorneys' notes of witnesses' oral statements. In *Hickman*, the Court refused to require disclosure of "what [the attorney] saw fit to write down regarding witnesses' remarks." 329 U.S. at 513. The Court also accorded work product protection to attorney notes and memoranda of witness interviews in *Upjohn Co. v. United States, supra*. *Upjohn* held that "memoranda based on oral statements of witnesses" must be given "special protection" under Rule 26. 449 U.S. at 400. The Court reasoned that "[f]orcing an attorney to disclose notes and memoranda of witnesses' oral statements is particularly disfavored because it tends

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[34] Some insight into what the Court may have meant by "sharp practices" may be gained from the transcript of oral argument in *Hickman v. Taylor*. When asked by Justice Jackson what the practical effect would be of requiring production of the attorney interview notes, counsel responded: "In my judgment, interviews will go unrecorded, unpleasant sources will not be pursued, and counsel will be tempted to keep files under his bed at home." Quoted in 1 *McCormick on Evidence* § 96 at 358 (4th ed. 1992).

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to reveal the attorney's mental processes." *Upjohn Co. v. United States, supra,* 449 U.S. at 399.

Hickman and *Upjohn*, as well as lower court cases,[35] accorded heightened protection to initial *witness* interviews. The issue of work product protection for intial *client* interviews has not previously arisen (presumably because client interviews, until this case, have been protected by the attorney-client privilege). But there is even more reason to grant heightened work product protection to client interviews. At a witness interview, the attorney's principal focus likely is to elicit facts. By contrast, at a client interview—particularly an initial interview—the attorney also may outline the legal situation, discuss possible approaches, and explain the consequences and risks of various courses of action. For this reason, the notes of a client interview, even more than a witness interview, are likely to be permeated by the "attorney's mental processes." *Upjohn Co. v. United States, supra,* 449 U.S. at 687.

2. The court of appeals held that "the ordinary Rule 26(b)(3) standard should apply" in determining whether an attorney's notes of an initial client interview must be produced to the prosecutor. Pet. App. 14a. Under that standard, the prosecutor obtains access to work product upon showing a "substantial need" for the material and inability to obtain the "substantial equivalent" of the material by other means "without undue hardship." Fed. R. Civ. Proc. 26(b)(3). But application of the ordinary Rule 26(b)(3) standard to attorney notes of initial client interviews transgresses *Upjohn* and the policies underlying the work product privilege.

The magistrate in *Upjohn*, as did the court of appeals here, applied the "substantial need" and "without undue

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[35] *E.g., In re Allen*, 106 F.3d 582, 607 (4th Cir. 1997), *cert. denied*, 118 S. Ct. 689 (1998); *Cox v. Administrator, U.S. Steel*, 17 F.3d 1386, 1421-23 (11th Cir.), *modified on reh'g on other grounds*, 30 F.3d 1347 (11th Cir.), *cert. denied*, 513 U.S. 1110 (1994).

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hardship" tests of the ordinary Rule 26(b)(3) standard. 449 U.S. at 401. This Court reversed, holding that "a far stronger showing of necessity and unavailability by other means" is required. 449 U.S. at 401-2. The Court recognized that the lower courts had split on the degree of protection allowed attorney interview notes of witness interviews, with some courts holding that "*no* showing of necessity can overcome protection of work product which is based on oral statements from witnesses," and others holding that such material is entitled to "special protection." [36] But the Court concluded that it need not resolve this conflict, because under either test the lower court had erred in applying the ordinary Rule 26(b)(3) standard. 449 U.S. at 401-02.

Subsequent lower court decision have followed *Upjohn*, holding that attorney interview notes are producible, if at all, "only in very rare and extraordinary circumstances." *In re Allen, supra,* 106 F.3d at 607; *Cox v. Administrator, supra,* 17 F.3d at 1421-23 (same); *In re Sealed Case,* 676 F.2d 793, 809-10 (D.C. Cir. 1982) ("extraordinary justification" required for disclosure).[37]

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[36] 449 U.S. at 401 (emphasis in original), citing *In re Grand Jury Proceedings,* 473 F.2d 840, 848 (8th Cir. 1973) (absolute protection); *In re Grand Jury Investigation,* 412 F. Supp. 943, 949 (E.D. Pa. 1976) (same); *In re Grand Jury Investigation,* 599 F.2d 1224, 1231 (3d Cir. 1979) (disclosure in "rare situations").

[37] Independent Counsel previously has relied on two cases, but they do not support the court of appeals' application of a lesser standard. In *In re Grand Jury Investigation,* 599 F.2d 1224 (3d Cir. 1979), the Third Circuit rejected absolute protection, concluding that attorney interview notes are producible in a "rare situation." 599 F.2d at 1231. It found the "rare situation" standard met in part because of the interviewee's death and in part for other reasons. 599 F.2d at 1231-32. In *In re John Doe Corp.,* 675 F.2d 482, 493 (2d Cir. 1982), the Second Circuit, after noting that "the mental processes and legal theories of the interviewing attorney . . . are entitled to the greatest protection available under work-product immunity," held that, under the circumstances of that case, production of attorney interview notes would not reveal the attorney's mental processes.

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The court of appeals asserted that *Upjohn* "did not decide whether factual elements embodied in [attorney interview] notes should be accorded the virtually absolute protection that the privilege gives to the attorney's mental impressions." Pet. App. 12a. It rested this conclusion on its assumption that the factual portions of the interview notes at issue in *Upjohn* were covered by the attorney-client privilege and thus were not involved in the Court's work-product ruling. Pet. App. 12a-13a. In fact, the interview notes on *Upjohn* included notes of interviews with seven former employees of the client company and this Court expressly said that its work product "discussion will also be relevant to counsel's notes and memoranda of interviews with [these seven] should it be determined [by the lower courts on remand] that the attorney-client privilege does not apply to them." 449 U.S. at 394 n.3, 397 n.6.

Moreover, the Court's reasoning in *Upjohn* made clear that the special protection afforded attorneys' "mental processes" extended to the factual portion of the interview notes. The Court equated "the attorney's mental processes" with "what he saw fit to write down," including "what [the attorney] considered to be the important questions, the substance of the responses to them . . . ." 449 U.S. at 399, 400 n.8 (quoting *Hickman v. Taylor, supra,* 329 U.S. at 516-17). The Court also relied on Justice Jackson's statement in *Hickman* that attorney interview notes are protected partly because they are in the attorney's "language, permeated with his inferences." *Hickman, supra,* 329 U.S. at 516-17 (Jackson, J., concurring), quoted in *Upjohn,* 449 U.S. at 399-400.

The notes taken by Mr. Hamilton were not verbatim, but were cast in his language. They reflect Mr. Hamilton's own "selections, interpretations, and interpolations"; as such, the notes "could not fairly be said to be the witness' own statement." *Palermo v. United States,* 360 U.S. 343, 350 (1959). Because they contain the attorney's language and selections rather than Mr. Foster's statement, they

would not be a "statement" producible under the Jencks Act.[38] For much the same reason, the notes are entitled to special protection under the work product privilege, reflecting as they do the attorney's perceptions of the case and his "mental processes" as he began to review the case.

Applying the ordinary standard of need of Rule 26(b)(3) to attorney interview notes has the effect of destroying the "privileged area within which [the attorney] can analyze and prepare his client's case." *United States v. Nobles, supra,* 422 U.S. at 238. At the time of taking interview notes, an attorney cannot possibly know how a court might view a prosecutor's assertion of "need" or unavailability of "substantially equivalent" material "without undue hardship." If disclosure hinges on application of those tests under the ordinary Rule 26(b)(3) standard, the attorney and client could be at peril whenever the attorney takes interview notes. The inevitable result would be that "much of what is now put down in writing would remain unwritten"—degrading the quality of case preparation and, ultimately, the administration of justice. *Hickman v. Taylor, supra,* 329 U.S. at 511.

3. The court of appeals apparently believed that the damaging effect of applying the ordinary Rule 26(b)(3) standard could be limited by confining it to attorney notes of initial client interviews. Pet. Ap. 13a. But it is particularly important not to discourage attorney note-taking at this stage. As recognized by a widely-used manual on trial technique, an accurate record of the initial interview is important because "[y]our client will never have a better

[38] *See, Palermo v. United States,* 360 U.S. 343, 352-53 (1959) ("summaries of an oral statement which evidence substantial selection of material . . . are not to be produced"); *United States v. North American Reporting, Inc.,* 761 F.2d 735, 740 (D.C. Cir.) (notes "contain[ing] incomplete, episodic statements" are not witness statements) *cert. denied,* 474 U.S. 905 (1985); *United States v. Fowler,* 608 F.2d 2, 6 (D.C. Cir. 1979) ("short [and] very cryptic," "incomplete" notes "set[ting] forth a few references to scattered facts" are not witness statements).

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grasp of the pertinent facts than at this stage." Lane, *Goldstein Trial Technique* § 1.03 at 3 (3d ed. 1996). Adequate notes taken "while the matter is fresh in the client's mind will prevent a later sketchy and perhaps incomplete recall of the facts" and "will prove extremely helpful, particularly where the trial takes place several years in the future." *Id.*, § 1.05 at 4.

Moreover, a client's subsequent recollections may be tainted by the "education" he or she acquires, during the course of litigation, as to what the facts "should" be in order to prevail. A lawyer who has taken adequate written notes at the initial interview will be better equipped to ensure that the client does not deviate from the truth to accommodate his or her developing perception of legal or tactical advantage. A rule that hampers the ability of a lawyer to perform this function only can injure the administration of justice. *Hickman v. Taylor, supra,* 329 U.S. at 511.

Nor can the danger of discouraging note-taking at initial client interviews be ameliorated by redaction, as the court below suggests. Pet. App. 14a. The redaction procedure presumes that the policies of the work product privilege are satisfied if explicit expressions of the attorney's opinions and mental impressions are protected from disclosure. But attorney interview notes also should be protected because disclosure would "tend[] to reveal the attorney's mental processes" by revealing " 'what he saw fit to write down regarding witnesses' remarks.' " *Upjohn Co. v. United States, supra,* 449 U.S. at 399, quoting *Hickman v. Taylor, supra,* 329 U.S. at 513. Redacting explicit statements of opinion from attorney notes is thus insufficient to protect the attorney's mental processes.

4. The court of appeals was particularly misguided in creating an apparently conclusive presumption that a lawyer taking notes at an initial interview "has not sharply focused or weeded the materials," thus rendering inappropriate the heightened protection accorded to "the attorney's

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mental processes." *Upjohn Co. v. United States, supra,* 449 U.S. at 399. This argument ignores the reality of the practice of law. As amici attorney associations confirm, it is totally unrealistic to assume that the lawyer plays a passive role in an initial interview, simply recording facts to be shaped into legal theories at some later stage. Instead, the initial interview serves the dual purpose of "obtaining an exhaustive account of the client's predicament *and outlining available solutions.*" Lane, *Goldstein Trial Technique* § 1.03 at 3 (3d ed. 1996) (emphasis added). At the initial interview, the attorney's task is not only to elicit facts, but also to "explore various approaches and possible action to be taken." *Id.,* § 4.02 at 5. Inevitably, as part of that process, the lawyer will wish to explore certain factual areas more intensely than others. And in recording the interview, the lawyer will emphasize certain factual elements over others, depending on his or her concept of what the problem areas are and what approaches might be fruitful. For these reasons, an attorney's account of an initial interview typically is cast "in language permeated with his inferences." *Hickman v. Taylor, supra,* 329 U.S. at 516-17 (Jackson, J., concurring).

The court below argued that an initial client interview is not deserving of special protection because the lawyer may encourage the client to engage in "a fairly wide-ranging discourse." Pet. App. 13a. While this may be true, the issue is not what the client says at the initial interview, but which portions of the client's "discourse" the attorney chooses to record and the words he or she selects to accomplish this. It is these choices the attorney's notes reflect and the work product privilege protects. *Upjohn Co. v. United States, supra,* 449 U.S. at 399.

The court of appeals' presumption that the lawyer is not sufficiently knowledgeable to play an active role at the initial interview also ignores the record of this case. Mr. Hamilton came to the meeting with Mr. Foster with considerable experience in highly-publicized, "political" cases.

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As many attorneys do, he prepared for the "initial interview"; the record shows that he had read and taken notes on the White House's report on the Travel Office matter. Pet. App. 40, 41.

Moreover, as Judge Tatel observed, the notes themselves demonstrate that Mr. Hamilton exercised his professional judgment during the interview. "In two hours, he created only three pages of notes," which were not verbatim but contained only what "he thought significant, omitting everything else." Pet. App. 31a. Three pages of notes, to memorialize a two-hour interview, must be the product of a high degree of professional selectivity. The notes, as Judge Tatel observed, bear various markings ("check marks and question marks") and "clearly represent the opinions, judgments, and thought processes of counsel." *Id.*

The record thus fully supports the district court's factual finding that Mr. Hamilton's "written notes reflect the mental impressions of the lawyer . . . ." Pet. App. 42a. The court of appeals' conclusion to the contrary is unsupported by the record and fatally infected by the erroneous conclusive presumption that lawyers do not exercise professional judgment when they take notes during initial client interviews.

5. The court of appeals' work product decision, when coupled with its ruling on the attorney-client privilege, will have dire practical results. If clients are advised that their disclosures to an attorney might be unprotected after death, they may not talk candidly. If lawyers are advised that their notes of initial client interviews may be available to a grand jury, they may cease taking notes. The net result will be to degrade the administration of justice —lawyers are less likely to know the full truth about their clients' conduct and will not have a written record of what their clients initially said. And there will be no offsetting benefits, because grand juries will not benefit from client

statements that are not made and notes that are not taken. As Judge Tatel's dissent correctly observed, the court of appeals' "two new holdings—one chilling client disclosure, the other chilling lawyer note-taking—will damage the quality of legal representation without producing any corresponding benefits to the fact-finding process." Pet. App. 31a-32a.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1997

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OFFICE OF
INDEPENDENT COUNSEL

No. 97-1192

SWIDLER & BERLIN AND JAMES HAMILTON, *Petitioners*

v.

UNITED STATES OF AMERICA, *Respondent*

On Writ of Certiorari to the
United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Faced with indefensible rulings by the court of appeals, Independent Counsel advances different positions. As to attorney-client privilege, he disavows the court of appeals' balancing approach, instead arguing flatly that "the attorney-client privilege does not apply in federal criminal proceedings when the client is deceased." Br. 9 (upper case omitted). Indeed, he specifically asks this Court to order production of relevant portions of the notes, although the court of appeals required the district court to engage in a balancing process before ordering production. Pet. App. 10a-11a, 13a-14a; compare Br. 41 n.40, 49. Because Independent Counsel did not file a cross petition, his request to alter the judgment is improper. Northwest

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Airlines v. County of Kent, Michigan, 510 U.S. 355, 364-65 (1994); Stern & Gressman, Supreme Court Practice (7th ed.) § 6.35.

As to work product, Independent Counsel does not attempt to defend the court of appeals' holding that notes of an initial client interview cannot reflect the attorney's mental processes, arguing instead that the work product privilege, like the attorney-client privilege, expires with the client's death. He also seeks an order directing production of all relevant portions of the notes, a relief broader than that entered by the court of appeals. Br. 49; Pet. App. 12a. This he cannot do without a cross-petition. Northwest Airlines, supra.

In any event, Independent Counsel's positions, like those of the court of appeals, should be rejected.

I. Attorney-Client Privilege.

A. Confidentiality is necessary to foster candor between client and attorney.

1. Independent Counsel argues that "the rule that the privilege does not apply after death in criminal proceedings should cause no chilling effect whatsoever on appropriate attorney-client communications -- that is, on clients who intend to testify truthfully or assert the Fifth Amendment." Br. 39 (emphasis in original). In other words, his position is that only those who intend to commit perjury will be restrained by such a rule. This argument, however, is contrary to case law, common sense, and the experience of the legal profession reflected in the briefs of amici attorney associations, which Independent Counsel ignores.

The purpose of the attorney-client privilege is "to encourage full and frank communication between attorneys and their clients." Upjohn Co. v. United States, 449 U.S.

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383, 389 (1981); see also United States v. Zolin, 491 U.S. 554, 562 (1989); Fisher v. United States, 425 U.S. 391, 403 (1976). The privilege promotes free and unrestrained conversations by ensuring that these conversations are, and remain, "off the record," and is intended to benefit all clients in need of legal advice. Common sense and the legal profession's experience teach that even truthful people may need to talk to a lawyer in confidence and that those conversations may well be chilled by fear of disclosure after death. The rule that the privilege survives death is not intended to benefit the perjurer.

Independent Counsel recognizes the "importance" of the attorney-client privilege when the client asserts the Fifth Amendment privilege. Br. 33. However, he suggests that, because the deceased client cannot be prosecuted, the client planning to assert this privilege would not be chilled by the prospect of the attorney's revealing their conversations after death. This disregards the obvious harm such disclosure could have on the client's reputation and the fate of others.

Independent Counsel contends that federal law recognizes the attorney-client privileges in cases where the client testifies for two reasons. Br. 35-37. First, if the client testifies there is little need for the attorney also to do so. Second, to allow the attorney to testify would create a litigation side-show focusing on discrepancies between the attorney's and the client's testimony. But Independent Counsel overlooks the most salient reason for recognizing the privilege: to encourage candid conversations between the attorney and the client. Fear of revelation of those candid conversations after death would chill them.

To abandon the need for candor as the basic reason for the privilege would throw its legitimacy into doubt even for the living. The litigation side-show rationale is insufficient to

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support the privilege because it would not protect the privilege in pretrial discovery. Moreover, neither that rationale nor the claim that the attorney's testimony is unnecessary justifies the privilege when the client is unavailable to testify because of flight, illness, or loss of memory. The Fifth Amendment analogy is an inadequate justification because it has no application in purely civil matters. Encouragement of candor, therefore, remains the chief reason for the privilege.

Clients must be able to talk freely and without restraint with attorneys "if the professional mission is to be carried out." Trammel v. United States, 445 U.S. 40, 51 (1980). The client who is overly cautious and circumspect may fail to reveal matters the lawyer should know. Lawyers doing their job encourage clients freely to express their suppositions, emotions, doubts, fears, speculations, and the like.

Once the client has freely confided in the lawyer, the lawyer can help sort the relevant from the irrelevant, separate what the client actually knows from guesswork and speculation, assist the client in thinking through apparent inconsistencies, and prod the client into testing personal recollections against available documents and the statements of others. After that process, the lawyer will have an accurate basis for giving advice, and the client will be better equipped to present a cogent, truthful account, if testimony is required.[1/] But this process --

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[1/] It is much too simplistic to say, as Independent Counsel does, that "[t]he client who will testify truthfully ... will simply tell her attorney the same facts that she will disclose under oath." Br. 35 (emphasis in original). Anyone who has practiced law knows that, even as to the wholly truthful client, some aspects of the private conversations with the lawyers may differ from later "on the record" testimony. At any given time (even just before the client's death) the lawyer, and perhaps the client, may not know with any completeness what the "facts" are, particularly if the matter is complex and involves multiple parties. We expect that what Independent Counsel eventually wants from Mr. Hamilton is not just "facts," but his

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which is fully appropriate and replicated daily in law offices across the country -- cannot operate effectively unless the client is first able to confer with a lawyer in confidence without restraint.

The difficulty of sorting a client's surmises and speculations from actual knowledge is particularly acute when the client speaks about the activities of friends, family or associates. Here suspicion may be more prevalent than knowledge. A client knowing that the conversation with counsel is confidential can -- and often should -- voice all his or her fears and suspicions about others, even if they have little foundation. But it could well be irresponsible to impugn others by speculation and surmise knowing that a prosecutor or a grand jury could become privy to the conversation. That is one reason why a person who intends to be truthful in later testimony must be able to speak first with a lawyer in confidence. Independent Counsel's suggestion that a client may not, in a privileged setting, retain and consult a lawyer about the legal difficulties of others (particularly those relating to his or her own conduct) is simply wrong.[2/]

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testimony about everything, speculations included, Mr. Foster said to him. To allow that sort of probing into an attorney's recollections of a conversation with a client would chill client candor and have pernicious effects on the practice of law and the administration of justice.

[2/] See Br. 29. Independent Counsel asserts that a person consulting an attorney "to enable the attorney to advise or assist someone else" may not claim the privilege. Br. 45 n. 45, quoting Larkin, Federal Testimonial Privileges § 2.02, at 2-17. But a client may want legal advice for the client's own benefit about the activities of friends, family and associates, either because that conduct may implicate the client or for other reasons. As long as the person consulting the attorney is seeking legal advice (rather than arranging for the attorney to provide advice to someone else), he or she is entitled to the privilege.

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In short, Independent Counsel's position that only intended perjurers will eschew candor if they fear their conversations with counsel will be posthumously revealed contravenes reason and experience. Clients who intend truthful testimony, as well as those who intend to assert their Fifth Amendment privilege, also would be restrained.

2. Independent Counsel concedes that clients anticipating death may care about their reputation and about the fate of family, friends and associates. Br. 43-44. He argues, however, that a client's desire to protect others and his or her own reputation does not justify nondisclosure after death because the client could be forced to testify about such matters before death. "[T]he information" disclosed by the attorney, he says, "is the same factual information that the client himself would have been legally required to disclose if he were alive." Br. 44 (emphasis in original). This argument attacks the very fundamentals of the privilege.

The attorney-client privilege is not intended only to protect incriminating information the client cannot be forced to reveal. Rather, it is based chiefly on the need to foster client candor. If a client anticipating death cannot talk to a lawyer freely about matters implicating family, friends, associates and his or her own reputation because the lawyer later might be turned into a funnel to the prosecutors, the client might well not talk at all -- and thus there would be no information to discover. It thus is not at all clear, as Independent Counsel argues, that the costs of protecting attorney-client communications after death are high, because if the privilege dissipates upon death such communications might not be made.

As discussed above, a client's discussion with a lawyer may be expansive, involving speculation, rumor, factual uncertainties, and the like. That a client later could be required to

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testify about certain facts after receiving professional assistance and advice should not make such wide-ranging conversations any less confidential. To conclude otherwise would be to squelch the types of communications necessary for the legal system to function.

B. There is no basis for Independent Counsel's assertion that the chilling effect of posthumous disclosure would be "marginal."

Independent Counsel concludes -- contrary to the views of amici attorney associations -- that the chilling effect of the rule he espouses would be "extraordinarily marginal." Br. 39. None of his arguments in this regard has merit.

1. Independent Counsel suggests that clients will not be chilled because they will not learn about the confidentiality exception he proposes. Br. 39-40. We have no doubt, however, that any decision by this Court vitiating the privilege after death would receive widespread publicity, particularly among the aged and ill.

2. Independent Counsel asserts that clients already are chilled by the lawyer's obligation to reveal client perjury. As remarked, however, even truthful people often need to talk to a lawyer in confidence. For the truthful client, fear of what the lawyer might do if perjury occurred would not be important. But fear of disclosure after death -- particularly where the client is elderly, ill or suicidal -- would chill candor, and that is why the privilege should survive death.

3. Independent Counsel rightly observes that prosecutors rarely have sought disclosure of attorney-client communications after the client's death. This is the first reported

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federal case; there is only one reported state case.[3/] This circumstance may be because prosecutors with "the perspective that multiple responsibilities provide"[4/] understand that the law is settled and that ultimately the government and law enforcement benefit if clients are candid with their attorneys. However, if this Court holds such evidence obtainable, federal prosecutors will have no choice but to seek it and inhibited candor will be the by-product.

4. Independent Counsel contends that grand jury secrecy and admissibility rules will minimize the chilling effect of the disclosure he seeks. But a client would be restrained by the prospect that friends, family or associates could be indicted as a result of disclosure, even if the evidence that led to indictment is not admissible at trial. Moreover, inadmissible attorney writings might be utilized at trial, for example, to refresh recollection or to cross-examine. Lack of admissibility would not ensure that attorney-client information remains confidential.

5. To disparage the chilling effect of posthumous disclosure, Independent Counsel repeatedly asserts that criminal prosecution after death would not affect the client's estate. Br. 9, 16 n.11, 22, 29. This contention rests on the bizarre notion that persons contemplating death care only about the magnitude of their estates and not about whether family, friends or associates might be incarcerated -- a notion contrary to reason and experience. This assertion also is demonstrably wrong, for criminal proceedings can decimate

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[3/] In re John Doe Grand Jury Investigation, 562 N.E.2d 69 (Mass. 1990). In the other state cases excluding such evidence from criminal trials (cited in our principal Brief at 19 n.16), the defense sought the evidence; the prosecution opposed.

[4/] Morrison v. Olsen, 487 U.S. 654, 732 (1988) (Scalia, J., dissenting).

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an estate by leading to property forfeitures, fines, restitution, and huge legal fees.[5/] Even from a purely economic standpoint, criminal proceedings can be at least as disastrous as civil proceedings, and both the court of appeals and Independent Counsel concede that the privilege survives death in civil proceedings because of the effect of a contrary rule on a decedent's estate.

C. There is no support for distinguishing between criminal and civil proceedings in applying the attorney-client privilege.

Independent Counsel argues that privileges that apply in civil proceedings may not apply in criminal proceedings. That may be true for certain qualified privileges, where a balancing test applies and the interests supporting disclosure in a criminal proceeding may be weightier than in a civil case. See United States v. Nixon, 418 U.S. 683, 711-12 & n.19 (1974) ("President's generalized interest in confidentiality"); Branzburg v. Hayes, 408 U.S. 665, 688 (1972) (journalist's privilege).[6/] But the argument has no support in cases involving absolute privileges where balancing tests are not utilized.[7/]

[5/] See Federal Sentencing Guidelines Manual, §§ 5E1.1 (Restitution), 5E1.2 (Fines for Individual Defendants). Examples of statutes providing for forfeiture as a result of criminal conduct are: 18 U.S.C. § 981 (forfeiture for a list of offenses); 21 U.S.C. § 853 (forfeiture of assets traceable to narcotics violations); 18 U.S.C. § 1955(d) (forfeiture of property connected to illegal gambling); 26 U.S.C. § 7301 (forfeiture of property connected to tax avoidance); 18 U.S.C. § 1963(e) (forfeiture under RICO).

[6/] But see University of Pennsylvania v. EEOC, 493 U.S. 182, 201 (1990). (Branzburg followed in a civil enforcement proceeding.)

[7/] Independent Counsel cites McCormick's statement that some state statutes deny the physician-patient privilege in criminal cases. Br. 11, citing 1 McCormick on Evidence § 104, at 388 (4th ed. 1992). However, McCormick concedes that, "[i]n the absence of specific limiting language, the [physician-patient] privilege will generally be held to apply to criminal as well as civil cases." Id. at 388 n.4.

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The civil-criminal distinction especially fails in the context of the attorney-client privilege. Lawyers frequently are consulted in situations where both civil and criminal liability is possible. Matters concerning securities, tax, antitrust, fraud or RICO laws all could involve either civil or criminal liability.[8/] It is nonsensical to contend, for example, that a conversation involving a client's liability under the securities laws is inviolate after death in a civil case, but accessible by a grand jury. To attempt to explain such a dichotomy to a client hardly would foster client candor.[9/]

D. The decision discriminates against the dying.

Independent Counsel argues that extinguishing the privilege at death would not discriminate against the dying because (1) they "most likely" would consult lawyers about wills or property dispositions, and (2) the will contest exception already negates the privilege. Br. 16-17, 45-46. However, while a person near death might be concerned about bequests and a will contest might develop (without which the exception does not apply), the client might

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[8/] See, e.g., 18 U.S.C. §§ 1963 (RICO criminal penalties), 1964 (RICO civil liabilities); 15 U.S.C. §§ 1, 2 (antitrust criminal penalties), 15 (antitrust civil liabilities), 77k, 77l (Securities Act civil liabilities), 77x (Securities Act criminal penalties).

[9/] Independent Counsel argues that disclosure is needed in criminal proceedings, because nondisclosure may allow "'a murderer ... still at large and likely to strike again' to evade justice." Br. 24, (quoting In re John Doe Grand Jury Investigation, supra, 562 N.E.2d at 73 (Nolan, J., dissenting)). Present ethical rules address public safety, allowing disclosure "to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm." ABA Model Rules of Professional Conduct, Rule 1.6(b)(1). While these rules do not directly concern possible future criminal conduct by third parties, they at least suggest that a lawyer's ethical obligations would not protect such information. In any event, the present case does not raise a public safety issue, and any "public safety" exception that might be fashioned likely would not depend on whether the client was dead.

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well wish to consult a lawyer for some other purpose, including grand jury investigations that might involve the client or others. Mr. Foster, after all, did not seek out Mr. Hamilton to confer about estate planning. To rob the dying of confidentiality as to nontestamentary matters is discriminatory.

Independent Counsel also says there is no discrimination against the dying because the client must testify truthfully and the attorney "simply" must disclose the same information the client would have disclosed. We have dealt with the essence of this wrong-headed argument above, but here make an additional point. The dying would often know that, as a practical matter, they never will testify in a criminal proceeding because death will overtake other events. The Court will recall that Mr. Foster died only nine days after he spoke with Mr. Hamilton. Under either the court of appeals' or Independent Counsel's formulation, if the client near death declines to speak with a lawyer, his or her secrets go to the grave; but if the client does consult an attorney, whose advice may be desperately needed, disclosure of those secrets is a distinct possibility. To force this Hobson's choice on dying clients discriminates against them.

E. Existing law overwhelmingly supports survival of the privilege after death; the commentators are split.

Independent Counsel argues that the "vast majority" of state cases supports his position, as well as state statutes and the "virtual consensus" of commentators. Br. 14, 16. This claim is both wrong and misleading.

1. The "vast majority" of state cases Independent Counsel refers to involve the "testamentary exception" where the privilege is waived for the sole purpose of obtaining

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evidence as to the client's testamentary intent. Br. 16. But these cases, and the state statutes that codify the testamentary exception, recognize that it is just that -- an exception to the general rule that the privilege survives death.[10/]

Independent Counsel argues that these cases represent a policy determination that correctly disposing of an estate trumps the interest in preserving the confidentiality of the deceased's conversation with counsel who drafted the will. The issue of whether a crime was committed and by whom, he then contends, is at least important as "who gets Blackacre," and the needs for such information "are surely sufficient to trump the privilege after death." Br. 17 (emphasis in original).

But this analysis overlooks the basic notion that the "testamentary exception" is designed to implement the client's testamentary intent. This Court in Glover v. Patten, 165 U.S. 394, 408 (1897), recognized that this is so; numerous other cases concur.[11/]

[10/] See Glover v. Patten, 165 U.S. 394, 408 (1897) (exception described as a "waiver" of the general rule of confidentiality); Blackburn v. Crawfords, 70 U.S. 175, 194 (1865) (same); Hitt v. Stephens, 675 N.E.2d 275, 278 (Ill. App. 1997), appeal denied, 679 N.E.2d 380 (Ill. 1997) ("[t]he only context in which a client's death might affect the viability of the privilege is a will contest"); Doyle v. Reeves, 152 A. 882, 883 (Conn. 1931) (will contest rule is a "recognized exception"); Succession of Norton, 351 So.2d 107, 112 (La. 1977) ("exception" to general rule that "the death of the client does not terminate the privilege").

Rule 502 of the Uniform Rules of Evidence describes the will-contest rule as an "Exception" to the "General Rule of Privilege," as do 18 of the statutes that adopt the Uniform Rules: Alabama, Alaska, Arkansas, Delaware, Hawaii, Idaho, Kansas, Kentucky, Louisiana, Maine, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, South Dakota, Texas and Wisconsin (cited in our principal Brief at 21-22 n.22). The California Evidence Code, § 953, also labels the will-contest rule as an "Exception."

[11/] The cases cited in n.10 supra all state or indicate that implementing the client's testamentary intent is the basis for the testamentary exception. Examples of other cases relying on the client intent rationale are: Clark v. Turner, 183 F.2d 141, 142 (D.C. Cir. 1950); Doherty v.

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Attempting to find (or invent) similar intent in the criminal investigation situation, Independent Counsel makes an extraordinary statement. It is, he says "'fair to presume' that the client would have wanted to provide relevant information to the grand jury." Br. at 19. He derives this supposed presumption from the citizen's duty to testify before the grand jury. But citizens also have a duty to pay taxes, and the Court should not presume that a client would want everything he says to his or her tax attorney revealed to the IRS. Nor can a similar presumption rationally be made in many grand jury situations where the client's own reputation may be at stake, as well as the fate of family, friends and associates. To base negation of the privilege at death on such a doubtful presumption would be to ignore reality. To apply the privilege after death in criminal proceedings, but not in will contests, will not create "an irrational asymmetry in the law" because reason and experience tell us that different presumptions as to client intent should pertain, as amici attorney associations confirm.

2. Independent Counsel also claims support from state statutes providing that the deceased client's personal representative may assert the privilege. He argues that criminal proceedings have no relevance to the administration of estates, and thus these statutes impliedly limit the posthumous privilege to civil proceedings.

None of these codes (including the Arkansas statute governing Mr. Foster's still-open estate) states that they are limited only to civil matters. Indeed, some have been applied in

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O'Callaghan, 31 N.E. 648, 650 (Mass. 1892); In re Cunnion's Will, 94 N.E. 648, 650 (N.Y. 1911); Bergsvik v. Bergsvik, 291 P.2d 724, 731 (Or. 1955); Hugo v. Clark, 99 S.E.521 (Va. 1919); Holty v. Landauer, 52 N.W.2d 890, 892 (Wis. 1952).

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criminal cases to uphold the privilege.[12] Moreover, Independent Counsel is wrong to assert that criminal proceedings have no relevance to estate administration, because criminal proceedings may result, e.g., in forfeitures that could deplete an estate. He also disregards the many state evidence codes (including Arkansas') that allow the deceased's attorney to claim the privilege -- provisions that cannot be read as limited to civil proceedings. Indeed, one such statute has been applied in a criminal case.[13]

3. Also relevant are the reason and experience reflected in bar and state ethics opinions. The consistent position is that the attorney's obligation of confidentiality survives death.[14]

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[12] In People v. Pena, 198 Cal. Rptr. 819, 828 (Cal. App. 1984), the court in a criminal trial relied on the California Code provision authorizing the decedent's personal representative to assert the privilege to sustain exclusion of a communication between the decedent and his attorney. See also Cooper v. Oklahoma, 661 P.2d 905, 907 (Okla. Crim. App. 1983) (citing similar provision of Oklahoma Code to support exclusion of decedent's privileged communication in a criminal trial); In re John Doe Grand Jury Investigation, 562 N.E.2d 69 (Mass. 1990) (allowing administratrix of decedent's estate to assert privilege in response to motion to compel attorney's testimony before grand jury).

[13] See our principal Brief at 23 n.25. Cooper v. Oklahoma, supra, cited the Oklahoma statute allowing the attorney to claim the privilege in sustaining exclusion from a criminal trial of a deceased client's statements.

[14] See ABA Ethics Committee Informal Opinion 1293 (confidences must be preserved following client's death). State and local bar opinions adopting the same rule are summarized in ABA/BNA, Lawyers. Manual on Professional Conduct, ¶ ¶ 801:4361 (Maryland), 801:1710 (LA County), 801:6609 (North Carolina), 901:1033 (Alabama), 901:2069 and 2070 (Connecticut), 901:5102 (Mississippi), 901:6265 (Nassau County), 901:8606 (Vermont), 901:9110 (Wisconsin), 1001:6001 (New Mexico), 1001:7313 (Pennsylvania). This Court has looked to bar pronouncements in determining reason and experience. Upjohn, supra, 449 U.S. at 390-91.

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4. Independent Counsel's assertion that he is supported by a "virtual consensus" of "overwhelming scholarly authority" (Br. 12-15) exaggerates. The commentators' views are canvassed in our opening brief (at 23-24). Suffice it to say here that all commentators concede that the case law supports posthumous application of the privilege; that none supports the view that the posthumous privilege operates differently in criminal and civil proceedings;[15] that certain commentators supporting termination of the privilege argue that people care little about what happens after they die -- a view Independent Counsel does not defend;[16] and that some commentators (Wigmore and Frankel) agree that the case law represents sound policy, while others (Hazard and Hodes, Weinstein, Epstein, Rice) do not criticize the present rule. In addition, one commentator Independent Counsel cites is fundamentally antagonistic to the privilege and this Court's decisions applying it, making reliance on his views dubious at best.[17]

5. Independent Counsel contends that the cases offer little reasoning to support survival of the privilege after death. Br. 21. However, survival is so well-established

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[15] We read Mueller and Kirkpatrick to contend that the privilege should be overcome posthumously to avoid "extreme injustice" both in civil and criminal cases. 2 Mueller & Kirkpatrick, Federal Evidence, § 199 at 380 & n. 11 (2d ed. 1994).

[16] See 24 Wright & Graham, Federal Practice and Procedure, § 5498, at 484 (1986) (concern for posterity would be "Pharaoh-like"); Wolfram, Modern Legal Ethics, § 6.3.4 at 256 (1986) (concern over post-death disclosure would be "mythic").

[17] Professor Fischel believes that in Upjohn "[t]he Court got it exactly backwards." Fischel, Lawyers and Confidentiality, 65 U. Chi. L. Rev. 1, 29 (1998). He concludes that "the ethical duty of confidentiality, the attorney-client privilege, and the work product doctrine . . . are of dubious value to clients and society as a whole" and "[a]bsent some more compelling justification for their existence than has been advanced to date, these doctrines should be abolished." Id. at 33.

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that extended discussion may have been deemed unnecessary. Moreover, the only nontestamentary case supporting termination of the privilege at death is a civil case that -- if the position advocated by Independent Counsel or the court of appeals is adopted -- was wrongly decided. Cohen v. Jenkintown Cab Company, 357 A.2d 689, 692-4 (Pa. Super. 1976).

By contrast, a leading recent decision holding that the privilege survives death in a criminal case contains an extensive discussion supporting that conclusion. It explains that, in many instances, a contrary rule would "so deter the client from 'telling all' as to seriously impair the attorney's ability to function effectively," a result "inconsistent with the traditional value our society has assigned, in the interest of justice, to the right to counsel and to an effective attorney-client relationship." In re John Doe Grand Jury Investigation, 562 N.E.2d 69, 71 (Mass. 1990).

F. Independent Counsel cannot rely on possible defendant rights to enhance his ability to obtain evidence.

This case involves a prosecutor and grand jury's attempt to break the privilege and obtain evidence; it does not concern the rights of criminal defendants. Independent Counsel, however, asserts a principle of evidentiary neutrality, claiming that, if a defendant has a right to obtain exculpatory information despite a privilege, a grand jury has a similar right because it is empowered to command information that will protect the innocent. Br. 24-27. This effort to piggyback on possible defendant rights fails for several reasons.

First, there is no principle equalizing the rights of grand juries and defendants to obtain evidence. Defendants have a due process right to obtain material exculpatory evidence the

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government possesses. Brady v. Maryland, 373 U.S. 83 (1963). Prosecutors have no right to force inculpatory testimony from defendants, and F.R. Crim. Proc. 16(b)(2) further limits their pre-trial discovery rights. Defendants have a right to exclude evidence prosecutors obtained illegally; prosecutors have no comparable right to exclude defendants' evidence. 1 McCormick on Evidence (4th ed.), § 173 at 707-8; Weinstein's Federal Evidence (2d ed.) § 512.05. Defendants have a special Sixth Amendment right to confront and cross-examine. Prosecutors, however, may obtain a court order immunizing a witness claiming the Fifth Amendment, an investigative technique defendants do not enjoy.

Moreover, criminal defendants have no general right to override valid privileges. The state criminal cases actually reaching the issue all have decided that the attorney-client privilege prevails over a defendant's rights to obtain evidence. More broadly, rules that "'accommodate other legitimate interests in the criminal trial process'" override a defendant's right to present a defense unless those rules are "'arbitrary' or 'disproportionate to the purposes they are designed to serve.'" United States v. Scheffer, 118 S.Ct. 1261, 1264 (1998), quoting Rock v. Arkansas, 483 U.S. 44, 55 (1987).

It may be that, despite the transcendent interests the attorney-client privilege serves, some rare circumstance will arise where its application after the client's death would be unconstitutionally "arbitrary" or "disproportionate." Compare Davis v. Alaska, 415 U.S. 308 (1974). But the Court need not and should not decide that issue here.[18/] Here, Independent

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[18/] Upjohn, supra, 449 U.S. at 396; Jaffee v. Redmond, 508 U.S. 1, 18 (1996).

We note that courts often have found ways to do justice without violating the attorney-client privilege. Various courts have refused, on conflict-of-interest grounds, to allow a

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Counsel claims that the grand jury is entitled to obtain privileged material whenever it is relevant, without attempting to demonstrate that anyone would be arbitrarily or disproportionately harmed by denying disclosure. Br. 41 n.40.[19/] Even under the most liberal interpretation of a defendant's constitutional rights, a defendant would not be entitled to pretrial discovery of any privileged material defense counsel might think relevant.[20/]

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husband accused of murdering his wife to assert her privilege to exclude evidence potentially harmful to him. Arizona v. Gause, 489 P.2d 830 (Ariz. 1971), vacated on other grounds, 409 U.S. 815 (1972); Wyoming v. Kump, 301 P.2d 808 (Wyo. 1956); District Attorney v. Magraw, 628 N.E.2d 24 (Mass. 1994). In Magraw a probate court, at the district attorney's behest, removed the husband as executor and appointed another, thereby negating his ability to assert the privilege. In Arizona v. Macumber, 544 P.2d 1084 (Ariz. 1976), the exemplar case for those asserting that maintaining the privilege after death can produce untoward results, the Arizona Supreme Court reversed the conviction on another ground. Then, on remand, the privilege appropriately was waived. However, the attorney evidence eventually was deemed untrustworthy and not admitted. Arizona v. Macumber, 582 P.2d 162 (Ariz. 1978). That result was not surprising; allegations that someone since dead admitted the crime -- "someone who will neither contest the allegations nor suffer punishment as a result of them" -- are "not uncommon" and "are to be treated with a fair degree of skepticism." Herrera v. Collins, 506 U.S. 390, 423 (1993) (O'Connor, J., concurring).

19/ A prosecutor's determination of relevance is virtually impossible to contest in the grand jury context. A person challenging a grand jury subpoena on relevance grounds must show "there is no reasonable possibility that the category of materials the Government seeks will produce information relevant to the general subject of the grand jury's investigation." United States v. R. Enterprises, Inc., 498 U.S. 292, 297 (1991).

20/ The recent decisions limiting the attorney-client privilege for governmental attorneys do not affect this case. Both make clear that they do not apply to government employees seeking advice from private attorneys. In re Grand Jury Proceedings, D.D.C. May 27, 1998 (Misc. Nos. 98-095, 98-096 & 98-097 (NHJ), slip op. 22-27; In re Grand Jury Subpoena, 112 F.3d 910, 921 (8th Cir.), cert. denied, 117 S.Ct. 2482 (1997).

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II. Work Product

A. The client's death does not terminate the work product privilege, which also belongs to the attorney.

Independent Counsel argues that the work product doctrine exists only for the benefit of the client and therefore must expire with the client's death. Br. 46-47. This argument is flatly wrong and is contrary to the very case Independent Counsel cites for it. Moody v. IRS, 654 F.2d 795, 800 (D.C. Cir. 1981)

Moody held that the work product privilege "creates a legally protectable interest in non-disclosure in two parties: lawyer and client," and that the "lawyer has standing to protect 'confidentiality necessary to proper preparation of a case ...'; that is, that degree of privacy necessary to function as an effective advocate." Moody v. IRS, supra, 654 F.2d at 801 and n.22 (citation omitted). Even the court of appeals in the immediate case recognized that the work product privilege protects "'a complex of individual interests particular to attorneys that their clients may not share.'" Pet. App. 11a, quoting In re Sealed Case, 676 F.2d 793, 809 (D.C. Cir. 1982).[21/]

Here the work product privilege belongs to two persons -- Mr. Foster and Mr. Hamilton. Unfortunately, Mr. Foster is not here personally to assert it, but Mr. Hamilton is

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[21/] Other cases holding that the work product privilege belongs to the lawyers involved include In re Special September 1978 Grand Jury, 640 F.2d 49, 63 (7th Cir. 1980) (lawyer may assert privilege to protect opinion work product, even though client could not do so because of participation in fraud); In re Sealed Case, 29 F.3d 715, 178 (D.C. Cir. 1994). See Larkin, Federal Testimonial Privileges, § 11.03 at 11-53 (1998) ("The principal possessor of the right to invoke the benefits of the [work product] doctrine is the attorney or agent who prepared the materials in anticipation of litigation or for trial.").

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and does. Independent Counsel's argument in this regard, made but not adopted below, is untenable.

B. There is no basis for reversing the district court's finding that the notes reflect the attorney's mental impressions; the grand jury's need does not outweigh the privilege.

Alternatively, Independent Counsel asks this Court to determine that Mr. Foster's death created a sufficient need to overcome the work product privilege with respect to factual portions of the notes. Br. 47-48. Independent Counsel ignores the district court's finding that "the need of the grand jury does not outweigh the privileges asserted." Pet. App. 52a. He does not attempt to defend the court of appeals' basis for reversing that finding -- i.e., the erroneous conclusive presumption that lawyers do not exercise professional judgment in taking notes at initial client interviews.

There is not, as Independent Counsel contends (Br. 47), a "settled rule" allowing disclosure in the circumstances at hand. Rather, under the district court's finding that the notes "reflect the mental impressions of the lawyer" (Pet. App. 52a), the notes are entitled to "the super-protective envelope reserved by Rule 26(b)(3) for 'mental impressions'" (Pet. App. 13a-14a), and may not be produced using the ordinary standard of need applied by the court of appeals. The district court's finding is supported by the record and by common sense -- an attorney simply cannot take three pages of notes during a two-hour interview without exercising professional selectivity. Redaction of the notes to eliminate explicit expressions of

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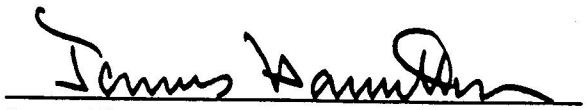
opinion would not protect the lawyer's exercise of his professional judgment in selecting what information to record.[22/]

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,



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June 1, 1998

[22/] Independent Counsel cites two decisions in which courts have required production of attorney notes of witness interviews. In re John Doe Corp., 675 F.2d 482 (2d Cir. 1982); In re Grand Jury Investigation, 599 F.2d 1224 (3d Cir. 1979) (decided before Upjohn). Both cases, however, recognized that attorney notes reflecting mental processes enjoy heightened protection and did not allow disclosure of attorney thought processes. The descriptions of the notes involved in those cases demonstrate that they did not resemble the highly fragmented, selective notes Mr. Hamilton took. See 675 F.2d at 487 (notes were "recitations of [witness'] statements"); 599 F.2d at 1231-2 (interview notes were embodied in "memoranda" containing "factual recitation.")

Independent Counsel also cites Epstein, The Attorney-Client Privilege and the Work-Product Doctrine 354 (1997), for the proposition that a witness' death is usually sufficient to require production of work product materials. That statement, however, was directed at ordinary work product, not opinion work product such as involved here.

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CERTIFICATE OF SERVICE

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No. 97-1192

In The

Supreme Court of the United States

October Term, 1997

SWIDLER & BERLIN AND JAMES HAMILTON,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

MERITS STAGE AMICUS

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF AMICUS CURIAE OF THE AMERICAN COLLEGE OF TRIAL LAWYERS IN SUPPORT OF PETITIONERS

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BRIEF AMICUS CURIAE OF THE AMERICAN COLLEGE OF TRIAL LAWYERS IN SUPPORT OF PETITIONERS

The American College of Trial Lawyers files this brief as *amicus curiae* pursuant to the written consent of the parties.[1]

INTEREST OF AMICUS CURIAE

The American College of Trial Lawyers (the "College"), an organization of lawyers in this country and Canada skilled and experienced in the trial of cases, seeks to improve and enhance the standards of trial practice, the administration of justice and the ethics of the profession. Membership in the College is by invitation. The College strives to induct as Fellows lawyers from the top rank of the trial bar of each jurisdiction. The College limits membership to one percent of the number of persons admitted to practice in any particular state. To qualify as a Fellow, a lawyer must have at least fifteen years of trial experience.

Concern for the preservation of the attorney-client privilege motivates the College to submit this brief. The College considers the privilege a critical feature of our adversary system of justice. The College's Board of

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[1] Letters from all parties consenting to the filing of this brief have been filed with the Clerk of this Court.

Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that this brief was not prepared, written, funded or produced by any person or entity other than *amicus curiae* or its counsel.

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Regents has authorized the College to seek *amicus curiae* participation in support of petitioners – as it authorized the College to seek *amicus curiae* participation in support of the petition for certiorari – because the issues presented fundamentally affect the relationship between lawyer and client, the administration of justice and the conduct of the legal profession.

The briefs filed by the parties set forth the particular facts of this case and their respective interests in the litigation. The impact of the decision below, however, extends far beyond the parties to this litigation. It will create a substantial gap in the attorney-client privilege by providing that, in certain criminal cases, the privilege does not survive the death of the client. This decision, which runs counter to more than a century of precedent, will have drastic and unfortunate implications for the legal profession and the administration of justice. Accordingly, the College files this brief *amicus curiae* to present the considerations of broader policy with which it is particularly concerned, as well as its view regarding the sweeping, negative impact that is likely to result from the Court of Appeals decision.

SUMMARY OF ARGUMENT

The College urges reversal because the decision of the Court of Appeals contains dangerous implications for attorney-client relations far beyond its narrow factual context. In particular, the Court of Appeals creates a

general theoretical framework for determining the applicability of the attorney-client privilege that threatens continuing future erosion of the privilege. In identifying its goal as "maximiz[ing] the sum of the benefits of confidential communications with attorneys and those of finding the truth through our judicial processes," Pet. App. 6a, the court suggests that every challenge to the privilege provides a new occasion for ad-hoc judicial balancing. Underscoring the risks of this approach, the court proceeds to create an exception without the benefit of factual or legal support, making plain that proponents of the privilege bear the burden of demonstrating its utility in every instance. Given the open-ended nature of the court's inquiry, the breadth of its rationale, and the difficulties in proving the benefits of confidential communications, the court's approach potentially supports many additional exceptions to the privilege. Thus, the decision will create a general uncertainty in the minds of lawyers and their clients regarding the scope of the privilege that necessarily will chill the full and frank communications essential to the attorney-client relationship.

The rationales offered by the Court of Appeals for the particular exception it creates are equally broad and no less troubling. The court myopically assumes that clients do not care about posthumous disclosure of their communications in criminal proceedings because the clients will, by definition, not be directly affected by such disclosures. Yet experience teaches the opposite – that clients care deeply about many posthumous developments such as events affecting their reputations and their estates, as well as the ongoing welfare of their friends or

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family. Obviously, it is important to preserve clients' ability to confide in lawyers with respect to these subjects. But the logic of the Court of Appeals opinion would support disclosure in these and many other contexts, as it might just as easily be assumed that a client no longer cares about his business or his estate after death. In this respect as well, the decision lays the foundation for future erosion on the privilege.

Clients can draw little solace from the Court of Appeals' efforts to narrow the scope of its exception by limiting it to criminal proceedings and by introducing a balancing test. The distinction between civil and criminal cases breaks down in such instances as civil forfeiture, in which a criminal proceeding against a client's relative may result in forfeiture of the client's property, or in cases involving parallel criminal and civil or administrative proceedings. Limiting disclosure to criminal proceedings based on a post-hoc determination of the "importance" of the communications at issue also does nothing to allay the fear of a client, at the time of a particular communication, that a court will someday order its disclosure. In sum, reversal is appropriate both because the particular exception created by the Court of Appeals is unsound, and because, in creating this exception, the Court of Appeals has written a road map for further and equally unwarranted and unpredictable exceptions to the privilege.

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ARGUMENT

I. The Court Of Appeals Decision Lays The Foundation For An Unwarranted Further Erosion Of The Attorney-Client Privilege.

A. The Court Of Appeals Decision Inappropriately Creates A Presumption Against The Attorney-Client Privilege.

The Court of Appeals decision authorizing disclosure of attorney-client communications deemed "important" in certain criminal proceedings following the death of the client, creates an exception to the long-standing common law rule without any factual or legal support. In announcing a standard far easier to state than to apply, the court declares that its "object . . . is to maximize the sum of the benefits of confidential communications with attorneys and those of finding the truth through our judicial processes." Pet. App. 6a. As a threshold matter, the notion that any effort to create an exception to the privilege warrants a fresh policy assessment of the pros and cons of disclosure stands in stark contrast to hundreds of years of authority according absolute protection for attorney-client communications apart from a few, well-defined exceptions such as the crime-fraud and testamentary exceptions.

But even assuming that "maximizing the sum of the benefits of confidential communications and those of finding the truth" represents the proper approach, the court's application of that standard leaves much to be desired. Far from undertaking this inquiry with the precision suggested by the court's formulation, the court proceeds without any empirical evidence to support its

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central conclusion that clients are unlikely to be inhibited by posthumous disclosure of their communications to attorneys in subsequent criminal proceedings. Nor does the court identify any cases or statutes supporting its interpretation of the privilege, stressing instead the purported absence of an articulated rationale in the long line of authority supporting survival of the privilege after death as a basis for ignoring this body of precedent.

Essentially, the Court of Appeals creates a presumption against the privilege, burdening its proponents with the task of demonstrating its validity. This approach might be warranted if a new privilege was being created, but given the long and virtually unbroken history of precedent supporting survival of the attorney-client privilege after death, the onus should be on those proposing a departure from the long-standing common law rule to justify the change.

B. The Court Of Appeals' Assumption That Its Decision Will Not Chill Attorney-Client Communications Is Both Unsupported And Unsound.

The court's central assumption – that clients will be indifferent to posthumous disclosure of their communications in criminal proceedings because such disclosure cannot affect them directly – is troubling in several respects. First, it is counterintuitive. Experience teaches that clients care deeply about many posthumous subjects that do not affect them tangibly, such as their reputations after death and legal consequences that might befall friends and family. Clients often seek advice and counsel

from lawyers about these subjects, and value highly the confidential nature of these conversations. The Court of Appeals acknowledges this concern in suggesting that posthumous disclosure of client communications in civil proceedings may not be appropriate, because clients have a "motive to preserve their estates" and thus would be troubled by disclosure of privileged communications that might affect their estates. Pet. App. 6a.

This concern applies with at least equal force in the criminal context. A client troubled about the effect of posthumous disclosure on the size of a bequest for a relative will be equally if not more troubled about the possibility that such disclosure could land the relative in prison. Suppose a client confides in his lawyer, for example, with regard to an estate planning decision influenced in part by his son's drug problem that, after the client's death, becomes the subject of a criminal prosecution. Under the Court of Appeals decision, this client cannot confide in his lawyer without disclosure of information that will be usable against his son.

Likewise, disclosure of a protected communication in a subsequent criminal action may put the client's family member in physical danger. For example, a client may seek legal advice about resistance to extortion or blackmail attempts, only to have his lawyer's subsequent testimony in a criminal proceeding result in retaliation against the client's family. Clients faced with that risk will be discouraged if not prevented from obtaining needed legal advice. The existence of myriad other examples is obvious.

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C. The Rationale Of The Court Of Appeals Decision Would Support Other Unwarranted Exceptions To The Privilege.

1. The Notion That Clients Do Not Care About Disclosure Of Communications That Do Not Affect Them Personally Is Not Limited To Posthumous Criminal Proceedings.

The logic of the Court of Appeals' assumption that clients are indifferent to posthumous disclosure extends well beyond the context of this case. As noted, this assumption rests on the faulty premise that clients only care about events that affect them personally. There is no logical limitation of this premise to criminal liability. It is just as natural to suppose that clients will have no concern about the fate of their businesses or the size of their estates after death because at that point they will be no more personally affected by developments in these areas than in a subsequent criminal proceeding. Thus, notwithstanding the court's disclaimers, its rationale would logically support expansion of its exception to posthumous disclosure in all civil proceedings. Worse yet, it is but a short leap to the assumption that clients have no concern about any disclosures they make, even during their lifetime, regarding other individuals or entities, thus paving the way for elimination of the privilege in a wide variety of additional contexts.

There are also practical circumstances in which the Court of Appeals' distinction between civil and criminal cases will prove unworkable. For example, a criminal proceeding against a client's child may result in a civil forfeiture action against the client's property. *See, e.g., United States v. One Parcel of Property at 31-33 York Street,*

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930 F.2d 139 (2d Cir. 1991) (affirming forfeiture of house belonging to mother following arrest of her sons for drug sales allegedly conducted from the house). In such a case, introduction of a communication as evidence in a criminal proceeding may unavoidably affect a civil proceeding as well, thereby preventing the client from claiming the benefit of the privilege in that proceeding.

Nor is the overlap between criminal and civil proceedings limited to the forfeiture area. Parallel criminal and civil or administrative proceedings occur with increasing frequency in the areas of antitrust, tax, government contracts, and securities law. Under the Court of Appeals decision, disclosure of a privileged communication in, for example, a criminal antitrust action might lead to liability in a subsequent civil class action based on the same conduct. Similarly, disclosure in a criminal fraud action could result in debarment or license violation proceedings entailing devastating consequences to family, friends and business associates. Nor is there a practical method to limit disclosure of the privileged communications to the particular criminal proceeding, for, as the Court has recognized in the analogous context of the privilege of self-incrimination, once disclosure is made, the court ordinarily cannot "unring the bell." *Maness v. Meyers*, 419 U.S. 449, 460 (1975).

2. The Rationale Based On A Client's Unavailability To Testify Is Not Limited To Posthumous Disclosures.

The court's alternative rationale for its exception – that disclosure is needed to obtain truthful testimony

because of the unavailability of the client – has equal potential to lead to further erosion of the privilege. As pointed out in Judge Tatel's dissent, death is not the only circumstance in which a witness is unavailable. "Witnesses unable to remember facts, incompetent to testify, or beyond the court's process likewise deny relevant information to the factfinder." Pet. App. 25a. Moreover, "[t]he unavailability of a witness likewise does no greater harm to the factfinding process than an available witness who testifies inaccurately." *Id.* Accordingly, the rationale that truthful evidence must be adduced also contains significant potential for expansion of the Court of Appeals' exception.

II. Even Accepting *Arguendo* The Logic Of The Court Of Appeals' Exception, The Costs Of The Exception In Terms Of Chilling Attorney-Client Communications Far Outweigh Any Countervailing Benefits To The Truth-Seeking Process.

The Court of Appeals decision is all the more troubling because it is sweeping in its potential application. Although the decision only provides for disclosure of attorney-client communications in federal criminal proceedings, it will inhibit client communications in a myriad of contexts in lawyers' offices across the nation. Thus, the decision will preclude clients from relying upon the laws of their home states, which are almost certain to provide that the privilege survives the death of the client. *See* Pet. at 13 n.13 (citing state statutes); Pet. App. 17a (Court of Appeals dissenting opinion).

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The evisceration of state privilege laws that will result from the Court of Appeals opinion is of great concern because, as this Court has previously concluded, "the existence of a consensus among the States indicates that 'reason and experience' support recognition of the privilege." *Jaffee v. Redmond*, 116 S. Ct. 1923, 1930 (1996). Additionally, "any State's promise of confidentiality would have little value if the [client] were aware that the privilege would not be honored in a federal court. Denial of the federal privilege therefore would frustrate the purposes of the state legislation that was enacted to foster these confidential communications." *Id.*

The significance of the Court of Appeals opinion is likely to be enhanced rather than reduced by use of the court's balancing test to determine whether posthumous disclosure is justified in the particular case. The inherently unpredictable and post-hoc nature of the balancing test will create ambiguity concerning the scope of the privilege. Accordingly, no lawyer will be able to offer any assurance to a client that a future court will apply the test to deny disclosure of that client's communications. On the contrary, a lawyer will be bound to warn the client of the prospect of posthumous disclosure along the lines set forth in Judge Tatel's dissent, and perhaps of current disclosure should the client be "unavailable" for some other reasons. Pet. App. 20a (lawyer must warn client that "when you die, I could be forced to testify – against your interests – in a criminal investigation or trial, even of your friends or family, if the court decides that what you tell me is important to the prosecution"). The Court of Appeals' amorphous balancing test thus creates the very problem that led this Court to reject the "control

group" test for the attorney-client privilege in the corporate context – that "[a]n uncertain privilege . . . is little better than no privilege at all." *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981).

The Court of Appeals decision will have an overall negative rather than positive effect on the administration of justice. For each time a prosecutor is able to convince a trial judge that the privileged information sought is "substantially important" to a pending criminal proceeding, there will have been hundreds if not thousands of instances in which clients will have been deterred from confiding in their lawyers for fear of posthumous disclosure. Thus, while the Court of Appeals decision will assist prosecutors only in rare cases in which a deceased client has confided "substantially important" information to his lawyer that is not available from any other witness, the ruling will have a significant and very negative impact on many communications between clients and their attorneys in the future.

Moreover, except in a narrow set of circumstances – such as cases involving statements against the client's penal interest when "corroborating circumstances clearly indicate the trustworthiness of the statement" under Fed. R. Evid. 804(b)(3) – the client communications that the lawyer may be obligated to disclose to the grand jury will constitute hearsay inadmissible at a subsequent criminal trial. This hearsay limitation further reduces the practical benefits to the truth-seeking function that will result from the Court of Appeals' exception. Thus, though the Court

of Appeals seeks to craft a narrow exception, the aggregate costs of inhibiting full and frank client communications will far exceed any benefits to the truth-seeking process.

CONCLUSION

For the reasons stated, it is respectfully requested that the judgment be reversed with instructions to affirm the District Court judgment quashing the subpoenas issued to the petitioners.

Respectfully submitted,

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No. 97-1192

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

SWIDLER & BERLIN AND JAMES HAMILTON,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

CERT STAGE - REPLY BRIEF

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR PETITIONERS

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Introduction

Defending the Court of Appeals decision, Independent Counsel asserts, as did that court (over Judge Tatel's compelling dissent), that the new rule it announced will not chill attorney-client communications. Four major attorney organizations that have filed amicus briefs—the American Bar Association, the American College of Trial Lawyers, The National Association of Criminal Defense Lawyers, and the American Corporate Counsel Association—strongly disagree. These organizations rely not on the views of commentators—as does the Court of Appeals' majority and Independent Counsel—but on the innumerable experiences of thousands of their members, which confirm that the majority's new rule would have a pronounced chilling effect.

The National Hospice Organization also has filed an amicus brief. The members of this organization reason—as does the ABA's Commission on Legal Problems of the Elderly, which supports the ABA's brief—that the majority's opinion effectively discriminates against persons who, anticipating death, wish to consult a lawyer in confidence about criminal matters.

The reason and experience these knowledgeable groups bring to the issue are significant. Federal Rule of Evidence 501 mandates that application of the attorney-client privilege "shall be governed by the principles of the common law as they may be interpreted in the light of reason and experience." Except for a brief citation in "Questions Presented," Independent Counsel ignores this rule. This disregard is not surprising, because the position Independent Counsel supports wars with the experience of seasoned, practicing lawyers. It also conflicts with the reason and experience reflected in virtually all non-testamentary state decisions on the issue, and the twenty-six state statutes which recognize that the privilege survives death. None of these decisions or statutes makes any distinction between civil and criminal matters. As this Court said in *Jaffee v. Redmond*, 116 S.Ct. 1923, 1930 (1996), "it is

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appropriate to treat a consistent body of policy determinations by state legislatures as reflecting both 'reason' and 'experience'."

Independent Counsel ignores this passage from *Jaffee*—indeed, he does not even cite the case—just as he overlooks *Jaffee*'s emphasis on the importance of uniformity between federal and state decisions on privileges issues.[1] He further disregards *Jaffee*'s admonition that "[m]aking the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of [a person's] interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege." *Id.* at 1932. This, of course, is precisely the effect of the after-the-fact balancing test announced by the Court of Appeals' majority, which also is condemned by the observation in *Upjohn Co. v. United States,* 449 U.S. 383, 393 (1981) that "[a]n uncertain privilege . . . is little better than no privilege at all."

Attorney-Client Issue

1. Independent Counsel argues that the issue of posthumous disclosure of client communications in criminal cases is "novel[]" and "narrow." Br. at 7. But the issue is not that "novel." Seven states have held that the privilege survives death in criminal cases.[2] A federal court of appeals (in two cases) and at least 13 state courts have held in civil cases that the privilege survives death, with no suggestion that criminal cases require a contrary rule.[3] Nor is the issue "novel" in the commentaries, which all concede that under the common-law rule—whatever its wisdom (an issue on which commentators

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[1] Otherwise "any State's promise of confidentiality would have little value." *Jaffee,* 116 S.Ct. at 1930.

[2] The cases are cited in the Petition at 10 n.4.

[3] The cases are cited in the Petition at 10 ns.5 and 6. And there are dicta to this effect in other cases, including federal cases. See Petition at 13 n.12.

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split)—the privilege survives death, with no hint that criminal cases are different.

However, the case is "novel" in the sense that, contrary to this Court's admonitions, the lower court adopted a balancing test for an "absolute" privilege. It is especially novel because *no one* (not even the commentators on which Independent Counsel relies) ever has suggested, prior to this case, that it would be rational to bar disclosure of privileged conversations in civil cases after the client's death, but not in criminal cases where the potential consequences are much more severe. And the case is "novel" because the court below has created a new and irrational exception to a well-established rule. Because the rule is important to our legal system and the proposed exception has no rational basis, such "novelty" should argue for, not bar, review.

Nor is the decision below "narrow," even if limited to criminal cases. Innumerable attorney-client discussions involving potential criminal implications occur daily. The decision below affects those conversations, particularly where the client is elderly, ill, or otherwise anticipates death in the near future. Under the decision below, for example, persons who are elderly or seriously ill cannot talk to an attorney in confidence about a child whom they suspect may be dealing in drugs. A decision having an immediate and significant impact on a broad range of everyday occurrences is not "narrow."

2. Echoing the majority (Pet. App. 6a), Independent Counsel says that, after the client dies, "neither the client nor the client's estate is subject to liability" in a criminal proceeding. Br. at 11 n.3. That statement is wrong, for a client's estate may be decimated as a result of criminal proceedings after his or her death. For example, a child's drug activities could lead to civil forfeiture of estate property. *See, United States v. One Parcel of Property at 31-33 York St.*, 930 F.2d 139 (2d Cir. 1991); *cf. Bennis v. Michigan*, 516 U.S. 442 (1996). Moreover, disclosure could cause investigation, prosecution, or conviction of an

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heir of the deceased client, which could result in fines or attorney fees that deplete the portion of the estate left to that heir.

3. Independent Counsel relies heavily on the views of certain commentators that the privilege should not survive the client's death. But even the commentators supporting Independent Counsel's view concede that the case law is otherwise. *McCormick on Evidence*, § 94, at 348 (4th ed. 1992) ("The accepted theory is that the protection afforded by the privilege will in general survive the death of the client."); *Restatement (Third) of the Law Governing Lawyers* § 127 comment c (March 29, 1996) ("The privilege survives the death of the client. A lawyer for a client who has died has a continuing obligation to assert the privilege.");[4] Wolfram, *Modern Legal Ethics* § 6.3.4, at 256 (1986) ("In general, courts hold that the death of the client does not end the privilege"); 24 Wright & Graham, *Federal Practice and Procedure* § 5498 at 483 (1986) (conceding that the "common law rule" is as stated by Wigmore—that the privilege, "being intended to secure a confidence on the client's part that no disclosure will be made . . . does not cease . . . upon the death of the client."); 2 Mueller & Kirkpatrick, *Federal Evidence* § 199 at 379 (2d ed. 1994) ("It is generally held that the privilege is not terminated even by the death of the client, although this view has been sharply criticized by commentators.") *Moreover, none of these commentators supports the view that there should be one rule for civil cases and another for criminal cases.*

Other prominent commentators recognize that the privilege survives death and make no call for changing the rule. Hazard and Hodes, *The Law of Lawyering*, § 1.6:101 at 131 (1998); *Weinstein's Federal Evidence*, § 503.32

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[4] After describing the testamentary exception, the Reporter's Note states that, where it does not apply, the cases "routinely hold that the privilege survives." *Restatement, supra,* § 127 Reporter's Note.

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at 503-96 (2d ed. 1997). Some argue forcefully that the rule should not be changed.[5]

4. Independent Counsel argues that posthumous disclosure in criminal cases follows *a fortiori* from the accepted rule of disclosure in testamentary cases.[6] But testamentary disclosure is premised on the purpose of the testimony, which is to implement the client's intent. *Glover v. Patten*, 165 U.S. 394, 408 (1897); *United States v. Osborn*, 561 F.2d 1334, 1340 n.11 (9th Cir. 1977); *Hitt v. Stephens*, 675 N.E.2d 275, 278 (Ill. App. 1997). The theory underlying this limited exception is that "if the decedent could be asked, he would want to waive the privilege so that the lawyer could dispose of the property according to his wishes." Hazard and Hodes, *supra*, § 1.6:101 at 131 n.5.7. To be sure, disclosure in this context may lead to embarrassment or wounded feelings, but the courts have presumed that the client would have wanted his or her testamentary intent fulfilled, even at the cost of hurtful disclosure.

By contrast, disclosure in criminal proceedings about the client's family, friends or associates is not designed to implement the client's intent, and may have more drastic consequences than mere embarrassment or hurt feelings. In that situation, a court cannot presume that, if the "decedent could be asked, he would want to waive the privilege." Hazard and Hodes, *supra*. Accordingly, disclosure in criminal proceedings does not follow *a fortiori* from disclosure in testamentary disputes. Indeed, because the consequence of disclosure in criminal proceedings may

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[5] *See*, 8 Wigmore, *Evidence* § 2323 (McNaughton rev. 1961); Epstein, *The Attorney-Client Privilege and the Work-Product Doctrine* (3d ed. 1997), at 234; Frankel, *The Attorney-Client Privilege After the Death of the Client*, 6 Geo. J. Legal Ethics, 45, 78-79 (1992).

[6] Independent Counsel says repeatedly that the "vast majority" of cases hold that the privilege does not survive death. (*E.g.*, Br. at 6) This is so only if the testator cases are counted; remove them and only one, largely ignored state court case holds this. *Cohen v. Jenkintown Cab Co.*, 357 A.2d 689 (Pa. Super. 1976).

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be so much more injurious than in civil proceedings, *non-disclosure* follows *a fortiori* from the rule that posthumous disclosure is not allowed in civil cases.

5. Citing *State v. Gause* 489 P.2d 830 (Ariz. 1971) and *State* v. *Kump*, 301 P.2d 808 (Wyo. 1956), Independent Counsel suggests (Br. at 9) that these two cases hold, as a general proposition, that "the privilege does not apply after death." This is not so; those cases held that, in the circumstances involved, a husband accused of murdering his wife could not assert her attorney-client privilege where he either had a conflict of interest or lacked authority.[7] Here Independent Counsel does not question the authority of Mr. Hamilton (who also represents the Foster family) to assert the privilege. In so doing, Mr. Hamilton is not only carrying out the intent of Mr. Foster and his family, but also is fulfilling his ethical obligation to protect confidential client disclosures.[8]

The *Gause* and *Kump* cases are significant (as is the *Magraw* case cited in n.7) because they demonstrate that courts will find acceptable means to deal with unjust situations without doing harm to the attorney-client privilege. So also, in the circumstance when a criminal *defendant's* constitutional right to a fair trial is affected by application of the privilege, a court might find a limited solution.[9] But this is not this case. Here a *prosecutor*, not a criminal defendant, seeks to violate the privilege.[10] The

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[7] *See State v. Gause, supra,* 489 P.2d at 834: "Where such a conflict of interest existed . . . the privilege could not be claimed." *See also District Attorney v. Magraw,* 628 N.E.2d 24 (Mass. 1994) (where husband accused of murdering his wife is her executor and refuses to waive her attorney-client and psychotherapist-patient privileges, district attorney may petition the probate court to remove him on ground that he cannot make a disinterested waiver decision).

[8] *See Restatement (Third) of the Law Governing Lawyers* (March 29, 1996) § 127 comment c: "A lawyer for a client who has died has a continuing obligation to assert the privilege."

[9] *See* Petition at 12.

[10] To allow a prosecutor to do so in the name of a grand jury's constitutional right to investigate would throw open the flood gates.

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Court can decide this case without reaching the issue of a defendant's constitutional rights. A ruling here for Petitioners will not produce the parade of horribles conjured up by Independent Counsel. But real harm looms to the privilege—and to the administration of justice that depends on lawyers' obtaining the unvarnished truth from their clients—if the lower court decision is allowed to stand.

6. Independent Counsel disputes that the new rule will make clients less willing to confide in their attorneys. His reasoning is curious; he states that the client's interest in his reputation and in protecting his family and associates cannot justify non-disclosure after death because it does not justify non-disclosure before death. This is so, he says, because the living client must testify truthfully (perhaps under grant of immunity) and the lawyer must disclose his client's deception if he does not.

This argument attacks the basic concept of the privilege—that it permits the client to impart information to his attorney in confidence. By suggesting that the information provided to attorneys necessarily will be disclosed, even if the client lives, Independent Counsel in effect contends that the privilege is meaningless.

But he is wrong. The fact is that the contents of attorney-client communications normally will be kept confidential. While the client must testify truthfully about underlying facts, he is not required to reveal *the content of his conversation* with his attorney. Any seasoned practicing lawyer knows that clients impart many matters to their attorneys besides "facts"—*e.g.*, their fears, doubts, speculations, emotions, theories, intentions, and the like. Such thoughts may never be revealed in testimony, and it generally is accepted that the lawyer must hold them confidential, whether the client lives or dies.

Moreover, while immunity is possible, there may be numerous reasons it will not be given by the government. And while an attorney in some circumstances must dis-

close a client's deception, this will happen rarely and even then disclosure will be limited.[11]

7. Independent Counsel argues that there is no "empirical support" for Petitioners' chilling effect argument (and then goes on to assert, with no support other than the opinion below, that changing the rule would have only a "minimal" effect on client candor). Br. at 15. Judge Tatel's response to this argument is conclusive: "because the Independent Counsel himself urges overturning the common law rule, and because that rule rests on the proposition that preserving the attorney-client privilege after the client's death is necessary to promote client disclosure, the Independent Counsel bears the responsibility of producing evidence to the contrary." Pet. App. 29a.[12]

In *Upjohn*, this Court, without citing "empirical support," drew on "reason and experience" to conclude that a proposed restriction on the privilege as applied to corporations would chill client candor, thus "discouraging the communication of relevant information" to the attorney and making it more difficult for the attorney "to formulate sound advice." 449 U.S. at 391-93. "Reason and experience" (the standard embodied in Rule 501) support the same conclusion here. Experience (including the experience of *amici's* many thousands of members) teaches that possible violations of the law, by friends and associates as well as the client, are a frequent subject of

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[11] *See Model Rules of Professional Conduct*, Rule 3.3 anno.: "Within the bounds of the Rule prohibiting any affirmative misrepresentations, a lawyer need not disclose all the weaknesses in the client's case, nor must the lawyer correct every error of opposing counsel or the court."

[12] In *Branzburg v. Hayes*, 408 U.S. 665 (1972), the argument was that the First Amendment required a news reporter's privilege because of an impermissible chilling effect, but the Court cited the lack of empirical evidence in declining to create such a privilege. 408 U.S. at 693-94. Similarly, a court should decline to denigrate a well-recognized privilege supported by reason and experience in the absence of compelling empirical evidence that the premise underlying the privilege is seriously flawed.

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attorney-client conversations. Similar experience also teaches that people care about what happens after they die, because they, for example, write wills, establish trusts, endow chairs, establish foundations, buy life insurance and burial plots, and write memoirs. And while most people may not "anticipate [death] in an immediate or definite sense," [13] experience teaches that many elderly, severely ill or suicidal people do. Such people have a right to seek confidential legal advice. "Reason and experience" support the conclusion that they would not speak to an attorney in confidence if told their statements would be available to a prosecutor after death.

Work-Product Issue

As to the work product issue, Independent Counsel does not even attempt to justify the court of appeals' extraordinary holding that an attorney's notes of an initial interview are producible "under the ordinary Rule 26(b)(3) standard" because they must be presumed not to contain opinion work product, whose production demands a much higher standard. Pet. App. 13a-14a. Independent Counsel's reticence is understandable because there is a clear conflict between the majority's position that notes of an initial interview with a client may *never* constitute opinion work product and the large number of cases—including *Upjohn* and *Hickman,* which Independent Counsel does not even cite in this regard—which declare that attorney notes are entitled to heightened protection and may never be produced or only produced in the rarest of circumstances. This conflict counsels review by this Court, particularly because the ramifications of the majority's holding are harmful to the practice of law.

Independent Counsel does rely on two court of appeals decisions, but neither is pertinent. One case held that the government had made a sufficient showing of necessity, in light of the witness's death and other factors, to meet the *higher* standard of necessity applicable to opinion work

[13] *See* Independent Counsel Brief at 12, quoting 2 Mueller & Kirkpatrick, *Federal Evidence* § 197, at 380.

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product. *In re Grand Jury Investigation,* 599 F.2d 1224, 1230-32 (3d Cir. 1979). The other case merely reflects a factual determination by the court (not based on a presumption) that the interview notes did not reflect the attorney's opinions. *In re John Doe Corp.*, 675 F.2d 482, 493 (2d Cir. 1982).

Independent Counsel also cites the Restatement's position that factual portions of interview notes may be produced, where redaction is feasible. *Restatement, supra,* § 138 comment c. Moreover, the court of appeals directed redaction of those portions of the notes that are "protected by . . . the work-product privilege." Pet. App. 14a. But this does not salvage the majority's opinion. Even if only the "facts" selected by Mr. Hamilton to record are produced upon an ordinary showing of need, that result still runs counter to the numerous opinions of this Court and other federal courts holding that such a product of an attorney's thought processes is entitled to heightened protection.[14]

Conclusion

The Petition for Certiorari should be granted.[15]

Respectfully submitted,

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February 27, 1998

[14] Petition at 18-19.

[15] Independent Counsel contends that this Court should deny certiorari to speed the conclusion of his investigations. It appears, however, that his investigations will not end until long after this Court, if it determines to review this case, decides it. Petitioners would not object to expedited treatment for this case.

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No. 97-1192

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

SWIDLER & BERLIN AND JAMES HAMILTON,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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JOINT APPENDIX

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PETITION FOR CERTIORARI FILED DECEMBER 31, 1997
CERTIORARI GRANTED MARCH 30, 1998

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NOTICE

The following items have been omitted in printing this Joint Appendix because they appear on the following pages in the printed Appendix to the Petition for a Writ of Certiorari:

Opinion of the United States District Court for the District of Columbia on subpoena to Swidler & Berlin	33a
Opinion of the United States District Court for the District of Columbia on subpoena to James Hamilton	43a
Opinion of the United States Court of Appeals for the District of Columbia Circuit and dissenting opinion of Judge Tatel	1a
Order of the United States Court of Appeals for the District of Columbia Circuit denying rehearing and dissenting opinion of Judges Tatel and Ginsburg	27a

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Sealed Case, Nos. 95-446 and 95-447

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Date	Proceedings
December 4, 1995	Grand Jury Subpoenas to James Hamilton and Swidler & Berlin
December 18, 1995	Motions to Quash or Modify Grand Jury Subpoenas; Memorandum in Support of Motions; Affidavit of Sheila Anthony; Affidavit of James Hamilton
December 26, 1995	Motion of Independent Counsel to Compel Production of Documents and a Privilege Log; Memorandum in Support of Motion
February 5, 1996	Memorandum in Opposition to Independent Counsel's Motion to Compel a Privilege Log and Production of Documents
February 12, 1996	Independent Counsel's Reply to Opposition to Motion to Compel Production of Documents and Privilege Log
February 20, 1996	Sur-Reply to Independent Counsel's Reply to Opposition to Motion to Compel Production of Documents and Privilege Log
June 21, 1996	Order: that by July 1, 1996 all documents responsive to subpoena, except those which are privileged, shall be produced to Independent Counsel; and all documents for which privilege is asserted shall be submitted to the Court for *in camera* review

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Date	Proceedings
July 9, 1996	Privilege Log
July 12, 1996	Amended Privilege Log
July 16, 1996	Independent Counsel Memorandum in Support of Opposition to Motions to Quash or Modify Grand Jury Subpoenas
July 26, 1996	Reply Memorandum in Support of Motions to Quash or Modify Grand Jury Subpoenas; Third Affidavit of James Hamilton
December 16, 1996	Memorandum Order: motions to quash or modify grand jury subpoenas denied in part and granted in part; motions to modify granted and Swidler & Berlin and James Hamilton not required to produce documents described in privilege log
January 15, 1997	United States' Notice of Appeal

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UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

In re Sealed Case, Nos. 97-3006 and 97-3007

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Date	Proceedings
January 27, 1997	Case docketed; Order consolidating cases and setting briefing schedule
March 28, 1997	Brief of Appellant United States; Appellant's Appendix
April 28, 1997	Brief of Appellees Swidler & Berlin and James Hamilton
May 12, 1997	Reply Brief of Appellant United States
June 13, 1997	Letter filed by Appellant advising of additional authorities re attorney-client privilege
June 19, 1997	Letter filed by Appellee submitting James Hamilton's notes of July 11, 1993 for *in camera* Review
June 20, 1997	Oral Argument held before Judges Wald, Williams and Tatel
August 29, 1997	Judgement and Opinion reversing and remanding case to United States District Court; Dissenting Opinion of Judge Tatel
October 8, 1997	Appellees' Petition for Rehearing With Suggestion for Rehearing En Banc
October 27, 1997	Appellant's Response to Petition for Rehearing and Suggestion for Rehearing En Banc

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Date	Proceedings
November 21, 1997	Order Denying Petition for Rehearing; Order Denying Suggestion for Rehearing En Banc; Dissenting Opinion of Judges Tatel and Ginsburg
January 12, 1998	Order unsealing certain record documents, provided certain redactions are made
April 23, 1998	Order granting Appellant's motion to unseal a portion of the record and granting Appellees' alternative request contained in response to Appellant's motion

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Excerpt from Affidavit of James Hamilton executed December 18, 1995 in Sealed Case, U.S. District Court for the District of Columbia, Nos. 95-446 and 95-447.

[The portion of the affidavit printed below has been unsealed in accordance with the Order of the United States Court of Appeals for the District of Columbia Circuit issued April 23, 1998 in *In re Sealed Case*, No. 97-3006. The remainder of the affidavit remains under seal.]

34. On July 11, 1993, Mr. Foster conferred with me regarding the possibility of my being retained by the White House, or perhaps him if I did not represent the White House, in connection with certain matters that had occurred at the White House. He made clear at the outset that this was a "privileged" conversation. From the very beginning of the conversation I understood that I was being considered for retention regarding the investigations Mr. Foster anticipated and any ensuing litigation, which also was probable. In fact, litigation regarding the matter we discussed has occurred. I have notes on this conversation, which contain information provided by Mr. Foster, as well as my mental impressions, observations, conclusions, and plans for action. These notes are my work product and are properly characterized as core work product.

Excerpt from Affidavit of James Hamilton executed July 25, 1996 in Sealed Case, U.S. District Court for the District of Columbia, Nos. 95-446 and 95-447.

[The portion of the affidavit printed below has been unsealed in accordance with the Order of the United States Court of Appeals for the District of Columbia Circuit issued April 23, 1998 in *In re Sealed Case*, No. 97-3006. The remainder of the affidavit remains under seal.]

7. During my privileged meeting with Mr. Foster on July 11, 1993, I discussed with him his need for personal representation as well as my possible representation of the White House.