'Dead Men Tell No Tales,' but Their Attorney May Have To: Overlooked Exceptions to Privilege in California

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Attorneys or their clients might mistakenly, but reasonably, believe that privilege automatically continues on in perpetuity, but in the probate world, privileges are often eviscerated as a matter of statutory law after death.

Attorneys treat privileges as sacrosanct. We believe that everything a client tells us in private stays in our metaphorical vault, never to see the light of day under the attorney-client privilege. All good attorneys know that the client is the holder of this privilege, and even if an attorney wanted to tell-all, no attorney can waive this privilege without a client's consent under California Evidence Code Section 912.
The same rule applies to doctors under Evidence Code Section 994. Relatedly, a spouse cannot testify as to anything their husband or wife told them in confidence while they were married if their spouse (or former spouse) objects under Evidence Code Section 980.

These rules exist for good reason—lawyers and doctors need complete honesty from their client/patient in order to best serve their interests. Marriages are more harmonious when spouses are free to be completely honest with each other.

Given the private nature of attorney-client relationships and the widespread knowledge of the attorney-client privilege in popular culture, attorneys or their clients may mistakenly, but reasonably, believe that the privilege automatically continues on in perpetuity. But, in the probate world, privileges are often eviscerated as a matter of statutory law after death. Under California law, no privilege can exist without someone to assert the privilege—the decedent does not count. Someone must be appointed by a court to act as the decedent's personal representative.

No representative means no privilege at all under Evidence Code Sections 953, 954(c) (as well as Sections 993 and 994 for patient-physician privilege). This was confirmed by the California Supreme Court in *HLC Properties Ltd. v. Superior Court*, (2005) 35 Cal.4th 54, 66. Once someone dies, there needs to be affirmative action to protect a privilege should someone be seeking such information. It takes at least a month—and often much more—for a noticed hearing to be heard in a California probate court, even on something as routine as seeking to be appointed a personal representative of a decedent to assert a privilege.

Even if a personal representative gets appointed, the Evidence Code provides several exceptions to privilege that arise often in trust and estates litigation.

First, Evidence Code Section 957 provides that there is no privilege regarding "a communication relevant to an issue between parties all of whom claim through a deceased client." In other words, any communication that otherwise would be privileged is not if (1) it is relevant to an inheritance issue between the parties claiming through the decedent and (2) the speaker is dead. The statute also explicitly states that it applies to all types of inheritances—testate (through a will), nonprobate (typically through a trust), intestate (when there is no will or trust) or inter vivos (a gift made while alive).

Critically, for this exception to apply, all the litigants must be "claim[ing] through" the decedent. In other words, the issue in the litigation must be the decedent's testamentary intent. This exception would not break the attorney-client privilege of a decedent who is accused of some bad act or whose estate is suing regarding some issue unrelated to testamentary intent. Relatedly, Evidence Code Section 960 states that there is no privilege as to the intention of any deceased client regarding any conveyance of any interest in property.

Finally, Evidence Code Section 961 states that there is no privilege on any communication relevant to the validity of any document (like a deed or a will) that affects an interest in property that is executed by a deceased person.
There is sound policy reason behind these statutes—the key to any testamentary document is understanding the intent of the testator. Probate courts are courts of equity, meaning that they try to do what is fair. The underlying and often dispositive issue in nearly all trust and estates disputes is: What did the decedent want to do?

Presumably, when litigation arises about this intent and the testator is deceased, he or she would want the world to know their intent and fulfill their wishes.

Nevertheless, the ramifications of these statutes could reveal drama befitting a classic soap opera. A decedent could tell their lawyer that they want to make a substantial gift to their paramour, admit to their doctor that they lack the capacity to make a new will due to their advanced dementia, or confide in their spouse that, despite the rhetoric otherwise, they indeed do have a favorite child and therefore, want to benefit them just a tad more. All of these otherwise private and extremely sensitive conversations would be relevant to an all-too-often dispute over the decedent's intentions with their property like contesting the validity of a will or other gifts that they made.

Estate planning or elder law lawyers would be well advised to inform their client at the beginning of any consultation that, while their conversations are usually privileged, it is possible that the attorney may be compelled to testify after the client's death. It is also advisable for the attorney to take detailed notes as to the client's intent, particularly when it deviates from boilerplate, evenly split, inheritances, as it is likely that an attorney may not remember years later exactly why this client made the estate planning choices that they did.

Lawyers often advise clients to not put anything in writing that they would not want on the front page of The New York Times. Most lawyers assume that this excludes, of course, communications with them. However, when it comes to the probate world, clients should be aware that anything they discuss could come to light after their death in the event of a dispute. The good news, for them at least, is that the decedent won't be around to see it.

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