

# CPLR 4503(a): Identity of Third Party Who Retains Attorney for Criminal Defendant Not Protected by Attorney-Client Privilege

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might be placed on the examination of a witness should be equally applicable to the use of the deponent's written statement. In reaffirming the broad common-law powers of the trial court to control the conduct of the litigation,<sup>66</sup> the *Feldsberg* Court has recognized that the mere fact that evidence has been rendered admissible by statute should not necessarily mandate its admission.

It is suggested, however, that the holding in *Feldsberg* should not be interpreted as conferring upon the trial court unfettered discretion to exclude material and relevant evidence. As the dissent correctly pointed out, all evidence having probative value is admissible unless forbidden by a specific rule.<sup>67</sup> Thus, unless unfair prejudice would result, any conflict between the trial court's discretion to control the proceedings and the admission of material and relevant evidence generally should be resolved in favor of inclusion of the evidence.<sup>68</sup>

*Daniel D. Rubino*

#### ARTICLE 45—EVIDENCE

#### *CPLR 4503(a): Identity of third party who retains attorney for criminal defendant not protected by attorney-client privilege*

The attorney-client privilege, codified in CPLR 4503(a), prohibits the disclosure of confidential communications made by a cli-

(2d Cir. 1946).

<sup>66</sup> See note 39 *supra*.

<sup>67</sup> 49 N.Y.2d at 647, 404 N.E.2d at 1299, 427 N.Y.S.2d at 757 (Meyer, J., dissenting); *Ando v. Woodberry*, 8 N.Y.2d 165, 167, 168 N.E.2d 520, 521, 203 N.Y.S.2d 74, 75-76 (1960); 1 J. WIGMORE, EVIDENCE § 10, at 293 (3d ed. 1940). For an extensive analysis of the admissibility of logically probative evidence see Thayer, *Presumptions and the Law of Evidence*, 3 HARV. L. REV. 141 (1889).

<sup>68</sup> The power of a trial court to exclude technically admissible evidence may be founded upon such considerations as undue consumption of time, repetition, unfair surprise or undue prejudice to one of the opposing parties. See *Radosh v. Shipstad*, 20 N.Y.2d 504, 508, 231 N.E.2d 759, 762, 285 N.Y.S.2d 60, 63 (1967); *People v. Caruso*, 246 N.Y. 437, 444, 159 N.E. 390, 392 (1927); *People v. Harris*, 209 N.Y. 70, 82, 102 N.E. 546, 550 (1913). The New York courts have employed a balancing test to determine the admissibility of evidence—weighing its probative value against these countervailing policy considerations. See, e.g., *People v. Duffy*, 36 N.Y.2d 258, 262-63, 326 N.E.2d 804, 807, 367 N.Y.S.2d 236, 240, *cert. denied*, 423 U.S. 861 (1975); *People v. Sandoval*, 34 N.Y.2d 371, 375, 314 N.E.2d 413, 416, 357 N.Y.S.2d 849, 854 (1974); *People v. Schwartzman*, 24 N.Y.2d 241, 247, 247 N.E.2d 642, 646, 299 N.Y.S.2d 817, 823, *cert. denied*, 396 U.S. 846 (1969).

ent to his attorney in the course of the professional relationship, absent a waiver of the privilege by the client.<sup>69</sup> Generally, it has been held that the privilege does not protect the identity of the client or the fee arrangements to which he has agreed.<sup>70</sup> Some

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<sup>69</sup> CPLR 4503(a) provides, in pertinent part:

Unless the client waives the privilege, an attorney or his employee, or any person who obtains without the knowledge of the client evidence of a confidential communication made between the attorney or his employee and the client in the course of professional employment, shall not disclose, or be allowed to disclose such communication, nor shall the client be compelled to disclose in any action, disciplinary trial or hearing, or administrative action, proceeding or hearing . . .

CPLR 4503(a) (Supp. 1980-1981). CPLR 4503(a) and its predecessors, section 353 of the Civil Practice Act, ch. 925, § 353, [1920] N.Y. Laws 135, and section 835 of the Code of Civil Procedure, ch. 448, § 835, [1876] N.Y. Laws 158, codify the common-law attorney-client privilege. *United States v. Kovel*, 296 F.2d 918, 921 n.2 (2d Cir. 1961); *King v. Ashley*, 179 N.Y. 281, 284, 72 N.E. 106, 107 (1904) (per curiam). The privilege is deemed to exist:

(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communication 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 adviser, (8) except the protection he waived.

8 J. WIGMORE, EVIDENCE § 2292, at 554 (McNaughton rev. ed. 1961); see *United States v. Kovel*, 296 F.2d 918, 921 (2d Cir. 1961). See also *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 358-59 (D. Mass. 1950).

The American Bar Association's Code of Professional Responsibility, which has been adopted by the New York Bar Association, also imposes a duty of confidentiality upon the attorney as a tenet of professional ethics. See N.Y.S.B.A. CODE OF PROFESSIONAL RESPONSIBILITY, CANON 4, in N.Y. JUD. LAW app., at 429-33 (McKinney 1975). Disciplinary Rule 4-101 provides that "a lawyer shall not knowingly reveal a confidence or secret of his client." *Id.* DR 4-101(B)(1), at 433. The Code defines "confidence" as that information which is protected by the attorney-client privilege, and "secret" as other information gained in the professional relationship, disclosure of which would be detrimental to the client or which the client has held to be inviolate. *Id.* DR 4-101(A), at 432. Thus, the ethical obligation of confidentiality is broader in scope than the legal privilege. *Id.* EC 4-4, at 431.

<sup>70</sup> *E.g.*, *In re Jacqueline F.*, 47 N.Y.2d 215, 219-20, 391 N.E.2d 967, 970, 417 N.Y.S.2d 884, 887 (1979); *Registered Country Home Builders, Inc. v. Lanchantin*, 10 App. Div. 2d 721, 198 N.Y.S.2d 767 (2d Dep't 1960) (mem.); *People ex rel. Vogelstein v. Warden*, 150 Misc. 714, 718-19, 270 N.Y.S. 362, 368-69 (Sup. Ct. N.Y. County), *aff'd*, 242 App. Div. 611, 271 N.Y.S. 1059 (1st Dep't 1934). Disclosure of a client's identity has been compelled on the ground that his adversary "cannot be obliged to struggle in the dark against unknown forces," J. WIGMORE, *supra* note 69, § 2313, at 609; see *In re Jacqueline F.*, 47 N.Y.2d 215, 220, 391 N.E.2d 967, 970, 417 N.Y.S.2d 884, 887 (1979); that the client must be identified in order to prove the existence of an attorney-client relationship, *People ex rel. Vogelstein v. Warden*, 150 Misc. 714, 718, 270 N.Y.S. 362, 368 (Sup. Ct. N.Y. County), *aff'd*, 242 App. Div. 611, 271 N.Y.S. 1059 (1st Dep't 1934); that the name of a client is not a "confidential communication," *United States v. Pape*, 144 F.2d 778, 782-83 (2d Cir.), *cert. denied*, 323 U.S. 752 (1944); *Dunipace v. Martin*, 73 Ariz. 415, 419, 242 P.2d 543, 546 (1952); that anonymity was sought to perpetrate a fraud, *In re Franklin Washington Trust Co.*, 1 Misc.2d 697, 699, 148 N.Y.S.2d 731, 734 (Sup. Ct. N.Y. County 1956); that overriding policy reasons require disclosure, *Tierney v. Flower*, 32 App. Div. 2d 392, 395, 302 N.Y.S.2d 640, 643 (2d Dep't 1969); or that disclosure was required to expose suspected conflicts of interest, see *In re*

courts, however, have held that the privilege may be claimed by an attorney on behalf of an unidentified client who has paid the legal fees of a named client if, under the circumstances, such a fee arrangement suggests the complicity of the unidentified client with the named client.<sup>71</sup> Recently, in *Priest v. Hennessy*,<sup>72</sup> the Court of Appeals declined to endorse this exception to the general rule, holding that the payment of legal fees by an undisclosed third party was insufficient evidence of an attorney-client relationship between the third party and the attorney upon which a claim of privilege could be based.<sup>73</sup>

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Michaelson, 511 F.2d 882, 888 (9th Cir.), *cert. denied*, 421 U.S. 978 (1975). Similarly, the amount of an attorney's fee and the method of payment generally are not privileged if the fees themselves are the subject of litigation or investigation, *see Colton v. United States*, 306 F.2d 633, 637-38 (2d Cir. 1962), *cert. denied*, 371 U.S. 951 (1963); *Mauch v. Commissioner*, 113 F.2d 555 (3d Cir. 1940); *Glines v. Estate of Baird*, 16 App. Div. 2d 743, 227 N.Y.S.2d 71 (4th Dep't 1962) (mem.); *Lincoln First Bank v. Miller*, 89 Misc. 2d 727, 392 N.Y.S.2d 542 (Rochester City Ct. 1977), or if disclosure is necessary to show an attorney's interest in the litigation, *see Registered Country Home Builders, Inc. v. Lanchantin*, 10 App. Div. 2d 721, 198 N.Y.S.2d 767 (2d Dep't 1960) (mem.).

In *In re Kaplan*, 8 N.Y.2d 214, 168 N.E.2d 660, 203 N.Y.S.2d 836 (1960), the Court of Appeals recognized an exception to the general rule requiring disclosure of a client's identity. In *Kaplan*, an attorney who had transmitted information to a committee investigating official corruption was cited for contempt for refusing to identify his informant. *Id.* at 216, 168 N.E.2d at 660, 203 N.Y.S.2d at 837. The Court reversed the contempt conviction, however, finding that the privilege applied since the confidential communication was made to expose rather than conceal wrongdoing, the substance of the communication had already been revealed, there was no dispute as to the existence of an attorney-client relationship, and disclosure of the client's name would serve no necessary purpose. *Id.* at 218, 168 N.E.2d at 661, 203 N.Y.S.2d at 839. *See generally* 10 BUFFALO L. REV. 364, 369 (1961).

<sup>71</sup> *See, e.g., In re Grand Jury Proceedings*, 517 F.2d 666, 674 (5th Cir. 1975); *Tillotson v. Boughner*, 350 F.2d 663, 666 (7th Cir. 1965); *Baird v. Koerner*, 279 F.2d 623 (9th Cir. 1960); *Ex parte McDonough*, 170 Cal. 230, 233, 149 P. 566, 567 (1915). In *Grand Jury Proceedings*, a grand jury investigating narcotics and income tax violations subpoenaed attorneys to identify third parties who had retained them on behalf of clients who had been arrested, indicted, or convicted for marijuana offenses. 517 F.2d at 663. The third parties were alleged not only to have been involved in the marijuana offenses, but also to have paid attorneys' fees and posted bonds in excess of their reported incomes. *Id.* at 673. The Fifth Circuit reversed the lower court's contempt order, holding that the identities of such third parties were privileged in situations where "disclosures would yield substantially probative links in an existing chain of inculpatory events or transactions." *Id.* at 674. Similarly, in *McDonough*, the court found that where a third party retained an attorney to represent clients who were indicted for election fraud, there was "no distinction in principle" between that situation and the obviously privileged situation arising if the third party "had said to such attorney that he aided and abetted" the indicted clients. *Ex parte McDonough*, 170 Cal. 230, 233, 149 P. 566, 567 (1915).

<sup>72</sup> 51 N.Y.2d 62, 409 N.E.2d 983, 431 N.Y.2d 511, *aff'g*, 75 App. Div. 2d 722, 427 N.Y.S.2d 110 (4th Dep't 1980).

<sup>73</sup> 51 N.Y.2d at 67, 409 N.E.2d at 987, 431 N.Y.S.2d at 516.

*Hennessy* arose out of a grand jury investigation of prostitution in Onondaga County.<sup>74</sup> Attorneys Priest and Raus represented several women who testified before the grand jury concerning their involvement in prostitution.<sup>75</sup> Subsequently, the attorneys were served with subpoenas requiring them to testify before the grand jury regarding their fee agreements with the women and with any third party on behalf of the women, and to disclose the identity of any such third party.<sup>76</sup> The attorneys moved to quash the subpoena, claiming that the information sought was protected by the attorney-client privilege.<sup>77</sup> The Onondaga County Court granted the motion,<sup>78</sup> but the Appellate Division, Fourth Department, unanimously reversed.<sup>79</sup>

On appeal, the Court of Appeals affirmed, finding that no attorney-client relationship had been demonstrated upon which a claim of privilege could be predicated.<sup>80</sup> Writing for the majority,<sup>81</sup> Judge Jasen noted that in all cases an attorney-client relationship must exist before the privilege of confidentiality may attach.<sup>82</sup> The Court stated that an attorney-client relationship is created "only when one contacts an attorney in his capacity as such for the purpose of obtaining legal advice or services."<sup>83</sup> Since the third party did not seek to obtain legal advice for himself, the majority concluded that the payment of legal fees on behalf of the women failed to give rise to an attorney-client relationship between the attorney and the third-party benefactor.<sup>84</sup> Similarly, Judge Jasen asserted, the *Hennessy* attorneys' claim that they had previously represented the benefactor in a related matter was also insufficient to justify a claim of privilege without independent corroborative proof establishing the existence of an attorney-client relationship

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<sup>74</sup> *Id.* at 65, 409 N.E.2d at 984, 431 N.Y.S.2d at 512.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 66, 409 N.E.2d at 984, 431 N.Y.S.2d at 513.

<sup>77</sup> *Id.* at 66, 409 N.E.2d at 985, 431 N.Y.S.2d at 513.

<sup>78</sup> *Id.* at 67, 409 N.E.2d at 985, 431 N.Y.S.2d at 513.

<sup>79</sup> 75 App. Div. 2d 722, 427 N.Y.S.2d 110 (4th Dep't), *aff'd*, 51 N.Y.2d 62, 409 N.E.2d 983, 431 N.Y.S.2d 511 (1980).

<sup>80</sup> 51 N.Y.2d at 68, 409 N.E.2d at 987, 431 N.Y.S.2d at 516.

<sup>81</sup> Judge Jasen was joined in the majority by Chief Judge Cooke and Judges Gabrielli, Jones, Wachtler, and Meyer. Judge Fuchsberg dissented in a separate opinion.

<sup>82</sup> 51 N.Y.2d at 68, 409 N.E.2d at 986, 431 N.Y.S.2d at 514; *see In re A and M*, 61 App. Div. 2d 426, 429, 403 N.Y.S.2d 375, 377-78 (4th Dep't 1978); *Bergmann v. Manes*, 141 App. Div. 102, 125 N.Y.S. 973 (2d Dep't 1910).

<sup>83</sup> 51 N.Y.2d at 68-69, 409 N.E.2d at 986, 431 N.Y.S.2d at 514.

<sup>84</sup> *Id.* at 69-70, 409 N.E.2d at 987, 431 N.Y.S.2d at 515.

at the time of the making of the alleged confidential communication.<sup>85</sup> Therefore, the Court concluded, the attorneys' refusal to furnish the grand jury with the information requested was improper.<sup>86</sup>

In dissent, Judge Fuchsberg contended that the attorneys' uncontradicted assertions in open court that they had previously represented the third party<sup>87</sup> should be accepted as sufficient evidence of the existence of an attorney-client relationship.<sup>88</sup> Since the payment of legal fees on behalf of prostitutes could be construed as evidence that the payor was involved in the promotion of prostitu-

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<sup>85</sup> The Court stated that the burden of proving the attorney-client relationship was on the party claiming the privilege. *Id.* at 70, 409 N.E.2d at 987, 431 N.Y.S.2d at 515; *accord*, *Bloodgood v. Lynch*, 293 N.Y. 308, 314, 56 N.E.2d 718, 721 (1944); *Randy Int'l Ltd. v. Automatic Compactor Corp.*, 97 Misc. 2d 977, 981, 412 N.Y.S.2d 995, 998 (N.Y.C. Civ. Ct. Queens County 1979).

<sup>86</sup> 51 N.Y.2d at 70, 409 N.E.2d at 987, 431 N.Y.S.2d at 516. The Court relied primarily on *People ex rel. Vogelstein v. Warden*, 150 Misc. 714, 270 N.Y.S. 362 (Sup. Ct. N.Y. County), *aff'd*, 242 App. Div. 611, 271 N.Y.S. 1059 (1st Dep't 1934). In *Vogelstein*, an attorney was required to disclose to a grand jury the name of a "client" who had retained him to represent certain defendants in an earlier criminal prosecution. The court held that a client's existence must be established before the attorney-client privilege would attach. Therefore, the privilege could not be claimed until the client's identity was disclosed. 150 Misc. at 718, 270 N.Y.S. at 368. Otherwise, the court reasoned, an attorney could avoid testifying as to any fact by claiming that he learned it from an unidentified client whose existence was not proven. *Id.*; *see United States v. Lee*, 107 F. 702, 704 (E.D.N.Y. 1901). *See generally* Comment, *Assertion of the Attorney-Client Privilege to Protect the Client's Identity*, 28 U. CHI. L. REV. 533, 537-38 (1961).

The *Hennessy* Court also held that prior representation of the third-party benefactor was insufficient to invoke the privilege. 51 N.Y.2d at 70-71, 409 N.E.2d at 987, 431 N.Y.S.2d at 516. Such prior representation, according to Judge Jasen, merely amounted to a "fortuitous circumstance," since it had "no relation" to the subsequent fee arrangement entered into on behalf of the prostitutes. *Id.* at 71, 409 N.E.2d at 987, 431 N.Y.S.2d at 516. Furthermore, the Court considered whether the attorney-client relationship between the attorneys and the women would protect from disclosure the fee arrangements made on the women's behalf. *Id.* at 67, 409 N.E.2d at 985, 431 N.Y.S.2d at 513. Judge Jasen noted, however, that only confidential communications made to an attorney for the purpose of obtaining legal advice or services were protected by the attorney-client privilege. *Id.* at 69, 409 N.E.2d at 986, 431 N.Y.S.2d at 514. The fee arrangements between the attorneys and the women were held not to constitute a confidential communication. *Id.* at 69, 409 N.E.2d at 986, 431 N.Y.S.2d at 515; *see note 70 supra*.

<sup>87</sup> 51 N.Y.2d at 71, 409 N.E.2d at 988, 431 N.Y.S.2d at 516 (Fuchsberg, J., dissenting). Priest and Raus allegedly had represented the unidentified third party upon his arrest a few months earlier on "charges intimately related to the Grand Jury's investigation." *Id.* (Fuchsberg, J., dissenting).

<sup>88</sup> *Id.* (Fuchsberg, J., dissenting). Judge Fuchsberg contended that the word of the attorneys, as officers of the court, was entitled to respect. *Id.* (Fuchsberg, J., dissenting). He also asserted that, since an attorney-client relationship is usually "one-to-one," it may not be supported by any independent corroborative evidence. *Id.* (Fuchsberg, J., dissenting).

tion, Judge Fuchsberg stated, such payment should be considered a confidential communication entitled to the same protection as a verbal admission of guilt to counsel.<sup>89</sup> Indeed, the dissent concluded, notwithstanding that recognition of the privilege might "frustrate the administration of justice," the prosecutor had failed to demonstrate that the necessity of obtaining the information outweighed the policy underlying the privilege—the maintenance of a professional confidence which is "reasonable in scope."<sup>90</sup>

The Court of Appeals' holding in *Hennessy* is consistent with prior case law, which has tended to afford only minimal protection under the attorney-client privilege to the identity and fee arrangements of a client.<sup>91</sup> By a literal application of the rules of the privilege, however, the *Hennessy* Court has reached a conclusion that conflicts with the purpose of attorney-client confidentiality<sup>92</sup> and is unsupported by the customary reasons for compelling disclosure of a client's identity.<sup>93</sup> Under the facts of *Hennessy*, it appears that

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<sup>89</sup> *Id.* at 72, 409 N.E.2d at 988, 431 N.Y.S.2d at 517 (Fuchsberg, J., dissenting).

<sup>90</sup> *Id.* at 73, 409 N.E.2d at 989, 431 N.Y.S.2d at 517 (Fuchsberg, J., dissenting). Judge Fuchsberg also suggested that the attorney-client privilege had a constitutional underpinning in the sixth amendment right to counsel. *Id.* at 72, 409 N.E.2d at 988, 431 N.Y.S.2d at 516 (Fuchsberg, J., dissenting); see *In re Jacqueline F.*, 47 N.Y.2d 215, 228, 391 N.E.2d 967, 975, 417 N.Y.S.2d 884, 892 (1979) (Fuchsberg, J., dissenting). *But see* *People ex rel. Vogelstein v. Warden*, 150 Misc. 714, 716, 270 N.Y.S. 362, 365 (Sup. Ct. N.Y. County), *aff'd*, 242 App. Div. 611, 271 N.Y.S. 1059 (1st Dep't 1934). The dissent contended that the guarantee of uninhibited communication between attorney and client was an indispensable adjunct to the constitutional right. Therefore, Judge Fuchsberg asserted, recent Court of Appeals decisions expanding the right to counsel, e.g., *People v. Cunningham*, 49 N.Y.2d 203, 400 N.E.2d 360, 424 N.Y.S.2d 421 (1980) (per curiam); *People v. Rogers*, 48 N.Y.2d 167, 397 N.E.2d 709, 422 N.Y.S.2d 18 (1979); *People v. Settles*, 46 N.Y.2d 154, 385 N.E.2d 612, 412 N.Y.S.2d 874 (1978); *People v. Hobson*, 39 N.Y.2d 479, 348 N.E.2d 894, 384 N.Y.S.2d 419 (1976); see *People v. Samuels*, 49 N.Y.2d 218, 400 N.E.2d 1344, 424 N.Y.S.2d 892 (1980); *The Survey*, 54 ST. JOHN'S L. REV. 580, 605 (1980), should be complemented by strong judicial support of the attorney-client privilege. 51 N.Y.2d at 72, 409 N.E.2d at 988, 431 N.Y.S.2d at 517 (Fuchsberg, J., dissenting).

<sup>91</sup> See *Glines v. Estate of Baird*, 16 App. Div. 2d 743, 227 N.Y.S.2d 71 (4th Dep't 1962) (mem.); *In re Franklin Washington Trust Co.*, 1 Misc. 2d 697, 148 N.Y.S.2d 731 (Sup. Ct. N.Y. County 1956); *People ex rel. Vogelstein v. Warden*, 150 Misc. 714, 270 N.Y.S. 362 (Sup. Ct. N.Y. County), *aff'd*, 242 App. Div. 611, 271 N.Y.S. 1059 (1st Dep't 1934); note 70 *supra*.

<sup>92</sup> The privilege of confidentiality between an attorney and his client is intended to encourage candid consultation with legal advisors, uninhibited by the threat of compelled disclosure. Note, *Evidence—Attorney-Client Relationship—Client's Identity Privileged*, 27 MERCER L. REV. 1213, 1213 (1976).

<sup>93</sup> See note 70 *supra*. First, the traditional justification for requiring disclosure of a client's name—that a litigant is entitled to know the identity of his adversary—is rooted in civil litigation. Comment, *Assertion of the Attorney-Client Privilege to Protect the Client's Identity*, 28 U. CHI. L. REV. 533, 536-37 (1961). The rationale for this rule is that a party should not be permitted to avail itself of the legal process without assuming responsibility

the pendency of a grand jury inquiry into prostitution justified an inference that the unidentified "client," a potential defendant, sought legal advice from his former counsel and reasonably expected that his name would be kept confidential. In such circumstances, when a client's identity or fee arrangement reveals his motive for seeking legal advice, it seems that an attorney-client relationship should be inferred more easily and the client's fee arrangement should be privileged like any other professional confidence.<sup>94</sup> Otherwise, prospective clients, desirous of maintaining their anonymity, may be deterred from seeking legal advice.

Furthermore, it appears that *Hennessy* may encourage prosecutorial misuse of the grand jury.<sup>95</sup> Under *Hennessy*, the grand jury may elicit incriminating evidence concerning a client

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for the consequences of doing so. *Id.* Thus, the historical justification for disclosure appears to be inapplicable to criminal defendants. See *Ex parte McDonough*, 170 Cal. 230, 149 P. 566 (1915); 29 HARV. L. REV. 109, 110 (1915); cf. *Neugass v. Terminal Cab Corp.*, 139 Misc. 699, 249 N.Y.S. 631 (Sup. Ct. N.Y. County 1931) (rule not applicable to civil defendant). Additionally, it does not appear that there was a serious dispute as to the existence of the client. Rather, the questions posed by the grand jury seemed to assume his existence. See text accompanying note 76 *supra*. Furthermore, disclosure was not justified as a means of revealing suspected conflicts of interest, since the grand jury was investigating prostitution, not alleged unethical behavior on the part of the attorneys. See *In re Grand Jury Proceedings*, 517 F.2d 666, 674 (5th Cir. 1975). Finally, the privilege was not claimed to perpetuate an ongoing crime. Instead, the unidentified client's fee arrangements tended to implicate him in a past wrongdoing, which normally is held to be within the privilege of confidentiality. *Coveney v. Tanahill*, 1 Hill 33, 34-36 (N.Y. 1841); *In re Franklin Washington Trust Co.*, 1 Misc. 2d 697, 699, 148 N.Y.S.2d 731, 734 (Sup. Ct. N.Y. County 1956); 8 J. WIGMORE, *supra* note 69, § 2298, at 573.

<sup>94</sup> See *Tillotson v. Boughner*, 350 F.2d 663, 666 (7th Cir. 1965); *Baird v. Koerner*, 279 F.2d 623 (9th Cir. 1960); *United States v. Pape*, 144 F.2d 778, 783 (2d Cir.), *cert. denied*, 323 U.S. 752 (1944) (Hand, J., dissenting). Professor Wigmore has stated that "the litigant is not entitled to ask any more than serves to fix the *client's identity*. A communication as to . . . the ultimate motive of the litigation, is equally protected with others, so far as any policy of privilege is concerned." 8 J. WIGMORE, *supra* note 69, § 2313, at 609 (emphasis in original). In New York, this view finds support in two lower court cases holding that an attorney may claim the privilege on behalf of an unidentified client where disclosure of the client's identity would tend to subject him to civil liability. See *In re Shawmut Mining Co.*, 94 App. Div. 156, 87 N.Y.S. 1059 (4th Dep't 1904); *Neugass v. Terminal Cab Corp.*, 139 Misc. 699, 249 N.Y.S. 631 (Sup. Ct. N.Y. County 1931).

<sup>95</sup> See *Zwerling, Federal Grand Juries v. Attorney Independence and the Attorney-Client Privilege*, 27 HASTINGS L.J. 1263, 1286 (1976). It is true that in some jurisdictions, the traditional exclusionary rules of evidence are relaxed in the grand jury context to facilitate the investigation of criminal charges. See generally *United States v. Calandra*, 414 U.S. 338 (1974); Comment, *Evidence—Rules of Evidence in Disbarment, Habeas Corpus, and Grand Jury Proceedings*, 58 MICH. L. REV. 1218 (1960). By statute in New York, however, grand jury proceedings are governed by the same rules of evidence as petit jury trials. CPL § 190.30(1) (Pam. 1980-1981). Therefore, the investigatory function of the grand jury may not justify a suspension of the attorney-client privilege in New York.



from his attorney under the pretext of ascertaining the client's identity. Thus, the government may be able to advance its investigation without offering immunity to many potential defendants.<sup>96</sup> More importantly, by discovery of his attorney, the grand jury could effectively circumvent the criminal defendant's fifth amendment privilege against self-incrimination.<sup>97</sup> Thus, in criminal and quasi-criminal proceedings, the suspension of the attorney-client privilege in such a manner may have constitutional, as well as ethical, implications.<sup>98</sup>

It is submitted that, by compelling disclosure on the ground that no attorney-client relationship existed, the Court of Appeals has begged the issue of whether a client's identity, imparted in

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<sup>96</sup> See *Priest v. Hennessy*, 51 N.Y.2d at 72, 409 N.E.2d at 988, 431 N.Y.S.2d at 516 (Fuchsberg, J., dissenting).

<sup>97</sup> See 2 J. WEINSTEIN & M. BERGER, *WEINSTEIN'S EVIDENCE* 603-31 (1975). An attorney under examination may not assert the fifth amendment privilege against self-incrimination on behalf of his client. *In re Michaelson*, 511 F.2d 882, 889-90 (9th Cir.), cert. denied, 421 U.S. 978 (1975). The Supreme Court has stated:

It is important to reiterate that the Fifth Amendment privilege is a *personal* privilege: it adheres basically to the person, not to information that may incriminate him . . . . The Constitution explicitly prohibits compelling an accused to bear witness "against himself": it necessarily does not proscribe incriminating statements elicited from another.

*Couch v. United States*, 409 U.S. 322, 328 (1973) (emphasis in original).

<sup>98</sup> One commentator has suggested that the criminal defendant's right to attorney-client confidentiality is grounded on the fifth and sixth amendments. See Note, *The Attorney-Client Privilege: Fixed Rules, Balancing, and Constitutional Entitlement*, 91 HARV. L. REV. 464 (1977). The author asserts that if disclosure of a defendant's identity can be compelled through subpoena of his attorney, the defendant would have to avoid contacting an attorney in order to preserve his fifth amendment right against self-incrimination. *Id.* at 485-86. Likewise, to obtain effective assistance of counsel, the defendant would have to risk self-incrimination by discovery of his attorney. *Id.* Thus, the criminal defendant would be penalized for his exercise of either right by incurring a waiver of the other. *Id.* See also Comment, *Legal Ethics: Confidentiality and the Case of Robert Garrow's Lawyers*, 25 BUFFALO L. REV. 211, 235-36 (1975), wherein the author states: "Under no circumstances does the attorney have an obligation to assist in the preparation of his adversary's case [by revealing incriminating evidence about his client]. The burden of proof is solely on the prosecutor . . ." *Id.* At least one court, however, has rejected the notion that a criminal defendant's sixth amendment rights are violated by bringing his attorney by subpoena before the grand jury. In *In re Michaelson*, 511 F.2d 882 (9th Cir.), cert. denied, 421 U.S. 978 (1975), the court stated:

We find it difficult to see how the disclosure of fee information will impair [the defendant's] right to effective counsel. Rather, it seems to us that, as in the situation of insurance company's paid attorneys representing a policy holder, disclosure of payments from others to represent a client may be necessary to insure that an attorney is truly representing his client and not some other interest, and for the court to satisfy itself that a client is being effectively represented.

*Id.* at 892.

confidence to his attorney, may be privileged even if disclosure tends to implicate the client in the commission of a crime. *Hennesy* therefore may undermine the purpose of the attorney-client privilege by coercing a breach of professional ethics<sup>99</sup> and thereby discourage free and candid consultation with legal advisors.<sup>100</sup> It is hoped, therefore, that the courts will be more solicitous of attorney-client confidentiality by considering carefully the likelihood that an attorney-client relationship in fact exists.

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#### ARTICLE 78—PROCEEDING AGAINST BODY OR OFFICER

*Writ of prohibition will not issue against a public prosecutor acting in an investigatory rather than a quasi-judicial capacity*

Article 78 of the CPLR authorizes a proceeding in the nature of prohibition<sup>101</sup> to prevent a judicial or quasi-judicial officer from

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<sup>99</sup> See *In re Michaelson*, 511 F.2d 882, 894 (9th Cir.), cert. denied, 421 U.S. 978 (1975) (Merrill, J., dissenting). Voluntary disclosure of a client's "secret" is a breach of the American Bar Association's Code of Professional Responsibility, even if that "secret" is not technically protected by the attorney-client privilege. N.Y.S.B.A. CODE OF PROFESSIONAL RESPONSIBILITY, DR 4-101(B)(1) in N.Y. JUD. LAW app., at 433 (McKinney 1975). While the disciplinary rule allows an attorney to reveal confidences or secrets when required by court order, *id.*, DR 4-101(C)(2), at 433, the policy behind attorney-client confidentiality seems disserved by excessive use of the subpoena power to compel such disclosure.

<sup>100</sup> See *In re Michaelson*, 511 F.2d 882, 894 (9th Cir.), cert. denied, 421 U.S. 978 (1975) (Merrill, J., dissenting); note 94 *supra*.

<sup>101</sup> CPLR 7801 abolishes the procedural forms of the prerogative writs of certiorari, mandamus, and prohibition which existed at common law and provides for the maintenance of a single all-encompassing article 78 proceeding. See generally SEIGEL § 557. However, the substantive distinctions between the remedies survive. See CPLR 7801, commentary at 17 (1963). Thus, CPLR 7803 permits a party to raise any one of four separate questions in an article 78 proceeding, each of which corresponds to the issues triable under the common-law writs. Notably, CPLR 7803(2) embodies the common-law writ of prohibition by authorizing a proceeding to determine whether a body or officer is acting "without or in excess of jurisdiction." CPLR 7803(2) (1963).

The birth of the writ of prohibition can be traced to the conflict between the ecclesiastical court system and the common-law court system in medieval England. The writ was developed by the common-law courts as a means of restricting the exercise of jurisdiction by the ecclesiastical courts in matters which were thought to be purely temporal in nature. See Note, *The Writ of Prohibition in New York—Attempt to Circumscribe an Elusive Concept*, 50 ST. JOHN'S L. REV. 76, 77-79 (1975) [hereinafter cited as *The Writ of Prohibition in New York*]. Evolving from this common-law heritage, prohibition is now seen as an essential protection of the individual in his relations with the state. *Dondi v. Jones*, 40 N.Y.2d 8, 12, 351 N.E.2d 650, 654, 386 N.Y.S.2d 4, 7-8 (1976). Prohibition continues to be regarded, however,