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Mortal Clients, Immortal Privilege - In re Death of Miller and the Future of the Posthumous Attorney-Client Privilege in North Carolina

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Mortal Clients, Immortal Privilege? *In re Death of Miller* and the Future of the Posthumous Attorney-Client Privilege in North Carolina

The circumstances surrounding the death of Wake County pediatric AIDS researcher Eric Miller are both tragic and intriguing.[1] An autopsy indicated that the cause of Miller's December 2, 2000, death was arsenic poisoning, a condition he first experienced in mid-November of that year.[2] Shortly after Miller's death, Derril H. Willard, Jr., who allegedly was having an affair with Miller's wife Ann,[3] sought the services of Raleigh attorney Richard T. Gammon[4] in anticipation of being questioned by police about Eric Miller's death. Willard met with Gammon on several occasions. Then, on January 22, 2001, Willard was found dead in his garage of a self-inflicted gunshot wound.[5]

Suspicious circumstances surrounding Eric Miller's sickness and subsequent death have contributed to the Wake County District Attorney's interest in discovering the contents of Willard's communication with Gammon. First, Willard and Ann Miller were co-workers at GlaxoSmithKline, where investigators believe each had access to an arsenic compound.[6] Second, Willard purchased and poured a beer for Miller at a bowling alley on the first night Miller became sick.[7] Although no connection between this action and Miller's death has been confirmed, it is at least possible, given Miller's

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1. *See* Andrea Weigl, *Confidentiality Ruling a Test*, NEWS & OBSERVER (Raleigh, N.C.), Mar. 31, 2002, at B1.

2. Oren Dorell, *Poisoning Victim's Family Marks Somber Anniversary*, NEWS & OBSERVER (Raleigh, N.C.), Dec. 3, 2001, at A12.

3. *See* Matthew Eisley, *State's Top Court Takes Case*, NEWS & OBSERVER (Raleigh, N.C.), June 29, 2002, at A1; Andrea Weigl, *New Details Revealed in Miller Case*, NEWS & OBSERVER (Raleigh, N.C.), Mar. 8, 2002, at A1.

4. Brief for the State at 4, *In re* Death of Miller (N.C. Sept. 30, 2002) (No. 303PA02) [hereinafter Brief for the State], *available at* http://www.ncappellatecourts.org (on file with the North Carolina Law Review).

5. Carole Tanzer Miller, *Executors' Power at Issue*, NEWS & OBSERVER (Raleigh, N.C.), July 7, 2002, at A20. Willard's suicide occurred the day after police searched Willard's home and seized documents and two computers. Dorell, *supra* note 2. In a note found at the scene, Willard denied that he killed Miller. Weigl, *supra* note 1.

6. Weigl, *supra* note 3. A search of Ann Miller's lab produced 200 milliliters of an arsenic compound. Dorell, *supra* note 2. Miller's autopsy later revealed traces of the same arsenic compound in Miller's liver, blood, and urine. *Id.*

7. Eisley, *supra* note 3.

hospitalization for arsenic poisoning the same night,[8] that Miller was exposed to arsenic at the bowling alley. Third, Willard's wife disclosed to investigators that Gammon advised her husband that he could be charged with attempted murder in connection with Miller's death.[9]

The well-established rule in North Carolina is that once an attorney-client relationship exists, an attorney is not permitted to disclose confidential client communications unless the client consents.[10] The North Carolina Supreme Court "has never ruled on the kind of attorney-client privilege dilemma at issue in Gammon's case."[11] In October 2002, the court heard arguments regarding whether Gammon must comply with Wake County Superior Court Judge Donald Stephens's order compelling him to submit for in camera[12] review any information in his possession relevant to Miller's death.[13] On the basis of this in camera review, the judge would then decide whether the information should be disclosed to the Wake County District Attorney.[14] To this point, Gammon has steadfastly invoked the attorney-client privilege in refusing to comply with the order.[15] The North Carolina Academy of Trial Lawyers supports

8. Dorell, *supra* note 2.

9. Weigl, *supra* note 1. This revelation raises an interesting question as to whether Willard's disclosure of this communication to his wife may amount to waiver of attorney-client confidentiality. As commentator Paul Rice notes:

> The voluntary disclosure of confidential attorney-client communications to a spouse presents a difficult problem for courts. On the one hand, the spouse is theoretically no different than any other third party. Therefore, disclosure to [the spouse] should affect a waiver. On the other hand, disclosures to a spouse are also protected under the marital communications privilege.

PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 9:27, at 83 (2d ed. 1999).

10. *See* State v. Van Landingham, 283 N.C. 589, 601, 197 S.E.2d 539, 547 (1973); Dobias v. White, 240 N.C. 680, 684, 83 S.E.2d 785, 788 (1954); Guy v. Bank, 206 N.C. 322, 323, 173 S.E. 600, 601 (1934); Carey v. Carey, 108 N.C. 267, 270, 12 S.E. 1038, 1038 (1891); *see also* N.C. ADMIN. CODE tit. 27, r. 1.6(c) (June 2002) (prohibiting attorneys from disclosing confidential client communications, using them against the client, or using them to the advantage of a third party without the client's consent).

11. Eisley, *supra* note 3.

12. In camera refers to proceedings conducted in a judge's private chambers, judicial action in the courtroom in the absence of spectators, or judicial action taken when court is not in session. BLACK'S LAW DICTIONARY 763 (7th ed. 1999).

13. Eisley, *supra* note 3.

14. Brief for the State, *supra* note 4, at 11.

15. Eisley, *supra* note 3. "If the state Supreme Court orders Gammon to divulge what his client told him and he refuses, the Raleigh lawyer could be held in contempt, facing possible jail time and loss of his license to practice law." Andrea Weigl, *How Safe Are Your Secrets? What Your Doctors, Lawyers and Clergy May Reveal*, NEWS & OBSERVER (Raleigh, N.C.), July 7, 2002, at A19.

Gammon's refusal, and it filed a brief with the Wake County Superior Court emphasizing that the value of the attorney-client privilege lies in its encouragement of full and frank communications between lawyers and clients.[16] While District Attorney C. Colon Willoughby has not received much support from attorneys in his quest to obtain the privileged information, he has garnered the support of someone who may prove to be more influential in this case: Yvette Willard, Derril H. Willard, Jr.'s wife. In her capacity as executor of her husband's estate, Yvette Willard has waived the attorney-client privilege and asked Gammon to disclose to the Raleigh Police Department and the Wake County District Attorney's office any information in his possession relevant to Miller's death.[17] Miller's parents, as co-executors of his estate, agreed to waive any claim against Willard, thereby releasing his estate from any potential civil liability that might result from a finding that Willard played a role in causing Miller's death.[18] Because Willard's will did not authorize his wife to waive the attorney-client privilege on his behalf, Gammon believes that Yvette Willard's waiver is insufficient to relieve him of his obligation to maintain the privilege.[19]

Although the *Miller* case was argued partially on the basis of the established estate or testamentary exception to the attorney-client privilege,[20] it is a model case for adopting a "good cause" exception of

16. Brief of the North Carolina Academy of Trial Lawyers as Amicus Curiae in Support of Respondent's Claim of Attorney-Client Privilege at 3, *In re* Death of Miller (Wake Co. Super. Ct. Mar. 6, 2002) (No. 02-SP-550).

17. Brief for the State, *supra* note 4, at 5. At the Superior Court level, Judge Stephens made findings of fact with regard to Yvette Willard's ability to waive the privilege. *Id.* at 7–8. The judge found that, as executor of her husband's estate, she had waived any attorney-client privilege that would prohibit Gammon from disclosing information regarding Miller's death. *Id.* Additionally, he found that no evidence before the court indicated that Willard alone had reserved the right to waive the privilege or that Yvette Willard had been prohibited from doing so. *Id.* Gammon's attorneys argue, however, that Yvette Willard is not empowered by either North Carolina law or the terms of her husband's will to waive the privilege. Respondent-Appellant's Brief at 37, *In re* Death of Miller (N.C. Aug. 16, 2002) (No. 303PA02) [hereinafter Appellant's Brief], *available at* http://www.ncappellatecourts.org (on file with the North Carolina Law Review); *see also* N.C. GEN. STAT. § 32-27 (2001) (enumerating the power that may be incorporated in a trust instrument and omitting reference to the power to waive the attorney-client privilege on behalf of the estate). *But see* THOMAS E. SPANN, A PRACTITIONER'S GUIDE TO THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK PRODUCT DOCTRINE 175 (2001) (pointing out that a client's successor may generally waive the privilege).

18. Brief for the State, *supra* note 4, at 5–6; *see also id.* at 31–32 (discussing the Millers' decision to release the Willard estate from any potential claims).

19. *See* Appellant's Brief, *supra* note 17, at 37–38.

20. *Id.* at 36–42. The testamentary exception provides that when litigation occurs after a client's death, such as when two or more parties make claims to the proceeds of the

the kind envisioned by Justice O'Connor in her dissenting opinion in *Swidler & Berlin v. United States*.[21] This Recent Development examines *In re Death of Miller* as a foundational case on which to construct such a narrow, interest-balancing "good cause" exception to the posthumous attorney-client privilege in North Carolina.

Justice O'Connor's dissent in *Swidler*, in which Justices Scalia and Thomas joined, acknowledged that the benefits of the attorney-client privilege are generally understood to outweigh the risk of excluding important pieces of evidence.[22] She also pointed out, however, that situations may arise in which the costs of allowing an absolute posthumous attorney-client privilege can be unacceptably high.[23] Justice O'Connor illuminated several such situations, including: (1) where the privilege functions to bar an innocent criminal defendant from seeking disclosure of a deceased client's confession to the offense with which the defendant is charged; (2) where the constitutional rights of the defendant are at stake; and (3) where there is a compelling law enforcement need for information.[24]

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client's estate, no party may assert the privilege against another. *See In re* Kemp, 236 N.C. 680, 73 S.E.2d 906 (1953). This exception is widely accepted because it is perceived as advancing the client's interest in having his estate properly distributed. *See* United States v. Osborn, 561 F.2d 1334, 1340 n.11 (9th Cir. 1977). For a brief discussion of the legal theories relied on in the *Miller* case, see generally Molly McDonough, *Secrecy Until Death or Beyond? North Carolina to Rule on Posthumous Attorney-Client Privilege*, 1 ABA JOURNAL EREPORT 41 (2002). *See also infra* note 25 and accompanying text (giving a brief overview of the long history of the attorney-client privilege and the reluctance of courts to expand the category of exceptions to the privilege).

21. 524 U.S. 399, 411–16 (1998) (O'Connor, J., dissenting). In *Swidler*, Independent Counsel Kenneth Starr sought disclosure of the notes of James Hamilton, an attorney consulted by Deputy White House Counsel Vincent W. Foster, Jr., in the wake of the firings of several White House Travel Office employees. *Id.* at 399. Foster committed suicide nine days after meeting with Hamilton. *Id.* In blocking Starr's disclosure request, the Court reaffirmed the common law assumption that the attorney-client privilege survives the death of a client. *Id.*; *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 77 cmt. c (2000) (stating that the attorney-client privilege survives the death of the client or the termination of the existence of an organization).

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

23. *Id.* at 413 (O'Connor, J., dissenting) (citing *In re* Sealed Case, 124 F.3d 230, 233–34 (D.C. Cir. 1997)). Courts often have acknowledged the privilege's tendency to thwart the search for truth and urged that because of this tendency, the privilege should be narrowly construed. *See generally* United States v. Nixon, 418 U.S. 683, 710 (1974) (explaining that evidentiary privileges should not be construed expansively because of their tendency to impede the search for truth); *In re* Feldberg, 862 F.2d 622, 627 (7th Cir. 1988) (stating that accuracy suffers when the privilege operates to conceal information courts need to make correct decisions); EDNA SELAN EPSTEIN, THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK PRODUCT DOCTRINE 12–13 (4th ed. 2001) (discussing strict construction of privilege).

24. *Swidler*, 524 U.S. at 413 (O'Connor, J., dissenting). It is the third situation, a compelling law enforcement need for information, which bears most directly on the *Miller*

In the five years since the United States Supreme Court's opinion in *Swidler*, North Carolina courts have not had occasion to clarify the scope of the posthumous attorney-client privilege. North Carolina courts generally have given the attorney-client privilege a wide berth, allowing exceptions to its application in only a narrow range of situations, including: (1) where the client discloses to the attorney that he is planning to commit a crime or fraud (the crime-fraud exception); (2) where the client has lodged a malpractice or ineffective assistance of counsel claim against the attorney or otherwise waived the privilege; and (3) where the client has died and the client's executor waives the privilege to allow disclosure of privileged information for the purpose of settling the estate (the estate or testamentary exception).[25] Although most state courts have been reluctant to alter the contours of the venerable privilege[26]

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case. Had Willard lived, he might have been offered immunity to compel his testimony, or he might have decided on his own volition to reveal what he knew to the police. His suicide foreclosed both possibilities. If Gammon is not compelled to testify in Willard's place, "a complete 'loss of crucial information' " may result. *See id.* at 412–13 (O'Connor, J., dissenting) (quoting 24 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5498, at 484 (1986)). For an interesting discussion of the protection of criminal defendants' constitutional rights as a justification for dispensing with the posthumous attorney-client privilege, see Jon J. Kramer, *Supreme Court Review, Dead Men's Lawyers Tell No Tales: The Attorney-Client Privilege Survives Death*, 89 J. CRIM. L. & CRIMINOLOGY 941, 964–72 (1999).

25. *See* 1 KENNETH S. BROUN, BRANDIS AND BROUN ON NORTH CAROLINA EVIDENCE § 129, at 427–28 (5th ed. 1998); *see also* N.C. ADMIN. CODE tit. 27, r. 1.6(d)(4) (June 2002) (explaining that attorneys may disclose confidential information concerning the intent of a client to commit a crime and any information necessary to prevent the crime); *id.* at r. 1.6(d)(5) (providing that attorneys may disclose confidential information to the extent necessary to remedy the consequences of a client's criminal or fraudulent conduct in which the attorney's services were used); State v. Taylor, 327 N.C. 147, 152, 393 S.E.2d 801, 805 (1990) (explaining that when a criminal defendant lodges an ineffective assistance of counsel claim against his attorney, the defendant in effect waives both the attorney-client and work product privileges with respect to matters relevant to the claim); Battle v. State, 8 N.C. App. 192, 197, 174 S.E.2d 299, 302 (1970) (holding that when the client filed a petition challenging the integrity and abilities of his court-appointed lawyers, he waived the protection of the attorney-client privilege with respect to matters alleged in the petition); *In re Kemp*, 236 N.C. at 684, 73 S.E.2d at 909 (explaining that it is generally understood that the attorney-client privilege does not bar an attorney from testifying with regard to confidential communications where conflicting claims to the client's estate arise after the client's death). *See generally* Jason Greenberg, Comment, Swidler & Berlin v. United States . . . *And Justice for All?*, 80 B.U. L. REV. 939, 946 (2000) (describing the three main exceptions to the attorney-client privilege that courts have carved out over the years).

26. *See Swidler*, 524 U.S. at 403 ("The attorney client privilege is one of the oldest recognized privileges for confidential communications."); Greenberg, *supra* note 25, at 944 (noting that the attorney-client privilege dates back to sixteenth century England and is the oldest common law privilege providing for the protection of confidential

beyond these general categories, recent cases[27] have highlighted the need for a new exception focused on balancing the interests of law enforcement in resolving criminal investigations with the interests of attorneys in maintaining the confidentiality of their communications with clients. Such exceptions frequently are referred to as "good cause" exceptions,[28] and their unifying characteristic is that they incorporate an interest-balancing analysis in determining whether the attorney-client privilege should be applied posthumously.

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communications). For a brief overview of the history of the attorney-client privilege, see Kramer, *supra* note 24, at 942–45.

27. The *Miller* case should not be regarded as an isolated incident constituting an overly individualized basis on which to construct an interest-balancing exception to the posthumous attorney-client privilege. Relatively recent cases presenting similar circumstances have also called into question whether the attorney-client privilege should be allowed to apply after the death of the client when the privilege impedes the progress of a criminal investigation. Although these cases have not necessarily resulted in the adoption of interest-balancing exceptions, the recent cases at least demonstrate the broader need for privilege exceptions in criminal investigations.

One case centers on the investigation into the whereabouts of nine-year-old Erica Baker, who disappeared while walking her dog in February 1999. Janice Morse, *Lawyer's Refusal Ripples*, CINCINNATI ENQUIRER, Aug. 24, 2002, at B1. Prosecutors believe that the attorney for Jan Marie Franks, a homeless woman who died in December 2001, may know what happened to Erica. *Id.* Reports from a tip hotline indicated that Franks was a passenger in a van that struck, and presumably killed, Erica. *Id.* Franks's husband executed a waiver pursuant to a section of Ohio law that allows the attorney-client privilege to be waived if a surviving spouse agrees to the disclosure in question. *Id.* Despite the waiver, Lewis has refused to disclose any information conveyed to her by Franks. *Id.*

Another case, *In re John Doe Grand Jury Investigation*, 562 N.E.2d 69 (Mass. 1990), presented facts quite similar to the *Miller* case. Charles Stuart was accused of murdering his pregnant wife, who died in the hospital shortly after giving birth to their child. Simon J. Frankel, *The Attorney-Client Privilege After the Death of the Client*, 6 GEO. J. LEGAL ETHICS 45, 45 (1992). When Stuart's brother came forward with information implicating Stuart in the murder, Stuart allegedly confessed the murder to his attorney. *Id.* The next day Stuart's body was discovered in a nearby river; he had apparently jumped to his death. *Id.* The Massachusetts court ultimately denied prosecutors' attempts to force Stuart's attorney to testify about what Stuart told him, but, in a strong dissent, Judge Nolan acknowledged that the court should have considered a narrow interest-balancing exception to the rule of posthumous attorney-client privilege under these facts. *In re John Doe*, 562 N.E.2d at 72 (Nolan, J., dissenting). Judge Nolan went on to criticize the decision for its failure to put in place a "safety valve" by which the privilege could be overridden when the interests of justice so require. *Id.* at 73 (Nolan, J., dissenting).

28. RICE, *supra* note 9, § 8:1, at 18 n.39 ("The 'balancing' test (occasionally referred to as a 'good cause' test) balances the need for the privileged information against the benefit derived from the privilege's suppression of that information."). Ten states have adopted some form of the "good cause exception." *Id.* at 19. Of these ten states, four have signaled their acquiescence to piercing the posthumous attorney-client privilege in an appropriate case, but have not yet encountered such a case. *Id.* The remaining six states have used the exception almost exclusively in criminal cases in which the defendant's rights to confrontation and to mount an effective defense were implicated. *Id.*

In *Swidler*, Justice O'Connor wrote that where "a compelling law enforcement interest is at stake ... the cost of silence warrants a narrow exception to the rule that the attorney-client privilege survives the death of the client."[29] The burden of persuading the North Carolina Supreme Court of the value of the privilege over any competing interests rests with the proponent of the privilege,[30] here, Gammon. In this case, the Raleigh Police Department and the Wake County District Attorney's office have a competing interest: solving Miller's homicide case. Because Willard's suicide foreclosed the possibility of obtaining that information directly, law enforcement officials were left with no other source from which to obtain Willard's testimony except Gammon. Under the balancing approach described by Justice O'Connor,[31] for Gammon to prevail, he would need to show that Willard's posthumous interest in confidentiality overrides the interests of law enforcement officials in obtaining the information necessary to resolve the Miller homicide case.

Because the majority in *Swidler* based its opinion on federal common law, rather than constitutional principles, its holding is not binding on the states.[32] As such, the states are free to define the limitations of the posthumous attorney-client privilege in conformity with their distinct statutory and common law systems. While Justice O'Connor's balancing approach does not constitute a very specific exception to the posthumous attorney-client privilege, several guiding principles emerge from her dissenting opinion that would allow the North Carolina Supreme Court to formulate a new exception. The first principle is that the privilege should apply only to the extent necessary to accomplish its purpose; where the privilege seems only to serve as an obstacle to the fair administration of justice, it should

29. *Swidler*, 524 U.S. at 416 (O'Connor, J., dissenting).

30. Scott v. Scott, 106 N.C. App. 606, 612, 417 S.E.2d 818, 823 (1992) ("The burden is on the proponent of the privilege to demonstrate that the privilege should be applied."), *aff'd*, 336 N.C. 284, 442 S.E.2d 493 (1994). For additional authority on this point, see *United States v. Tedder*, 801 F.2d 1437, 1441 (4th Cir. 1986) (stating that "the proponent of the privilege ... must prove its applicability"), and *Parkway Gallery Furniture, Inc. v. Kittinger/Penn. House Group, Inc.*, 116 F.R.D. 46, 50 (M.D.N.C. 1987) ("The proponent of the attorney-client privilege has the burden of proving its applicability.").

31. *Swidler*, 524 U.S. at 415–16 (O'Connor, J., dissenting).

32. *See* RICE, *supra* note 9, § 2:1, at 6 n.1 (explaining that the attorney-client privilege is shaped by state and federal common law, rather than constitutional law); Richard C. Wydick, *The Attorney-Client Privilege: Does It Really Have Life Everlasting?*, 87 KY. L.J. 1165, 1189 (1999) ("*Swidler & Berlin* tells us that, *in a case governed by the federal common law of privilege*, the privilege remains intact after the client dies ...." (emphasis added)).

be carefully examined.[33] With this principle in mind, any proposed exception to the posthumous attorney-client privilege must limit invocations of the privilege that exceed the boundaries of the privilege's purpose. To do so requires careful articulation of that purpose.

In his 1986 article, Professor David J. Fried identified two justifications for the attorney-client privilege, the instrumental and intrinsic justifications, each of which is based on some conception of the privilege's purpose.[34] The instrumental justification emerges from the idea that the privilege exists to foster the provision of legal advice to clients who might not seek such advice if they thought their attorneys could be forced to disclose their confidences.[35] This justification resonates in *In re Sealed Case*,[36] the *Swidler* case as presented to the United States Court of Appeals for the District of Columbia, in which the court acknowledged that "[t]he 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."[37] Under this justification, the privilege is perceived to accomplish its proper purpose so long as clients remain willing to confide in their attorneys.[38]

By contrast, the intrinsic value justification focuses less on the function of the privilege and more on the relationship between attorney and client.[39] Under this justification, the attorney-client relationship is analogized to other privileged relationships, such as those between husbands and wives and between priests and penitents, which exist for the purpose of preventing betrayal of intimate information shared in such relationships.[40] The intrinsic value justification takes the view that the information protected by the

33. *Swidler*, 524 U.S. at 412 (O'Connor, J., dissenting) (citations omitted).

34. David J. Fried, *Too High a Price for Truth: The Exception to the Attorney-Client Privilege for Contemplated Crimes and Frauds*, 64 N.C. L. REV. 443, 490 (1986). For an expanded discussion of the instrumental and intrinsic (non-instrumental) justifications, see Wydick, *supra* note 32, at 1173–76.

35. Fried, *supra* note 34, at 490.

36. 124 F.3d 230 (D.C. Cir. 1997), *rev'd sub nom.* Swidler & Berlin v. United States, 524 U.S. 399 (1998).

37. *Id.* at 233.

38. Fried, *supra* note 34, at 491. This justification for the privilege is narrow, but some authorities conclude that because there is no real substitute for legal advice, there is no reason that the privilege should not be narrowed even further or abolished outright. *Id.*

39. *Id.*

40. *Id. See generally* Charles Fried, *The Lawyer As Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060 (1976) (comparing the traditional role of a lawyer as a professional having certain ethical obligations with the ideal that an individual should follow moral principles over ethical guidelines).

privilege is nearly identical to that protected by the Fourth and Fifth Amendments, such that "[t]here is little moral difference between convicting a client by testimony compelled from his or her own mouth and convicting a client by testimony compelled from his or her attorney's mouth."[41] The justification is rarely discussed by courts, which tend to favor the instrumental justification.[42] Still, the emotional appeal of this justification is considerable because it identifies the attorney-client privilege as protecting an intimate, inviolable relationship between attorney and client.

The privilege's purpose has figured prominently in the *Miller* case. One of Gammon's most powerful arguments for maintaining the privilege is rooted in the instrumental justification, explained above: "Like Vince Foster, 'it seems quite plausible that [Willard], perhaps already contemplating suicide, may not have sought legal advice from [Gammon] if he had not been assured the conversation was privileged.' "[43] From this premise, Gammon reasons that any loss of evidence resulting from his invocation of the privilege is justified because the evidence would not have existed but for the attorney-client privilege.[44] This argument, however, fails to adequately take into account the irreplaceable nature of legal counsel. Some authorities argue that because there is no real substitute for legal advice, there is no reason to sustain a broad attorney-client privilege on the grounds that it encourages otherwise reluctant persons to seek legal advice when they need it.[45] To accept Gammon's argument, we

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41. Fried, *supra* note 34, at 492.

42. Frankel, *supra* note 27, at 45.

43. Appellant's Brief, *supra* note 17, at 34 (citing Swidler & Berlin v. United States, 524 U.S. 399, 407–08 (1998); *see supra* note 21 (discussing the *Swidler* case and the circumstances surrounding Foster's suicide). Like Willard, Foster committed suicide soon after consulting with his attorney, thereby giving rise to the inference that he may have already been considering suicide prior to the consultation. *See supra* note 21 (stating that Foster committed suicide nine days after meeting with his attorney).

The instrumental justification seems to assume that the average client is well-versed enough in the intricacies of the attorney-client privilege to know that it is generally believed to survive the client's death and to therefore base a decision either to seek or not seek legal advice on that knowledge. *But see* Wydick, *supra* note 32, at 1172 n.45 (summarizing Professor Zacharias's 1989 "Rethinking Confidentiality" study, which concluded that most clients are not well-informed about the extent to which the attorney's duty of confidentiality applies).

44. Appellant's Brief, *supra* note 17, at 34.

45. Fried, *supra* note 34, at 491; *see also* Edward J. Imwinkelried, *The Historical Cycle in the Law of Evidentiary Privileges: Will Instrumentalism Come into Conflict with the Modern Humanistic Theories?*, 55 ARK. L. REV. 241, 254 (2002) (briefly describing empirical studies suggesting that very few laypersons would be discouraged from seeking professional advice in the absence of a privilege protecting confidentiality); Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351, 364 (1989) (suggesting that,

must assume that Willard would have preferred to undergo police questioning and any subsequent legal proceedings alone rather than confide in an attorney who *might*, under narrow circumstances, be compelled to reveal those confidences after his death. Given the circumstantial evidence mounting against him prior to his death,[46] it is unlikely that Willard would have foregone legal advice on this basis alone.

It has never been conclusively proven that the attorney-client privilege guarantees full and frank communications between attorneys and their clients.[47] Thus, this idea should not function as a bar to the adoption of a narrow exception to the posthumous attorney-client privilege in the *Miller* case. Given that the primary purpose of the posthumous attorney-client privilege (the preservation of full and frank attorney-client communications) may be based on nothing more than shaky assumptions about the motivations of clients in seeking legal advice, courts should consider whether a privilege so premised should be allowed presumptively to stand in the way of serious criminal investigations, the resolution of which may hinge on disclosure of privileged information.

The second principle raised in the O'Connor dissent acknowledges that while deceased clients continue to hold certain interests in confidentiality, the consequences associated with disclosure of the confidential information are substantially less serious following the client's death.[48] While the client's individual interests in confidentiality may be less significant after death, other important interests in maintaining confidentiality remain. Writing for the majority in *Swidler*, Chief Justice Rehnquist recognized that limiting posthumous disclosure of confidential communications to the criminal context might reduce the fears of some clients and therefore preserve the frankness of their communications to their attorneys. He also pointed out, however, that clients who are concerned about their reputations, potential civil liability, and possible harm to their

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even if more exceptions to confidentiality existed, laypersons would continue to use lawyers because of their pressing needs for professional legal advice); Note, *The Attorney-Client Privilege: Fixed Rules, Balancing, and Constitutional Entitlement*, 91 HARV. L. REV. 464, 470–71 (1977) (stating that "[c]lients seek out attorneys and will continue to do so largely because there is no ready substitute for legal advice" and because the harms that might result from disclosure of confidential information are likely to be outweighed by the costs of keeping information from their attorneys).

46. See *supra* notes 6–9 and accompanying text.

47. RICE, *supra* note 9, § 2:3, at 18.

48. Swidler & Berlin v. United States, 524 U.S. 399, 412 (1998) (O'Connor, J., dissenting).

family and friends may in fact fear posthumous disclosure as much as disclosure during the client's life.[49]

In the *Miller* case, each of Justice Rehnquist's concerns may be alleviated by an examination of the surrounding facts. First, Willard's suicide foreclosed the possibility of him being held criminally responsible for any role he may have played in bringing about Miller's death.[50] Second, the possibility that civil sanctions could be levied upon his estate also was eliminated when Miller's parents agreed to release the estate from civil liability.[51]

Although reputational concerns certainly could extend beyond the life of the client, these concerns are widely understood to be most relevant during the life of the client.[52] Another concern expressed by Chief Justice Rehnquist, "possible harm to friends or family,"[53] also seems unlikely to be implicated in the Miller case: "Yvette Willard said [her husband] told her to decide what she should do for herself and their 2-year-old daughter. 'He told me before he died that what I did would be entirely up to me—whatever I thought would be best for me and Kelsey,' she said."[54] Yvette Willard's choice to waive the attorney-client privilege in the interest of bringing closure to the situation strongly indicates that the family Willard left behind is willing to face the possible harm associated with disclosure.

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49. *Id.* at 407. *But see* 24 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5498, at 484 (1986) (stating 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").

50. For an interesting analysis of the legal significance of suicide, see generally Michael Paulsen, *Dead Man's Privilege: Vince Foster and the Demise of Legal Ethics*, 68 FORDHAM L. REV. 807 (1999).

51. *See supra* note 18 and accompanying text.

52. The Court of Appeals for the D.C. Circuit recognized:

> To the extent that concern over reputation arises from an interest in the sort of treatment a person will receive from others . . . 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 . . . .

In re Sealed Case, 124 F.3d 230, 233 (D.C. Cir. 1997), *rev'd sub nom.* Swidler & Berlin v. United States, 524 U.S. 399 (1998). *See generally* Gugliuzza v. K.C.M.C., Inc., 606 So.2d 790 (La. 1992) (explaining in the context of a defamation case that after a person dies, there is no longer a reputation that can be injured or that the law can protect); Jessica Berg, *Grave Secrets: Legal and Ethical Analysis of Postmortem Confidentiality*, 34 CONN. L. REV. 81, 95 (2001) (arguing that a person's interests in confidentiality for the purpose of controlling the manner in which their identities are perceived are stronger during life than after death).

53. *Swidler*, 524 U.S. at 407.

54. Weigl, *supra* note 3.

In her article discussing confidentiality in the medical context, Professor Jessica Berg explained that living persons may suffer two levels of harm as a result of the disclosure of a confidential communication: those harms resulting from having information known that they did not wish to be known and those more personal harms resulting from knowing that their wishes regarding confidentiality were not respected.[55] Where a deceased person is concerned, however, the potential harms are diminished. For example, while a deceased person might have an interest in posthumous preservation of confidentiality, he will suffer none of the consequences a living person might face if that confidentiality is breached.[56] Neither will a deceased person experience the personal affront of knowing that his desire for confidentiality was not respected.[57] It follows that posthumous disclosure of confidential information generally is less harmful to the client than disclosure during his lifetime.[58]

Professor Berg's analysis is applicable to the *Miller* case. Common sense dictates that Willard, like most of us, probably wanted to be remembered in a favorable light and, for that reason, might have desired that his communications with Gammon remain confidential even after his death. Even if disclosure of his communications with Gammon produces information that casts Willard in a negative light, however, Willard himself will suffer none of the consequences. Additionally, he cannot experience the feeling of betrayal that might have accompanied any disclosure by Gammon while he was living.

The importance of a sound reputation, even posthumously, should not be lightly dismissed as a goal of clients seeking legal counsel. Still, its importance must be weighed against any competing interests in deciding whether to compel disclosure of confidential information after a client's death. Preservation of Willard's reputational interests, especially when weighed against the interests of law enforcement in proceeding with its investigation into Miller's

55. Berg, *supra* note 52, at 95 (discussing legal and ethical issues surrounding the posthumous disclosure of confidential information of medical patients).

56. *Id.*

57. *Id.*

58. *See, e.g.*, *id.* (concluding that the notion of harm to identity is difficult to define with respect to the living and even more difficult with respect to the dead: "[A]lthough the dead may have some interests in maintaining confidentiality postmortem, this interest is not as strong as it is when the patient is living. Thus, other interests may take precedence when weighing the appropriateness of confidentiality versus disclosure.").

murder, does not seem to be a proper basis on which to sustain the attorney-client privilege posthumously.

The third principle emerging from Justice O'Connor's dissent centers on the idea that if the privilege bars an attorney from testifying, then "a complete 'loss of crucial information' will often result."[59] A strong argument against the adoption of "good cause"[60] exceptions is that "privileged communications kept from the court do not really represent a 'loss' of evidence since the client would not have written or uttered the words absent the safeguards of the attorney-client privilege."[61] Although this is a strong argument in the abstract, there is some reason to believe that Willard could have been persuaded to cooperate with investigators had he lived. Prior to Willard's consultations with Gammon, investigators already were interested in questioning him in connection with Miller's death, but Willard simply avoided them.[62] Presumably, Willard sought Gammon's advice in anticipation of having to answer investigators' questions. Had Willard lived and cooperated with investigators, his testimony could have been elicited in a number of ways; Willard might have offered it of his own volition, or he could have been offered immunity in exchange for his testimony. Although these possibilities are purely speculative, the premise underlying the argument—that a crucial loss of information does not result from posthumous invocation of the attorney-client privilege because the client would never have disclosed the information but for the attorney-client privilege—is also speculative. Obviously, there is no way to know whether Willard would have provided investigators with crucial information had he lived, but there is also no reason to conclude that he never would have disclosed such information to anyone except his attorney under the promise of confidentiality.

The final, and perhaps most important, principle to draw from Justice O'Connor's dissent is that "[w]hen the [attorney-client] privilege is asserted in the criminal context, and a showing is made that the communications at issue contain necessary factual

59. *Swidler*, 524 U.S. at 412–13 (O'Connor, J., dissenting) (quoting 24 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5498, at 484 (1986)).

60. RICE, *supra* note 9, § 8:1, at 19 n.39 (quoting Garner v. Wolfinbarger, 430 F.2d 1093 (5th Cir. 1970)).

61. *Id.* § 2:3, at 21; *see also supra* notes 34–38 and accompanying text (discussing the validity of the instrumental justification for the attorney-client privilege, which focuses on the idea that the privilege encourages people who might not otherwise seek legal counsel to do so).

62. *See* Weigl, *supra* note 3.

information not otherwise available, *courts should be permitted to assess whether interests in fairness and accuracy outweigh the justifications for the privilege.*"[63] This principle provides the foundation of a narrow balancing test presented as a discretionary judicial tool for use in addition to the recognized exceptions.

The American Law Institute ("ALI") outlined a similar approach in a comment to the *Restatement (Third) of the Law Governing Lawyers*.[64] Although the Institute acknowledged that the law currently recognizes no exception to the rule that the attorney-client privilege survives death, it nonetheless set out several considerations supporting such an exception.[65] In setting forth the considerations, the ALI, like Justice O'Connor, recognized the desirability of permitting judges to implement need-based exceptions on a case-by-case basis after weighing the interests in confidentiality against compelling needs for disclosure.[66]

Either of these applications of the balancing approach easily could be incorporated into existing North Carolina law regarding the attorney-client privilege. The North Carolina Rules of Evidence would govern the application of the principles embodied in Justice O'Connor's dissent in *Swidler* to the state's attorney-client privilege jurisprudence. North Carolina Rule of Evidence 501 mandates that "[e]xcept as otherwise required by the Constitution of the United States, the privileges of a witness, person, government, state, or political subdivision thereof shall be determined in accordance with the law of this State."[67] By contrast, Federal Rule of Evidence 501 provides that privileges are governed by common law principles as interpreted by courts of the United States "in the light of reason and experience."[68] The North Carolina and federal rules governing the

63. *Swidler*, 524 U.S. at 413–14 (O'Connor, J., dissenting) (emphasis added).

64. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 77 cmt. d (2000). Like Justice O'Connor, the *Restatement* identifies courts as the proper arbiters of when and how an attorney should be compelled to disclose the confidential communications of her deceased clients. *Id.* The *Restatement* further addresses the issue of waiver by a personal representative of the deceased client's privilege, but concludes that the more direct approach would be to allow the judge conducting the proceedings in which the evidence is proffered to make the determination based on a set of relevant factors. *Id.*

65. *Id.*

66. *Id.* Comment d to the *Restatement* goes to great lengths to point out that a need-based exception to the privilege has never been approved by legislatures or courts. *Id.* The ALI follows this disclaimer with a detailed description of how a need-based exception would function, which possibly signals a shift in favor of such exceptions among some attorneys.

67. N.C. R. EVID. 501.

68. FED. R. EVID. 501.

operation of evidentiary privileges are therefore similar in that each derives from the common law of its respective jurisdiction. But, the manner in which the North Carolina rule governs the posthumous attorney-client privilege is necessarily different from the manner in which it is governed under the comparable federal rule. Because in *Swidler* the Supreme Court so clearly rejected the notion of an interest-balancing exception[69] and because that decision is now a part of federal common law, it might be futile for a party to now propose that a federal court adopt an interest-balancing exception. In North Carolina, however, the absolute nature of the attorney-client privilege has yet to be challenged in a context similar to that presented in *Swidler*.[70] For that reason, the common law is not hostile to the concept of an interest-balancing exception, and it would appear at least possible that North Carolina courts could allow the exception consistent with Rule 501.

In North Carolina, implementation of a new exception would not revolutionize the state's attorney-client privilege jurisprudence because North Carolina is one of twenty-four states that have not yet adopted a modern privilege rule.[71] Currently, attorneys can be judicially compelled to disclose confidential attorney-client communications in certain circumstances.[72] Therefore, the privilege,

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69. *See* Swidler & Berlin v. United States, 524 U.S. 399, 409 (1998).

70. *See* Eisley, *supra* note 3.

71. "Modern privilege rules" are attorney-client privilege rules "patterned on Unif R. Evid. 502 (1974) (amended 1986), deleted Fed. R. Evid. 503, Unif. R. Evid. 26 (1953), or Model Code of Evid. 209–10 (1942)." Wydick, *supra* note 32, at 1181 n.89 (citations and internal references omitted). Modern privilege rules essentially codify and define the parameters of the attorney-client privilege. Rejected Rule 503, for example, not only stated the general rule of attorney-client privilege, it also established who could claim it and enumerated the exceptions to the privilege. Because North Carolina has not adopted a modern privilege rule, there is no definitive list of exceptions the state's courts will find acceptable. As such, North Carolina could embrace a new exception without having to amend or contradict existing statutory law. The twenty-four states that had not adopted such rules as of 1998 are Arizona, Colorado, Connecticut, Georgia, Illinois, Indiana, Iowa, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Virginia, Washington, West Virginia, and Wyoming. *Id.* at 1181 n.88.

72. N.C. ADMIN. CODE tit. 27, r. 1.6(d)(3) (June 2002). The North Carolina Administrative Code states:

> If a lawyer is called as a witness to give testimony concerning a client, absent waiver by the client, paragraph (c) requires the lawyer to invoke the privilege when it is applicable. The lawyer must comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client.

Id. at cmt. 20. Like the need-based exception, the procedure outlined in this rule designates the court as the arbiter of the interests raised when a lawyer raises the attorney-

while closely guarded, is not absolute. Adopting an interest-balancing exception to the posthumous attorney-client privilege would not require repealing statutes[73] or overhauling the Rules of Professional Conduct. Rather, North Carolina may embrace the exception simply by choosing to employ it in the context of an appropriate case.[74]

> Under existing common law in North Carolina,
>
> the attorney client privilege exists if: (1) the relation of attorney and client existed at the time the communication was made, (2) the communication was made in confidence, (3) the communication relates to a matter about which the attorney was professionally consulted, (4) the communication was made in the course of giving or seeking legal advice for a proper purpose although litigation need not be contemplated, and (5) the client has not waived the privilege.[75]

Under this definition, it appears likely that an attorney-client relationship existed between Willard and Gammon. Willard went to Gammon seeking legal advice in anticipation of being questioned by police about the death of Eric Miller. Presumably he discussed with Gammon the circumstances surrounding Miller's death and received an opinion from Gammon as to whether he could face criminal charges.[76] Because the North Carolina Supreme Court has never ruled on a privilege question of the kind presented by Gammon's case, however, it is less clear, on the basis of state common law, whether the attorney-client privilege resulting from Willard's consultation with Gammon absolutely survived Willard's death. Unless the court rests its decision entirely on the validity of Yvette

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client privilege. *See supra* notes 64–66 and accompanying text (discussing the ALI's view that courts are the best arbiters of attorney-client privilege dilemmas).

73. The North Carolina General Statutes do not address the attorney-client privilege directly. They only establish confidentiality guidelines for some of the following privileged relationships: physician-patient; clergyman-communicant; psychologist-client/patient; school counselor-student; and social worker-client. N.C. GEN. STAT. §§ 8-53 to 8-53.7 (2000).

74. Because the operation of the attorney-client privilege in North Carolina is controlled by state common law, it follows that any changes to the operation of the privilege would emerge from case law. *See* N.C. R. EVID. 501 (indicating that privileges are determined in accordance with the law of the state).

75. Miles v. Martin, 147 N.C. App. 255, 259, 555 S.E.2d. 361, 364 (2001) (citing State v. Murvin, 304 N.C. 523, 531, 284 S.E.2d 289, 294 (1981)).

76. See *supra* note 9 and accompanying text (noting Yvette Willard's claim that Gammon advised her husband that he could be charged with attempted murder).

Willard's waiver of the privilege, the decision in the *Miller* case should clarify the scope of the posthumous attorney-client privilege.

Most court references to the posthumous application of the attorney-client privilege have arisen in the context of disclosures made pursuant to the testamentary exception.[77] The Supreme Court in *Swidler* endorsed disclosure under this exception because it tends to advance the client's interests.[78] In approving this exception on the basis of its conformity with the client's intent, the Court implicitly includes in the universal client's intent the affirmative desire that any other privileged communications remain eternally privileged.[79] If there was a clear empirical basis for imputing such a subjective intent to clients with regard to the posthumous treatment of the privilege, such an implication might make sense. Because no clear empirical basis exists,[80] it is not unreasonable to posit that the Court's basis for rejecting a new interest-balancing exception to the privilege is as speculative as the "no harm in one more exception rationale"[81] the Court ascribes to the proponents of the new exception.

In re Death of Miller exemplifies the rare case in which an interest-balancing exception to the posthumous attorney-client privilege is entirely in order. The exception to the posthumous attorney-client privilege as derived from analysis of Justice O'Connor's dissent in *Swidler* and the circumstances of the *Miller* case might take the following form: where a judge determines through in camera review of privileged information that the invocation of the posthumous attorney-client privilege (1) no longer reasonably serves the interests of a deceased client and (2) obstructs resolution of the investigation of a serious crime, such as homicide, (3) by withholding crucial information not otherwise available to law enforcement, the attorney-client privilege should not bar access to the information for use in criminal proceedings.[82]

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77. Swidler & Berlin v. United States, 524 U.S. 399, 402 (1998); *see also* Frankel, *supra* note 27, at 58 n.65 (examining 400 cases in which the client was dead and the application of the attorney-client privilege was at issue, and concluding that in ninety-five percent of the cases, the issue was raised in the testamentary context).

78. *Swidler*, 524 U.S. at 405.

79. *Id.* at 409–10 (explaining that the established exceptions to the attorney-client privilege do not conflict with the privilege's purposes, whereas a posthumous exception applied in the criminal context would come into conflict with the goals of promoting open communication and protecting the client's interests).

80. *Id.* at 409–10 n.4 ("Empirical evidence on the privilege is limited. Three studies do not reach firm conclusions on whether limiting the privilege would discourage full and frank communication." (citations omitted)).

81. *Id.* at 410.

82. *Id.* at 413 (O'Connor, J., dissenting).

The second and third prongs of the proposed exception are rather easily satisfied in the *Miller* case. First, Gammon's refusal to submit the information he learned from Willard for in camera review poses an obvious impediment to the investigation of Miller's death. Second, there appears to be no other source from which investigators can obtain Willard's testimony, now that Willard is deceased. Although these two prongs of the exception call for relatively concrete judgments, the first prong will probably be more difficult for courts to confront.

The first prong presents some difficulty for courts because it requires them to evaluate the client's interests in the maintenance of the privilege. From consideration of the instrumental justification for the privilege, courts might conclude that the client's most significant interest is in obtaining legal advice, often for the purpose of avoiding criminal prosecution or civil liability.[83] However, the client's death renders this interest moot. The remaining interests identified by Justice Rehnquist in *Swidler*, those touching primarily on reputation and the effects of disclosure on those left behind, therefore are likely to dominate analysis under the first prong.[84] To the extent that a client's interests in the attorney-client privilege are not generally quantifiable, courts will have to make this first determination on a case-by-case basis by examining the surrounding factual circumstances and the probable effects of disclosure of confidential communications.

In the *Miller* case, it is possible to conclude on the basis of the facts that most of Willard's interests are no longer served by the persistence of the attorney-client privilege; namely, Willard's death foreclosed the possibility of criminal punishment. The Millers' waiver of any claims to Willard's estate also eliminated the possibility of civil liability.[85] Additionally, Yvette Willard has waived the attorney-client privilege on her husband's behalf, in effect signaling the willingness of Willard's survivors to face the consequences of the disclosure.[86] What remains, Willard's own interest in the maintenance of a good reputation, seems a weak basis for upholding the privilege in light of its obstruction of a homicide investigation. Therefore, the application of the proposed interest-balancing exception to the *Miller*

83. *See generally* Fried, *supra* note 34, at 490 (identifying that the instrumental value of the attorney-client privilege is its tendency to encourage people to seek legal advice).

84. *See Swidler*, 524 U.S. at 407.

85. *See* Brief for the State, *supra* note 4, at 5–6, 31–32 (discussing the Millers' decision to waive any claims against the Willard estate).

86. *See id.* at 5.

case would have the very constrained effect of providing investigators with information crucial to bringing about resolution of the homicide investigation. Although disclosure potentially could have a negative impact on Willard's memory, press coverage reporting on Willard's alleged links to Miller's murder may already have had that effect.[87]

No privilege should be self-perpetuating in the sense that it may be successfully invoked for the sole purpose of preserving itself.[88] Based on the circumstances surrounding Willard's disclosures and his subsequent death, it is difficult to resist the conclusion that the attorney-client privilege is being asserted here for the purpose of such self-perpetuation, rather than for the proper purpose of concealing those confidential communications that may truly harm the deceased client's interests.

In applying the attorney-client privilege in the legally hazy posthumous realm, courts should never cease to question the privilege where it seems to thwart the search for truth for no more compelling a reason than it has always been allowed to do so at common law. Additionally, "[i]f one were legislating for a new commonwealth, without history or customs, it might be hard to maintain that a privilege for lawyer-client communications would facilitate more than it would obstruct the administration of justice. *But we are not writing on a blank slate.*"[89] If the existing attorney-client privilege is to remain responsive to the changing needs of justice and the "central truth-seeking function of the courts,"[90] it must be capable of tolerating reasonably drawn exceptions to its principles.

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87. *See, e.g., supra* notes 1–3 and accompanying text (illustrating news coverage regarding Willard's alleged involvement in Miller's death).

88. *See generally Swidler*, 524 U.S. at 411 (O'Connor, J., dissenting) ("We are reluctant to recognize a privilege or read an existing one expansively unless to do so will serve a 'public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.' " (quoting Trammel v. United States, 445 U.S. 40, 50 (1980))); *see also* State v. Freeman, 302 N.C. 591, 595, 276 S.E.2d 450, 453 (1981) (stating that in a situation in which adherence to precedent is the sole reason for supporting a common law rule, courts must reconsider the rule); Cannon v. Miller, 71 N.C. App. 460, 496, 322 S.E.2d 780, 803 (1984) (stating that courts should reexamine common law rules in situations in which they cannot achieve their purpose and where their application is supported only by precedent), *vacated by* 313 N.C. 324, 327 S.E.2d 888 (1985).

89. Cohen v. Jenkintown Cab Co., 357 A.2d 689, 691 (Pa. Super. Ct. 1976) (quoting MCCORMICK ON EVIDENCE § 87, at 176 (2d ed. 1972)) (emphasis added). Justice O'Connor cited *Cohen* in her *Swidler* dissent for the proposition that the attorney-client privilege should be carefully examined where it is apparent that the interests of justice can only be frustrated by the exercise of the privilege. *Swidler*, 524 U.S. at 412 (O'Connor, J., dissenting).

90. *Swidler*, 524 U.S. at 413 (O'Connor, J., dissenting).

In the *Miller* case, the North Carolina Supreme Court is presented with an opportunity to craft such an exception in a very narrow and precise manner. Seizing the opportunity does not constitute wiping clean the slate of attorney-client privilege. It merely clarifies the privilege's life span by allowing it to exist only so long as it serves the legitimate interests of clients, who are, after all, mere mortals incapable of deriving much benefit from an immortal privilege.

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