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Olds v. State, 302 So. 2d 787 (Fla. 4th Dist. Ct. App. 1974)

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With the *Goss* decision the Court has indeed plunged into a "new thicket." Significant questions remain unanswered, but the Court has at least suggested its willingness to evaluate the due process rights of school-age children. The *Goss* guidelines are far from comprehensive, even as to school suspensions. Though decisions attempting to follow these guidelines may therefore produce disparate results, it seems inevitable that the due process rights of school children will be more closely examined than ever before.

In the final analysis, the *Goss* ruling on disciplinary proceedings may prove to be but a minor facet of a larger problem. *Goss v. Lopez,* for all its caution, may prove to be the first step towards judicial review of educators' discretion in areas far more complex than student suspensions. It is at least clear that teachers and school administrators must begin to consider the due process implications of a wide range of decisions affecting their pupils' futures.

STEPHEN J. KUBIK

Evidence—ATTORNEY-CLIENT PRIVILEGE—PUBLIC DEFENDER NOT AUTOMATICALLY DISQUALIFIED BY ATTORNEY-CLIENT PRIVILEGE FROM EXAMINING WITNESS WHO NEGOTIATES PLEA AND TESTIFIES AGAINST FORMER CODEFENDANT.—*Olds v. State,* 302 So. 2d 787 (Fla. 4th Dist. Ct. App. 1974).

The appellant, an attorney for the public defender's office, was held in contempt of court for attempting to impeach a critical prosecution witness. The conviction resulted from the representation of multiple defendants by the public defender.

V. L. Odums and Clarence Perry had been charged with first degree murder. The public defender was appointed to represent both of them. Appellant represented Perry; another member of the staff was assigned to defend Odums. Odums subsequently pled guilty to a lesser charge. After being sentenced, Odums appeared as a prosecution wit-

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60. Professor Kirp feels a trial-like procedure is necessary to guarantee the due process rights of the student in a classification dispute:

> [E]ffective review of the decision requires both access to the school's records and the opportunity to have the school's determination reviewed by an impartial outside authority. Unless parents can examine test scores, psychological interview writeups, teacher recommendations and the like, the school's decision is not only unchallengeable; it is simply incomprehensible. And unless the parents can obtain the services of a disinterested professional, they may well lack the competence to understand the basis of the school's action.

Kirp, *supra* note 50, at 788-89.

ness at the trial of his former codefendant and identified Perry as the murderer. The trial court found that representation by the public defender of both the witness and the accused created a conflict of interest, and had made the accused's attorney cognizant of information that would otherwise have been unavailable to the defense.[1] The court, seeking to protect the witness' attorney-client privilege, appointed separate counsel for the witness and sharply restricted appellant's efforts to impeach the witness. Appellant's contempt conviction resulted from his continued attempts to impeach Odums.[2] On appeal, the Fourth District Court of Appeal reversed and held, *inter alia,* that the public defender is not automatically disqualified by the attorney-client privilege from examining a witness who negotiates a plea and testifies against his former codefendants.[3]

In *Olds,* the appellate court based its decision on the fact that specific matters on which appellant attempted to impeach the witness were not confidential, and hence not privileged.[4] The court recognized that appellant had been placed in a most difficult position.[5] On one hand, he was charged with representing his client zealously,[6] and doing so required him to attempt to discredit the critical prosecution witness. On the other hand, appellant was bound to respect confidences gained by the public defender's office during its initial representation of the witness.[7] The court indicated the only proper course open to appellant, so long as the public defender's office continued to represent the defendant, was to attempt to impeach the witness without revealing the witness' confidences.[8] Such an approach offers one solution to a situation the court acknowledged was likely to recur under the public defender system.[9] But *Olds* suggests that an attorney attempting to follow such a course of action will encounter considerable practical difficulties —especially when the defense attorney and judge disagree, as in *Olds,* as to which impeaching material arises from the witness' confidences. Such practical difficulties, and uncertainity as to how they will be re-

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1. Olds v. State, 302 So. 2d 787, 788-89 (Fla. 4th Dist. Ct. App. 1974). As to conflicting interests, see note 34 *infra.*

2. 302 So. 2d at 789.

3. *Id.* at 792.

4. *Id.* at 790. The trial court had held the attorney-client privilege precluded proof of such matters as prior statements of the witness made to or in the presence of third parties, and the public record of the witness' plea. *Id.* As to the requirement of confidentiality, see note 17 and accompanying text *infra.*

5. 302 So. 2d at 791.

6. *Id. See* FLA. CODE OF PROFESSIONAL RESPONSIBILITY, CANONS 6, 7.

7. 302 So. 2d at 791. *See* FLA. CODE OF PROFESSIONAL RESPONSIBILITY, CANONS 4, 9.

8. 302 So. 2d at 792. *Cf.* Hutson v. Superior Court, 21 Cal. Rptr. 753 (Ct. App. 1962).

9. 302 So. 2d at 792.

solved, will necessarily hamper the effectiveness of defense counsel and impede the search for truth on which a defendant's liberty rests. The question thus remains whether a former codefendant who turns state's evidence after being sentenced for his role in the crime should ever be able to use the attorney-client privilege as a shield against impeachment.[10]

The attorney-client privilege was recognized as early as the sixteenth century.[11] Early cases justified the privilege on several grounds, including the necessity for free disclosure of information by a client to his attorney.[12] Today, the common law attorney-client privilege is still most often justified on the public policy postulate that persons seeking legal aid should be able to communicate freely with their attorneys without fear that their communications will be disclosed.[13] The privilege is recognized as an exception to the general rule that requires all persons to give complete and truthful testimony concerning matters within their knowledge.[14]

The common law attorney-client privilege is recognized in Florida.[15]

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10. A similar situation will result where one codefendant respresented by the public defender is granted immunity and subsequently testifies in the trial of his former codefendant.

11. *See, e.g.,* Kelway v. Kelway, 21 Eng. Rep. 47 (P.C. 1580); Berd v. Lovelace, 21 Eng. Rep. 33 (P.C. 1577).

12. *E.g.,* in Annesley v. Angesea, 17 How. St. Tr. 1140, 1225 (Ex. 1743), it was argued that (1) business required the privilege—people must be willing to trust "attornies" with their business affairs; (2) the privilege enables the attorney to adequately represent the client by making it safe for the client to communicate freely to him; (3) the attorney is identified with the client and, therefore, the attorney cannot be examined on matters about which the client has no obligation to testify. *See* Noonan, *The Purposes of Advocacy and the Limits of Confidentiality,* 64 MICH. L. REV. 1485 (1966).

13. *See, e.g.,* Hunt v. Blackburn, 128 U.S. 464, 470 (1888) (The attorney-client privilege "is founded upon the necessity, in the interest and administration of justice," that persons seeking legal assistance be free to communicate with their attorney without fear of consequences or apprehension of disclosure.); United States v. Krulewitch, 145 F.2d 76, 79 (2d Cir. 1944) ("The justification for the privilege lies not in the fact of communication, but in the interest of the persons concerned that the subject matter should not become public."); Modern Woodmen of America v. Watkins, 132 F.2d 352 (5th Cir. 1942), *citing* Hunt v. Blackburn, *supra;* State v. Schroeder, 112 So. 2d 257, 261 (Fla. 1959) ("[N]either [the Florida Supreme] Court nor public policy favors either a prosecuting officer or grand jury calling as a witness an attorney for one under investigation for commission of a crime, or an attorney testifying regarding any confidential communications had with his client . . . ."); 8 J. WIGMORE, EVIDENCE § 2291, at 545 (McNaughton rev. 1961).

14. Cafritz v. Koslow, 167 F.2d 749 (D.C. Cir. 1948).

15. Keir v. State, 11 So. 2d 886 (Fla. 1943). *See* Seaboard Air Line Ry. v. Parker, 62 So. 589 (Fla. 1913).

A claim of privilege does not conclusively establish it; rather, the party seeking disclosure has the burden of proving that the information sought is not, in fact, privileged. Leithauser v. Harrison, 168 So. 2d 95, 97 (Fla. 2d Dist. Ct. App. 1964). The proposed Florida Evidence Code, Fla. H.R. 471 § 90.501 (1975), would abolish all common law

However, the privilege is not absolute; it may sometimes be outweighed by the state's interest in the fair administration of justice.[16] The privilege applies to communications made in confidence[17] to a legally certified attorney[18] in the course of the attorney's professional conduct.[19] The privilege belongs to the client[20] and extends to communications between the attorney and client that were made for the purpose of securing professional legal aid or advice.[21]

The client may at any time waive the privilege.[22] It is not necessary that the waiver be express. For example, there is an implied waiver if the client voluntarily reveals the details of the communication with the attorney.[23] Some jurisdictions have held that a witness waives the privilege by voluntarily taking the stand and testifying about the subject matter of the communication made to the attorney.[24] Florida, however, follows the general rule that a client does not waive the privilege merely by becoming a witness and testifying in his own behalf.[25] A waiver has been recognized in some jurisdictions where an accomplice turns state's evidence and testifies against his former codefendants.[26]

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privileges existing in Florida and make the creation of privileges dependent upon legislative action. The proposed Code contains a lawyer-client privilege in § 90.502.

16. Sepler v. State, 191 So. 2d 588 (Fla. 3d Dist. Ct. App. 1966).

17. Wirtz v. Fowler, 372 F.2d 315 (5th Cir. 1966) (the common law attorney-client privilege protects the disclosure of confidential information only); Wilcoxon v. United States, 231 F.2d 384 (10th Cir.), *cert. denied,* 351 U.S. 943 (1956); Schetter v. Schetter, 239 So. 2d 51 (Fla. 4th Dist. Ct. App. 1970).

18. Wartell v. Novograd, 137 A. 776 (R.I. 1927) (The privilege does not extend to a law student, unless the student is acting as an agent of the attorney in a particular transaction.). The proposed Florida Evidence Code, Fla. H.R. 471 § 90.502(1)(a) (1975), would relax the common law requirement that the communication be made to a legally certified attorney by defining a lawyer as "a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation."

19. Keir v. State, 11 So. 2d 886 (Fla. 1943).

20. Hunt v. Blackburn, 128 U.S. 464 (1888). However, the attorney may claim the privilege on behalf of the client. Seaboard Air Line Ry. v. Parker, 62 So. 589 (Fla. 1913).

21. Herrin v. Abbe, 46 So. 183 (Fla. 1908).

22. Hunt v. Blackburn, 128 U.S. 464 (1888). *See* Savino v. Luciano, 92 So. 2d 817 (Fla. 1957); Schetter v. Schetter, 239 So. 2d 51 (Fla. 4th Dist. Ct. App. 1970).

23. Hunt v. Blackburn, 128 U.S. 464 (1888); Sherman v. United States, 261 F. Supp. 522 (D. Hawaii 1966); Knaust Bros., Inc. v. Goldschlag, 34 F. Supp. 87 (S.D.N.Y. 1939); Kantaris v. Kantaris, 169 N.W.2d 824 (Iowa 1969).

24. *See* United States v. Pauldino, 487 F.2d 127 (10th Cir. 1973), *cert. denied,* 415 U.S. 981 (1974); Cleaves v. Kenney, 63 F.2d 682 (1st Cir. 1933); People v. Riordan, 250 P. 190 (Cal. App. 1926); Young v. State, 65 Ga. 525 (1880); State v. Hector, 138 N.W. 930 (Iowa 1912); Bowers v. State, 29 Ohio St. 542 (1876); State v. Hoben, 102 P. 1000 (Utah 1909).

25. *See* Seaboard Air Line Ry. v. Parker, 62 So. 589 (Fla. 1913); State v. White, 19 Kan. 445 (1877); Jones v. State, 3 So. 379 (Miss. 1888); People v. Lynch, 244 N.E.2d 29 (N.Y. 1968); People v. Shapiro, 126 N.E.2d 559 (N.Y. 1955); State v. Pusch, 46 N.W.2d 508 (N.D. 1950).

26. *See* People v. Gallagher, 42 N.W. 1063, 1065 (Mich. 1889) ("[I]n the case of one

Courts have also refused to recognize the privilege in civil cases involving a common attorney and multiple clients;[27] the rationale is that communications in these cases lack the required element of confidentiality.[28]

To meet the mandate of *Gideon v. Wainwright,*[29] the public defender system was established in Florida.[30] Under this system, rather than select a particular attorney to represent an indigent, the court will appoint the local public defender.[31] Since assistant public defenders act

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who has admitted his connection with a crime, testifying against another as his accomplice, not only the people, but the defense, are entitled to the whole story, and to all that the witness has said or done in relation to the offense up to the time of the giving of his testimony, including confidential communications to his attorney."); People v. Bortnik, 184 N.W.2d 275, 276 (Mich. App. 1970) ("[B]oth client and counsel may be compelled to disclose their confidential communications when the client turns state's evidence against a codefendant."); Jones v. State, 3 So. 379 (Miss. 1888); People v. Patrick, 74 N.E. 843 (N.Y. 1905), *appeal dismissed,* 203 U.S. 602 (1906) (accomplice's voluntary testimony in a prosecution found to be the equivalent of an express waiver of the privilege). *Contra,* State v. Hollins, 184 N.W.2d 676 (Iowa 1971) (codefendant's testimony for state after guilty plea did not waive the privilege); Dunn v. Commonwealth, 350 S.W.2d 709 (Ky. 1961); People v. Lynch, 244 N.E.2d 29 (N.Y. 1968).

27. *See, e.g.,* Dominguez v. Citizens' Bank & Trust Co., 56 So. 682, 683 (Fla. 1911) ("[W]here an attorney represents both or all the parties in a transaction, conversations and transactions between such parties in the presence of the attorney and each other are not privileged conversations, but such attorney may be required to testify to such conversations and communications . . . ."); Ogden v. Groves, 241 So. 2d 756 (Fla. 1st Dist. Ct. App. 1970); Hoffman v. Labutzke, 289 N.W. 652 (Wis. 1940). The privilege normally does apply to litigation between persons who have retained a common attorney and others. *See, e.g.,* Grand Trunk W.R.R. v. H.W. Nelson Co., 116 F.2d 823, 835 (6th Cir. 1941) ("The rule is . . . that when two persons employ a lawyer as their common agent, their communications to him as to strangers will be privileged . . . ."); Hurlburt v. Hurlburt, 28 N.E. 651 (N.Y. 1891).

28. *See, e.g.,* Petty v. Superior Court, 253 P.2d 28 (Cal. Ct. App. 1953); Henke v. Iowa Home Mutual Casualty Co., 87 N.W.2d 920 (Iowa 1958). *But see* Dominguez v. Citizens' Bank & Trust Co., 56 So. 682 (Fla. 1911) (communications made to common attorney in absence of other party held to be privileged); Ogden v. Groves, 241 So. 2d 756 (Fla. 1st Dist. Ct. App. 1970). The proposed Florida Evidence Code, Fla. H.R. 471 § 90.502(4)(e) (1975), holds the privilege inapplicable to joint communications between multiple parties and their common attorney in subsequent civil litigation between the parties.

29. 372 U.S. 335 (1963). *Gideon* established the basic right to counsel for indigents accused of felonies. Subsequent Supreme Court decisions expanded this right. *See* Miranda v. Arizona, 384 U.S. 436 (1966) (right to court-appointed counsel for indigents during custodial interrogation); United States v. Wade, 388 U.S. 218 (1967) (right to counsel at post-indictment identification lineups); Mempa v. Rhay, 389 U.S. 128 (1967) (right to counsel at probation revocation hearings); Argersinger v. Hamlin, 407 U.S. 25 (1972) (right to counsel reaches certain non-felony cases). *But see* Gerstein v. Pugh, 95 S. Ct. 854 (1975) (determination of probable cause to detain not a "critical stage" in prosecution, and hence does not require appointment of counsel).

30. *See* FLA. CONST. art. V, § 18; FLA. STAT. §§ 27.50-.59 (1973). FLA. STAT. § 925.035 (1973) permits the court to appoint private counsel in capital cases.

31. Corie v. State, 265 So. 2d 84 (Fla. 1st Dist. Ct. App. 1972); Hammond v. State, 264 So. 2d 463 (Fla. 4th Dist. Ct. App. 1972).

as agents of the public defender,[32] in legal effect multiple defendants represented by the public defender's office are represented by a common attorney.[33]

In the instant case the court declined to formulate a general rule regarding the application of the attorney-client privilege in cases involving a common attorney and multiple criminal defendants. The *Olds* court did state that the appointment of a new and independent defense counsel for Perry would have alleviated the conflicting interests presented, but noted the possible disadvantages visited upon a defendant by changing attorneys in mid-trial.[34] The appointment of new

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32. *See* FLA. CONST. art. V, § 18.

33. 1963 FLA. ATT'Y. GEN. OP. 063-105.

34. 302 So. 2d at 792. *See* Hutson v. Superior Court, 21 Cal. Rptr. 753 (Ct. App. 1962). Although the *Olds* court did note the trial judge could have appointed independent counsel for Perry, 302 So. 2d at 792, the court did not specifically refer to FLA. STAT. § 27.53(3) (1973), which provides:

> (3) If at any time during the representation of two or more indigents the public defender shall determine that the interests of those accused are so adverse or hostile that they cannot all be counseled by the public defender or his staff without conflict of interest, or that none can be counseled by the public defender or his staff, it shall be his duty to move the court to appoint one or more members of the Florida bar who are in no way affiliated with the public defender in his capacity as such, or in his private practice, to represent those accused. However, the trial court shall appoint such other counsel upon its own motion when the facts developed upon the face of the record and files in the cause disclose such conflict . . . .

A failure to appoint new counsel where a conflict of interests exists may lead to the reversal of a conviction. In Baker v. State, 202 So. 2d 563 (Fla. 1967), the Florida Supreme Court, citing Glasser v. United States, 315 U.S. 60 (1942), reversed the convictions of codefendants who had been jointly represented by two court-appointed attorneys. The court held that the appointment of joint counsel, over timely objections, "denied the defendants the right to effective assistance of counsel promised by both our federal and state constitutions." *Id.* at 566. The court's rationale was that effective representation by the same counsel is made almost impossible by the conflicting interests and defenses of most codefendants.

In Belton v. State, 217 So. 2d 97 (Fla. 1968), *cert. denied,* 395 U.S. 915 (1969), the court clarified the position it had taken in *Baker:*

> If a defendant is indigent and [a request for separate counsel] is made it should be granted unless it can be demonstrated to the trial judge that no prejudice will result or that no conflict will arise as an incident of the joint representation. Without such a request being made, failure to appoint separate counsel will not be held to constitute error unless it is demonstrated that prejudice results from such failure.

217 So. 2d at 98.

See Glasser v. United States, 315 U.S. 60 (1942); State v. Youngblood, 217 So. 2d 98 (Fla. 1968); Mitchell v. State, 213 So. 2d 289 (Fla. 2d Dist. Ct. App. 1968); Note, *Criminal Codefendants and the Sixth Amendment: The Case for Separate Counsel,* 58 GEO. L.J. 369 (1969).

The representation of multiple criminal defendants by a common attorney can also result in ethical problems. *See* 1963 FLA. ATT'Y. GEN. OP. 063-105 (it would not be ethically proper for a public defender to continue to represent four codefendants when two of them have plead guilty and will probably turn state's evidence); 1965 FLA. ATT'Y. GEN.

counsel, however, would not alleviate the inherent unfairness fostered by the attorney-client privilege in cases such as *Olds;* the defendant would still be denied the use of the impeaching evidence possessed by the public defender.

When confronted with a claim of common law privilege, a court should initially look to the rationale behind the privilege to determine its applicability. Wigmore recognized the need to evaluate the reason for the privilege before applying it:

> [T]he privilege remains an exception to the general duty to disclose. 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.[35]

The reason most often given for the attorney-client privilege is that the privilege encourages free disclosure and consultation between the attorney and client.[36] This reason, without more, does not justify the recognition of the attorney-client privilege in cases such as *Olds.* As a Florida court noted in *Sepler v. State,*[37]

> The question [as to whether a communication should be shielded from disclosure by the attorney-client privilege] requires a balancing of the interests, on the one hand as to the attorney and client in their right to the protection of the privilege, and on the other hand in the public and the state for the proper administration of law and justice.[38]

There is no valid reason for the application of the privilege in cases similar to *Olds.* Having been adjudged guilty and sentenced for his involvement in the crime, an individual who testifies against his former codefendant has little need to retain the privilege.[39] If his

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OP. 065-15; FLA. CODE OF PROFESSIONAL RESPONSIBILITY, ETHICAL CONSIDERATIONS 5-14 to -20; FLA. BAR PROFESSIONAL ETHICS COMM. OPINIONS, No. 72-50 (1973) ("A lawyer may not properly represent multiple clients in the same criminal case where proper representation of any one client would include efforts to obtain immunity."); *Id.* No. 67-37 (1968).

35. 8 J. WIGMORE, EVIDENCE § 2291, at 554 (McNaughton rev. 1961).

36. *See* note 13 and accompanying text *supra.*

37. 191 So. 2d 588 (Fla. 3d Dist. Ct. App. 1966).

38. *Id.* at 590.

39. Generally, the attorney-client privilege survives the attorney-client relationship. *See* Seaboard Air Line Ry. v. Parker, 62 So. 589, 590 (Fla. 1913); ABA CANONS OF PROFESSIONAL ETHICS No. 4.

If the privilege were held inapplicable in a case similar to *Olds* the witness would still be afforded the protection of the fifth amendment's double jeopardy and self-in-

testimony elaborates his role in the crime, he will not be brought to trial again.[40] Were a waiver of the privilege to be uniformly applied in these situations, it is doubtful that it would have a chilling effect on communications between a client and his attorney. A defendant is unlikely to be deterred from freely disclosing information to his attorney by the speculative possibility that his true role in the crime might be

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crimination provisions. *See* Alford v. United States, 282 U.S. 687 (1931). In *Alford,* the Court stated "[N]o obligation is imposed on the court . . . to protect a witness from being discredited on cross-examination, *short of an attempted invasion of his constitutional protection from self-incrimination, properly invoked.*" *Id.* at 694 (emphasis added).

Counsel should be available to advise the witness on the use of the fifth amendment's prohibition against compelled self-incrimination. The utilization of this provision would be necessary if the cross-examiner sought to inquire into areas not covered by the double jeopardy provision. *Cf.* State v. Craig, 257 A.2d 737 (N.J. Super. Ct. 1969). These constitutional safeguards would protect the penal interests of the witness while still permitting an effective cross-examination by defense counsel.

An entirely different situation arises where the witness testifies for the state prior to sentencing. Such a witness needs the privilege. United States *ex rel.* Platts v. Myers, 253 F. Supp. 23 (E.D. Pa. 1966), involved the representation of multiple defendants by a single, court-appointed attorney. Two of the defendants pled guilty and, prior to sentencing, testified for the state at the trial of their codefendant. He was found guilty. In granting his petition for habeas corpus, the court held that his sixth amendment right to effective assistance of counsel had been violated.

> [Petitioner's attorney] was thus in a very awkward position. On the one hand his job was to present the best possible case for the petitioner, and this involved the impeachment of his other two clients who were witnesses for the Commonwealth. On the other hand, he also had the task of protecting them. Since the Court had deferred their sentencing until after petitioner's trial, it seems obvious that the severity of their sentences depended in large measure on their testimony against the relator and their general cooperation with the prosecution. If the attorney had succeeded in impeaching these two witnesses for the relator's benefit, he would have destroyed the effectiveness of their testimony and thus vitiated the very factor that would have weighed heavily in their favor when they came up for sentencing. No attorney could have effectively advocated both these positions simultaneously.

Id. at 24-25. *See* People v. Ware, 233 N.E.2d 421 (Ill. 1968); Kent v. State, 273 A.2d 819 (Md. Ct. App. 1971); State v. Ebinger, 234 A.2d 233 (N.J. Super. Ct. 1967). *See also* United States v. Hayman, 342 U.S. 205 (1952); Commonwealth v. Smith, 291 N.E.2d 607 (Mass. 1973).

40. In Benton v. Maryland, 395 U.S. 784 (1969), the Supreme Court found the double jeopardy prohibition of the fifth amendment applicable to the states through the fourteenth amendment. Where the witness' testimony would expose him to prosecution for crimes other than those covered by the double jeopardy clause, the witness may protect his interest by invoking the fifth amendment's self-incrimination provision. *See* note 39 *supra.* These constitutional provisions would not, of course, prevent impeachment that compromises nonpenal interests of the witness. However, the witness' primary interest in application of the attorney-client privilege presumably is the maintenance of confidences that could lead to criminal prosecution or affect sentencing decisions. And even if the witness has significant nonpenal interests that will be compromised in the course of impeachment, application of the attorney-client privilege to bar impeachment and thereby protect those interests arguably violates the confrontation clause. *See* notes 45-46 and accompanying text *infra.*

discovered if, after being convicted and sentenced, he turns state's evidence and thereby waives the privilege. In these circumstances the only practical effect of the attorney-client privilege is the denial of highly relevant impeaching evidence to the defendant on trial.

Wigmore suggested four conditions which he felt should be met before granting communications a privilege against disclosure:

> (1) The communications must originate in a *confidence* that they will not be disclosed.
> (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relationship between the parties.
> (3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered.*
> (4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.[41]

These conditions could also be used to evaluate the propriety of allowing a recognized privilege to be invoked under particular circumstances.

If Wigmore's criteria are applied to a claim of privilege made by a witness testifying against a former codefendant, it would appear that recognition of the privilege is inappropriate. Assuming that the first three conditions are met, attention should then be focused on the fourth. The benefit to be gained from the correct disposal of a case similar to *Olds* is certainly greater than any injury which might inure to the relationship between the public defender and the former codefendant who has turned state's evidence. The relationship between the former codefendant and the public defender's office will, in reality, have ended by the time he is called upon to testify.

When confronted with a situation involving testimony of an accomplice who had turned state's evidence, the Mississippi Supreme Court in *Jones v. State*[42] recognized the very real danger in withholding information under a claim of attorney-client privilege:

> [The accomplice's] testimony comes in such a questionable shape that it should, in the interest of truth and justice, be subjected to the severest scrutiny, and acted on with the greatest caution. There is no case in which cross-examination is more desirable or important to test the credit of a witness than that in which one man is seeking to save his own life or liberty by swearing away the life or liberty of others.
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> . . . [The accomplice] has no right to claim any privilege concerning any of the facts pertinent to the issue . . . . He thereby waives all

41. 8 J. WIGMORE, EVIDENCE § 2285 (McNaughton rev. 1961).

42. 3 So. 379 (Miss. 1888). Unlike the situation in *Olds,* in *Jones* the witness was still subject to prosecution at the time of his accomplice's trial.

> privileges . . . against disclosing communications between himself and his counsel touching the offense charged. . . . The reason for maintaining such privilege ceases when one has voluntarily exposed himself by his own testimony to the very consequences from which it was intended by the privilege to protect him. To preserve such privilege in such case would be worse than vain, for, while it could not help the witness, it might, by withholding the only means of contradicting and impeaching him, operate with the greatest injustice towards the party on trial.[43]

Not only is the privilege unnecessary in a situation similar to *Olds*, but its application may very well result in a denial of the defendant's sixth amendment right of confrontation. Last year, in *Davis v. Alaska*,[44] the Supreme Court dealt with a situation analogous to *Olds*. Petitioner had been charged with larceny and burglary. At trial a protective order was issued prohibiting petitioner's attorney from questioning the key prosecution witness concerning his probationary status as a juvenile delinquent. This information would have been helpful in impeaching the witness by indicating the possibility of prejudice and ulterior motives for his testimony. In reversing the conviction, the Court held:

> The State's policy interest in protecting the confidentiality of a juvenile offender's record cannot require yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness.[45]

Applying the rationale of *Davis* to the instant case, it is difficult to imagine that the state's interest in the unnecessary application of the attorney-client privilege would somehow outweigh the "vital [sixth amendment] right" of "effective cross-examination."

Recently, in *Oregon v. Hass*,[46] the Court stated that "[w]e are, after all, always engaged in a search for truth in a criminal case so long as the search is surrounded with the safeguards provided by our Constitu-

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43. *Id.* at 380.

44. 415 U.S. 308 (1974).

45. *Id.* at 320. *See* Chambers v. Mississippi, 410 U.S. 284 (1973); Smith v. Illinois, 390 U.S. 129 (1968); Alford v. United States, 282 U.S. 687 (1931). In *Chambers* the Court stated:

> [T]he right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process. . . . But *its denial or significant diminution calls into question the ultimate "'integrity of the fact-finding process'" and requires that the competing interest be closely examined.*

410 U.S. at 295 (emphasis added).

46. 95 S. Ct. 1215 (1975).

tion."[47] The application of the attorney-client privilege, in cases similar to *Olds,* is a very real obstacle to that search for truth.

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47. *Id.* at 1221. In *Haas,* the Court dealt with statements obtained from a defendant in a manner that violated his fifth amendment right, as interpreted by Miranda v. Arizona, 384 U.S. 436 (1966), to be free from compelled self-incrimination. Applying the principles of Harris v. New York, 401 U.S. 222 (1971), the Court held that while the statements were inadmissible in the prosecution's case in chief, they were admissible for impeachment purposes.

> [T]he impeaching material would provide valuable aid to the jury in assessing the defendant's credibility . . . . [T]he shield provided by *Miranda* is not to be perverted to a license to testify inconsistently, or even perjuriously, free from the risk of confrontation with prior inconsistent utterances.

95 S. Ct. at 1221.

If impeachment is so vital to the truth-seeking process as to limit application of a constitutional rule of exclusion, it should also limit the attorney-client privilege—a mere rule of evidence—in a case such as *Olds.* It may be argued that *Olds* is not analogous to *Harris* and *Hass* because of the deterrence issues in the latter cases. But *Olds,* like *Harris* and *Hass,* presents a situation in which initial conduct is unlikely to be affected substantially by the possibility that an impeachment effort will subsequently be made.