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Evidence--Attorney-Client Privilege--The Identity of the Client

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heavy emphasis on corporate suffrage, its effort to ease the small plaintiff's financial burden, and its not unfavorable reference to the Laurenzano approach to causation,[33] that with the proper facts before it, the Supreme Court will eventually hold that materiality of the proxy defect establishes a cause of action in all section 14(a) fraud cases.

Steve Hixson

EVIDENCE—ATTORNEY-CLIENT PRIVILEGE—THE IDENTITY OF THE CLIENT. —Petitioner, an attorney, was called as a witness in a criminal trial involving the alleged theft of a typewriter by Williams. Petitioner had been the intermediary in the return of the typewriter to the police. While on the witness stand, he testified that someone had phoned him and employed him to deliver the typewriter to the police. He refused, however, to reveal the name of the individual who employed him, asserting that this information was a privileged communication which he should not be compelled to disclose. He was found in contempt of court[1] because of this refusal, and sought a writ of prohibition[2] restraining enforcement of the contempt rule. *Held:* Petition denied. The identity of a person who employed an attorney to deliver stolen property to the police is not privileged and therefore must be disclosed by the attorney. *Hughes v. Meade*, 453 S.W.2d 538 (Ky. 1970).

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[33] — U.S. at —, 90 S. Ct. at 622 n.7.

[1] The difference between civil and criminal contempt is well established. A commitment or fine for civil contempt is to coerce the witness. The sentence for criminal contempt is not intended to coerce, but rather as a punishment to vindicate the Court's authority. Tillotson v. Boughner, 350 F.2d 663 (7th Cir. 1965).
In the instant case, the Court of Appeals classified the contempt as civil. 453 S.W.2d at 542.

[2] Writs of prohibition will issue from the Court of Appeals to prohibit actions by inferior courts where, although proceeding within their jurisdiction, they are exercising or are about to exercise it erroneously and there exists no adequate remedy by appeal or otherwise, and great injustice and irreparable injury would result to the applicant if they should do so. Stafford v. Bailey, 301 Ky. 155, 191 S.W.2d 218 (1945), Litteral v. Woods, 223 Ky. 582, 4 S.W.2d 395 (1928). Appellant attorney, since he was not a party and did not represent the defendant, had no adequate remedy by appeal and once the identity of his client is revealed the harm is irreparable. KY. R. CIV. P. 81 Provides:

> Relief heretofore available by remedies of . . . prohibition . . . may be obtained by appropriate action or by appropriate motion, for injunction [or otherwise]. . . .

> While no general incompetency arises from the status of attorney at law, and an attorney may be called as a witness in a cause either for or against his client, the scope of the testimony which he is permitted to relate from the witness stand is limited by [the attorney-client privilege]. . . .[3]

The Kentucky Court of Appeals had not, before the instant case, decided whether the identity of a client is within the attorney-client privilege and had only summarily dealt with the history, policy and application of the privilege itself.[4] However, the privilege is provided for by statute in Kentucky:

> No attorney shall testify concerning a communication made to him, in his professional character, by his client, or his advice thereon, without the client's consent. . . .[5]

This statute is an embodiment of the common law[6] privilege and therefore the history, policy and application of the common law privilege are essential in laying a foundation for studying the legal problems posed in *Hughes.*

The attorney-client privilege, dating back to the reign of Elizabeth I of England, is the oldest of the privileges for confidential communications.[7] The theory and policy of the privilege have undergone radical changes through its development to its present status.[8] At first the privilege was given on the objective theory that the honor of the attorney, under a solemn pledge of secrecy to his clients, exempted him from testimonial compulsion. Also, there was a great reluctance on the part of judges to compel anyone to violate a confidence. This approach died in the last quarter of the 1700's and the privilege might have died with it except that a new theory subjectively based on the client's needs was propounded. This theory, still accepted today, is based on concepts of social policy[9] and human dignity[10] and stands

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[3] 58 AM. JUR. *Witnesses* § 460 (1948).

[4] *See* 19 KENTUCKY DIGEST *Witnesses* Key 197-206 (1946).

[5] KY. REV. STAT. § 421.210(4) (1952).

[6] Dunn v. Commonwealth, 350 S.W.2d 709 (Ky. 1961); Cummings v. Commonwealth, 221 Ky. 301, 298 S.W. 943 (1927).

[7] For a more extensive coverage of the history of the privilege *see* People v. Warden, 150 Misc. 714, 270 N.Y.S. 362 (1934); ALI MODEL CODE OF EVIDENCE *Foreword* (1942); Annot., 16 A.L.R. 3d 1050 (1967); 58 AM. JUR. *Witnesses* §§ 460-62 (1948); MCCORMICK, EVIDENCE [hereinafter cited as MCCORMICK] § 91 (1954); 8 J. WIGMORE, EVIDENCE § 2290 (McNaughton rev. 1961); Gardner, *A Reevaluation of the Attorney-Client Privilege,* 8 VILL. L. REV. 279, 288 (1963) (a second installment of this article begins at 447, *see* note 10 *infra*); Radin, *The Privilege of Confidential Communication Between Lawyer and Client,* 16 CALIF. L. REV. 487 (1928); Comment, 7 N.Y.L.F. 97, 99 (1961).

[8] *See* sources cited in note 7 *supra.*

[9] The bases of the social policy justification for the privilege are threefold: (1) The client's apprehension that confidential disclosures can be elicited from

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in the interest of the administration of justice.[11] It is that an effective attorney-client relationship requires the confidence of both parties; the client must be free from the apprehension that their communications might be forced from the attorney on the witness stand. The privilege is designed to encourage the client to make full disclosure of the facts of his legal problem to the attorney.[12] The crux of criticism of the attorney-client privilege, as with all the personal privileges, is that it suppresses the truth. This fact, coupled with the policy for promoting full disclosure, results in a general application of the privilege which is firm, but narrow. In *Hughes*, the Court adopts by reference[13] Wigmore's summary of the validity of this policy:

> Its benefits are all indirect and speculative; its obstruction is plain and concrete. . . . It is worth preserving for the sake of a general policy, but it is nonetheless an obstacle to the investigation of the truth. It ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle.[14]

Wigmore has concisely phrased the following general principle to contain all the common law essentials of the attorney-client privilege:

> (1) Where any 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.[15]

The Court of Appeals in *Hughes*[16] adopts the above statement along with the more detailed one found in *United States v. United Shoe Machinery Corporation*[17] which reads:

(Footnote continued from preceding page)
his attorney. (2) Without the privilege a disreputable lawyer would be the only one to whom clients would confidentially make disclosure since, for a large enough retainer, he would assure his client that he would not testify concerning any communication made to him. (3) There is a general unwillingness to allow a lawyer to be a witness. Comment, 28 U. CHI. L. REV. 533, 534 (1961).

[10] The privileges can be justified only on the basis of a maturing social ethos which has given rise to the concept of human dignity and inviolate personality. Gardner, *supra* note 7, at 512.
See also Gardner, *Agency Problems in the Attorney-Client Privilege*, 42 U. DET. L.J. 1 (1964).

[11] 58 AM. JUR. *Witnesses* § 462 (1948).

[12] For criticism of this policy *see* ALI MODEL CODE OF EVIDENCE *Foreword* (1942); 8 J. WIGMORE, EVIDENCE § 2291 (McNaughton rev. 1961).

[13] 453 S.W.2d at 540.

[14] 8 J. WIGMORE, EVIDENCE § 2291 (McNaughton rev. 1961).

[15] *Id.*

[16] 453 S.W.2d at 540.

[17] 89 F. Supp. 357 (D. Mass. 1950).

> The privilege applies only if (1) the asserted holder of the privilege is sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.[18]

Even under these restrictions the attorney-client privilege remains a strong one.[19]

The question of whether the client's identity is even eligible for consideration as being privileged under the aforementioned standards has been the subject of enough decisions in other jurisdictions that a general or majority rule and certain exceptions have been established. The general rule is that the fact of the attorney's employment and the identity of the person employing him are not privileged since they are not the proper subject matter for a confidential[20] communication.[21] Four reasons have been promulgated to support this general rule:

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[18] *Id.* at 358.

[19] The privilege owes its present broad scope and strong hold to a number of factors among which are: the thought patterns of a conservative profession, with ingrained tendencies to follow habit unquestioningly and precedent with blind devotion; the strong interest which certain special groups have in maintaining the privileged position which they have achieved; and, the innate desire of man to maintain secrecy in his personal affairs. Gardner, *Agency Problems in the Attorney-Client Privilege,* 42 U. DET. L.J. 1, 556-57 (1964).

[20] However, one writer has stated that ". . . identity, like any other communication is confidential when it is intended to be." Steinhaus, *The Attorney-Client Privilege . . . Recent Invasions,* 14 LA. B.J. 9, 11 (1966).

[21] Chirac v. Reinicker, 24 U.S. (11 Wheat.) 280 (1826); NLRB v. Harvey, 349 F.2d 900 (4th Cir. 1965); Colton v. United States, 306 F.2d 633 (2d Cir. 1962); United States v. Pape, 144 F.2d 778 (2d Cir. 1944); Goddard v. United States, 131 F.2d 220 (5th Cir. 1942); Mauch v. Comm'r, 113 F.2d 555 (3d Cir. 1940); Tomlinson v. United States, 93 F.2d 652 (D.C. Cir. 1937); United States v. Lee, 107 F. 702 (C.C.E.D.N.Y. 1901); Gretsky v. Miller, 160 F. Supp. 914 (D. Mass. 1958); Harris v. State, 281 Ala 622, 206 So. 2d 868 (1968); *Ex parte* Enzor, 270 Ala. 254, 117 So. 2d 361 (1960); Dunipace v. Martin, 73 Ariz. 415, 242 P.2d 543 (1952); Brunner v. Superior Court, 51 Cal. 2d 616, 335 P.2d 484 (1959); Fowler v. Sheridan, — Ga. —, 121 S.E. 308 (1924); People v. Warden, 150 Misc. 714, 270 N.Y.S. 362 (1934); *In re* Shawmut Mining Co., 94 App. Div. 156, 87 N.Y.S. 1059 (1904); McDonald v. Berry, 243 S.C. 453, 134 S.E.2d 392 (1964); ALI MODEL CODE OF EVIDENCE *Foreword* (1942); Annot., 16 A.L.R.3d 1050 (1967); 58 AM. JUR. *Witnesses* § 507 (1948); 97 C.J.S. *Witnesses* § 283(e) (1957); 8 J. WIGMORE, EVIDENCE § 2313 (McNaughton rev. 1961); MCCORMICK § 94; Steinhaus, *supra* note 20; Comment, 13 MERCER L. REV. 434 (1962); Comment, 59 MICH. L. REV. 791 (1961); Comment, 7 N.Y.L.F. 97 (1961; Comment, 13 S.C.L.Q. 280 (1960); Comment, 39 TEX. L. REV. 512 (1961); Comment, 28 U. CHI. L. REV. 533 (1961); Comment, 47 VA. L. REV. 126 (1961).

(1) the privilege presupposes the attorney-client relationship; therefore, it does not attach to its creation;[22] (2) where the undisclosed client is a party to the action the opposing party has the right to know his adversary;[23] (3) the court has the right to know that there actually is a client and, therefore, an attorney-client relationship;[24] (4) the identity of the client was not a confidence which the privilege was designed to protect; it was designed to protect only those statements of the client for the purpose of seeking advice from his counsel.[25] The general rule is often applied perfunctorily. It is interesting to note that only the fourth of the four reasons supporting the general rule looks to the policy behind the attorney-client privilege.

The exceptions to the general rule critically hinge on the facts and circumstances of the cases to which they are applied.[26] The exceptions can be broadly divided into three categories: (1) situations where disclosing the client's name would serve no necessary purpose, but on the contrary would make public the very fact as to which the client desired secrecy to which he was entitled, especially where the client's purpose in consulting an attorney was to the aid of a public purpose, for example, the attorney employed to give information to investigative hearings;[27] (2) the disclosure of the client's identity would necessarily reveal previous connections, conduct or transactions of the client which are themselves within the privilege;[28] (3) the

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[22] Chirac v. Reinicker, 24 U.S. (11 Wheat.) 280 (1826); *Ex parte*, Enzor, 270 Ala. 254, 117 So. 2d 361 (1960); Annot., 16 A.L.R.3d 1050 (1967); 58 AM. JUR. *Witnesses* § 507 (1948); 8 J. WIGMORE, EVIDENCE § 2313 (McNaughton rev. 1961); Comment, 59 MICH. L. REV. 791 (1961); Comment, 13 S.C.L.Q. 280 (1960).

[23] This reason is more appropriate in civil cases. Mauch v. Comm'r, 113 F.2d 555 (3d Cir. 1940); Annot., 16 A.L.R.3d 1050 (1967); 58 AM. JUR. *Witnesses* § 507 (1948); 8 J. WIGMORE, EVIDENCE § 2313 (McNaughton rev. 1961); Comment, 10 BUFF. L. REV. 364 (1961); Comment, 39 TEX. L. REV. 512 (1961); Comment, 28 U. CHI. L. REV. 533 (1961).

[24] Otherwise, it is felt, attorneys might conceal a multitude of information under the claim of privilege, without having to show that the alleged client ever, in fact existed. Annot., 16 A.L.R.3d 1050 (1967).
See also Chirac v. Reinicker, 24 U.S. (11 Wheat.) 280 (1826); United States v. Lee, 107 F. 702 (C.C.E.D.N.Y. 1901); People v. Warden, 150 Misc. 714, 270 N.Y.S. 362 (1934); 58 AM. JUR. *Witnesses* § 507 (1948); Comment, 10 BUFF. L. REV. 364 (1961); Comment, 39 TEX. L. REV. 512 (1961).

[25] People v. Warden, 150 Misc. 714, 270 N.Y.S. 362 (1934); MCCORMICK § 94.

[26] Baird v. Koerner, 279 F.2d 623 (9th Cir. 1960); 8 J. WIGMORE, EVIDENCE § 2313 (McNaughton rev. 1961).

[27] *In re* Kaplan, 8 N.Y.2d 214, 168 N.E.2d 660, 203 N.Y.S.2d 836 (1960); Comment, 10 BUFF. L. REV. 364 (1961); Comment, 46 IOWA L. REV. 904 (1961); Comment, 7 N.Y.L.F. 92 (1961).

[28] Tillotson v. Boughner, 350 F.2d 663 (7th Cir. 1965); NLRB v. Harvey, 349 F.2d 900 (4th Cir. 1965); Colton v. United States, 306 F.2d 633 (2d Cir. 1962); Baird v. Koerner, 279 F.2d 623 (9th Cir. 1960); United States v. Pape, 144 F.2d 778 (2d Cir. 1944); Tomlinson v. United States, 93 F.2d 652 (D.C. Cir.

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name of the client is material only for the purpose of showing an acknowledgement of guilt on the part of such client of the very offenses on account of which the attorney was employed.[29] An argument closely connected to the third exception is that the attorney might, by disclosing the identity of the client, incriminate his client thus allowing the prosecution to circumvent the client's constitutional protection against self-incrimination. It is well settled, however, that the privilege against self-incrimination is the client's alone and may not be claimed for him by another witness.[30] Even considering the above exceptions, the identity of the client is not, in and of itself, a matter within the attorney-client privilege.[31]

In discussing the Court's decision in the *Hughes* case, it is important to emphasize two facts. First of all, Hughes was not Williams' defense attorney but merely a witness in the case, and secondly, the extent of his employment was his part in the delivery of the stolen property to the police. The Court, because of these facts, found that Hughes was, although an attorney by profession, a mere "agent or conduit for the delivery of property which was completely unrelated to legal representation."[32] Thus, although the Court favorably discussed the general rule that the identity of a client is not a privileged communication, they did not directly apply it to the fact situation in Hughes. In fact, except for a summary of the authority on the subject, the question of disclosing the client's identity played no actual part in this facet of the decision. It is solely grounded on the fact that Hughes performed no legal service and was not acting in his professional capacity as an attorney.[33]

However, even more important to the Court was the fact that if they granted the writ of prohibition, the effect would be to "conceal

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1937); *In re* Kaplan, 8 N.Y.2d 214, 168 N.E.2d 660, 203 N.Y.S. 2d 836, (1960); *In re* Shawmut Mining Co., 94 App. Div. 156, 87 N.Y.S. 1059 (1904); McDonald v. Berry, 243 S.C. 453, 134 S.E.2d 392 (1964).

[29] Baird v. Koerner, 279 F.2d 623 (9th Cir. 1960); *Ex parte* Enzor, 270 Ala. 254, 117 So.2d 361 (1960); *Ex parte* McDonough, 170 Cal. Rptr. 230, 149 P. 566 (1915); 97 C.J.S. *Witnesses* § 283(e) (1957); Comment, 47 VA. L. REV. 126.

[30] *See, e.g.*, State v. Olwell, 64 Wash. 2d 828, 394 P.2d 681 (1964); U.S. CONST. amend. V.

[31] 58 AM. JUR. *Witnesses* § 507 (1948).

[32] 453 S.W.2d at 542.

[33] NLRB v. Harvey, 349 F.2d 900 (4th Cir. 1965); Colton v. United States, 306 F.2d 633 (2d Cir. 1962); Olender v. United States, 210 F.2d 795 (9th Cir. 1954); Monticello Tobacco Co. v. Am. Tobacco Co., 12 F.R.D. 344 (E.D.N.Y. 1952); United States v. United Shoe Mach. Corp., 89 F. Supp. 357 (D. Mass. 1950); Hansen v. Janitschek, 31 N.J. 545, 158 A.2d 329 (1960); Michel Plumbing and Heating Corp. v. Randall Ave. Theatre Corp., 179 Misc. 867, 39 N.Y.S.2d 830 (1943); Comment, 13 ALA. L. REV. 196 (1961).

transactions involving stolen property."[34] Here again, the Court went back to the general attorney-client privilege standards and side-stepped the identity issue in favor of the well recognized exception to the privilege that holds it will not be sustained where the advice sought is for the purpose of committing or continuing an illegal act.[35] In support of its decision, the majority cites two Kentucky cases[36] to the effect that an attorney is not acting in his professional capacity when the communications are made to him in seeking to perpetuate or conceal past wrongdoing. The Court as a policy matter concluded that under the circumstances there was in fact no attorney-client relationship and, therefore, no privilege. Hughes was required to disclose the identity of the person who employed him to deliver the typewriter to the police because the Court felt to grant the privilege would "shield" an undesirable transaction.

It is unfortunate that the facts of the case or the approach of the Court were not different. Had Hughes at the time of the delivery been Williams' defense attorney with respect to the theft of the typewriter, or if the Court viewed Hughes as an agent[37] for Williams' defense attorney, the decision might have required the Court to deal with the identity issue as a matter of first impression in Kentucky, since, because of the delivery of stolen property, Hughes' "client" would obviously be substantially prejudiced by the disclosure of the client's identity. Such a disclosure could well be "the link that could form the chain of testimony necessary to convict."[38] The always imminent dilemma which confronts attorneys when ordered by the court to disclose information given to them in confidence by a client makes it important that they be given some guidelines. The attorney as an officer of the court is bound to obey the court's order, but he is also bound by the attorney-client privilege not to disclose the client's privileged communications.[39] The relative consequences of failure to

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[34] 453 S.W.2d at 542.

[35] United States v. United Shoe Mach. Corp., 89 F. Supp. 357 (D. Mass. 1950); 58 AM. JUR. *Witnesses* §§ 515-16 (1948); 8 J. WIGMORE, EVIDENCE § 2298 (McNaughton rev. 1961); MCCORMICK § 99.

[36] Fidelity-Phoenix Fire Ins. Co. v. Hamilton, 340 S.W.2d 218 (Ky. 1960); Standard Fire Ins. Co. v. Smithhart, 183 Ky. 679, 211 S.W. 441 (1919). *See also* Cummings v. Commonwealth, 221 Ky. 301, 298 S.W. 943 (1927).

[37] The privilege includes all persons who act as the attorney's agents. The assistance of agents is vital to the rendering of legal services. 58 AM. JUR. *Witnesses* § 2301 (McNaughton rev. 1961).

[38] Baird v. Koerner, 279 F.2d 623, 633 (9th Cir. 1960).

[39] The attorney as an officer of the court is bound to obey the court's order, but he is also bound by the attorney-client privilege and ethical considerations not to disclose the client's privileged information. He therefore faces a dilemma when ordered to disclose information which is arguably privileged. He must either

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fulfill these duties must be considered. The attorney faces a contempt ruling or he must give the information and perhaps lose his client's trust,[40] and impair the ability of all defense attorneys to acquire a full account of their clients' situations.

Had the Court found an attorney-client relation so that it would have had to consider whether the privilege in Kentucky applied to protect the identity of Hughes' "client" in these circumstances, the decision would have had to recognize that by disclosing the identity of his client, Hughes would thereby link him with the stolen property. The disclosure would in any event be not only of the client's identity, but also would lead to inferences of the substance of the collateral communications he made to Hughes concerning the stolen property. There is no doubt that these collateral communications were confidential for if the client had known Hughes would be compelled to disclose his identity it would not have benefited him to return the stolen property through Hughes. It would therefore have been necessary for the Court to decide whether to accept the exception that extends the privilege to the client's identity where its disclosure is material only to establish the client's guilt. In making this decision, the policy behind the privilege must be weighed[41] against the policy of full disclosure of all relevant facts.[42] Both policies are based in the

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comply with the order, with resultant harm to his client, or withhold it and risk imprisonment and/or fine for contempt. ABA CODE OF PROFESSIONAL RESPONSIBILITY Disciplinary Rule 4-101 (1969); ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 268 (1945); Note, *The Attorney-Client Privilege: The Remedy of Contempt*, 1968 WIS. L. REV. 1192; Comment, 3 DUQ. L. REV. 239 (1965); Comment, 45 WASH. L. REV. 181 (1970); Comment, 25 WASH. & LEE L. REV. 133 (1968). Some cases, however, indicate that the attorney should perfunctorily follow the court's order; therefore, he is not in a dilemma. Harris v. State, 281 Ala. 622, 206 So.2d 868 (1968); *In Re Selser*, 15 N.J. 393, 105 A.2d 395 (1954); *Ex Parte* Lipscomb, 111 Tex. 409, 239 S.W. 1101 (1922).

[40] It seems few attorneys submit themselves to contempt because of the "Draconian" sanctions they would face; however, it does provide an immediate avenue for appeal. Its use should be made more often, especially where disclosure works irreparable harm. The courts, therefore, where refusal to disclose is based on a reasonable argument that the information is privileged, should not fine nor imprison the attorney, at least until the appeal has been prosecuted; and, perhaps even then, they should vacate the order and absolve the attorney even if the order to disclose was correct. Dike v. Dike, 75 Wash. Dec. 2d 1, 448 P.2d 490 (1968); Note, 1968 WIS. L. REV., *supra* note 39; Comment, 45 WASH. L. REV. 181 (1970). *Cf.* Sedler & Simeone, *The Realities of Attorney-Client Confidences*, 24 OHIO ST. L.J. 1 (1963).

[41] Several cases recognize the need to balance these two policies with respect to the facts and circumstances of each case. Baird v. Koerner, 279 F.2d 623 (9th Cir. 1960); Sepler v. State, 191 So.2d 588 (Fla. 1966); *In Re* Richardson, 31 N.J. 391, 157 A.2d 695 (1960); Dike v. Dike, 75 Wash. Dec. 2d 1, 448 P.2d 490 (1968); State v. Olwell, 64 Wash. Dec. 2d 868, 394 P.2d 681 (1964).

[42] One who reviews the cases in this area will be struck with the prevailing flavor of chicanery and sharp practice pervading most of the

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administration of justice and the decision should be determined after evaluating the results either policy would bring. Perhaps the best policy consideration to be made in deciding this question is whether the granting of the privilege would tend to discredit the legal profession and deprive it of that public confidence which alone justifies the privilege.[43]

The Court's actual decision seems to indicate that it would be disinclined to grant the privilege even if the facts were changed because it views keeping the client's identity secret as not within the scope of an attorney's professional duty. Here the Court applies a well-accepted limitation on the attorney-client privilege to a situation where its applicability is questionable. The limitation was designed to free the hand of counsel to aid the law in bringing to justice an unscrupulous person who would use the law for nefarious ends. However, "[a]dvice secured in aid of a legitimate defense by the client against a charge of past crimes or past misconduct, even though he is guilty, stands on a different footing and such consultations are privileged."[44] To broaden the limitation is dangerous because it is those communication-revealing facts which tend to disgrace and incriminate the client so that he would be reluctant to disclose to anyone except the most trusted confidant. The client would intend that his lawyer should never reveal these confidences to anyone. "It is here the privilege has its greatest claim to necessity and where it should be guarded most carefully."[45]

Rather than being considered as an act furthering an unlawful purpose,[46] the anonymous delivery of stolen property to the police

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attempts to suppress the proof of professional employment, and the broader solution of a general rule of disclosure seems the one most consonant with the preservation of the high repute of the lawyer's calling. MCCORMICK § 94.

[43] 8 J. WIGMORE, EVIDENCE § 2299 (McNaughton rev. 1961).

[44] MCCORMICK § 99.

[45] Gardner *supra* note 7, at 338.

[46] In considering the unlawful act exception to the attorney-client privilege, improper conduct has been said to include concealing a crime already committed. Sedler & Simeone, *supra* note 40, at 41. However, the answer is not clear even with respect to concealing or disposing of incriminating evidence. ABA COMMITTEE ON PROFESSIONAL ETHICS, OPINIONS, No. 268 (1945); Comment, 3 DUQ. L. REV. 239 (1965); Comment, 25 WASH. & LEE L. REV. 133 (1968). *Contra, In Re* Ryder, 381 F.2d 713 (4th Cir. 1967); Clark v. State, 159 Tex. Crim. 187, 261 S.W.2d 339 (1953); 97 C.J.S. *Witnesses* § 285 (1957). One court has suggested that in order to preserve the attorney-client privilege while still compelling the surrender of evidence to the prosecution, the source of the evidence will not be allowed to be disclosed in the presence of the jury. "The client's privilege is preserved and a balance is reached between these conflicting interests." State v. Olwell, 64 Wash. Dec. 2d 828, 394 P.2d 681, 684 (1964).

would seem more analogous to the tax cases[47] where the anonymity of the client conceals transactions in payment of delinquent taxes which are subject to governmental sanctions. These payments have not been deemed per se to be beyond the scope of the attorney-client privilege. The privilege has been held applicable to these situations because disclosure of the client's identity would lead to governmental investigations. The attorneys who withheld their clients' names in these cases were not considered to be using the purivilege as a cloak for wrongdoing.

The *Hughes* decision seems to lack consideration of the history and policy of the limitation in applying it to the delivery of stolen property to the police. Instead of considering the action of the attorney as a concealment to avoid justice, the Court should recognize the value of the recovery of stolen property. To require disclosure in such circumstances, the Court requires the attorney to incriminate his client to the point that any defense is crippled if not rendered impossible.

W. Stokes Harris, Jr.

CONSTITUTIONAL LAW—SCHOOL DRESS CODES—A STUDENT'S RIGHT TO CHOOSE HIS HAIR STYLE AND LENGTH.—Breen and Anton, students at a public high school, were expelled for wearing hair longer than that allowed by a school regulation.[1] Anton had his hair cut and was readmitted, but Breen refused to comply and was denied readmission. The State Superintendent of Public Instruction, petitioned by the students, found that the proceeding was moot in the case of Anton and that the expulsion was warranted in Breen's case. The Superintendent's finding was not that the student's long hair was disruptive, but that refusal to comply with the regulation was a disruptive influence warranting expulsion. A federal district court ordered the students reinstated,[2] and the school officials appealed. *Held:* Affirmed. The right of a student to wear his hair at any length or in any desired

[47] Tillotson v. Boughner, 350 F.2d 663 (7th Cir. 1965); Baird v. Koerner, 279 F.2d 623 (9th Cir. 1960).

[1] The regulation, similar to haircut regulations found in dress and appearance codes in other schools, stated:

> Hair should be washed, combed and worn so it does not hang below the collar line in back, over the ears on the side and must be above the eyebrows. Boys should be clean shaven; long sideburns are out. 419 F.2d at 1035.

[2] 296 F. Supp. 702 (W.D. Wis. 1969).