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The Accountant-Client Privilege: Does it and Should it Survive the Death of the Client?

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I. INTRODUCTION

The accountant-client privilege, although not recognized at common law,[1] or by federal courts,[2] has gained statutory recognition in nearly half of the states.[3] This comment examines whether the privilege does and should survive the death of the client.[4] Most jurisdictions which recognize the privilege do not give adequate statutory guidance on this issue. Similarly, there are no reported decisions expressly addressing the survivability of the accountant-client privilege. Therefore, this comment examines an analogous privilege—the attorney-client privilege—to determine whether, and under what circumstances, the accountant-client privilege should survive the client's death.

Specifically, the question of accountant-client privilege

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1. The common law rule is that "no pledge of privacy nor oath of secrecy can avail against demand for the truth in a court of justice. Accordingly, in the absence of statute to the contrary, a confidential communication . . . [to an] accountant . . . is not privileged from disclosure." 8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2286, at 528-30 (J. McNaughton rev. 1961) [hereinafter WIGMORE].

2. Couch v. United States, 409 U.S. 322, 335 (1973) ("no confidential accountant-client privilege exists under federal law, and no state-created privilege has been recognized in federal cases"); *accord In re* Grand Jury Proceedings, 658 F.2d 782, 784 (10th Cir. 1981) ("It is well settled that there is no confidential accountant-client privilege under federal law."). The Supreme Court recently reaffirmed its view of the accountant-client privilege in United States v. Arthur Young & Co., 465 U.S. 805, 817 (1984) ("To the extent that the Court of Appeals . . . sought to facilitate communications between independent auditors and their clients, its remedy more closely resembles a testimonial accountant-client privilege. . . . But as this Court stated in *Couch v. United States* . . . 'no confidential accountant-client privilege exists under federal law . . . .' ").

3. Twenty-three states and the Commonwealth of Puerto Rico have enacted accountant-client privilege statutes. The states which recognize this privilege are Arizona, Colorado, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Mississippi, Missouri, Montana, Nevada, New Mexico, Pennsylvania, Rhode Island, Tennessee, Vermont and Washington. *See infra* notes 6, 9 & 11.

4. The accountant's role in a corporate setting—principally as an independent auditor—has received extensive commentary since the Supreme Court's decision in United States v. Arthur Young & Co., 465 U.S. 805 (1984). *See, e.g.*, Merline, *The Expanded Scope of the IRS Summons Power After* United States v. Arthur Young & Company, 37 S.C.L. REV. 307 (1986); Note, United States v. Arthur Young & Co.: *Judicial Death Knell for Auditors' Privilege and Suggested Congressional Resurrection*, 71 CORNELL L. REV. 694 (1986). This comment is limited to an analysis of the accountant-client privilege in the context of services to private individuals.

survivability is examined in light of two policies which testimonial privileges serve: the promotion of full disclosure and the protection of individual privacy. This comment suggests that if the purpose of the privilege is to encourage communications between the accountant and client, the privilege should not survive because that purpose is adequately served by limiting the privilege to the client's lifetime. On the other hand, if the purpose is to protect the client's privacy, the privilege should survive when the decedent's right to privacy outweighs society's interest in facilitating the truth-seeking process. The comment also recommends criteria to be considered in balancing privacy concerns vis-a-vis society's interest in promoting the truth-seeking function of the adjudicatory process.

II. SURVIVABILITY OF THE ACCOUNTANT-CLIENT PRIVILEGE: ANALYSIS OF STATUTES AND CASE LAW

A. Statutes

Twenty-four American jurisdictions have enacted accountant- client privilege statutes.[5] Nine of the twenty-four[6] specifically provide for waiver of the privilege by the client, her heir, or personal representative. Two of those nine also provide that the personal representative may assert the privilege.[7] While the power to waive the privilege implies the power to assert it,[8] the plain language of the other seven statutes specifically permit only waiver of the privilege.

The statutes of ten other states permit disclosure only with the client's consent, and make no provision for consent by an heir or personal representative.[9] Thus, when the client dies, it is

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5. *See supra* note 3.

6. FLA. STAT. ANN. § 473.316 (West 1981); GA. CODE ANN. § 43-3-32(b) (1982); LA. REV. STAT. ANN. § 37:87A (West Supp. 1987); MD. CTS. & JUD. PROC. CODE ANN. § 9-110 (1984); MISS. CODE ANN. § 73-33-16 (Supp. 1985); MONT. CODE ANN. § 37-50-402 (1987); NEV. REV. STAT. ANN. §§ 49.125 to 49.205 (Michie 1979); N.M. STAT. ANN. § 38-6-6 (1978); PA. STAT. ANN. tit. 63, § 9.11a (Purdon Supp. 1986).

7. Only the statutes of Florida and Nevada expressly permit the client or her representative to assert the privilege as well as waive it. *See* FLA. STAT. ANN. § 473.316(3)(c) (West 1981); NEV. REV. STAT. ANN. § 49.195(1) (Michie 1979).

8. Martin v. Shaen, 22 Wash. 2d 505, 511, 156 P.2d 681, 684 (1945) (Addressing the attorney-client privilege the court stated that "[i]ntimately linked with the question of the right to assert the privilege is the question of the right to waive it").

9. COLO. REV. STAT. § 13-90-107(1)(f) (1973); IDAHO CODE § 9-203A (1979); IOWA ADMIN. CODE r.10-11.5 (116) (1980); KAN. STAT. ANN. § 1-401(b) (1982); KY. REV. STAT. ANN. § 325.440 (Michie/Bobbs Merrill Supp. 1986); MICH. COMP. LAWS ANN. § 339.713 (Supp. 1986); MO. ANN. STAT. § 326.151 (Vernon Supp. 1986); R.I. GEN. LAWS § 5-3-22 (Supp.

unclear whether another party may step forward and invoke the privilege on behalf of the client.[10]

Finally, in five jurisdictions[11] the statutes are drafted so poorly that giving literal effect to the statutory language would prevent anyone—including the client—from waiving the privilege. While these five statutes have been given flexibility through judicial interpretation,[12] establishing the survivability of the privilege clearly requires something other than resort to the statutory language.

B. Case Law

The case law on accountant-client communications is relatively recent, and is sparse in its treatment of the privilege.[13] There are

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1986); VT. STAT. ANN. tit. 26, § 82 (Supp. 1986); WASH. REV. CODE ANN. § 18.04.405 (Supp. 1986).

10. SCHWARTZSTEIN, *The Accountant-Client Privilege*, in TESTIMONIAL PRIVILEGES § 3.07, at 223 (S. Stone & R. Liebman eds. 1983).

11. ARIZ. REV. STAT. ANN. § 32-749 (Supp. 1986); ILL. ANN. STAT. ch. 111, para. 5533 (Smith-Hurd 1987); IND. CODE ANN. § 25-2-1-23 (Burns 1982); P.R. LAWS ANN. tit. 20, § 790 (1974); TENN. CODE ANN. § 62-1-116 (1982). Strictly speaking, statutes which do not permit either the client or the professional to waive disclosure are not "true" testimonial privilege statutes. Rather, they impose an unqualified prohibition on all disclosure of information arising from the professional relationship. *Cf.* Note, *Developments in the Law—Privileged Communications*, 98 HARV. L. REV. 1450, 1557 n.177 (1985) (arguing that some clergy-communicant privilege statutes do not provide for "a testimonial privilege since neither the communicant nor the professional may waive it"). In all probability, however, this is an unintended effect, merely the result of technical deficiencies in drafting.

12. None of the five statutes specifically provides for waiver by either the accountant or the client, but two courts have interpreted the broadly-worded Illinois statute as granting the privilege to the accountant, not the client. Western Employers Ins. Co. v. Merit Ins. Co., 492 F. Supp. 53, 55 (N.D. Ill. 1979); Dorfman v. Rombs, 218 F. Supp. 905, 907 (N.D. Ill. 1963) (dictum). This result has been severely criticized as violating the basic principle that it is the client's interest which is to be protected by the statute. *See* Note, *Government Access to Corporate Documents and Auditors' Workpapers: Shall We Include Auditors Among the Privileged Few?*, 2 J. CORP. L. 349, 369-70 (1976) [hereinafter Note, *Government Access*]; Note, *Privileged Communications—Accountants and Accounting—A Critical Analysis of Accountant-Client Privilege Statutes*, 66 MICH. L. REV. 1264, 1268 & n.15, 1269 & n.17 (1968) [hereinafter Note, *Privileged Communications*]; Comment, *Evidence: The Accountant-Client Privilege Under the New Federal Rules of Evidence—New Stature and New Problems*, 28 OKLA. L. REV. 637, 640 (1975) [hereinafter Comment, *Evidence*]. *But see* Ernst & Ernst v. Underwriters Nat'l. Assur. Co., 178 Ind. App. 77, 83, 381 N.E.2d 897, 901 (1978) (the court construed the Indiana statute which, like the Illinois statute, does not expressly mention the client as providing that the privilege belongs to the client).

13. The case law on this privilege is, by and large, less than twenty years old. In 1967, the Colorado Supreme Court in Pattie Lea, Inc. v. District Court, 161 Colo. 493, 496-97, 423 P.2d 27, 29 (1967) commented as follows:

> We have not been called upon to interpret this statute before today, and

no reported decisions specifically addressing the survivability issue. However, by analogizing the accountant-client privilege to the joint-client exception of the attorney-client privilege,[14] two courts have admitted an accountant's testimony following the client's death.

In *Gearhart v. Etheridge*,[15] a Georgia court permitted the estate of a deceased party to a joint venture to demand the testimony of an accountant who had been employed by the joint venturers. The court held that no privilege existed among participants in a joint venture as to communications arising from their common transaction with the accountant.[16] Similarly, in *Harwood v. Randolph Harwood, Inc.*,[17] a Michigan court relied on the joint-client exception to permit the accountant's testimony when the decedent's wife sought to prevent it. *Harwood* involved an action brought by decedent's wife against her deceased husband's corporation for breach of an alleged employment contract. On appeal from a verdict in defendant's favor, plaintiff argued, *inter alia*, that the trial court had erred by failing to take into account the existence of the accountant-client privilege as a bar to the accountant's testimony. The appellate court agreed that Michigan recognized the privilege, and "assume[d] without deciding that plaintiff had standing to assert the privilege *either on her own right or as Randolph Harwood's heir.*"[18] However,

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in fact this is apparently the first time this problem has arisen in any of the jurisdictions having a comparable statutory privilege for the accountant-client relation. . . . Counsel have referred us to no cases concerned with similar problems construing any of these statutes and our research discloses none.

Although in *Patty Lea* the court was dealing with the assertion of privilege to block an accountant's testimony in a shareholder derivative suit, the court's comment accurately reflects the limited occasions in which courts have been called upon to interpret these statutes. As one writer has noted, such dearth of case law is all the more surprising given the age of some of these statutes: thirteen jurisdictions enacted the privilege prior to 1957, Louisiana's law has been in effect since 1908 and Michigan's since 1929. *See* Note, *Government Access*, *supra* note 12, at 369 n.119.

14. *See* C. McCormick, McCormick on Evidence § 91, at 219 (E. Cleary 3d ed. 1984) [hereinafter McCormick]. McCormick notes that the joint-client exception arises where two or more persons jointly consult an attorney on the same matter. The communications between each client and the attorney remains confidential as to third parties, but between the clients no privilege exists. If a dispute between the parties subsequently arises, each may call upon the attorney to testify. The joint-client exception has long been recognized by the courts. *See, e.g.*, Grand Trunk W. R.R. v. H.W. Nielson Co., 116 F.2d 823, 835 (6th Cir. 1941).

15. 232 Ga. 638, 208 S.E.2d 460 (1974).

16. *Id.* at 638-39, 208 S.E.2d at 461.

17. 124 Mich. App. 137, 333 N.W.2d 609 (1983).

18. *Id.* at 141, 333 N.W.2d at 610 (emphasis added). For another application of the

because the trial record indicated that the accountant's professional services had been rendered jointly to the plaintiff and the defendant, neither party "could assert [the privilege] against the other."[19] By finding a joint-client exception, the court never had to address the question of the privilege's survivability. Interestingly, neither the *Gearhart* nor the *Harwood* courts relied on an analysis of the state's accountant-client statute, choosing instead to draw upon the well-established attorney-client privilege as the basis for their decisions.

C. *Examining an Analogous Privilege: The Attorney-Client Privilege*

The *Gearhart* and *Harwood* courts are not the only ones to analogize the accountant-client privilege to the attorney-client privilege.[20] However, most courts which have drawn the analogy have not expressly discussed their rationale, other than to say that both privileges are designed to encourage full disclosure of information between the client and the professional.[21] Commentators have been more explicit in finding similarities between functions performed by attorneys and accountants, specifically with regards to tax advice.[22] They argue that professional-client relations which are functionally similar should receive similar treatment under privilege law.[23] According to this view, there is no reason why a particular function (e.g., rendering tax advice) should be privileged when performed by an attorney but not when performed by an accountant.[24] Other commentators, while

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joint client exception to the accountant-client privilege, see Levin v. Levin, 43 Md. App. 380, 405 A.2d 770 (1979).

19. 124 Mich. App. at 141, 333 N.W.2d at 611.

20. *See* Neusteter v. District Court, 675 P.2d 1, 5 (Colo. 1984) ("[t]he statutory accountant-client privilege is analogous to the attorney-client privilege . . ."); Ernst & Ernst v. Underwriters Nat'l. Assur. Co., 178 Ind. App. 77, 381 N.E.2d 897 (1978); Patty Lea, Inc. v. District Court, 161 Colo. 493, 423 P.2d 27 (1967).

21. Affiliated of Fla., Inc. v. U-Need Sundries, Inc., 397 So. 2d 764, 766 (Fla. Dist. App. 1981) ("[The privilege] is designed to carry out the public policy of being able to consult an attorney or accountant without fear that the resultant communications may become public.").

22. *See* Jentz, *Accountant Privileged Communications: Is it a Dying Concept Under the New Federal Rules of Evidence?*, 11 AM. BUS. L.J. 149, 156-57 (1974); Comment, *Evidence*, *supra* note 12, at 646; *Leading Cases of the 1983 Term*, 98 HARV. L. REV. 87, 304-05 (1984) [hereinafter *Leading Cases*]. *But see* Note, *Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine*, 71 YALE L.J. 1226 (1962).

23. *See* Note, *supra* note 11, at 1491-92; *Leading Cases*, *supra* note 22, at 304-05.

24. In addition to the functional overlap argument, three other arguments have been

conceding the appeal of the functionalist argument, argue that the approach is impractical because of difficulties inherent in its implementation.[25] Finally, some courts have specifically declined to draw the functionalist analogy,[26] arguing that the analogy "would neglect the underlying reasons for the attorney-client privilege which are often not present in the accountant client relationship."[27]

According to McCormick, the attorney-client privilege survives the death of the client.[28] However, this general rule is rarely respected in practice, as courts frequently circumvent it by holding that the privilege has been waived.[29] This circumvention is particularly likely to occur in actions between parties claiming under the decedent.[30] Courts have, however, been more willing to follow the general rule when a party who is unrelated

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offered to justify the establishment of an accountant-client privilege patterned after the attorney-client privilege: (1) there is already a recognized extension of the attorney privilege to encompass communications to accountants when an attorney is involved; (2) the importance of the role of the accountant and recognition of her technical expertise has grown in a society which places a premium upon financial records; and (3) the public interest is served by promoting full disclosure by the client, thus enabling the professional accountant to render the best possible service. *See* Comment, *Evidence*, *supra* note 12, at 647.

25. Note, *supra* note 11, at 1491-93; Note, *Privileged Communications*, *supra* note 12, at 1274 ("Granting the privilege . . . [on the basis of a functionalist argument] would . . . pose practical problems for the courts . . . [and] would also frustrate the purpose of the privilege since clients could rarely be certain that matters disclosed to an accountant working in the tax field would be privileged").

26. Rubin v. Katz, 347 F. Supp. 322, 324 (E.D. Pa. 1972) ("[d]efendants' attempt to draw an analogy to the broad, stringent protections of the attorney-client privilege . . . cannot succeed"); *accord* Agra Enters. v. Brunozzi, 302 Pa. Super. 166, 171, 448 A.2d 579, 582 (1982) ("the [accountant-client privilege statute] makes only a limited change in the common law, and it does not extend the common law attorney-client privilege to the accountant-client relationship.").

27. *Rubin*, 347 F. Supp. at 324 n.3. In discussing arguments why the two privileges should not be treated similarly, some writers have noted (1) the tendency to restrict, rather than expand, privilege doctrine; (2) the courts' historical disfavor for the privilege as evidenced by their denial of attorney-client privilege claims when an attorney performs primarily accounting services for her client, and (3) the fact that the accounting profession itself is divided as to the advisability of the privilege because of concerns that the privilege is inconsistent with the requirement of auditor independence. *See* Jentz, *supra* note 22, at 157. In United States v. Arthur Young & Co., 465 U.S. 805, 817-19 (1984), the Supreme Court justified its denial of an accountant "work product" immunity claim partly on the basis of this last point.

28. McCormick, *supra* note 14, § 94, at 227; *see also In re* Busse's Estate, 332 Ill. App. 258, 266, 75 N.E.2d 36, 39 (1947) ("This protection, given by the law to communications made during the relationship of attorney and client, is perpetual and does not cease by the death of the client.").

29. McCormick, *supra* note 14, § 94, at 227.

30. *Id.*

to the decedent sues the decedent's heirs or personal representative. In those cases, assertion or waiver of the privilege has been permitted.[31] Courts have also permitted waiver of the attorney-client privilege when it benefits the client's estate,[32] and when it does not damage decedent's reputation.[33]

To the extent that the relationship between accountants and their clients approximates the nature of attorney-client contacts,[34] consistency in treatment of the two privileges suggests that the accountant-client privilege probably should survive. Following the attorney-client model, decedent's personal representative should be able to waive the privilege. Moreover, under certain circumstances assertion of the privilege should also be recognized.[35]

III. Purposes of the Privilege

The key to analyzing the privilege's survivability lies in identifying the goals which legislatures sought to achieve through enactment of the accountant-client privilege. Of the various theories which have been proposed to justify testimonial privileges, two have gained widespread support. One theory is based on desire to promote full disclosure of relevant information. This theory has been termed the "utilitarian" approach, and is traceable to Dean Wigmore's influential work on evidence.[36] The second rationale focuses on the protection of individual privacy. This approach has been termed the "non-utilita-

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31. *Id.* at 228.

32. *See, e.g.*, McKinney v. Kalamazoo-City Sav. Bank, 244 Mich. 246, 253, 221 N.W. 156, 158 (1928) (dictum) (followed by Eicholtz v. Grunewald, 313 Mich. 666, 671, 21 N.W.2d 914, 917 (1946)); *see also* Holyoke v. Holyoke's Estate, 110 Me. 469, 475, 87 A. 40, 44 (1913) ("The personal representatives, heirs and legatees are all interested in the protection of the estate, and it is to be presumed that they will waive the privilege only for the benefit of the estate.").

33. Martin v. Shaen, 22 Wash. 2d 505, 511, 156 P.2d 681, 684 (1945) (the court commented that it was well settled that the attorney-client privilege "may be waived by the personal representative . . . particularly where the disclosure would not injuriously affect the character or reputation of decedent."); *see also Holyoke*, 110 Me. at 475, 87 A. at 44.

34. Although this issue is by no means settled (compare Neusteter v. Superior Court, 675 P.2d 1, 5 (Colo. 1984) with Rubin v. Katz, 347 F. Supp. 322, 324 (E.D. Pa. 1972)), this comment assumes that there are sufficient similarities between the two privileges to support the analogy.

35. *But see infra* p. 1283 (discussing why the protection of a property interest in decedent's estate is not a sufficient justification for extension of the privilege).

36. Wigmore, *supra* note 1; *see also* McCormick, *supra* note 14, § 72, at 171.

rian" approach.[37] Some courts and commentators view these two approaches as mutually exclusive.[38] Others have argued that the distinctions between the two approaches are largely artificial and easily reconcilable if viewed as supplementary concerns.[39] While there is merit to this latter contention, the two are discussed here as distinct approaches to the issue.

A. The Utilitarian Rationale

According to the utilitarian approach, testimonial privileges are a necessary, but narrowly construed exception to the duty "to give testimony upon all facts inquired of in a court of justice."[40] As a result, privileges should be recognized only where certain conditions are met.[41] Inherent in the utilitarian approach is a balancing of the costs and benefits to society which accrue as a result of the privilege.[42] The chief benefit of privileges is that they encourage full and frank communication between the client and her doctor, lawyer, or priest. The underlying presumption is that absent the protection afforded by the privilege, the individual will be deterred from seeking assistance, or the professional will be unable to render effective service.[43] The

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37. McCORMICK, *supra* note 14, § 72, at 172; *see also* Black, *The Marital and Physician Privileges—Reprint of a Letter to a Congressman*, 1975 DUKE L.J. 45; Krattenmaker, *Testimonial Privileges in Federal Courts: An Alternative to the Proposed Federal Rules of Evidence*, 62 GEO. L.J. 61, 85 (1973).

38. Note, *supra* note 11, at 1483-84.

39. *Id.* at 1484-85 & 1485 n.91.

40. WIGMORE, *supra* note 1, § 2285, at 527.

41. Wigmore sets out four conditions which must be met for the establishment of a privilege:

> (1) The communications must originate in a *confidence* that they will not be disclosed.
>
> (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.
>
> (3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered.*
>
> (4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.

Id. (emphasis in original).

42. While this is true in theory, in practice the courts analyzing privileges in terms of a utilitarian rationale have opted for a more definite, rule-based approach to privilege questions. *See infra* text accompanying notes 67-72.

43. Pratt v. State, 39 Md. App. 442, 447, 387 A.2d 779, 782 (1978), *aff'd*, 284 Md. 516, 398 A.2d 421 (1979) ("The theory behind the creation of the [attorney-client] privilege is that a lawyer can act effectively only when he is fully advised of the facts and the client's knowledge that a lawyer cannot reveal his secrets promotes full disclosure.").

chief drawback to privileges is that relevant information is withheld from the courts. As a result, the truth-seeking adjudicatory process may be impaired.[44]

Wigmore's criteria for evaluating privileges demonstrate this balancing process. A communication will be protected from disclosure only where the benefit of protecting the professional-client relationship is significantly greater than the cost of withholding access to the evidence. Applying this test, Wigmore[45] and others[46] have concluded that the accountant-client relationship does not merit the protection afforded by the creation of a testimonial privilege.

Notwithstanding these commentators' assessments, twenty-four legislatures have enacted accountant-client privilege statutes. Unfortunately, other than the Colorado Legislature, none has articulated the policy goals behind the privilege. Colorado's policy statement is, at best, ambiguous, although its rationale is arguably utilitarian.[47]

Assuming that the accountant-client privilege is grounded in a utilitarian rationale, its survivability should depend on whether the policy goals are advanced if decedent's representative invokes the client's privilege. To examine these policy concerns, the following analysis is framed in terms of four scenarios: (1) when the privilege does not survive the client's death; (2) when the privilege survives and is fully exercisable[48] by decedent's representative; (3) when the privilege survives but the

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44. WIGMORE, *supra* note 1, § 2192, at 73:

> It follows . . . that *all privileges of exemption from this duty* [the duty to give testimony] *are exceptional*, and are therefore to be discountenanced. . . . They should be recognized only within the narrowest limits required by principle. Every step beyond these limits helps to provide, without any real necessity, an obstacle to the administration of justice."

Id. (emphasis in original).

45. WIGMORE, *supra* note 1, at 532-37.

46. Larson, *Accountant-Client Privilege Statutes: A Clear Need for Reform*, 8 SETON HALL LEGIS. J. 209, 217-18 (1984); Comment, *Evidence—Privileged Communications—Accountant and Client*, 46 N.C.L. REV. 419 (1968).

47. COLO. REV. STAT. § 13-90-107(1)(f) (1973) ("There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person shall not be examined as a witness in the following cases: . . . [a] certified public accountant . . . ."). While this statement of purpose evinces, at first blush, a utilitarian rationale, an equally credible argument can be made that the underlying rationale for the privilege is the protection of the individual's privacy interest. *See infra* text accompanying notes 73-101.

48. For present purposes, "full exercise" of the privilege is defined as the ability of the representative to assert or waive the privilege as she deems best in light of her fiduciary duties to the client's estate.

representative has no discretion to waive it; and (4) when the privilege survives but the right of decedent's representative to exercise it is determined through a case-by-case balancing of equities.

1. The privilege does not survive

Under this scenario, the privilege protects accountant-client communications during the client's lifetime. Upon her death, however, the protection ends and the accountant can be called upon to testify concerning information gained in the course of the professional relationship.

As a rule, courts have been unwilling to take this approach in construing the parameters of the attorney-client and doctor-patient privileges, holding instead that those privileges survive.[49] The courts have reasoned that clients will be deterred from fully confiding in their professional advisors unless they are assured that those confidences will not be revealed later. This view is widely accepted, but has been criticized by McCormick.[50] McCormick challenges, as highly speculative, the assumption that individuals' communicative behavior is affected by fear of later disclosure.[51] In particular, he criticizes as "fanciful" the view that free disclosure to professionals will be impaired by fear that such information may be revealed after death.[52] Thus, McCormick concludes that privileges arising in the context of a professional relationship should be construed as "personal" and terminable on the client's death.[53]

If McCormick is correct, the goal of encouraging full and frank communications between the accountant and the client will be adequately served by limiting the privilege to the client's lifetime. McCormick's conclusions are buttressed by evidence that the absence of privilege does not significantly deter or delay people from seeking needed professional help.[54] Moreover, a ma-

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49. McCormick, *supra* note 14, § 94, at 227 and § 102, at 253; *see also* Sprouse v. Magee, 46 Idaho 622, 631, 269 P. 993, 996 (1928) ("The survival of the right of the patient to waive this privilege has become so generally recognized that texts lay it down as the general rule, and cite decisions to the contrary as the exception.").

50. McCormick, *supra* note 14, § 102, at 253. While McCormick's comments arise in the context of the doctor-patient relationship, elsewhere he suggests that this view may also extend to the attorney-client relationship. *Id.* § 94, at 229.

51. *Id.*, § 102, at 253.

52. *Id.*

53. *Id.* § 94, at 229.

54. Shuman & Weiner, *The Privilege Study: An Empirical Examination of the Psy-*

jority of respondents in two studies viewed the practitioner's ethics as a greater safeguard to their confidences than statutory guarantees of privilege.[55] Finally, even where the client does rely on the privilege to safeguard confidences, the majority of statutes create one or more exceptions to the privilege.[56] Thus, in only five jurisdictions[57] is the expectation of confidentiality absolute.

To summarize, courts have traditionally presumed that the survivability of privileges is necessary to ensure that clients will entrust their professional advisors with sensitive information. However, this presumption has been criticized on theoretical grounds by a leading writer. Moreover, when tested empirically, research studies suggest that such a presumption is, at best, questionable. Because the legislative goal of encouraging communications between the client and the accountant can be adequately addressed by limiting the privilege to the client's lifetime, absent other demonstrable benefits, the privilege should not survive.

2. *The privilege survives and is fully exercisable by decedent's representative*

Assuming that the privilege is deemed to survive—either as a necessary adjunct to the policy of encouraging client communications or out of deference for the precedential value of analo-

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chotherapist-Patient Privilege, 60 N.C.L. REV. 893, 924-25 (1982). This study focused on patients' willingness to seek psychiatric or psychological help, an issue of considerable sensitivity to many people. Despite the sensitive nature of the subject, the researchers found that few people were deterred from seeking assistance by the absence of a legally recognized privilege. *But see* Singer, *Informed Consent: Consequences for Response Rate and Response Quality in Social Surveys*, 43 AM. SOC. REV. 144, 150-51 (1978) (empirical study finding that people are more likely to answer sensitive questions when assured of confidentiality) (cited in Note, *supra* note 11, at 1476 & n.30)); Note, *supra* note 22.

55. *See* Shuman & Weiner, *supra* note 54, at 926; Note, *supra* note 22, at 1239.

56. The following exceptions to the privilege are authorized by the statutes of one or more of the jurisdictions: (1) where the professional's service is at issue, (2) for peer reviews, (3) for disciplinary actions and other investigations, (4) for certification of financial statements according to the standards of the profession, (5) in response to valid subpoenas or summonses, (6) during bankruptcy proceedings, and (7) where services are sought in the commission of a crime or fraud. The Nevada statute has the most comprehensive list of exceptions to the privilege. NEV. REV. STAT. ANN. §§ 49.125-49.205 (Michie 1979); *see also* Larson, *supra* note 46, at 215-16.

57. The statutes of Colorado, Idaho, Kentucky, Louisiana, and Puerto Rico are the only ones which do not qualify the privilege in some way. *See supra* notes 6, 9 & 11 for citations.

gous privileges which do survive—the next issue to be resolved is how the privilege should be exercised by decedent's representative. One option is to permit the representative to act for the client by asserting or waiving the privilege. While this option is based on the well established rule that a personal representative stands in place of the decedent and represents her interest,[58] this option is undermined by the contrary policy that privileges should not be expansively construed.[59] The issue, therefore, is which of the competing policies should be given priority—permitting decedent's representative to act in the best interests of the estate or delimiting privileges because they impinge upon the truth-seeking process.

Protection of the truth-seeking process lies at the heart of the utilitarian rationale.[60] As a result, courts consistently seek to narrow the parameters of testimonial privilege.[61] On the other hand, courts recognize that executors have a fiduciary duty to manage and protect the assets of decedent's estate.[62] When the privilege is waived on behalf of the estate, no conflict arises because the representative's duty and the societal interest in promoting the truth-seeking process converge. But difficulties arise when the representative concludes that the estate's interests are furthered by assertion of the privilege. There, the legislative goal of encouraging client communications is not advanced, and the adjudicatory function may be impaired.[63]

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58. Unsatisfied Claim and Judgment Fund v. Hamilton, 256 Md. 56, 61, 259 A.2d 303, 306 (1969) ("The primary meaning of the term personal representative[] is . . . [a] person who with respect to his property and rights stands in deceased's place and represents his interests, whether transferred to him by the act of the deceased or by operation of law"); *accord In re* Harton's Estate, 213 Pa. 499, 503, 62 A. 1058, 1059 (1906) (the terms 'legal' or 'personal' representative include "all persons who stand in place or represent the interests of another. . . .").

59. United States v. Nixon, 418 U.S. 683, 710 (1974) (privileges are "not lightly created nor expansively construed, for they are in derogation of the search for truth").

60. WIGMORE, *supra* note 1, § 2192, at 72 ("When the course of justice requires the investigation of the truth, no man has any knowledge that is rightly private."); *see also* Note, *supra* note 11, at 1480.

61. *See, e.g., Nixon*, 418 U.S. at 709-10; Branzburg v. Hayes, 408 U.S. 665, 688 (1972); United States v. Bryan, 339 U.S. 323, 331 (1950); *see also* Krattenmaker, *supra* note 37, at 97-98 & n.134, and cases cited in Saltzburg, *Privileges and Professionals: Lawyers and Psychiatrists*, 66 VA. L. REV. 597, 599 n.8 (1980).

62. *See, e.g., In re* Estate of Pirie, 141 Ill. App. 3d 750, 758, 492 N.E.2d 884, 889 (1986) ("Generally, an executor has a fiduciary duty to act with the highest degree of fidelity and utmost good faith in handling estate assets."); Estate of Wenzlick, 715 S.W.2d 262, 265 (Mo. App. 1986) ("It is the duty of an executor to preserve and protect the estate for the benefit of all the interested parties.").

63. An additional problem is that the representative can only make an educated

Courts have permitted decedent's representatives to waive, and in some cases assert, the attorney-client or doctor-patient privilege where such action benefits the estate[64] or protects the rights or interests of decedent's heirs.[65] By analogy, decedent's representative should be able to invoke the accountant-client privilege under similar circumstances. To test whether the analogy should be extended one must again focus on the legislative purpose that the privilege presumably was designed to further.

In order to encourage communications within certain relationships, the utilitarian rationale accepts the creation of privileges, but only as a narrow exception to the general duty to testify. However, those courts which have permitted decedent's representatives to invoke the client's privilege appear to justify such decisions on different grounds, such as benefit to the estate and protection of the heirs' interests. By justifying recognition of privileges on these grounds, the courts appear to be protecting something akin to a property interest in the assets of the estate. On the utilitarian scale, however, protection of a property interest, important though it may be, cannot outweigh the goal of promoting the truth-seeking function of the courts.

Recognizing the protection of property interests as a basis for survivability of the accountant-client privilege would result in a broad expansion of privilege doctrine. This is because there would be no principled way to determine which financially-based relationships (e.g. banker, stock broker) contribute most to building the assets of the client's estate. Such an approach undermines the utilitarian view of narrow privileges. Extending an absolute right to assert or waive the privilege would create a significant and unwarranted limitation of the utilitarian goal of court access to relevant information. Consequently, the utilitarian rationale does not support permitting decedent's representative to have unrestrained discretion in the exercise of the privilege.

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guess as to when the client would have asserted or waived the privilege. Arguably, the representative's actions may not be reflective of what the decedent's choice would have been in actuality. As a result, the representative's fiduciary responsibilities might lead her to adopt a more conservative position with respect to waiver, exacerbating the withdrawal of information from the court.

64. *See supra* note 32.

65. Fraser v. Jennison, 42 Mich. 206, 224-25, 3 N.W. 882, 895-96 (1879); Thompson v. Ish, 99 Mo. 160, 174-75, 12 S.W. 510, 514 (1889).

3. The privilege survives but decedent's representative has no discretion to waive

This approach would be most effective in encouraging client disclosure by affording absolute protection to the client's confidences following the client's death. It would, however, have the anomalous effect of granting greater protection to a decedent's confidences than to those of a living client. This is because under current privilege law, even the best-established privileges are subject to limitations. Thus, for example, the attorney-client privilege does not protect against disclosure of information where a client has sought advice in furtherance of an illegal or fraudulent scheme.[66] Granting absolute protection against disclosure of client confidences to an accountant, where no other privilege is absolute, would undermine the truth-seeking process and impose upon both the courts and the decedent's representative limitations insupportable by the policies which privileges are intended to further.

4. Case-by-case balancing

Although the essence of the Wigmore test is the balancing of competing interests,[67] in practice, the utilitarian approach has led courts and commentators to eschew balancing of interests in favor of certainty in the application of privilege rules. To the extent that the goal of the privilege is to affect behavior—to actually encourage disclosure—this goal can only be achieved by providing assurance that the individual's disclosures will be protected.[68] Because certainty is more likely to be achieved through bright-line rules rather than through *ad hoc* standards,[69] writers have argued that privileges justified by the utilitarian rationale are best implemented through absolute rules.[70]

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66. MCCORMICK, *supra* note 14, § 95, at 229. Other recognized exceptions to the attorney-client privilege include the joint-client exception, *id.* § 91, at 219, disclosure of the fact that professional consultation or employment has occurred, *id.* § 90, at 215, or under some circumstances, disclosure in the presence of a third party, *id.* § 91, at 217-18.

67. The very language of Wigmore's fourth criterion which states that "the *injury* that would inure . . . must be *greater than the benefit thereby gained*" clearly indicates the balancing nature of his approach. WIGMORE *supra* note 1, § 2285, at 527 (emphasis in original); *see also* Comment, *The Attorney-Client Privilege: Fixed Rules, Balancing and Constitutional Entitlement*, 91 HARV. L. REV. 464, 467 (1977).

68. Note, *supra* note 11, at 1486-87.

69. *Id.*

70. *Id. But see* Shuman & Weiner, *supra* note 54, at 926; Comment, *supra* note 67, at 464; Note, *Functional Overlap*, *supra* note 22, at 1239.

If certainty becomes the critical criterion in the weighing of interests, then the scale tilts significantly against the survivability of the privilege. This is because certainty is most clearly found either when the privilege is absolute or when no privilege is recognized. Absolute assertion of the privilege will not work because, as noted previously, most jurisdictions already impose a variety of statutory exceptions to the privilege.[71] Moreover, the court's hesitancy to interpret the attorney-client privilege expansively suggests that even where the statutory language does not provide specific exceptions, the courts will presume them.[72] Therefore, the first situation conducive to obtaining certainty—through reliance on an absolute privilege—is not likely to occur.

Alternatively, certainty is furthered by finding that the privilege does not survive death. Given the judicial bias against privileges not recognized at common law, and the preference for certainty, it is reasonable to expect that courts weighing the benefits and costs of extending the accountant-client privilege will decide against its survival. Nevertheless, in recognition of the legislative will evidenced by passage of a privilege statute, and the fact that other arguably analogous privileges survive, courts may be unwilling to abrogate the privilege totally. Courts which are unsympathetic to extensions of privilege may adopt the fiction followed in the case of the attorney-client privilege by holding that the privilege survives, but has been waived.

In summary, the utilitarian approach to testimonial privileges seeks to encourage client communications, but is also concerned with the limitations which such privileges place on the truth-seeking process. Analysis of the accountant-client privilege under the utilitarian rationale suggests four options for the survivability of the privilege: (1) it does not survive; (2) it survives and can be waived or asserted according to decedent representative's discretion; (3) it survives and cannot be waived; and (4) its survivability depends on an *ad hoc* determination by the courts.

Under a purely utilitarian analysis the first option should be

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71. *See supra* note 56 and accompanying text.

72. *See, e.g.*, Gearhart v. Etheridge, 232 Ga. 638, 208 S.E.2d 460 (1974) (the court "read-in" a joint-client exception to the accountant-client privilege, even though the statute did not provide for one); *see also* Note, *supra* note 22, at 1247 ("Almost certainly all the exceptions and limitations of the attorney-client privilege will be grafted onto these [accountant-client privilege] statutes.").

preferred because empirical data suggests that survivability of the privilege is not a significant factor in encouraging client communications. The second option is not supportable because the representative's discretion to assert the privilege would only serve to protect a property interest in the estate while resulting in a withdrawal of relevant information. For similar reasons the third option is likewise unacceptable, and indeed may be the least supportable of the four positions because it creates an absolute privilege without adequate policy justification. Finally, the judicial process' interest in certainty creates strong pressures for the adoption of bright-line rules to replace ambiguous standards, thus undermining an *ad hoc* approach to the issue.

B. The Privacy Rationale (Non-Utilitarian Approach)

Although the utilitarian view remains the predominant justification for testimonial privileges, several commentators have argued that a privacy analysis presents a more satisfactory approach to the issue.[73] While the utilitarian approach is concerned with the effect of "forced silence" on the system, the privacy approach is concerned with the effect of "forced disclosure" on the individual. Thus, unlike the utilitarian approach which views privileges as a necessary but narrowly construed means to achieve a desired end, the privacy rationale views protection of personal information as an end in itself.[74]

Chief among the arguments for adopting a privacy rationale to justify testimonial privileges is the recognition that the right to privacy "is a long-standing tenet of American legal tradition."[75] This interest has been protected by common law, statutory provisions, and the Constitution.[76]

Supporters of the privacy rationale for testimonial privileges

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73. *See, e.g.*, Saltzburg, *supra* note 61, at 618; Krattenmaker, *supra* note 37, at 86; Black, *supra* note 37, at 48-49; Louisell, *Confidentiality, Conformity and Confusion: Privileges in Federal Court Today*, 31 TUL. L. REV. 101, 110 (1956).

74. Krattenmaker, *supra* note 37, at 88.

75. Note, *supra* note 11, at 1544.

76. *Id.* at 1544-47. The common law tort of invasion of privacy embodies the judicial recognition of an individual's privacy interest. A variety of statutes also evidence legislative recognition of this interest. *See, e.g.*, The Privacy Act of 1974, 5 U.S.C. § 552a (1982); The Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232g (1982). Finally, and most fundamentally, the Supreme Court in a number of opinions has recognized the constitutional underpinnings of the privacy interest and, in particular, the privacy interest in an individual's confidential communications. *See, e.g.*, Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 457-60 (1977); Whalen v. Roe, 429 U.S. 589, 598-99 (1977); Katz v. United States, 389 U.S. 347, 359 (1967).

nevertheless recognize that absolute protection of confidentiality is not possible, or even desirable.[77] Thus, the privacy rationale also entails a balancing of competing interests—society's interest in ascertaining the truth versus the client's expectation that her privacy will be protected against unwarranted intrusion. Courts applying a privacy rationale have, in fact, weighed these competing goals in light of particular situations,[78] thus making this analysis much more "amenable to the finer touch of a specific solution."[79] For this reason, McCormick has stated that "the focus on privacy as an operative basis for the recognition of some privileges is believed to be a healthy and overdue development."[80]

None of the legislatures which have enacted accountant- client privilege statutes explicitly justify them under the privacy rationale. However, at least one court has analyzed the privilege on the basis of privacy concerns.[81] The following discussion analyzes this rationale as a guide to determining the survivability of the accountant-client privilege in light of the four scenarios previously discussed.

1. The privilege does not survive

Determining that a privilege does not survive seriously undermines the goal of the privacy rationale, which is to safeguard a person's interests in controlling "how much information about oneself is disseminated and the scope and circumstances of its communication."[82] In the context of accountant-client communications, at least two client interests may be implicated: (1) an interest in keeping personal financial dealings confidential, and (2) an interest in protecting one's reputation and good name. While these two interests may be of the greatest importance to the client during her lifetime, they arguably extend, and are

77. Krattenmaker, *supra* note 37, at 86-87; *see also* Saltzburg, *supra* note 61, at 622.

78. *See, e.g.*, Nixon v. Administrator of Gen. Servs., 433 U.S. 425 (1977).

79. McCormick, *supra* note 14, § 77, at 187.

80. *Id.* § 77, at 186.

81. *In re* A Special Investigation No. 202, 53 Md. App. 96, 103, 452 A.2d 458, 462-63 (1982) (noting that although the accountant-client privilege was intended to protect the individual's expectation of privacy, there was no privacy justification for matters involving the violation of criminal or bankruptcy laws). *Cf.* Nixon v. Administrator of Gen. Servs. 433 U.S. at 425 (the court recognized that Mr. Nixon's privacy interests were threatened, but concluded that any intrusion had to be weighed against the public interest).

82. Krattenmaker, *supra* note 37, at 86.

worthy of protection, beyond her death.[83] Failure of the privilege to survive would threaten these two client interests and, thereby undermine the focus of the privacy rationale.

The client's interest in keeping personal financial dealings confidential generally will not be a sufficiently weighty argument to justify extension of the privilege beyond the client's lifetime. Although society often views an individual's financial status as a measure of personal value, making its disclosure potentially a much more significant violation of the client's privacy than what initially might be suspected, this generally will not outweigh the societal interest in promoting full disclosure in judicial proceedings.[84] As a result, having the privilege terminate with the client's death would not impact significantly upon this interest because courts would not be likely to give it determinative weight even if the privilege survived.

The interest in protecting one's reputation, on the other hand, presents a weightier basis for justifying the survivability of the accountant-client privilege. The decedent is obviously unable to act on her own behalf to protect her good name, so survivability of the privilege is necessary to enable the personal representative to safeguard the decedent's reputation. In an attorney-client context, some courts have relied on precisely this reasoning to explain why they have permitted a personal representative to exercise the client's privilege.[85] Similarly, this analysis should apply to the accountant-client situation. If that is the case, failure of the privilege to survive would defeat the client's privacy interest in her reputation. Because such an outcome cannot be reconciled with the privacy rationale, an absolute prohibition on survivability (as posited by this scenario) cannot be justified.

2. The privilege survives and is fully exercisable by decedent's representative

This option, like the preceding one, is not fully congruent with the competing concerns recognized under a privacy ration-

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83. At first blush it may seem odd to consider a decedent's "ongoing" privacy interests. For discussion purposes this comment considers the client's lifetime privacy interest to include an interest in protecting her reputation after her death.

84. *See supra* p. 1283 (discussing why protection of property interests in decedent's estate is not a sufficient justification for extension of the privilege).

85. Martin v. Shaen, 22 Wash. 2d 505, 511, 156 P.2d 681, 684 (1945).

ale.[86] As noted previously, the privacy rationale employs a balancing approach, weighing the loss of information to society versus the cost of disclosure to the individual's privacy. While survivability of the privilege permits the protection of the client's interests, unfettered discretion in its exercise undermines the societal interests in facilitating the adjudicatory process. As a result, courts distinguish among privacy interests, recognizing some, but not all, as valid legal interests.[87] Unrestricted exercise of the accountant-client privilege by decedent's representative could frustrate the ability of courts to examine and balance the equities arising in particular contexts, thus creating an outcome which is inconsistent with the privacy rationale.

3. The privilege survives but decedent's representative has no discretion to waive

This option creates an absolute privilege and prohibits judicial access to information arising from the accountant-client relationship following the client's death. Although this option fully protects the client's "expectation of privacy,"[88] such an outcome is not supportable by the privacy rationale as advocated by its supporters[89] or as recognized through court opinions.[90] The objection raised with respect to the preceding option (i.e., that judicial balancing of competing interests would be frustrated) applies with even greater force where no one is competent to determine whether or not a privacy interest in fact is compromised by the accountant's disclosure of information.

4. Case-by-case balancing

Ad hoc balancing of competing interests is the most appropriate way to protect legitimate client expectations of privacy and, at the same time, protect society's interest in facilitating the truth-seeking process. Not all privileges are of equal impor-

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86. *See supra* text accompanying notes 76-80.

87. For a discussion of the legal cognizability of privacy interests, see Note, *supra* note 11, at 1482.

88. United States v. White, 401 U.S. 745, 752 (1971); *see also* Katz v. United States, 389 U.S. 347, 359 (1967).

89. Krattenmaker, *supra* note 37, at 86-87; *cf.* A. WESTIN, PRIVACY AND FREEDOM 20-21 (1973) (arguing that society requires some invasions of privacy).

90. Nixon v. Administrator of Gen. Servs., 433 U.S. 425 (1977); *In re* A Special Investigation No. 202, 53 Md. App. 96, 452 A.2d 458 (1982).

tance,[91] nor do all situations call for similar action. By using a qualified privilege approach, courts are able to recognize the existence and survivability of a privilege and still limit the manner in which it is exercised so it is consistent with the demands of justice.[92] Thus, where privacy is the underlying rationale for the privilege, the preferred approach is to examine a claim of privilege on a case-by-case basis.[93]This approach has the drawback of uncertainty[94] making the scope and protection of a privacy-based privilege unpredictable. However, uncertainty of application is less troublesome when the privilege is grounded in a privacy rationale than when it is justified under a utilitarian approach. As discussed earlier,[95] the utilitarian rationale justifies the creation of privileges for their instrumental value—*i.e.*, because they presumably encourage confidential communications between clients and their professional advisors. Uncertainty in that context will arguably create disincentives to full and candid disclosure, thereby impairing the professional's ability to effectively perform her duties.[96] However, when privileges are justified on the basis of privacy interests, no instrumental values are implicated. Even the strongest proponents of a privacy rationale do not envision the absolute protection of privacy above all other interests.[97] Thus, a privacy rationale can better accommodate the inherent uncertainty of *ad hoc* balancing.

Critics of the case-by-case approach have noted that determinations of what constitutes protected information will, of necessity, require *in camera* proceedings. They argue that the very act of submitting to such arrangements breaches the privacy interests which those procedures are designed to protect.[98] While it is true that *in camera* disclosure necessarily breaches some of the secrecy surrounding the information, the essence of the privacy right is that it limits, but does not ban, access to sensitive information.[99] Thus, while this approach is not free from difficulties, its inherent flexibility permits individuals and society to

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91. Saltzburg, *supra* note 61, at 622 & n.81.
92. Krattenmaker, *supra* note 37, at 75-76, 94.
93. Note, *supra* note 11, at 1487.
94. *See supra* text accompanying notes 67-72.
95. *See supra* text accompanying notes 40-43.
96. *But see supra* text accompanying notes 50-57.
97. *See supra* note 77 and accompanying text.
98. Note, *supra* note 11, at 1487 n.106. *But see* McCormick, *supra* note 14, § 77, at 187 (noting that *in camera* review offers a workable compromise).
99. Krattenmaker, *supra* note 37, at 89.

achieve a "balance without being forced to choose between the extremes of total secrecy and total openness."[100] For this reason, McCormick has stated that it "may offer a theoretical basis for a more satisfactory accommodation than has heretofore been achieved between the legitimate demands for freedom against unwarranted intrusion . . . and the basic requirements of the judicial system . . . ."[101]

To summarize, adopting a privacy rationale as a basis for justifying testimonial privileges is consistent with long- established legal tradition. However, to an even greater extent than is the case with the utilitarian rationale, privacy justifications cannot support an absolutist approach to the treatment of privileges. As a result, testimonial privileges based on this approach can only be defended after analysis of the factual context in which the claim arises, and courts must be given the latitude to examine and weigh the competing considerations on a case-by-case basis.

IV. Factors to be Considered in Determining the Survivability of the Accountant-Client Privilege

The preceding discussion has been premised on the notion that a determination of the survivability of the statutory accountant-client privilege requires an analysis of the underlying justification of the privilege. Although privileges traditionally are explained on the basis of a utilitarian rationale, this comment concludes that a better justification may be found through a privacy rationale. However, because the privacy analysis rests on a case-by-case balancing, courts charged with determining the survivability of this privilege should consider the following factors: (1) the extent to which decedent's reputation would be impaired by disclosure, (2) the decedent's expectation of confidentiality and the reasons for such expectation (whether of sufficient weight to be legally cognizable), (3) the extent to which the information sought constitutes a "trivial" or a "significant" intrusion into the client's privacy interests, (4) the availability of alternative sources from which the information can be secured, and (5) the ways in which disclosure can be managed to minimize its negative impact.[102]

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100. *Id.*

101. McCormick, *supra* note 14, § 77, at 186.

102. For a related list of factors to consider, see Saltzburg, *supra* note 61, at 601.

V. Conclusion

The accountant-client privilege is statutorily recognized in twenty-four American jurisdictions. Few of those jurisdictions, however, have made explicit provision for survivability of the privilege. Fewer still have evaluated the different and conflicting public policies which are brought into play when decedent's representative seeks to assert or waive the client's privilege on behalf of the estate.

The traditional justification for testimonial privileges maintains that privileges are supportable when the benefit they provide—encouraging client communications—outweighs the limitations which they impose on the truth-seeking process. Under this rationale, and contrary to the recognized survivability of arguably analogous privileges, the accountant- client privilege should not survive the death of the client.

Adoption of a privacy rationale to justify the survivability of the accountant-client privilege suggests that the privilege should survive the death of the client. However, the exact extent of its exercise is best determined through a case-by-case balancing of the client's privacy interests and the countervailing societal interest in court access to all relevant information.

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