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Evidence--Attorney-Client Privilege -- Identiy of Client Held Privileged

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EVIDENCE — ATTORNEY-CLIENT PRIVILEGE — IDENTITY OF CLIENT HELD PRIVILEGED—Petitioner attorney was retained by an organization of fruit merchants to investigate parking conditions on the New York piers which prevented its members from attending the daily fruit auctions, and to take steps to remedy this situation. During his investigations petitioner learned from one of his employers that two local politicians were being paid to allow certain large trailer trucks to continue parking illegally on the piers. The attorney reported this information to city officials. He was subsequently subpoenaed to testify on the matter before respondent, New

York City Commissioner of Investigation, who was conducting an inquiry into waterfront conditions. At the hearing, petitioner refused to identify the persons who had retained him.[1] On appeal from affirmance of an order for his arrest for contempt,[2] *held,* reversed. Since the communication had been made in aid of a public purpose and had been disclosed to the public authorities, and since the existence of an actual attorney-client relationship had been otherwise established, the privilege should extend to cover the client's identity. *In re Kaplan,* 8 N.Y.2d 214, 168 N.E.2d 660, 203 N.Y.S.2d 836 (1960).

The attorney-client privilege generally protects from disclosure those communications made by the client to the attorney while the latter is acting in his professional capacity where the client is seeking legal advice of any kind and when the communication is necessary to that purpose and made in confidence.[3] The privilege rests upon the desirability of encouraging full and open disclosure by the client.[4] Since its invocation results in the suppression of otherwise competent evidence, however, the privilege is strictly construed.[5]

Generally, the *identity* of the client has been held to be outside the scope of the privilege.[6] Two reasons have been advanced for this position. First, it is said that every party to litigation has a right to know the identity of his adversary.[7] This principle has been said to apply although no litigation is pending if the attorney performs acts during his employment which affect the rights of third parties.[8] The second reason, and the one most often invoked, is that before any privilege can be recognized, the relationship which gives rise to that privilege must first be proved, and that this

1 Petitioner relied on N.Y. CIV. PRAC. ACT § 353 which provides, "An attorney or counselor at law shall not disclose or be allowed to disclose a communication made by his client to him, or his advice given thereon, in the course of his professional employment. . . ."

2 *In re* Blumenfeld, 22 Misc. 2d 839, 200 N.Y.S.2d 836 (Sup. Ct.), *aff'd,* 10 App. Div. 2d 909, 202 N.Y.S.2d 198 (1960).

3 See generally 8 WIGMORE, EVIDENCE §§ 2290-329 (3d ed. 1940); MCCORMICK, EVIDENCE §§ 91-100 (1954).

4 See 8 WIGMORE, EVIDENCE § 2291 (3d ed. 1940).

5 *Id.* § 2291, at 557-58.

6 Behrens v. Hironimus, 170 F.2d 627 (4th Cir. 1948); United States v. Pape, 144 F.2d 778 (2d Cir. 1944); Mauch v. Commissioner, 113 F.2d 555 (3d Cir. 1940); Magida v. Continental Can Co., 12 F.R.D. 74 (S.D.N.Y. 1951); *In re* Richardson, 157 A.2d 695, 31 N.J. 391 (1960). Terms of the fee arrangement may also be outside the privilege. Baskerville v. Baskerville, 246 Minn. 496, 75 N.W.2d 762, 764 (1956). See generally 8 WIGMORE, EVIDENCE § 2313 (3d ed. 1940).

7 Mauch v. Commissioner, *supra* note 6, at 556; *Ex parte* McDonough, 170 Cal. 230, 235-36, 149 Pac. 566, 568 (1915); 8 WIGMORE, EVIDENCE § 2313, at 608 (3d ed. 1940).

8 MCCORMICK, EVIDENCE § 94 (1954). *But see In re* Shawmut Mining Co., 94 App. Div. 156, 87 N.Y. Supp. 1059 (1904), in which the privilege was said to apply although an attorney negotiated the purchase of certain mining property for his client, thereby "affecting the rights" of certain customers of the purchased corporation. *Cf.* Neugass v. Terminal Cab Corp., 139 Misc. 699, 249 N.Y. Supp. 631 (Sup. Ct. 1931), in which the court indicates that this principle may apply only when the attorney is himself attempting to use the courts to benefit his client.

necessarily involves revelation of the client's identity.[9] Although originally advanced on purely logical grounds, this latter explanation seems to have been retained primarily as a means of dealing with possible attempts of attorney-witnesses to evade all questioning by invoking the privilege of an alleged client who in fact does not exist.[10] Resort to it has also been made, however, in cases in which the existence of an actual client is unquestioned, but where other evidence indicates that the privilege is being claimed for the purpose of hiding questionable dealings of the attorney, the client, or both. Professor McCormick has, in fact, remarked, "One who reviews the cases in this area will be struck with the prevailing flavor of chicanery and sharp practice pervading most of the attempts to suppress proof of professional employment. . . ."[11] These cases thus present strong policy reasons for full disclosure, in order that the law will not provide a cloak for illicit activity.[12] In this more modern context, the courts have continued to advance the argument that before the privilege will arise the client's identity must be disclosed to establish the existence of an attorney-client relationship. The logical appeal of this argument is such that the courts have tended to invoke it as the sole basis for decision in cases where the privilege is claimed.[13] The few exceptional cases seem to involve circumstances in which disclosure would visit particularly severe injury upon the client.[14]

The decision in the principal case stands squarely against this trend toward inflexible application of the rule that the identity of the client is never within the privilege. Its result is especially significant in light of the prior New York decision in *People ex rel. Vogelstein v. Warden of County Jail,*[15] which had appeared to commit the jurisdiction to the position that

9 Behrens v. Hironimus, *supra* note 6; Goddard v. United States, 131 F.2d 220 (5th Cir. 1942); Gretsky v. Miller, 160 F. Supp. 914 (D. Mass. 1958); United States v. Lee, 107 Fed. 702 (E.D.N.Y. 1901).

10 *E.g.*, United States v. Lee, *supra* note 9.

11 MCCORMICK, EVIDENCE § 94 at 190 (1954).

12 "Disclosure should be made if we are to maintain confidence in the bar and in the administration of justice." People *ex rel.* Vogelstein v. Warden of County Jail, 150 Misc. 714, 270 N.Y. Supp. 362 (Sup. Ct.), *aff'd,* 242 App. Div. 611, 271 N.Y. Supp. 1059 (1934).

13 Behrens v. Hironimus, *supra* note 6; Gretsky v. Miller, *supra* note 9; Magida v. Continental Can Co., *supra* note 6; People *ex rel.* Vogelstein v. Warden of County Jail, *supra* note 12.

14 *E.g.*, Chirac v. Reinicker, 24 U.S. (11 Wheat.) 280 (1826) (disclosure would have revealed the particular purpose for which the attorney was employed); *Ex parte* McDonough, *supra* note 7 (disclosure would have implicated attorney's known clients with other individuals who had been indicted in an election fraud case, and thus would have operated indirectly as an admission of guilt); Elliott v. United States, 23 App. D.C. 456 (D.C. Cir. 1904) (disclosure would have violated an express pledge by the attorney that he would not reveal that a certain client had made a will); *In re* Shawmut Mining Co., *supra* note 8 (disclosure would have linked the client with a transaction which might have become the basis of a civil suit against him).

15 150 Misc. 714, 270 N.Y. Supp. 362 (Sup. Ct.), *aff'd,* 242 App. Div. 611, 271 N.Y. Supp. 1059 (1934). This case involved a petition for a writ of habeas corpus to secure the release of an attorney arrested for contempt for refusing to reveal to a grand jury the identity of persons who had retained him to represent 15 individuals who had been arrested on lottery and gambling charges. The court, in denying the petition, said that the attorney must name an actual client in order to prove the existence of the relation-

the client's identity is never privileged. The court did not overrule *Vogelstein,* but rather distinguished it by pointing out that the existence of the attorney-client relationship in the principal case was not questioned, and that disclosure was therefore not essential to activate the privilege.[16] It should be clear, however, that while the court refused to adhere to an inflexible rule of disclosure, its decision does not establish the converse proposition that identity of the client ought always to be privileged. The facts of the principal case presented policy considerations in the opposite extreme from the "undercurrent of chicanery" which had previously led some courts to require disclosure. Here the client's communication had been made to expose wrongdoing, and with intent that the information be transmitted to public authorities. This had been done, and the public interest had been served; to disclose the client's name would merely have left him vulnerable to reprisals from the persons whose illegal activities he had exposed. It therefore seems that the presence of equally compelling policy considerations will be required before the court will again extend the privilege to include the identity of the client. Absent these considerations, cases in this area will merit substantially the same treatment they have received in the past. The principal case merely retains for the courts a discretion to extend the attorney-client privilege to those situations where the interests of justice so demand.[17]

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1 Federal Trade Commission Act, 38 Stat. 717 (1914), as amended, 15 U.S.C. §§ 41-58 (1958). The power to regulate advertising practices is derived from that part of the FTCA which directs the FTC to prevent persons subject to the act from using "unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce."