St. John's Law Review

Volume 54
Number 1 *Volume 54, Fall 1979, Number 1*

Article 11

July 2012

CPLR 4503(a): Notwithstanding Claim of Attorney-Client Privilege, Attorney May Be Compelled Under Exigent Circumstances to Reveal Client's Address in Collateral Proceeding to Enforce a Judgment

Annette L. Guarino

ARTICLE 45 — EVIDENCE

CPLR 4503(a): Notwithstanding claim of attorney-client privilege, attorney may be compelled under exigent circumstances to reveal client's address in collateral proceeding to enforce a judgment

The attorney-client privilege, as embodied in CPLR 4503(a), prevents the disclosure of confidential communications made by a client to his attorney in the course of the professional relationship, unless the client has waived the privilege.[159] During the pendency of a civil litigation, CPLR 3118 permits one party to compel another party to disclose his address.[160] Recently, the issue arose whether,

---

Id. at 56, 133 N.E.2d at 695-96, 150 N.Y.S.2d at 181-82. The *pro se* status of the plaintiff, *id.* at 56, 133 N.E.2d at 695, 150 N.Y.S.2d at 181, may have influenced the *Dulberg* Court, however.

There may be cases where a defendant will be severely prejudiced by denying summary judgment and allowing the plaintiff an opportunity to replead. *Cf.* DeFabio v. Nadler Rental Serv., Inc., 27 App. Div. 2d 931, 278 N.Y.S.2d 723 (2d Dep't 1967) (party waits an "inexcusably long period of time"); Ciccone v. Glenwood Holding Corp., 44 Misc. 2d 273, 253 N.Y.S.2d 576 (Civ. Ct. Kings County 1964) (lapse of time bars plaintiff relief from another party). *See also* CPLR 3025, commentary at 477-78 (1974).

[159] 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 such communication, in any action . . . or . . . proceeding . . . .

CPLR 4503(a) (Pam. 1979).

The attorney-client privilege against nonconsensual disclosure of confidential communications is considered necessary to promote full disclosure between an attorney and his client. E. FISCH, NEW YORK EVIDENCE § 516, at 336-38 (2d ed. 1977); 8 J. WIGMORE, EVIDENCE § 2290, at 543 (McNaughton rev. 1961); Radin, *The Privilege of Confidential Communication Between Lawyer and Client,* 16 CAL. L. REV. 487 (1928); Note, *The Attorney-Client Privilege: Fixed Rules, Balancing, and Constitutional Entitlement,* 91 HARV. L. REV. 464 (1977). The privilege has been 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 communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.

J. WIGMORE, *supra,* § 2292, at 554 (emphasis and footnote omitted). An attorney-client relationship must exist before the privilege of confidentiality may attach. *Id.* §§ 2300-2304, at 580-87; E. FISCH, *supra,* § 519, at 341-42; *see* People *ex rel.* Vogelstein v. Warden of County Jail, 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).

[160] CPLR 3118 states in part:

> A party may serve on any party a written notice demanding a verified statement setting forth the post office address and residence of the party . . . and of any person who possessed a cause of action or defense asserted in the action which has been assigned.

CPLR 3118 (1970).

after an action has terminated, the attorney-client privilege protects a client's address from disclosure efforts directed against the attorney. In *In re Jacqueline F.*,[161] the Court of Appeals held that an attorney who had represented the unsuccessful party in a custody proceeding was required to reveal his client's address in a subsequent collateral action in order to facilitate the enforcement of the custody decree.[162]

In re Jacqueline F. involved protracted proceedings in which the natural parents of Jacqueline F. sought to obtain physical custody of their child after voluntarily placing her in the care of her aunt.[163] The Bronx County Surrogate ordered the aunt to return the child to her natural parents.[164] While the order of the surrogate's court was stayed pending appeal to the appellate division, the aunt absconded with the infant to Puerto Rico.[165] The appellate division unanimously affirmed the surrogate's order,[166] and the Court of Appeals denied a motion for leave to appeal.[167] Subsequently, the surrogate's court granted the parents' application to compel the aunt's attorney to disclose his client's address in Puerto Rico.[168] The Appel-

---

CPLR 3118 is a recodification of Rule 9-a of the Civil Practice Act. CPA 9-a; *see* SIXTH REP. 319; FIFTH REP. 470. CPA 9-a mandated the disclosure of a party's address, upon demand by another party, in the course of a civil action. *See* Freedman v. Statewide Mach. Inc., 19 Misc. 2d 930, 192 N.Y.S.2d 196 (Sup. Ct. Monroe County 1959); Fischer v. Seamen's Church Inst., 195 Misc. 2d 471, 92 N.Y.S.2d 379 (Sup. Ct. Queens County), *modified on other grounds*, 275 App. Div. 1047, 92 N.Y.S.2d 427 (1949). CPA 9-a represented the statutory embodiment of the common-law doctrine compelling disclosure of a client's address during the pendency of the litigation. *See, e.g.*, Markevich v. Royal Ins. Co., 162 App. Div. 640, 147 N.Y.S. 1004 (2d Dep't 1914); Richards v. Richards, 64 Misc. 285, 119 N.Y.S. 81 (Sup. Ct. N.Y. County 1909), *aff'd*, 143 App. Div. 906, 127 N.Y.S. 1141 (1st Dep't 1911); O'Connor v. O'Connor, 62 Misc. 53, 115 N.Y.S. 965 (Sup. Ct. N.Y. County 1909); Walton v. Fairchild, 4 N.Y.S. 552 (N.Y.C. Civ. Ct. N.Y. County 1889).

[161] 47 N.Y.2d 215, 391 N.E.2d 967, 417 N.Y.S.2d 884 (1979), *aff'g sub nom. In re* Fernandez, 65 App. Div. 2d 545, 409 N.Y.S.2d 704 (1st Dep't 1978).

[162] 47 N.Y.2d at 223, 391 N.E.2d at 972, 417 N.Y.S.2d at 889.

[163] In 1971, the infant's natural parents voluntarily placed her in the care of her paternal aunt because of an illness suffered by the child's mother. *Id.* at 217, 391 N.E.2d at 968, 417 N.Y.S.2d at 885. Following the aunt's refusal to return Jacqueline, the parents commenced a family court action in 1975 seeking the release of the child. The proceeding was dismissed since the aunt previously had obtained letters of guardianship over the child, giving the surrogate's court exclusive jurisdiction over the matter. *Id.* Subsequently, Jacqueline's parents initiated a proceeding in the Bronx County Surrogate's Court to revoke the letters of guardianship. *Id.* at 217-18, 391 N.E.2d at 968-69, 417 N.Y.S.2d at 885-86.

[164] *Id.* at 217, 391 N.E.2d at 968, 417 N.Y.S.2d at 886.

[165] *Id.* at 218, 391 N.E.2d at 969, 417 N.Y.S.2d at 886. Upon learning of the aunt's departure with the child, the parents moved to vacate the stay, but the motion was denied when the aunt's attorney explained that she was on vacation. *Id.*

[166] *In re* Fernandez, 59 App. Div. 2d 1064, 399 N.Y.S.2d 552 (1st Dep't 1977).

[167] 47 N.Y.2d at 218, 391 N.E.2d at 969, 417 N.Y.S.2d at 886.

[168] *In re* Jacqueline F., 94 Misc. 2d 96, 97, 404 N.Y.S.2d 790, 791 (Sur. Ct. Bronx County),

late Division, First Department, unanimously affirmed without opinion.[169]

On appeal, the Court of Appeals affirmed.[170] Writing for the majority, Judge Jasen[171] noted that since "the attorney-client privilege constitutes an 'obstacle' to the truth-finding process,"[172] claims of the privilege should be scrutinized to assure that it is applied only where it is necessary to achieve its purpose of promoting full disclosure between the attorney and his client.[173] Asserting that the existence of the privilege is contingent upon the circumstances of the particular case,[174] the majority emphasized that only communications made confidentially to the attorney in order to obtain legal advice are protected.[175] Turning to the situation involved in *Jacqueline F.*, the majority found that the client's address was not privileged since it was not disclosed in confidence for a legitimate purpose but rather to hinder the enforcement of the surrogate's judgment that custody should be awarded to the natural parents.[176] The Court determined that it would be impermissible, after subjecting the child to the "unfortunate but often necessary" ordeal of a custody proceeding, to allow the unsuccessful party to circumvent

---

aff'd mem., 65 App. Div. 2d 545, 409 N.Y.S.2d 204 (1st Dep't 1978), *aff'd*, 47 N.Y.2d 215, 391 N.E.2d 967, 417 N.Y.S.2d 884 (1979). This proceeding was commenced on the same day that the Court of Appeals had denied the aunt's motion for leave to appeal the surrogate's direction that she return the child to her parents. 47 N.Y.2d at 218, 391 N.E.2d at 969, 417 N.Y.S.2d at 886. An additional request to hold the aunt in contempt for failure to comply with the court's custody decree was refused by the surrogate's court due to improper service of process. 94 Misc. 2d at 97, 404 N.Y.S.2d at 791.

[169] *In re* Fernandez, 65 App. Div. 2d 545, 409 N.Y.S.2d 204 (1st Dep't 1978) (mem.).

[170] 47 N.Y.2d at 223, 391 N.E.2d at 972, 417 N.Y.S.2d at 889.

[171] Judge Jasen was joined by Chief Judge Cooke and Judges Gabrielli and Wachtler. Filing a separate opinion, Judge Jones concurred in the result. Judge Fuchsberg dissented in a separate opinion.

[172] 47 N.Y.2d at 219, 391 N.E.2d at 969, 417 N.Y.S.2d at 886.

[173] *Id.* at 219, 391 N.E.2d at 969, 417 N.Y.S.2d at 887 (citations omitted).

[174] *Id.* at 222, 391 N.E.2d at 971, 417 N.Y.S.2d at 888 (quoting *In re* Kaplan, 8 N.Y.2d 214, 219, 168 N.E.2d 660, 662, 203 N.Y.S.2d 836, 839 (1960) (quoting 8 J. WIGMORE, EVIDENCE, § 2313 at 609 (McNaughton rev. ed. 1961)).

[175] 47 N.Y.2d at 219, 391 N.E.2d at 970, 417 N.Y.S.2d at 887.

[176] *Id.* at 222, 391 N.E.2d at 971, 417 N.Y.S.2d at 888-89. According to the Court,

> [w]here a calculated intent to frustrate a court mandate exists on the part of a client under the circumstances of this case, it matters little whether his or her attorney acted for a legitimate purpose, inasmuch as a finding of a "conspiracy" is not necessary to defeat the privilege.

Id. at 222, 391 N.E.2d at 971-72, 417 N.Y.S.2d at 889 (citing Clark v. United States, 289 U.S. 1, 15 (1933); W. RICHARDSON, EVIDENCE § 417 (10th ed. 1973)); *see* People *ex rel.* Vogelstein v. Warden of County Jail, 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).

the final decree.[177] The attorney-client privilege, therefore, had to "yield to the best interests of the child."[178] The majority also found that CPLR 3118 was not controlling, because the statute has no application "once the litigation ha[s] terminated, a judgment [has been] rendered and the appellate process [has been] exhausted."[179] Moreover, the Court stated that neither CPLR 3118 nor its common law precursor[180] negated the possibility that a client's address may sometimes be protected by the attorney-client privilege.[181]

Concurring in the result, Judge Jones maintained that only in the "most unusual case" could a client's address be held privileged, for it rarely would be material to resolving the merits of a dispute.[182] Concluding that the address involved in the *Jacqueline F.* controversy was not privileged,[183] Judge Jones stated that, under CPLR 3118, the attorney could be compelled to disclose his client's address in the parents' effort to facilitate the enforcement of the surrogate's mandate.[184] The concurring judge rejected the majority's contention that the litigation had terminated,[185] declaring that the instant ac-

---

[177] 47 N.Y.2d at 222, 391 N.E.2d at 971, 417 N.Y.S.2d at 888-89.

[178] *Id.* at 223, 391 N.E.2d at 972, 417 N.Y.S.2d at 889 (citing People *ex rel.* Chitty v. Fitzgerald, 40 Misc. 2d 966, 244 N.Y.S.2d 441 (Sup. Ct. Kings County 1963)). *See* note 194 *infra.*

[179] 47 N.Y.2d at 220, 391 N.E.2d at 970, 417 N.Y.S.2d at 887. According to the majority, the litigation during which the attorney had acted as counsel to the aunt had terminated when the aunt's motion for leave to appeal had been denied by the Court of Appeals. *Id.* at 221, 391 N.E.2d at 971, 417 N.Y.S.2d at 888. *But see* notes 185 & 186 and accompanying text *infra. See generally* note 168 *supra.*

[180] *See, e.g.,* Hyman v. Corgil Realty Co., 164 App. Div. 140, 149 N.Y.S. 493 (1st Dep't 1914); *In re* Trainor, 146 App. Div. 117, 130 N.Y.S. 682 (1st Dep't 1911); Neugass v. Terminal Cab Corp., 139 Misc. 699, 249 N.Y.S. 631 (Sup. Ct. N.Y. County 1931); Walton v. Fairchild, 4 N.Y.S. 552 (N.Y.C. Civ. Ct. N.Y. County 1889). *See generally* note 160 *supra.*

[181] 47 N.Y.2d at 220, 391 N.E.2d at 971, 417 N.Y.S.2d at 887-88. The Court stated that the principle underlying CPLR 3118 and the case law on which it is based is that, "although [a client's address may be] privileged, it must be disclosed in the course of a pending action where disclosure is necessary for the proper administration of justice." *Id.* at 221, 391 N.E.2d at 971, 417 N.Y.S.2d at 888.

[182] *Id.* at 224, 391 N.E.2d at 973, 417 N.Y.S.2d at 890 (Jones, J., concurring).

[183] *Id.* (Jones, J., concurring). Since the address had no relevance to the determination of who should get custody of the child but was requested only to bring about the enforcement of the final decree, Judge Jones found that the address had no evidentiary characteristics and, therefore, was not a privileged communication. *Id.* (Jones, J., concurring).

[184] *Id.* at 225, 391 N.E.2d at 973, 417 N.Y.S.2d at 890-91 (Jones, J., concurring). Contrary to the majority, Judge Jones opined that the duty to reveal the address, as set forth in CPLR 3118, "exists entirely without regard to the existence of any evidentiary privilege under CPLR 4503(a)." *Id.* at 224, 391 N.E.2d at 973, 417 N.Y.S.2d at 890 (Jones, J., concurring). *But see* note 181 and accompanying text *supra.*

[185] *Id.* at 225, 391 N.E.2d at 973, 417 N.Y.S.2d at 891 (Jones, J., concurring). *But see* note 179 and accompanying text *supra.*

tion was "incidental to the custody proceeding," which could not be considered closed "[u]ntil enforcement ha[d] been effected."[186] Finally, notwithstanding that CPLR 3118, by its terms, is directed to demands made between parties, Judge Jones found no plausible reason for not also binding a party's attorney to the statutory duty to disclose.[187]

Judge Fuchsberg dissented, concluding that the circumstances presented in *Jacqueline F.* did not outweigh the policy of full disclosure underlying the attorney-client privilege.[188] Addressing CPLR 3118, the dissenting Judge stated that the demand, "though . . . addressed to the lawyer, . . . is substantively . . . made on the client."[189] Observing that only the client can decide whether to reveal the address or suffer the penalties for noncompliance,[190] Judge Fuchsberg posited that the attorney has no authority to disclose such information without his client's consent.[191]

It is submitted that the *Jacqueline F.* Court's interpretation of the attorney-client privilege both preserves the proper function of the privilege[192] and denies its availability to those who would employ it to interfere with the administration of justice.[193] Just as prior

---

[186] *Id.* at 225-26, 391 N.E.2d at 973-74, 417 N.Y.S.2d at 890-91 (Jones, J., concurring). Judge Jones apparently viewed disclosure of the aunt's address by her attorney as an exercise of the court's responsibility to ensure enforcement of its earlier custody determination. *See id.* at 226, 391 N.E.2d at 974, 417 N.Y.S.2d at 891 (Jones, J., concurring). The concurring Judge questioned the procedural authority of the Court to mandate disclosure if the order were not viewed as such. *Id.* (Jones, J., concurring).

[187] *Id.* at 224, 391 N.E.2d at 973, 417 N.Y.S.2d at 890 (Jones, J., concurring).

[188] *Id.* at 227-28, 391 N.E.2d at 975, 417 N.Y.S.2d at 891-92 (Fuchsberg, J., dissenting).

[189] *Id.* at 228, 391 N.E.2d at 975, 417 N.Y.S.2d at 893 (Fuchsberg, J., dissenting).

[190] *Id.* at 229, 391 N.E.2d at 976, 417 N.Y.S.2d at 893 (Fuchsberg, J., dissenting); *see* note 199 *infra.*

[191] 47 N.Y.2d at 229, 391 N.E.2d at 976, 417 N.Y.S.2d at 893 (Fuchsberg, J., dissenting). Making an analogy to the Government, Judge Fuchsberg pointed out that litigants often opt to forego the lawsuit rather than reveal evidence they prefer to keep confidential. *Id.* (Fuchsberg, J., dissenting). The dissenting Judge maintained that, when a client is willing to suffer the sanctions imposed for his refusal to disclose evidence, the attorney should not be able to go against his client's wishes and answer a CPLR 3118 demand. *Id.* (Fuchsberg, J., dissenting).

[192] For a discussion of the purpose of the attorney-client privilege see note 159 *supra.*

[193] In People *ex rel.* Vogelstein v. Warden of County Jail, 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), an attorney was summoned before a grand jury and asked to reveal the name and address of the person who had retained him to represent the defendants in a criminal prosecution. 150 Misc. at 715, 270 N.Y.S. at 365. Finding that the attorney's clients had retained him in order to continue a scheme to violate the law, the court rejected the attorney's claim of privilege since "it was not the purpose of the privilege to shield guilt." *Id.* at 717, 270 N.Y.S. at 367. The court stated that under the circumstances of the case "the injury that would result to the correct and orderly administration of justice would be immeasurably greater than the benefit

dispositions have turned on the facts peculiar to each case,[194] the Court emphasized that the circumstances present in *Jacqueline F.* — the client's intent to thwart the enforcement of a court decree and the welfare of a child — rendered it inappropriate to recognize the privilege.[195] It is suggested, however, that *Jacqueline F.* should not be read as supporting the principle that a client's motive to frustrate a judicial order alone is sufficient to negate the existence of the privilege, since the need to protect the best interests of the child apparently was critical to the Court's refusal to uphold the privilege.[196] Where alternative means for obtaining nonevidentiary material necessary to enforce a judicial mandate involving so vital a concern as the welfare of a child are either unavailable or would impose an unreasonable burden upon the party seeking enforcement, as in *Jacqueline F.*, it is submitted that the privilege should

---

that would enure to the relation of attorney and client." *Id.* at 721, 270 N.Y.S. at 370. Thus, where the privilege is invoked for unlawful purposes, "[t]he privilege vanishes [if] the relation giving rise to it is abused by the client." *Id.* at 721, 270 N.Y.S. at 371. Furthermore, the *Vogelstein* court determined that whether or not the attorney knew of the client's illegal purpose was irrelevant to the claim of privilege. *Id.* at 721, 270 N.Y.S. at 371. After *Vogelstein*, it seemed as though the identity of the client would never be protected by the attorney-client privilege. *See* Anonymous v. Anonymous, 59 Misc. 2d 149, 150-51, 298 N.Y.S.2d 345, 346 (Sup. Ct. Nassau County 1969). In *In re* Kaplan, 8 N.Y.2d 214, 168 N.E.2d 660, 203 N.Y.S.2d 836 (1960), however, a unanimous Court of Appeals held that a client's identity could fall within the ambit of the privilege when the client had contacted the attorney in order to "aid [in] a public purpose to expose wrongdoing and not . . . to conceal wrongdoing." *Id.* at 218, 168 N.E.2d at 661, 203 N.Y.S.2d at 839.

[194] *See In re* Kaplan, 8 N.Y.2d 214, 219, 168 N.E.2d 660, 662, 203 N.Y.S.2d 836, 839 (1960).

[195] 47 N.Y.2d at 222-23, 391 N.E.2d at 971-72, 417 N.Y.S.2d at 888-89. The *Jacqueline F.* Court balanced the client's intent, which it found to be solely to hinder the enforcement of the custody decree, *id.* at 222, 391 N.E.2d at 972, 417 N.Y.S.2d at 889, with the other circumstances of the case, and determined that it could not tolerate the client's use of the privilege for an unlawful purpose where the welfare of the child was at stake. *Id.* at 222-23, 391 N.E.2d at 972, 417 N.Y.S.2d at 889.

[196] 47 N.Y.2d at 222-23, 391 N.E.2d at 972, 417 N.Y.S.2d at 889. Where the custody of a child is concerned, the courts frequently emphasize the State's *parens patriae* interest and tend to favor full disclosure. *Id.* In Tierney v. Flower, 32 App. Div. 2d 392, 302 N.Y.S.2d 640 (2d Dep't 1969), the plaintiff brought a proceeding to compel the disclosure of the identity of the couple who had privately adopted her child as part of her effort to revoke her prior written consent to the adoption. *Id.* at 394-95, 302 N.Y.S.2d at 642-43. In affirming the lower court's disclosure order, the appellate division held that a claim of confidential privilege should not be sustained where the "safe and proper custody of a child is involved." *Id.* at 395, 302 N.Y.S.2d at 643. The *Tierney* court declared that the "overriding concern with the welfare of the infant as a ward of the court overbalances any interest of technical claim . . . with respect to the confidential relationship between him and his clients." *Id.* at 395, 302 N.Y.S.2d at 643; *accord,* Anonymous v. Anonymous, 59 Misc. 2d 149, 298 N.Y.S.2d 345 (Sup. Ct. Nassau County 1969); Falkenhainer v. Falkenhainer, 198 Misc. 29, 97 N.Y.S.2d 467 (Sup. Ct. Nassau County 1950).

yield. Caution should be exercised, however, where less drastic means for aquiring the information are at hand or the interests of a child are not at stake, notwithstanding the client's intent to hinder the administration of justice. In such a situation, alternative avenues should be pursued to avoid an unwarranted intrusion into the confidentiality between a lawyer and his client.[197]

In addition, it is submitted that the majority correctly determined that CPLR 3118 does not remove a client's address from the scope of the attorney-client privilege.[198] Rather, it is suggested that CPLR 3118 stands as no bar to the invocation of the privilege, since the express language of the statute is directed at the parties to the action, not their attorneys.[199] In the course of the litigation, the client controls the decision whether to release his address upon demand or incur the sanctions available to compel compliance with the statute.[200] Once the action has terminated, however, disclosure

[197] It is submitted that the devices provided in the CPLR for enforcing judgments should be utilized instead of violating the attorney-client privilege. *See* CPLR arts. 51 & 52; notes 200 & 201 *infra.*

[198] It would also appear Judge Jasen's statement that the common-law background of CPLR 3118 did not consider the client's address as being outside the scope of the privilege in all circumstances is consistent with prior case law. These cases generally held that the only situation where the client's address was not protected by the privilege was during the pendency of an action to which the client was a party and disclosure was required in the interests of justice. *In re* Trainor, 146 App. Div. 117, 130 N.Y.S. 682 (1st Dep't 1911); Neugass v. Terminal Cab Corp., 139 Misc. 699, 249 N.Y.S. 631 (Sup. Ct. N.Y. County 1931); Walton v. Fairchild, 4 N.Y.S. 552 (N.Y.C. Civ. Ct. N.Y. County 1889). For example, a client's address received the benefit of the privilege once the attorney-client relationship had ceased because the attorney was bound by the "confidence imposed by the original relation." *In re* Trainor, 146 App. Div. 117, 120, 130 N.Y.S. 682, 684 (1st Dep't 1911); Walton v. Fairchild, 4 N.Y.S. 552, 552 (N.Y.C. Civ. Ct. N.Y. County 1889). In addition, the attorney could not be compelled to reveal his client's address in order to facilitate future lawsuits against the client. Neugass v. Terminal Cab Corp., 139 Misc. 699, 702, 249 N.Y.S. 631, 634 (Sup. Ct. N.Y. County 1931); Walton v. Fairchild, 4 N.Y.S. 552, 552 (N.Y.C. Civ. Ct. N.Y. County 1889). A client's identity or address has been held to be privileged where such information was superfluous to the substantive basis of the suit. *See In re* Stolar, 397 F. Supp. 520 (S.D.N.Y. 1975).

[199] CPLR 3118 (1970); note 159 *supra.*

[200] *See* 47 N.Y.2d at 228-29, 391 N.E.2d at 975-76, 417 N.Y.S.2d at 893 (Fuchsberg, J., dissenting); CPLR 3126 (1970 & Supp. 1979-1980); SIEGEL § 365, at 461; 3A WK&M § 3118.02. A common denominator of the provisions available under the CPLR to compel compliance with CPLR 3118 is that all sanctions are directed against the parties, not their attorneys. For example, CPLR 3124 provides, *inter alia,* that application may be made to the court to compel compliance with a "demand for address under rule 3118." CPLR 3124 (1970); *see* CPLR 3124, commentary at 625-33 (1970). CPLR 3126 empowers the court to impose civil sanctions upon parties who refuse to obey disclosure orders or who willfully disregard compliance with disclosure requests. *See* CPLR 3124, commentary at 631-32 (1970). These devices are limited to the pending action and terminate upon its completion. CPLR 3102(d) (1970). CPLR 5104 (1978), however, permits the issuance of a civil contempt order upon parties who refuse to comply with the enforcement of a judgment. This provision is augmented by other

efforts directed at the former party's attorney would transfer the burden to counsel alone either to comply and breach a confidence or not comply and personally face a contempt order.[201] It is suggested that it is unlikely that the statute contemplated such a result.

It is submitted that the *Jacqueline F.* majority neither derogated the principles upon which the attorney-client privilege is based nor diluted the strength of the privilege itself. Nevertheless, in the absence of potential harm to a child's welfare, it is suggested that the privilege should not be disregarded even where nondisclosure of the client's address may serve to evade a court order. Conceivably, resort to available enforcement procedures in that instance may be sufficient to compel disclosure.[202]

Annette L. Guarino

GENERAL MUNICIPAL LAW

GML § 50-e: Time period for claimant to apply for permission to serve late notice of claim not tolled by infancy under CPLR 208

Where a notice of claim is required by statute[203] as a condition

---

devices available in article 52 of the CPLR for the enforcement of money judgments. *See, e.g.*, CPLR 5222, 5251 (1978).

[201] *See* CPLR 5104 (1978); SIEGEL §§ 482-483, at 644-46. With respect to the enforcement of child custody decrees, the contempt remedy is available to "uphold judicial process and the reasonable expectations of those who turn to it." *Id.* § 481, at 645; *see* People *ex rel.* Feldman v. Warden, 46 App. Div. 2d 256, 362 N.Y.S.2d 171 (1st Dep't 1974), *aff'd mem.*, 36 N.Y.2d 846, 331 N.E.2d 631, 370 N.Y.S.2d 913 (1975) (foster mother who willfully refused to produce child in custody proceeding, with ability to do so, incarcerated for contempt until performance of act); SIEGEL, at 644 n.24.

[202] *See* notes 196, 200 & 201 *supra*.

[203] The primary purpose of modern notice of claim statutes is to permit prompt and efficient investigation of claims against municipalities. *See, e.g.*, Beary v. City of Rye, 44 N.Y.2d 398, 412-13, 377 N.E.2d 453, 458, 406 N.Y.S.2d 9, 13-14 (1978); Adkins v. City of New York, 43 N.Y.2d 346, 350, 372 N.E.2d 311, 312, 401 N.Y.S.2d 469, 471 (1977); Board of Educ. v. Heckler Elec. Co., 7 N.Y.2d 476, 483, 166 N.E.2d 666, 669, 199 N.Y.S.2d 649, 653 (1960). Although the scope of section 50-e is limited to tort suits, contract actions against municipalities may also entail the mandatory service of a timely notice of claim. *See, e.g.*, Flanagan v. Board of Educ., 63 App. Div. 2d 1013, 406 N.Y.S.2d 503 (2d Dep't 1978), *rev'd on other grounds*, 47 N.Y.2d 613, 393 N.E.2d 991, 419 N.Y.S.2d 917 (1979); Shulga v. Lewin, 415 N.Y.S.2d 765 (Civ. Ct. Kings County 1979); CPLR 9802; N.Y. EDUC. LAW § 3813(1) (McKinney Supp. 1978-1979); N.Y. LOCAL FIN. LAW § 85.10 (McKinney Pam. 1971-1979); N.Y. TOWN LAW § 65(3) (McKinney 1965); NEW YORK, N.Y. ADMIN. CODE ch. 16, § 394a-1.0 (1976). If there is no express statutory provision, service of a notice of claim is not a pre-

precedent[204] to the commencement of a tort action against a public corporation, section 50-e of the General Municipal Law mandates that the notice be served within 90 days from the time the cause of action accrues.[205] Prior to the amendment of subdivision 5 of section 50-e in 1976, courts had discretion to grant leave to serve a late notice only when the application was made within 1 year of the accrual of the plaintiff's claim, the 1-year period not subject to tolling by reason of a claimant's infancy.[206] As amended, the subdi-

---

requisite to the maintenance of an action. *See* Meed v. Nassau County Police Dep't, 70 Misc. 2d 274, 332 N.Y.S.2d 679 (Sup. Ct. Nassau County 1972).

The constitutionality of notice of claim statutes in general, and as applied to infants, has been repeatedly upheld. *See* Brown v. Board of Trustees, 303 N.Y. 484, 104 N.E.2d 866 (1952); MacMullen v. City of Middletown, 187 N.Y. 37, 79 N.E. 863 (1907); Paulsey v. Chaloner, 54 App. Div. 2d 131, 388 N.Y.S.2d 35 (3d Dep't 1976), *appeal dismissed mem.*, 41 N.Y.2d 900, 362 N.E.2d 641, 393 N.Y.S.2d 1029 (1977); Guarrera v. A.L. Lee Memorial Hosp., 51 App. Div. 2d 867, 380 N.Y.S.2d 161 (4th Dep't), *appeal dismissed*, 39 N.Y.2d 942, 386 N.Y.S.2d 1029 (1976).

[204] A condition precedent is an act or event, other than a lapse of time, which must exist or occur before a duty of immediate performance of a promise arises. RESTATEMENT (SECOND) OF CONTRACTS § 250 (Tent. Draft Nos. 1-7, 1973); RESTATEMENT OF CONTRACTS § 250(a) (1932). As applied to tort claims under § 50-e of the General Municipal Law, service of a timely notice of claim is required before the municipal entity "performs its promise" to allow suits against itself. *See* Brown v. Board of Trustees, 303 N.Y. 484, 485, 104 N.E.2d 866, 869 (1952). Ordinarily, a failure to perform a condition precedent may be excused. S. WILLISTON, CONTRACTS § 676 (3d ed. 1961); *see* Winter v. City of Niagara Falls, 190 N.Y. 198, 204, 82 N.E. 1101, 1102 (1907). Types of excuses include impossibility, waiver, and estoppel. S. WILLISTON, *supra*. In *Winter*, the Court doubted that the requirement of serving a notice of claim could be waived by the authorities. 190 N.Y. at 204, 82 N.E. at 1103. Recently, however, the Court of Appeals held that a defendant may be estopped from asserting a defense of untimely service of a notice of claim where a claimant changes his position to his detriment in justifiable reliance on the actions of a governmental subdivision. Bender v. New York City Health & Hosps. Corp., 38 N.Y.2d 662, 668, 345 N.E.2d 561, 564, 382 N.Y.S.2d 18, 20-21 (1976), *rev'g* 46 App. Div. 2d 898, 361 N.Y.S.2d 939 (2d Dep't 1974), *and modifying* Economou v. New York City Health & Hosps. Corp., 47 App. Div. 2d 877, 366 N.Y.S.2d 644 (1st Dep't 1975); *see* Scibilia v. City of Niagara Falls, 44 App. Div. 2d 757, 757, 354 N.Y.S.2d 229, 230 (4th Dep't 1974); Johnson v. Board of Educ., 33 App. Div. 2d 647, 647, 305 N.Y.S.2d 89, 90-91 (4th Dep't 1969).

[205] Section 50-e(1)(a) of the General Municipal Law provides in pertinent part:

> In any case founded upon tort where a notice of claim is required by law as a condition precedent to the commencement of an action . . . against a public corporation . . . the notice of claim shall comply with and be served in accordance with the provisions of this section within ninety days after the claim arises.

N.Y. GEN. MUN. LAW § 50-e(1)(a) (McKinney 1977).

Section 50-e itself does not require service of a notice of claim as a condition precedent to maintaining a tort action against a public corporation. Preliminary notices of claim are mandated by numerous general, special and local laws scattered throughout the state. For a partial compilation of such laws, see Graziano, *Recommendations Relating to Section 50-e of the General Municipal Law and Related Statutes*, TWENTY-FIRST ANN. REP. N.Y. JUD. CONFERENCE, 358, 420-27 (1976). Section 50-e was enacted to provide uniform time and procedural requirements for these statutes. Martin v. School Board, 301 N.Y. 233, 235, 93 N.E.2d 655, 655 (1950).

[206] The requirement under the prior law that leave to serve a late notice of claim could