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Comment

Dead Man Talking:
A New Approach to the
Post-Mortem Attorney-Client Privilege

Erick S. Ottoson*

Seven employees of the White House travel office were fired abruptly in May, 1993, over alleged financial mismanagement.1 A subsequent congressional inquiry into the matter uncovered evidence linking First Lady Hillary Rodham Clinton to the firings.2 Though Mrs. Clinton denied any connection to the decision to terminate the employees, a high-ranking White House official claimed that the First Lady had ordered the firings directly.3 Independent Counsel Kenneth Starr was brought in to investigate Mrs. Clinton's connection to the matter, including claims that she cleared out the office in order to award the lucrative travel contracts4 to personal associates.5

A key figure in the investigation was Vincent Foster, Jr., a White House deputy counsel and Hillary Clinton's former private attorney.6 Foster, who was thought to have direct knowledge of Mrs. Clinton's involvement in the firings,7 committed suicide in

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4. The travel office coordinates travel arrangements, including commercial flights, for the White House staff and press corps accompanying the President on trips. See Frisby, supra note 1, at A5.
7. Foster had reportedly instigated an FBI probe into travel office fi-
July 1993. In early 1997, pursuant to the ongoing investigation, Starr obtained a subpoena for notes of a conversation between the deceased Foster and his civilian attorney, James Hamilton. A federal district court, in secret proceedings, held that the attorney-client privilege shielded the communications from subpoena. On appeal, Starr argued that Foster’s death rendered the privilege inapplicable to the communications at issue. The U.S. Court of Appeals for the D.C. Circuit agreed, and reversed the lower court’s ruling in In re Sealed Case, stating that the privilege “should not automatically apply” in all circumstances.

The decision in Sealed Case departs significantly from the common law rule regarding post-mortem application of the attorney-client privilege. Courts have generally been reluctant to carve out exceptions to the privilege, and outside of certain narrow circumstances, have uniformly held that its protection extends indefinitely after the death of the client. By contrast, the court in Sealed Case described a “discrete realm” in which circumstances may allow a court to strip away the protective cloak of the privilege and compel disclosure of attorney-client communications. Despite the court’s attempt to narrowly circumscribe the scope of its holding, the decision in Sealed Case has the potential to significantly diminish the scope of post-mortem privilege, and thereby to affect the flow of information between clients and attorneys.

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8. See id.
9. Mr. Foster’s diary contained references to Mrs. Clinton’s role in the firings. See id.
11. See id.
12. See id.
14. Id. at 234.
15. See infra text accompanying notes 73-76.
17. See Sealed Case, 124 F.3d at 234.
18. See infra Part II (discussing the court’s holding and rationale).
This Comment argues that the court in Sealed Case correctly concluded that certain circumstances justify departure from the strictures of the common law rule, but failed in its decision to adequately safeguard the interests protected by the privilege. Part I briefly describes the attorney-client privilege and its underlying rationale, and examines existing exceptions to the privilege. Part II outlines the court’s holding and reasoning in Sealed Case. Part III analyzes the balancing test articulated by the court in Sealed Case in light of the underlying rationale for the attorney-client privilege. This Comment concludes that the standard articulated in Sealed Case was neither sufficiently narrow nor adequately defined. Part IV proposes in its stead a new exception to the privilege. This new exception, which is predicated on a showing of a conspiracy involving the decedent, will allow future courts access to information under appropriate compelling circumstances while providing maximum protection for the interests served by the attorney-client privilege.

I. ATTORNEY-CLIENT PRIVILEGE: THE RULE AND ITS EXCEPTIONS

A. ORIGINS AND EVOLUTION OF THE PRIVILEGE

The attorney-client privilege “seal[s] the lips of an attorney as to communications with [a] client.”19 While the wording and precise contours of the rule differ among jurisdictions,20 modern


20. Most states have codified the privilege. See Frankel, supra note 16, at 55 n.52 (“While most states have codified the attorney-client privilege, . . . interpretation of the scope and application of the privilege in most areas continues to be an arena of common law interpretation, with court-fashioned exceptions regularly read into statutory privilege provisions.”); Geoffrey C. Hazard, Jr., An Historical Perspective on the Attorney-Client Privilege, 66 CAL. L. REV. 1061, 1064 (1978) (“The law of attorney-client privilege is the product of judicial decisions, augmented by statutes that usually incorporate the decisional law.”).

Until the 1970s, privilege law “varied widely from state to state.” Developments in the Law—Privileged Communications, 98 HARV. L. REV. 1450, 1462 (1985) (hereinafter Privileged Communications). In 1974, the National Conference of Commissioners on Uniform State Laws promulgated a revised version of the Uniform Rules of Evidence, which laid out a new version of the attorney-client privilege. See id. at 1462-63. “[W]idespread acceptance of the [revised rules] has reduced the discrepancies between states’ privilege laws.” Id. at 1463.

Application of the privilege in federal courts is controlled by Federal Rule
formulations generally afford a client permanent control over the disclosure of his or her communications with a legal advisor.\(^\text{21}\)

The early history of the privilege is somewhat hazy.\(^\text{22}\) Official references to the rule first appear in English decisions as early as the late Sixteenth Century.\(^\text{23}\) Courts initially characterized the privilege as “a protection for the honor of the attorney,”\(^\text{24}\)

of Evidence 501, enacted in 1975. The rule provides, “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 . . . in the light of reason and experience.” FED. R. EVID. 501. Federal courts applying state substantive law must apply state law privilege principles. See id. See generally Privileged Communications, supra, at 1463-70 (discussing the history of the revised federal evidentiary rules).

21. The most well-known and oft-quoted formulation of the rule belongs to Wigmore:

(1) Where legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal advisor, (8) except the protection be waived.


The attorney’s ethical obligation to protect client confidences, which is distinguishable from the attorney-client privilege, is codified separately in Rule 1.6 of the Model Rules of Professional Conduct. The rule states simply that a lawyer “shall not reveal information relating to representation of a client.” MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1983). On the whole, professional ethics codes “vary in their edicts, ranging from nearly absolute prohibitions on attorney disclosures to general rules containing significant exceptions.” Fred C. Zacharias, Rethinking Confidentiality, 74 IOWA L. REV. 351, 352 (1989).

22. See Hazard, supra note 20, at 1070 (“Taken as a whole, the historical record is not authority for a broadly stated rule of privilege or confidence.”); Brian R. Hood, The Attorney-Client Privilege and a Revised Rule 1.6: Permitting Limited Disclosure After the Death of the Client, 7 GEO. J. LEGAL ETHICS 741, 759 (1994) (discussing the privilege’s “ambiguous historical pedigree,” and noting that “its historical justifications and limits have been disputed recently”); Privileged Communications, supra note 20, at 1502 (“Historians do not agree on why courts originally granted a privilege for attorney-client communications.”). See generally Hazard, supra note 20, at 1070-91 (tracing the development of the privilege from the Seventeenth Century in England through the Nineteenth Century in America).

23. See Privileged Communications, supra note 20, at 1456. The attorney-client privilege was the first evidentiary privilege recognized, followed by the spousal privilege, which emerged by the late 1600s. See id.

24. See Frankel, supra note 16, at 49 (explaining that, by protecting attorneys from being forced to disclose others’ confidences, the privilege was thought to safeguard the “gentlemanly” status of members of the legal profession); Hazard, supra note 20, at 1070 (same); Alvin K. Hellerstein, A Comprehensive Survey of the Attorney-Client Privilege and Work Product Doctrine, in CURRENT PROBLEMS IN FEDERAL CIVIL PRACTICE 1996, at 589, 607 (PLI
and only later came to view it as "belonging to" the client. A version similar to the modern formulation crystallized in the United States and England by the middle of last century.

Courts have nearly universally held that the privilege against compelled disclosure extends indefinitely after the death of the client. The views of legal scholars have not been quite as uniform; a few have argued vehemently for the traditional rule, but most have supported some degree of post-mortem diminishment of the privilege under certain compelling circumstances. Nonetheless, except in cases involving disputes between survivors claiming under the decedent's estate, the death of the client has not in itself been viewed as an independent reason for abrogating the privilege.

B. WHY THE PRIVILEGE?

The settled rationale behind the attorney-client privilege is that it promotes honest and complete disclosure by clients and thereby serves the public's interest in competent legal representation. Without the guarantee of confidentiality, clients


25. Only the client may waive the privilege. See generally infra text accompanying notes 59-63 (discussing waiver of the privilege); see also Hellerstein, supra note 24, at 607.

26. See Frankel, supra note 16, at 48-49.

27. See id. at 46-47, 55-57. The most notorious recent case to so hold was In re John Doe Grand Jury Investigation, 562 N.E.2d 69 (Mass. 1990). The facts of Doe highlight the traditional weight accorded the privilege, even after the death of the client. Three months after Carol DiMaiti Stuart was fatally shot, her brother-in-law came forward with information implicating himself and the deceased's husband in the homicide. See Frances M. Jewels, Comment, Evidence—Attorney-Client Privilege Survives Client's Death—In re John Doe Grand Jury Investigation, 408 Mass. 480, 562 N.E.2d 69 (1990), 25 Suffolk U. L. Rev. 1260, 1260-61 (1991). Charles Stuart, the alleged victim's husband, thereafter took his own life hours after meeting with his attorney. See id. at 1261. The Supreme Judicial Court of Massachusetts refused to allow the state to compel the attorney to reveal the content of his communications with Charles Stuart, despite the ongoing criminal investigation into the brother-in-law's involvement. See 562 N.E.2d at 71-72.

28. See, e.g., Frankel, supra note 16, at 48, 58-79 (arguing that, outside of situations involving the established testamentary exception, the rule should consistently protect client communications even after death).


30. See infra text accompanying notes 73-76 (discussing the testamentary exception).

31. See generally Privileged Communications, supra note 20, at 1472-74.
would hesitate to reveal embarrassing or damaging facts, and attorneys would be forced to render legal advice and services based on partial knowledge of clients' situations. By providing attorneys with all of the information needed to provide competent representation, the privilege is thought to promote greater accuracy in the truthfinding process, despite the fact that it blocks the factfinder's access to potentially relevant evidence. Under this utilitarian framework, without some specific compelling reason to compel disclosure, it makes sense to extend the privilege after the death of the client, since clients are more likely, on average, to be frank with their attorneys when assured of continuing confidentiality.

The privilege also protects the privacy interests of those who seek legal representation by ensuring that third parties do not gain access to clients' personal information. The privacy rationale assumes that persons have an interest in protecting their reputation, even after death, by controlling the flow of information concerning their intimate affairs. The privilege thus serves society's interest in preserving individuals' dignity and autonomy.

Courts articulating rationales for the attorney-client privilege have generally accorded privacy interests less weight than utilitarian concerns. Although this has led some com-

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The Supreme Court has embraced the utilitarian rationale, stating that the purpose of the privilege is "to encourage full and frank communication between attorneys and their clients." Upjohn Co. v. United States, 449 U.S. 383, 389 (1981); accord United States v. Grand Jury Investigation, 401 F. Supp. 361, 363 (W.D. Pa. 1975).

"Three assumptions form the basis of this rationale: the assumption that clients need to consult lawyers, the assumption that lawyers need all the facts to adequately deal with clients' matters, and the assumption that clients would not disclose information without the privilege's promise of confidentiality." Grace M. Giesel, The Legal Advice Requirement of the Attorney-Client Privilege: A Special Problem for In-House Counsel and Outside Attorneys Representing Corporations, 48 MERCER L. REV. 1169, 1176 (1997).


33. See Privileged Communications, supra note 20, at 1473.

34. See id. at 1480-83 (discussing the privacy rationale).

35. See id. at 1481.

36. Judicial opinions infrequently discuss explicitly the privacy or "rights-based" justifications for the rule. See Giesel, supra note 31, at 1179-80 (stating that modern courts have not explicitly relied on the privacy rationale). But see Frankel, supra note 16, at 53 n.41 (cataloguing various cases in which courts have explicitly addressed the privacy rationale behind the privilege).
mentators to announce the death of the rights-based justification for the privilege, privacy concerns remain inescapably enmeshed with the utilitarian rationale. Because rational clients will weigh such concerns when deciding whether to disclose information, the rules of privilege must take privacy interests into account if they are to facilitate frank communication with attorneys.

At least two "political" arguments have also been advanced by scholars to explain the privilege, both of which frame the rule as something other than a principled attempt to protect individual freedoms or to safeguard the accuracy of court proceedings. The first of these characterizes the privilege as a tool of the powerful, a means of allowing the wealthy to maintain a veil of secrecy around their activities so as to avoid loosening their stranglehold on power and resources. The second describes the privilege as a way of enhancing the image of the legal system. According to this view, by safeguarding certain communications between clients and attorneys, the privilege prevents society from viewing courts as despotic juggernauts, and prevents the emergence of information after the fact that might undermine the credibility of the factfinding process.

Although the Constitution is often absent from scholarly debate over the privilege, the rule can have significant constitutional underpinnings. In the criminal context, information conveyed to an attorney by a potential defendant is protected against compelled disclosure only if it falls within the scope of the Fifth Amendment protection against self-incrimination—in

37. See, e.g., Note, supra note 32, at 1705 (explaining how the rights-based argument "gradually sank from view" and "no longer animates discussions of the attorney-client privilege").

38. See Privileged Communications, supra note 20, at 1483-86 (describing the privacy rationale as "supplementary" to the traditional justification and concluding that "both [are] really instrumental approaches that differ only in... focus, respectively, on the direct and the indirect consequences of compelling testimony").

39. See id. at 1493-94.

40. See id. at 1498-1500.

41. See id. This argument is sometimes framed as a Kantian "categorical imperative":

   Underlying the categorical imperative argument for the privilege is the premise that a trusting lawyer-client relationship is itself the chief value inherent in the confidentiality principle. This is so not because the privilege leads to better lawyering, but because it enhances client autonomy and gives clients a sense that the legal system is capable of fair play.

Hood, supra note 22, at 761.
other words, if the client could not have been forced to reveal the information prior to disclosing it to the attorney.42 The Fifth Amendment only bars the use of incriminating information in a criminal proceeding against the person from whom it was obtained, however, and does not erect a per se barrier to the state's obtaining the information.43 Thus, disclosure by an attorney might be constitutionally permissible if the defendant is granted immunity.44 The privilege also implicates the Sixth Amendment right to effective assistance of counsel.45 Compelling disclosure of client confidences can threaten this right by preventing the free flow of information from client to attorney and by forcing an attorney to become a witness against a client.46


43. See Subin, supra note 42, at 1125.

44. Subin concludes: “When a demand is made of an attorney to disclose privileged communications, the defendant's fifth amendment rights may be jeopardized.... [A] court should not permit disclosure in the absence of a constitutionally adequate immunity provision. The invocation of such a provision would, however, resolve the self-incrimination problem.” Id. at 1132.

45. See id. at 1127. The right of access to counsel “encompasses both the sixth amendment right to counsel in criminal cases and the fourteenth amendment due process right to counsel in civil cases.” Id.

46. See id. at 1128. Subin describes two prongs of the right-to-counsel argument:

First, the right to counsel requires that incriminating communications from the client to the attorney be considered privileged, and therefore nondisclosable. Second, whether privileged or not, permitting or requiring the lawyer to disclose such information renders it impossible for the attorney to provide effective representation, either because it destroys the client's trust in the attorney, or because it puts the attorney in the intolerable position of being a witness against the client.

Id. The first argument is unconvincing because “[t]he right to counsel may be violated by compelled disclosure of privileged information, but only because such information is related to the attorney's professional task of providing legal advice, and not because it may be incriminating.” Id. at 1129. The primary limitation of the second Sixth Amendment rationale is this: because the Constitution merely guarantees the right to effective counsel, and not to representation by any particular attorney, the principle would not be violated if a court assigned new counsel to a defendant whose original attorney was required to reveal confidences. See id. at 1130-31.
The last few decades have witnessed extensive debate over the proper scope of the privilege. Much of this debate is really a debate over the appropriate reasons to have such a privilege at all, since the differing rationales suggest different formulations of the rule. Courts and commentators do agree that the privilege should be defined in such a way as to shield no more information than necessary from the eye of the factfinder. After all, the device "inevitably excludes potentially relevant information from the consideration of the finder of fact," and thus has the potential to impair the functioning of courts.

C. EXCEPTIONS TO THE PRIVILEGE

Despite debate over the proper scope of the attorney-client privilege, courts have been reluctant to establish any general judicial discretionary authority to waive the privilege when a balancing of the relevant interests indicates that abrogation of the privilege is justified. Courts reason that only a test

47. See id. at 1095 (describing a "far-ranging" debate over legal ethics and noting that issues of attorney loyalty and confidentiality have dominated this debate); Hazard, supra note 20, at 1067-68 ("There are respectable and vociferous supporters of the proposition that anything a lawyer learns about his client ought to be secret, maybe even including the client's intention to have the lawyer cooperate in [the] exercise [of] perjury.").

48. See Privileged Communications, supra note 20, at 1486 ("The rationale used to justify a privilege plays an important role in debates about what form that privilege should take."); Hazard, supra note 20, at 1062 (stating that the real issue in the debate "is not whether [the privilege] should exist, but precisely what its terms should be").

49. Frankel, supra note 16, at 49; see also Privileged Communications, supra note 20, at 1454 ("Unlike other rules of evidence, privileges are not fashioned primarily to exclude unreliable evidence or otherwise to aid in the truth-seeking function. Indeed . . . privileges expressly subordinate the goal of truth seeking to other societal interests.").

50. Not surprisingly, courts generally disfavor privileges that allow anyone to conceal relevant information from judicial proceedings. See, e.g., Jaffee v. Redmond, 116 S. Ct. 1923, 1928 (1996). The Court quotes the maxim that "the public . . . has a right to every man's evidence," and explains that exceptions to this rule can only be justified by a public need that outweighs "the normally predominant principle of utilizing all rational means for ascertaining the truth." Id. (quoting Trammel v. United States, 445 U.S. 40, 50 (1980)).

51. See supra text accompanying notes 31-33 (discussing the interests served by the privilege).

52. See, e.g., Jaffee, 116 S. Ct. at 1932 (recognizing a patient-psychotherapist privilege, but refusing to adopt a balancing approach allowing abrogation of the privilege where trial judge later determined that evidentiary need for disclosure outweighed patient's interest in privacy); In re John Doe Grand Jury Investigation, 562 N.E.2d 69, 71 (Mass. 1990) (refusing to adopt a rule allowing abrogation of the privilege when society's interest in the truth out-
that ensures predictability will adequately protect the interests served by the privilege, since clients will be less likely to disclose incriminating or embarrassing information if they are unsure whether the court may later force the attorney to reveal that information in a judicial proceeding. While a number of proposed "balancing tests" have been advanced over the years, none has proven concrete enough to satisfy courts and commentators that its implementation would result in uniform application.

Despite powerful theoretical arguments for retaining a near-absolute privilege, the empirical assumptions underlying the rule are less than settled. Proponents of the balancing weighed the harm caused by disclosure).

53. See Giesel, supra note 31, at 1173 ("For the privilege to encourage client disclosure to counsel, a high degree of certainty must exist that the privilege will protect what the client says from disclosure in the event litigation ensues.").

54. See, e.g., Jaffee, 116 S. Ct at 1932; Doe, 562 N.E.2d at 71; infra note 88 (discussing Upjohn v. United States, 449 U.S. 383 (1981)).

55. A number of commentators have advanced arguments in support of the balancing approach, calling for abrogation of the privilege in certain compelling circumstances. The typical "compelling situation" is one in which an attorney knows that disclosure of certain information conveyed by the client is the only way to prevent harm or death to another person, but has been sworn to secrecy by the client. See, e.g., Hood, supra note 22, at 741-42 (posing a hypothetical in which an attorney finds herself unable to disclose a client's confession to committing a crime for which an innocent person has already been convicted and sentenced to death); Subin, supra note 42, at 1101-06 (advancing a hypothetical based on the famous "Buried Bodies" case, in which an attorney remained silent despite his knowledge of the location of a dismembered victim's remains); Zacharias, supra note 21, at 352 (discussing a hypothetical in which an attorney learns from a client, who is not implicated in the crime, the location of a kidnapping victim); cf. STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 28-30 (4th ed. 1995) (discussing the attorney's ethical, rather than legal, obligations, and posing the following hypotheticals: (1) an attorney learns that a client has AIDS, and that the client lives with a woman who is unaware of his condition; (2) an attorney learns that her client has hidden a handgun in a police car in a location not likely to be discovered by the police but easily accessible to anyone arrested and placed in the rear of the vehicle; (3) an attorney has a strong intuition that one of his clients is planning to commit suicide). See generally Kathryn W. Tate, The Hypothetical as a Tool for Teaching the Lawyer's Duty of Confidentiality, 29 LOY. L.A. L. REV. 1659 (1996).

56. See Privileged Communications, supra note 20, at 1474-80 (discussing the difficulty of ascertaining empirically the potential deterrent effect of abolishing the privilege); Giesel, supra note 31, at 1172, 1181-82 & n.46-48 (listing several studies that have attempted to document the effect of the privilege, and concluding that "[n]one have [sic] produced forceful results."); Subin, supra note 42, at 1163 ("The conclusion that confidentiality is essential to adequate representation rests upon the premise that without it clients would not disclose all the facts that the attorney needs to know to perform
DEAD MAN TALKING

approach suggest that in many, if not most cases, an exception allowing for disclosure in limited circumstances would make no real difference to clients, and that the normal lawyer-client relationship would thus go unaffected. A strict rule against nondisclosure in all circumstances, they argue, unnecessarily adheres to the theoretical justifications behind the privilege and ignores the practical benefits of allowing such disclosure.

Despite the general tendency to retain a nearly absolute attorney-client privilege, courts have recognized exceptions to the privilege in a few limited sets of circumstances, including cases of waiver by the client, cases in which a client seeks or uses legal advice in furtherance of a crime or fraud, and testamentary disputes. In addition, third parties may be able in some instances to compel disclosure of a client's conversations with an attorney when suing the attorney over a matter in which he or she represented the client, or, according to a recently established rule, when the third party is the executive branch of the federal government, seeking to compel disclosure of communications made to government attorneys. Each of these exceptions is justifiable in light of the utilitarian justification for the privilege, either because it allows the client to retain some measure of control over the release of confidential information, or because it operates on communications that lie outside the scope of proper attorney-client communications.

1. Waiver: The attorney-client privilege may be waived by client consent. For a waiver to be valid, the client must waive the privilege knowingly and intelligently. The existence of waiver authority does not threaten clients' willingness to disclose, and thus does not undermine the attorney-client privilege; it is

competently. But that premise lacks empirical support. Little data exists, and that which does exist is at best inconclusive.); Frankel, supra note 16, at 61 ("The available empirical evidence... tells us little about the degree to which people are concerned with protection against disclosure, either before or after they die, when they confide in an attorney."); Note, supra note 32, at 1702 (referring to a "lack of empirical study devoted to the benefits and costs of the privilege").

57. See, e.g., Subin, supra note 42, at 1163-64.

58. See id.


60. See Hellerstein, supra note 24, at 814.
simply an outgrowth of the rule that the privilege belongs to the client. While there are limitations on clients' ability to dictate the scope of waiver, in general the client dictates which information is privileged and which is revealed.

2. The crime-fraud exception: Generally speaking, "[a] client who has sought assistance for the purpose of committing a crime or fraud... cannot require secrecy." The "crime or fraud" exception to the attorney-client privilege operates when a client reveals an intention to commit an act proscribed by law to his or her attorney, or when a client takes advantage of legal advice to advance a fraudulent or criminal plan. The exception is designed to prevent clients from using privileged communications to shield them from the consequences of their illegal actions.

61. A client may waive the privilege expressly, or impliedly through conduct, for example "by disclosure of any part of the information to a third party, production of privileged documents, deposition testimony, or the use of legal advice for business purposes." Thomas W. Hyland & Molly Hood Craig, Attorney-Client Privilege and Work Product Doctrine in the Corporate Setting, 62 DEF. COUNS. J. 553, 554 (1995). A court may also find implied waiver when a client knowingly allows an attorney to reveal privileged information without taking steps to prevent the disclosure. See, e.g., In re Claus von Bulow, 828 F.2d 94, 101 (2d Cir. 1987); In re Horowitz, 482 F.2d 72, 81-82 (2d Cir. 1973), cert. denied, 414 U.S. 867 (1973).

62. Any conduct by the client which is inconsistent with maintaining the privilege—for example, failing to invoke the privilege in response to another's attempt to gain access to confidential communications—will result in a finding of waiver. See HAZARD, supra note 59, at 271-72. In addition, an attorney may possess implied authority to waive the privilege. See id. at 272. In a litigation context, a client who selectively reveals portions of confidential conversations in order to bolster his or her case cannot maintain a veil of secrecy over the damaging or prejudicial portions of those same conversations. See, e.g., von Bulow, 828 F.2d at 102-03 (discussing this rule and noting various cases in which it has been applied).

63. See HAZARD, supra note 59, at 271-72.


65. See Fried, supra note 64, at 443-44. The latter case includes both instances in which the client seeks legal advice with a previously formed intention to commit an illegal act, and in which the client forms the intention only after obtaining advice, i.e., upon learning that his or her plan cannot be carried out by legal means. See id. at 444; St. Peter-Griffith, supra note 64, at 263. See generally Rachel A. Hutzel, Evidence: The Crime Fraud Exception to Attorney-Client Privilege—United States v. Zolin, 109 S. Ct. 2619 (interim ed. 1989), 15 U. DAYTON L. REV. 365, 372-73 (1990) (describing scenarios in which the exception applies). The crime-fraud exception was first announced unequivocally in the English case Regina v. Cox, 14 Q.B.D. 153 (1884), and there-
tion generally does not apply to past wrongdoings that a client reveals to an attorney.\textsuperscript{66}

The crime-fraud exception is based on the notion that communications made in furtherance of an illegal purpose do not fall within the purview of the attorney-client relationship, because it is not part of an attorney's professional role to further illegal activity.\textsuperscript{67} No attorney-client privilege can ever exist for such communications, because the privilege only applies to communications made for the purpose of obtaining legal counsel from an attorney acting in a professional capacity.\textsuperscript{68}

The crime-fraud exception presents vexing procedural issues. Courts have struggled to create a method of applying the exception that balances the need to protect legitimately privileged information with the need for access to communications after caught on quickly in the United States. \textit{See} Fried, supra note 64, at 456, 459; Christopher Paul Galanek, \textit{The Impact of the Zolin Decision on the Crime-Fraud Exception to the Attorney-Client Privilege}, 24 GA. L. REV. 1115, 1123 (1990). While the Cox decision seemed to limit the exception to cases in which the client had an unlawful intent at the time of the consultation, subsequent cases have applied the rule to clients who form this intent after obtaining the advice of counsel. \textit{See} Fried, supra note 64, at 459. \textit{See generally} Hellerstein, supra note 24, at 665-718 (reviewing the crime-fraud exception).

The Uniform Rules of Evidence state that no attorney-client privilege exists "if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud." UNIF. R. EVID. 502(d)(1). For an explanation of the role of the Uniform Rules of Evidence, see supra note 20.

\textsuperscript{66} See St. Peter-Griffith, supra note 64, at 263. The exception might apply to such a statement if it was made with an illegal purpose in mind. \textit{See} Subin, supra note 42, at 1117. Conversely, not every statement that relates to a future crime or fraud necessarily implicates the exception, since a client must actually use the advice obtained to further an illegal purpose. \textit{See id.; see also} David S. Rudolf & Thomas K. Maher, \textit{Attorney-Client Privilege May Protect Discussions of Future Criminal Activity}, CHAMPION, April 1997, at 41, 41-42 (discussing a recent Massachusetts case in which the defendant's disclosure of his plan to commit arson was held privileged and inadmissible after his attorney revealed the plan to the police).


\textsuperscript{68} See Subin, supra note 42, at 1117-18; Hazard, supra note 20, at 1063-64 (arguing that "if the client has in mind anything but a 'legitimate' purpose in consulting a lawyer, it might be said that communications between them are neither 'in the course of the attorney-client relationship nor in 'professional' confidence'). It is sometimes stated that in such a situation, no attorney-client relationship exists at all. \textit{See, e.g.,} Hutzel, supra note 65, at 371 (discussing the court's conclusion in Cox that "if a client seeks an attorney's aid in the commission of a crime or fraud... there is no professional relationship between the attorney and the client").
made in furtherance of illegal activity. The problem lies in determining what quantity and what type of evidence is needed to defeat the privilege. Generally speaking, a party seeking to invoke the exception must make some initial showing of illegality, a burden sometimes characterized as "some foundation in fact." A party seeking to compel disclosure via the crime-fraud exception need not introduce independent evidence of illegality, but instead may use the communications at issue as the basis for invoking the exception, provided they introduce evidence supporting a reasonable belief that in camera review will uncover evidence that establishes the exception's applicability.

3. The testamentary exception: Another, more limited exception abrogates the privilege after the death of the client for the limited purpose of resolving disputes between persons claiming under the decedent's estate. This "testamentary" exception is based on the notion that revealing information needed to resolve such disputes effectuates the deceased client's wishes by ensuring that assets are distributed according to his or her wishes. The privilege is not stripped away entirely in such a scenario, however, because the communications are only discoverable by persons with a legitimate stake in the deceased's property, and only in the case of a dispute. Application of the testamentary exception, therefore, is in a sense
controlled by the client, since it depends on the client's wishes expressed prior to death.  

4. The attorney self-defense exception: The attorney-client privilege also may not apply in suits against attorneys in which the attorney must discuss client communications in order to present an adequate defense. The self-defense exception, which arose in America in the 1800s, originally applied only "[to] situations in which the attorney and client [were] in an adversarial posture." It has since been extended to include situations in which the attorney is sued or prosecuted by a third party.

Disclosure in attorney self-defense cases, at least in suits brought by third parties, has disturbing implications. In the case of a suit brought by the client against the attorney, the goal of the privilege is not likely to be undermined, because a client who feels that the costs of disclosure outweigh the potential benefits of bringing a suit can simply avoid disclosure by not bringing the suit. Suits brought by third parties, on the other hand, offer the client no such option, and thus pose a risk of chilling client communications, especially given the risk that a third party will bring a suit against an attorney as a pretext for garnering information for use in a suit against the client.

In principle, at least, the danger posed by third-party lawsuits is minimized by the fact that courts limit the release of privileged information to that which is "necessary" to the attorney's defense.  

76. See id.
77. See Pizzimenti, supra note 42, at 449-50 n.31.
78. Jennifer Cunningham, Note, Eliminating Backdoor Access to Client Confidences: Restricting the Self-Defense Exception to the Attorney-Client Privilege, 65 N.Y.U. L. Rev. 992, 1009 (1990). Traditionally, the rule operated "when an attorney was sued for malpractice . . . brought suit to recover a fee, or . . . was charged with misconduct in the course of litigation between a client . . . and another party." Id. at 1008 (footnotes omitted). In such cases the client was generally said to have impliedly waived the privilege by making the accusations against the attorney. See id. at 1008-09.
79. See, e.g., Meyerhofer v. Empire Fire & Marine Ins. Co., 497 F.2d 1190 (2d Cir. 1974), cert. denied, 419 U.S. 998 (1974); Cunningham, supra note 78, at 1010-15 (discussing Meyerhofer); see also id. at 992-93, 1010-20 (describing the emergence of the exception for suits involving third parties).
80. See Cunningham, supra note 78, at 1021 (noting the potential for this form of abuse).
81. See id. at 1009-10. However, courts have not always adhered to this requirement in practice. See id. at 1010, 1015-17 (discussing cases in which courts have allowed the exception to operate without a showing of necessity, and noting that "there seem to be few, if any, cases in which a court has de-
5. The "Government Entity" exception: The most recently established exception to the attorney-client privilege is closely related to the crime-fraud exception. In a divided opinion, an Eighth Circuit court recently held that a White House official cannot invoke the privilege as to conversations with a government attorney, at least in the context of a federal criminal investigation. The decision rested primarily on the idea that the government's criminal justice needs outweigh its own need for confidentiality, and that allowing officials to use their government attorneys as a shield was a "misuse of public assets." Thus, the White House attorneys, as employees of the federal government, could not assert the privilege in the face of requests for disclosure by agents of that same government.

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Despite these exceptions to the attorney-client privilege, only one of which is tied directly to the client's death, courts have generally disfavored attempts to diminish the scope of the privilege, and have particularly avoided adopting exceptions that do not contain sufficiently concrete guidelines to ensure their uniform and predictable application. Because the Sealed Case exception is of the "balancing test" variety which has heretofore been shunned as unworkable, the decision bears examination.

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82. See supra notes 64-72 and accompanying text.
83. See In re Grand Jury Subpoena Duces Tecum, 112 F.3d 910, 915 (8th Cir. 1997). The decision arose essentially out of the same set of facts as Sealed Case, but involved Mrs. Clinton's communications with her government attorneys.
84. See id. at 920-21.
85. See id. at 921.
86. See id.
87. See supra text accompanying notes 73-76 (discussing the testamentary exception).
88. Upjohn Co. v. United States, 449 U.S. 383 (1981), is emblematic of this reluctance on the part of the judiciary. In Upjohn, the U.S. Supreme Court struck down the "control group" test, which had allowed for compelled disclosure of communications made to attorneys by any members of a corporation who had no significant decisionmaking authority in the organization. The Court rejected the control group standard as unworkable, primarily because of a lack of uniform application and the difficulty of predicting which employees would be found to be members of the control group. See generally Note, The Attorney-Client Privilege and the Corporate Client: Where Do We Go After Upjohn?, 81 MICH. L. REV. 665 (1983) (describing the origin of the control group test and cataloguing decisions adopting it).
II. IN RE SEALED CASE

In May, 1993, seven longtime employees of the White House travel office were fired, ostensibly over concerns of "serious financial mismanagement." A subsequent congressional review of the firings uncovered evidence that ultimately led Independent Counsel Kenneth Starr to subpoena notes of a conversation between Vincent Foster and his private attorney. A federal district court granted a motion to quash the subpoena, holding that the attorney-client privilege and work-product doctrine shielded the communications. In In re Sealed Case, the U.S. Court of Appeals for the D.C. Circuit reversed the district court's decision to shield the notes from subpoena, stating that the attorney-client privilege may not always apply after a client's death. In doing so, the Court of Appeals did not sweep away post-mortem privilege entirely. Rather, the court created a new, limited exception to the traditional rule, guided by the principle that a court mapping the contours of an evidentiary privilege should attempt to "maximize the sum of the benefits of confidential communications ... and those of finding the truth through our judicial processes."

The court began its reexamination of the post-mortem rule by noting that Federal Rule of Evidence 501 invites courts to continue to shape and refine privilege law "in the light of reason and experience." Thus, opined the court, "where precedents are in conflict or not controlling," federal courts should "find answers that best balance the purposes of the relevant doctrines." The court then observed that the post-mortem rule, though long-standing, has been kept alive largely through nominal recognition by courts applying the testamentary exception to the privilege. Courts have rarely been called upon

89. See Isikoff & Hosenball, supra note 6, at 17.
90. See In re Sealed Case, 124 F.3d 230, 231 (D.C. Cir. 1997); see also supra text accompanying notes 1-14 (describing the circumstances leading to the investigation and subpoena).
91. See 124 F.3d at 231.
92. See id.
93. Id. at 233 (emphasis added).
94. See supra note 20 (discussing Rule 501 and its role in federal courts).
96. 124 F.3d at 231.
97. Id.
98. See id.
to actually protect communications made by a now-deceased client, and the relatively few decisions that have "manifest[ed] the posthumous force of the privilege" read as mechanical applications of a prepackaged rule, offering little in the way of principled reasoning. Finally, the court noted that legal scholars, including most top evidence scholars, have historically criticized the strict prohibition on post-mortem disclosure, and "have . . . generally supported some measure of post-death curtailment [of the privilege]." Weighing the costs versus the benefits of protecting client disclosures after death, the court determined that the communications at issue fell within a "discrete realm" in which the chilling effect of abrogating the privilege would be minimal, and the benefits of disclosure great. The court first explained its reasoning behind the "minimal chilling effect," asserting at the outset that "post-death revelation will typically trouble the client less than pre-death revelation." The court then identified three potential concerns: civil liability, criminal liability, and reputational concerns. By confining its new exception to the realm of criminal liability, the court eliminated the first concern altogether. The other two concerns, the court reasoned, would pose a "modest" threat at most, because a dead person cannot be held criminally liable, and is not affected by reputational concerns. While a living client may be concerned with "the value of [his or her] posthumous reputation simpliciter," or may wish to avoid exposing surviving family members to financial or reputational harm, the court concluded that these "residual interests" are not likely to enter into one's mind "[i]n the sort of high-adrenaline situation likely to provoke consultation with counsel." The court then discussed the heightened costs of maintaining confidentiality after the death of a client. Shielding communications from the eyes of the factfinder can exact a high cost,

99. *Id.* at 231-32.
100. *Id.* at 231. The court noted the "one distinguished exception," Wigmore, who "proclaimed that there was 'no limit of time beyond which the disclosures might not be used to the detriment of the client or his estate.'" *Id.*
101. *See id.* at 234.
102. *Id.* at 233.
103. *See id.*
104. *See id.*
105. *See id.*
106. *Id.*
107. *Id.*
noted the court, particularly when the evidence is unavailable through other reliable means.\textsuperscript{108} In the case of a living client, the attorney-client privilege does not normally block access to the truth, because the factfinder retains direct access to the information via the client.\textsuperscript{109} After a client's death, however, the net cost of maintaining confidentiality rises drastically, because the privilege now prevents access to what is often the sole remaining source of the information formerly possessed by the client, namely the client's attorney.\textsuperscript{110} Thus, concluded the court, given the low risk of a chilling effect on client communications, and the high risk of jeopardizing the truthfinding function, certain circumstances may justify abrogation of the privilege.\textsuperscript{111}

The court next announced its adoption of a new, case-by-case balancing approach,\textsuperscript{112} defined by the following criteria: Statements made by a now-dead client, which would otherwise be protected by the attorney-client privilege, are admissible if they bear on a significant aspect of a criminal investigation, provided there is a scarcity of reliable alternative sources of evidence.\textsuperscript{113} The court then ordered the district court to reexamine the subpoenaed documents in light of this new balancing test.\textsuperscript{114}

\section*{III. HONEY, I SHRUNK THE ATTORNEY-CLIENT PRIVILEGE: MINIMIZING THE RISKS POSED BY COMPELLING DISCLOSURE}

\subsection*{A. THE COURT IN SEALED CASE ACCORDED REPUTATIONAL INTERESTS TOO LITTLE WEIGHT}

The court recognized that disclosure of clients' confidences might, in addition to raising issues of criminal and civil liability,
implicate reputational concerns. Its hasty dismissal of those concerns lies at the core of the court's errant formulation of its balancing test.

Identifying two "residual" aspects of one's post-death reputation that might concern a living client, concern for one's surviving family and the value of one's "posthumous reputation simpliciter," the court posited that these interests are unlikely to affect client disclosures, especially "[i]n the sort of high-adrenaline situation likely to provoke consultation with counsel." Undoubtedly, excitement and the accompanying rush of adrenaline may make clients less likely to carefully weigh the consequences of their words and actions, thus lessening the probability that they will take into account potential negative consequences of disclosing information to their attorneys.

There are two problems with the court's analysis, however. Despite the court's contrary supposition, it is not necessarily the case that the majority of attorney-client conversations take place in the heat of some embattled controversy. A variety of lawyer-client consultations take place in relaxed, colloquial settings. It is sensible to suppose that some clients who approach attorneys in these circumstances will have weighed all of the potential benefits and costs—including the risk that the content of one's conversations with an attorney will later be revealed—prior to seeking legal advice. These clients might well be deterred by the risk of reputational harm.

On the other end of the spectrum are those clients who are driven to consult with attorneys in order to avoid personal or financial ruin, criminal liability, or some similar cataclysmic fate. Of these clients, the most excited are often those whose conduct is particularly embarrassing or horrific, and who thus have the most compelling reasons to maintain the confidentiality their communications. In other words, the same factors that induce panic and excitement—and a corresponding greater

115. See 124 F.3d at 233.
116. See id. The court noted that "[t]o 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." Id.
117. Id.
118. See id.
119. See Frankel, supra note 16, at 60 (noting that "most of the cases where [the post-mortem] privilege issue has been litigated (outside of the testamentary context) involve some pretty ghastly topics of communication between client and lawyer").
likelihood that a client will become "caught up in the moment" and disregard the risk of future disclosure—also correspond with a higher likelihood that the client will have a strong motive to avoid public disclosure. Thus, the court's own argument for discounting reputational concerns in these types of cases militates for the strongest possible protection of confidentiality.

Admittedly, it is one thing to state that reputational concerns might affect some clients' willingness to disclose, and quite another to conclude that a majority of clients actively calculate and weigh the risk of post-death revelation when consulting with attorneys. Given the underlying utilitarian rationale for the attorney-client privilege, though, any potential threat to client candor posed by an exception to the privilege is problematic, because an exception is only justifiable if it offers a net benefit to the truthfinding process. Balancing tests that weigh the risks versus the benefits of disclosure are exceedingly difficult, if not impossible, to evaluate under this regime, because the actual risk posed by the revelation of client confidences is difficult to measure. Research into the chilling effect of abrogating the attorney-client privilege has not yielded quantifiable answers, and too many types of clients and legal problems exist to accurately generalize about the extent of the threat. Each client is an individual, possessing unique personality traits, idiosyncrasies, and legal needs that shape interactions with his or her attorney. For some clients, even a widespread, absolute repeal of post-mortem privilege would do little to dampen disclosure. Others might zealously safeguard the most benign information even when assured of eternal confidentiality.

This is not to suggest that courts should never create exceptions to the attorney-client privilege. Rather, the difficulty of ascertaining empirically the chilling effect caused by a given exception imposes a duty on courts to use whatever means available to minimize the risk of deterring client candor. The court in Sealed Case failed to recognize that reputational inter-

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120. Even without this reasoning, it is difficult to justify an exception to the privilege on the basis of a client's hotheadedness or imprudence alone—why not establish an exception for any information a client reveals to an attorney while in a state of intoxication? After all, the client in such circumstances is unlikely to be chilled by the risk of later revelation.

121. See sources cited supra note 56 (discussing the difficulty of determining the deterrent effect of abolishing the privilege).

122. See supra note 56.
ests will often influence client decisionmaking, and crafted a legal standard that unnecessarily disregards those interests.

B. THE SEALED CASE BALANCING TEST DOES NOT CONTAIN THE SAFEGUARDS FOUND IN EXISTING EXCEPTIONS TO THE PRIVILEGE THAT MINIMIZE THE RISK OF HARM TO THE TRUTHFINDING PROCESS

A court crafting an exception to the attorney-client privilege should attempt to minimize the risks of interrupting the normal flow of attorney-client communications. The surest way to do this is to fashion exceptions in such a way that the client retains some control over the release of the information. Even if the client cannot directly control the application of an exception, a predictable exception should be favored over an ambiguous one, in order to allow clients to anticipate with some certainty situations in which it will apply. Alternately, an exception might be designed to apply only to information falling outside of the scope of the attorney-client relationship.3

Existing exceptions to the attorney-client privilege generally contain one or more of these safeguards. The most obvious example is waiver by the client, in which the client must consent to abrogation of the privilege.4 Likewise, in the testamentary context, the deceased “controls” the operation of the exception through the very act of arranging for post-mortem distribution of assets.6 Communications revealed in such a case simply effectuate the deceased client’s previously expressed wishes.126 The crime-fraud exception applies in cases in which no relationship existed, at least with respect to the conversations at issue, and thus does not threaten legitimate attorney-client communications. Similarly, the “governmental entity” exception

123. Though this type of “exception” might deter client candor about certain matters, it does not deter legitimate attorney-client communications, and thus does not threaten the attorney-client relationship. See supra notes 67-68 and accompanying text (noting that the privilege does not apply to communications made in furtherance of crime or fraud).

124. See supra text accompanying notes 59-63 (discussing waiver).

125. See Frankel, supra note 16, at 76.

126. The court in Sealed Case, positing that the testamentary exception does not always reflect the decedent’s intent, offered the example of a client who “might want to provide for an illegitimate child but at the same time... [might] prefer that the relationship go undisclosed.” 124 F.3d at 234. The court overlooked the possibility that such a client could maintain the secrecy of the relationship by transferring assets to the child via nontestamentary means such as a gift or an irrevocable trust.
reflects the idea that it is not the role of government attorneys to render private legal counsel to government employees with regard to criminal activity.\textsuperscript{127} By formulating exceptions to the privilege in ways that allow clients to control or predict when their communications will be disclosed,\textsuperscript{128} courts have minimized the risk of hindering frank disclosure by clients.

Unlike existing exceptions to the privilege, the balancing test birthed in \textit{Sealed Case} contains inadequate safeguards and invites unpredictable application by courts. It thus poses a significant threat to the truthfinding process.

The court confined the reach of its new exception to criminal proceedings,\textsuperscript{129} reasoning that criminal liability—along with the accompanying deterrent effect caused by the threat of criminal sanctions—ends at death.\textsuperscript{130} This safeguard would be a powerful one if it functioned to limit the content of admissible information to that implicating the deceased in criminal conduct. Intuitively, society might feel more comfortable with a rule that essentially limited its reach to criminals; if nothing else, such a limitation would narrow the field of potential clients to whom the exception might apply. It would also ensure some measure of predictability, since a client would know which information might be disclosed after his or her death.

The problem with the court's new exception is that it contains no such limitation. The \textit{Sealed Case} balancing test allows for anyone's communications—including those of an innocent third party—to be revealed, so long as the communications at issue are of "substantial" importance to the outcome of some criminal proceeding.\textsuperscript{131} Under the court's formulation, the deceased client

\textsuperscript{127} See supra text accompanying notes 82-86 (explaining the circumstances under which this exception applies).

\textsuperscript{128} Two of the existing exceptions cannot be qualified in this way. The attorney self-defense exception, at least when it operates in suits brought by third parties, may compel disclosure of legitimately privileged information regardless of the client's wishes. Similarly, in the constitutional context, a criminal defendant's right to confront witnesses may compel the disclosure of otherwise legitimately privileged information. If there is anything to be said for these exceptions, it is that the client will nearly always be on notice of the potential for their application.

\textsuperscript{129} See \textit{Sealed Case}, 124 F.3d at 233.

\textsuperscript{130} See id.

\textsuperscript{131} The court did allow for the possibility of limiting access to the communications "[t]o the extent that the [reviewing] court finds an interest in confidentiality," and provided that a court "may in appropriate circumstances protect innocent third parties from disclosure." \textit{Sealed Case}, 124 F.3d at 235 & n.6. This discourages, but does not preclude, the possibility that communi-
might even be the victim of the very crime at issue, forced to posthumously (and, potentially, publicly) cough up exceedingly personal details in order to aid the government's investigation. This result would run counter to notions of fairness. Moreover, the potentially sweeping applicability of the court's exception renders futile any effort to predict when it will apply.

The other limitation built into the court's new balancing test—that the communications sought "bear on a significant aspect of the crimes at issue"—is similarly flawed. While it seems at first glance a prudent limitation, the wording of this portion of the exception has the potential to result in varied application of the rule, because it gives little guidance as to the meaning of the term "significant." "Significant" could mean "indispensable to the case," or "more likely than not to result in the solving of the crime, whereas without the communications the crime would probably go unpunished," or even "relevant to an important aspect of the case."

The court's use of the term begs this question: Must the government, in order to invoke the exception, assert that the communications are a necessary part of its case (that without the evidence the case will fail), or need it only show some lesser degree of relevance? If other courts adopt the Sealed Case balancing test, they will have to answer this question somehow. By failing to specify what it meant by "significant," the court invited varying interpretations of the term, and decreased the probability that clients will be able to predict with any certainty the circumstances in which the exception will apply. This lack of certainty, coupled with the risk of harm to

cations made by such a third party might be revealed.

132. Id. at 235.

133. A hypothetical is illustrative. Suppose that two deceased persons, prior to dying, each communicated information to their attorney that the government now seeks to discover in order to further a criminal investigation into a minor crime. One of the deceased persons was a career criminal and the defendant's partner in crime. Disclosure of his communications would almost certainly result in a favorable disposition of the government's case. The other deceased person took no part in the crime, and did not know the defendant. Her communications would probably aid the government's case, but would not alone be dispositive. Further, revelation of her communications would be extremely damaging, financially and reputationally, to her surviving family. Under the Sealed Case balancing test, a court in this case would not be required to weigh the potential damage to the latter party against the benefit of obtaining a conviction, and would not be required to limit the application of the exception to the former party's communications, despite the fact that the former party had much more reason to expect his personal affairs to become public, and would suffer less from the disclosure.
third parties posed by the court's new exception, militates in favor of an alternate legal rule.

IV. A NEW APPROACH: THE "CONSPIRACY" EXCEPTION

The facts of Sealed Case offer an ideal vehicle for reexamining the scope of post-mortem privilege. Vincent Foster's close ties to the Clintons and to the business of running the White House\textsuperscript{134} involved him directly in the events leading up to the travel office firings, and most likely in the firings themselves.\textsuperscript{135} While tragic, Foster's death did cut off access to probably the single most important source of evidence in the high-profile criminal investigation into Mrs. Clinton's role in the affair.

The court was thus probably justified, on the facts of Sealed Case, in admitting the notes of Foster's conversations. It based its decision to do so, however, on the wrong reasons, and ultimately cast too wide a net into the sea of client communications. Other courts should adopt a narrower and more principled formulation of the post-mortem exception. This new exception would abrogate the privilege in the following circumstances:

(1) after the death of a client,
(2) communications previously made by the client to an attorney, which would otherwise be privileged,
(3) may be admissible as evidence in a criminal proceeding
(4) upon a sufficient showing of probable conspiracy\textsuperscript{136} involving the decedent client and the subject(s) of a criminal investigation for which the evidence is now needed,
(5) provided the crime that provoked the investigation was part of the conspiracy,
(6) and provided the communications are necessary to the resolution of the investigation.

This "conspiracy" exception to post-mortem privilege would operate in situations similar to that involved in Sealed Case,\textsuperscript{137}

\textsuperscript{134} See generally Isikoff & Hosenball, supra note 6 (explaining the position of Vince Foster in the White House).
\textsuperscript{135} See id. at 7.
\textsuperscript{136} The crime of conspiracy generally requires an agreement between at least two parties to commit an unlawful act or a lawful act by unlawful means. See WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 6.4, at 525 (2d ed. 1986).
\textsuperscript{137} The communications at issue in Sealed Case may or may not have led
while avoiding the pitfalls associated with unfair and vague balancing tests.

Procedurally, operation of the conspiracy exception would mirror that of the crime-fraud exception, and by extension, that of the Sealed Case balancing test. In order to invoke the conspiracy exception, the state would be required to make an initial showing of a probable conspiracy. To ensure that legitimately privileged conversations remained shielded from discovery, courts could review the communications in camera when evaluating prosecutors' requests to compel disclosure.

The communications at issue could serve as the basis for invoking the exception, but only if the state introduced independent evidence supporting a reasonable belief that in camera review of those communications would lead to a showing of probable conspiracy.

By allowing compelled disclosure only in cases in which the communications sought were truly necessary to the conduct of the state's investigation, the conspiracy exception would limit the discretionary authority of the reviewing court, resulting in more predictable application. Imposing this standard would not eliminate discretion entirely; any inquiry into the "necessity" of providing the state access to privileged communications will ultimately require a subjective evaluation by the reviewing judge. What matters is that this "necessity" hurdle, by precluding compelled disclosure in cases in which the state is able to resolve its case by other means, improves upon the "substantial relative importance" prong of the Sealed Case bal-

to the successful invocation of the conspiracy exception. This Comment is not meant to imply that Mrs. Clinton and Mr. Foster conspired to commit any crime. Rather, given the criminal investigation into Mrs. Clinton's role in the travel office firings, it argues that the Independent Counsel should have been required to show that Foster was involved in the alleged wrongdoing—and that the communications sought were necessary to the investigation of Mrs. Clinton—before gaining access to Foster's conversations.

138. See supra text accompanying notes 64-72 (discussing the crime-fraud exception to the attorney-client privilege). In cases in which the decedent conspirator had sought or used legal advice in furtherance of the crime, the crime-fraud exception itself would render the privilege inapplicable.

139. The court in Sealed Case prescribed the use of the same procedural mechanisms for its balancing test. See 124 F.3d at 235; see also supra note 113 (explaining how this scheme would apply to the Sealed Case balancing test).

140. See supra text accompanying notes 71-72 (describing the evidentiary showing needed to invoke the crime-fraud exception).

141. See supra text accompanying notes 71-72.

142. See supra text accompanying notes 71-72.
Under the latter formulation, a court would be required to take into account the necessity of the evidence, but depending on how it interpreted the concept of "substantial importance," might compel disclosure of communications in some instances notwithstanding the existence of alternate means of resolving the case.

The conspiracy exception, by confining its scope to communications made by parties to the conspiracy, would also avoid the revelation of embarrassing or damaging information to the detriment of innocent third parties. This not only reduces the risk of deterring frank communications by law-abiding clients, it lessens the danger of undermining public confidence in the judiciary. Only a person who had had some stake in the criminal enterprise while alive would be subject to the threat of disclosure.

Confining the exception to communications made by conspirators is not a panacea. Under the utilitarian rationale, the need for a well-grounded expectation of confidentiality applies with equal force to criminal conspirators as it does to innocent third parties. However, this limitation would allow clients to predict with much greater certainty whether their communications were likely to become the subject of a request for disclosure. The vast, law-abiding majority of clients could consult with their attorneys free from the threat of disclosure. Conversely, potential conspirators would be on notice of the risk that their criminal compatriots' communications might be used against them. Thus, it is not only a fairer means of promoting the reso-

143. See supra notes 112-113 and accompanying text (describing the balancing test).
144. See supra notes 132-133 and accompanying text (noting the range of possible interpretations).
145. The court in Sealed Case, likely envisioning its exception operating in similar fashion, indicated that "[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." 124 F.3d at 235. The conspiracy exception, though, requires, rather than recommends, that courts refrain from compelling disclosure unless there is no alternative means of resolving the case.
146. The court in Sealed Case did not ignore the danger of harm to third parties, but did not entirely preclude the possibility. See supra note 131.
147. In strict utilitarian terms, this latter argument is of little relevance. However, an alternative rationale for the privilege is to promote public confidence in the court system. See supra text accompanying notes 40-41.
148. To the extent that would-be criminals plan their capers according to a rational cost-benefit analysis, the rule would thus tend to discourage group
olution of criminal investigations, but a more predictable legal standard as well.

CONCLUSION

The attorney-client privilege serves the needs of the legal system by ensuring that clients are willing to disclose information to their attorneys, thus improving the accuracy of the adversarial process. Courts have carved out exceptions to the privilege to allow for disclosure when doing so serves the client's interests, or when the information sought is not related to the provision of legal services. The court in In re Sealed Case established a new exception to the attorney-client privilege by holding that after the death of a client, an attorney may be compelled to disclose client communications if they are related to a significant aspect of a criminal investigation. Though the court acknowledged that courts have a duty to minimize the deterrent effect of exceptions to evidentiary privileges, it failed to recognize that its formulation could result in disclosure in an unnecessarily broad range of circumstances without the slightest warning to clients. An alternative formulation of the Sealed Case balancing test, predicated on the existence of a conspiracy between the decedent client and the object of the criminal investigation, would provide prosecutors with access to communications in appropriate cases while minimizing the threat to the truthfinding process.