

Date of Meeting: September 24, 25, 26,
1959

Date of Memo: September 15, 1959

Memorandum No. 4a

Subject: Uniform Rule 26 (Lawyer-Client Privilege)

The attached material has been prepared in a form suitable for transmission to the Bar Committee on the Uniform Rules of Evidence. It consists of Uniform Rule 26, as revised by the Commission. The revised rule also contains a number of revisions suggested by the Staff for consideration by the Commission. The revised rule is accompanied by a memorandum designed to explain Uniform Rule 26 as revised by the Commission. After review of this material by the Commission at the September meeting, the Staff can make any necessary revisions and then forward the material to the Bar Committee.

The revised rule is intended to be in a form suitable for adoption as the tentative action of the Commission on Uniform Rule 26. It is, of course, subject to changes at the September meeting when it will be reviewed by the Commission.

The accompanying explanation of the revised rule is intended to convey to the Bar Committee the thinking of the Commission regarding Uniform Rule 26 and the changes the Commission has made in it. The explanation is primarily designed to preserve in written form the thinking of the Commission while the matter is still fresh in our minds. Any changes made at the September meeting will, of course, be incorporated into the

explanation before sending it on to the Bar. This explanation is not intended to be in final form and will have to be worked over after the Bar has considered the Commission's revision of Uniform Rule 26.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

9/15/59

Note: This is Uniform Rule 26 as revised by the Law Revision Commission. See attached explanation of this revised rule. The changes in the Uniform Rule (other than the mere shifting of language from one part of the rule to another) are shown by underlined material for new material and by bracketed and strike out material for deleted material.

RULE 26. LAWYER-CLIENT PRIVILEGE.

(1) As used in this rule:

(a) "Client" means a person, [~~or~~] corporation, [~~or-ether~~]

association or other organization (including this State and any other public entity) that, directly or through an authorized representative, consults a lawyer or the lawyer's representative for the purpose of retaining the lawyer or securing legal service or advice from him in his professional capacity; and includes an incompetent (i) who himself so consults the lawyer or the lawyer's representative or (ii) whose guardian so consults the lawyer or the lawyer's representative in behalf of the incompetent. [~~]~~

(b) "Communication" includes advice given by the lawyer in the course of representing the client and includes disclosures of the client to a representative, associate or employee of the lawyer incidental to the professional relationship. [~~]~~

(c) "Holder of the privilege" means (i) the client when he is competent, (ii) a guardian of the client when the client is incompetent and (iii) the personal representative of the client if the client is dead.

(d) "Lawyer" means a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation the law of which recognizes a privilege against disclosure of confidential communications between client and lawyer.

(2) Subject to rule 37 and except as otherwise provided
[by-paragraph-2-of] in this rule, if a communication [e] is found by the
judge to have been between a lawyer and his client in the course of that
relationship and in professional confidence, ~~[are-privileged,-and-a]~~ the
client has a privilege to:

(a) ~~[if-he-is-the-witness-to]~~ Refuse to disclose ~~[any-such]~~
the communication. ~~[,-and]~~

(b) ~~[te]~~ Prevent his lawyer, or the lawyer's representative,
associate or employee, from disclosing the communication. ~~[it,-and]~~

(c) ~~[te]~~ Prevent any other ~~[witness]~~ person from disclosing
~~[such]~~ the communication if it came to the knowledge of such ~~[witness]~~
person (i) in the course of its transmittal between the client and the
lawyer, or (ii) in a manner not reasonably to be anticipated by the client ~~[,-]~~
or (iii) as a result of a breach of the lawyer-client relationship.

(3) Subject to rule 37 and except as otherwise provided in
paragraphs (4), (5) and (6) of this rule, the privilege under paragraph (2)
of this rule may be claimed for the client by:

(a) The holder of the privilege. ~~[the-client-in-person-or-by-his~~
~~lawyer,-or-if-incompetent,-by-his-guardian,-or-if-deceased,-by-his-personal~~
~~representative.]~~

(b) A person who is authorized to claim the privilege by the
holder of the privilege.

(c) The lawyer who received or made the communication if (i) the
client is living, and (ii) no other person claims the privilege under
subparagraph (a) or (b) of this paragraph and (iii) the privilege has not
been waived under rule 37.

(4) [~~(2)~~-Such-privileges-shall] The privilege under paragraph (2) of this rule does not extend [~~(a)~~] to a communication if the judge finds that sufficient evidence, aside from the communication, has been introduced to warrant a finding that the legal service was sought or obtained in order to enable or aid the client to ^{commit} ~~commit~~ or plan to commit a crime or [~~a-text~~] to perpetrate or plan to perpetrate a fraud.

(5) The privilege under paragraph (2) of this rule does not extend to a communication relevant to:

(a) [~~(b)~~-to-a-communication-relevant-to] An issue between parties all of whom claim through the client, regardless of whether the respective claims are by testate or intestate succession or by inter vivos transaction. [~~(b)~~]

(b) [~~(c)~~-to-a-communication-relevant-to] An issue of breach of duty by the lawyer to his client [~~(c)~~] or by the client to his lawyer. [~~(c)~~]

(c) [~~(d)~~-to-a-communication-relevant-to] An issue concerning an attested document of which the lawyer is an attesting witness. [~~(d)~~]

(d) [~~(e)~~-to-a-communication-relevant-to] A matter of common interest between two or more clients if made by any of them to a lawyer whom they have retained in common, when offered in an action between any of such clients.

(6) The privilege available to a corporation, [del] association or other organization under this rule terminates upon dissolution of the corporation, association or other organization.

9/15/59

RULE 26 (LAWYER-CLIENT PRIVILEGE), AS

REVISED BY THE COMMISSION

It is the purpose of this memorandum to explain Uniform Rule 26, relating to the lawyer-client privilege, as revised by the Commission.

DEFINITIONS

Arrangement. The definitions contained in paragraph (3) of Uniform Rule 26 have been made the first paragraph of the revised rule to conform to the form of other rules. The definitions are contained in the first paragraph in other rules. See, for example, rules 27, 29, 33 and 34.

Definition of "client." Referring to revised rule 26(1)(a), the definition of client has been revised to make clear that a corporation, association "or other organization (including this State and other public entities)" are considered clients for the purpose of the lawyer-client privilege. This change makes it clear that the State, cities and other public entities have a privilege in the case of a lawyer-client relationship. This is existing law in California. *Rust v. Roberts*, 171 A.C.A. 834, 838 (July 1959) (State has privilege); *Holm v. Superior Court*, 42 Cal.2d 500, 267 P.2d 1025, 268 P.2d 722 (1954) (city has privilege). There does not seem to be any reason why the State or any other public entity should not be entitled to the same privilege as a private client.

The definition of client has also been expanded by adding the words "other organization". The broad language of the revised rule is intended to cover such unincorporated organizations as labor unions, social

clubs and fraternal organizations in those circumstances where the particular situation is such that the organization (rather than its individual members) is the client. See *Oil Workers Intl. Union v. Superior Court*, 103 C.A.2d 512, 230 P.2d 71 (1951) (not involving a privilege question). There is no reason why in appropriate circumstances these and similar organizations should not have the same privilege as a private individual.

The definition of client has also been modified to make it clear that the term client includes an incompetent who himself consults the lawyer or the lawyer's representative. In this case, paragraph (3)(a) and (b), provide that the guardian of the incompetent client can claim the privilege for the incompetent client and that, when the incompetent client becomes competent, he may himself claim the privilege.

Definition of "lawyer." The definition of "lawyer" contained in the Uniform Rule has been modified by inserting a comma after the word "authorized." This corrects an apparent clerical error in the rules as printed by the Commission on Uniform State Laws. Compare with Rule 27 (as printed by the Commission on Uniform State Laws).

The Commission approves the provision of the Uniform Rule which defines "lawyer" to include a person "reasonably believed by the client to be authorized" to practice law. Since the privilege is intended to encourage full disclosure by giving the client assurance that his communication will not be disclosed, the client's reasonable belief that the person he is consulting is an attorney should be sufficient.

Definition of "holder of the privilege." The substance of the sentence in Uniform Rule 26(1) reading "the privilege may be claimed by the

client in person or by his lawyer, or if incompetent, by his guardian, or if deceased, by his personal representative" has been stated in the form of a definition in paragraph (1)(c) of the revised rule. This definition substantially conforms to the definition found in Uniform Rule 27, relating to the physician-patient privilege. It makes clear who can waive the privilege for the purposes of Rule 37. It also makes paragraph (3) of the revised rule more concise.

Note that under paragraph (1)(c)(i) of the revised rule, the client is the holder of the privilege if he is competent. Under paragraph (1)(c)(ii) of the revised rule, a guardian of the client is the holder of the privilege if the client is incompetent. Under these two provisions, an incompetent client becomes the holder of the privilege when he becomes competent. For example, if the client is a minor of 20 years of age and he or his guardian consults the attorney, the guardian under revised rule (1)(c)(ii) is the holder of the privilege until the minor becomes 21 and then the minor is the holder of the privilege himself. This is true whether the guardian consulted the lawyer or the minor himself consulted the lawyer.

Under paragraph (1)(c)(iii), the personal representative of the client is the holder of the privilege when the client is dead. He may claim the privilege on behalf of the deceased client. This may be a change in the existing California law. Under the California law, the privilege may survive the death of the client and no one can waive it on behalf of the client. If this is the present California law, the Commission believes that the Uniform Rule provision (which in effect provides that the evidence is admissible unless the person designated in the Uniform Rule claims the privilege) is a desirable change.

This definition of "holder of the privilege" should be considered with reference to paragraph (3) of the revised rule 26, specifying who can claim the privilege, and rule 37, relating to waiver of the privilege.

GENERAL RULE

The substance of the "general rule" now contained in rule 26(1) has been set out in the revised rule as paragraph (2).

The following modifications of the Uniform Rule have been made in the revised rule:

(1) The language of introductory exception to the rule has been revised to delete reference to a specific paragraph of the rule and is instead phrased in the general language "except as otherwise provided in this rule." This change has been made because the exceptions to the "general rule" are contained in various other parts of the revised rule.

(2) The words "are privileged" have been deleted in order to make it clear that the client has the privilege and if the privilege is not claimed by the client or person authorized under paragraph (3) of the revised rule to claim that privilege, the evidence of the communication will be admitted.

(3) The requirement that the communication be found to be between a lawyer and his client in the course of that relationship and in professional confidence had been stated as a condition to the exercise of the privilege. This is in accordance with the existing law which requires a showing by the person invoking the privilege both of the lawyer-client relationship and of the confidential character of the communication. *Sharon v. Sharon*, 79 Cal. 633, 677 (1889); *Collette v. Sarrasin*, 184 Cal. 283 (1920). It is suggested that this requirement is more accurately and clearly stated in the revised rule.

(4) Paragraphs (a), (b) and (c) of Uniform Rule 26(1) have been tabulated in paragraph form to improve readability and a number of revisions

have been made.

The words "if he is a witness" have been deleted from subparagraph (a) because they are unnecessary.

The words "or the lawyer's representative, associate or employee" have been inserted in subparagraph (b) to make clear the substance of the Uniform Rule that the client can prevent the stenographer or other employee or representative of the lawyer from testifying as to the communication. Thus the privilege respecting the attorney's secretary or clerk is vested in the client. Under the present California statute the privilege so far as employees of the attorney is concerned may be vested in the attorney. The basis for the privilege is to encourage full disclosure by the client and for this reason the Commission believes that in all cases the privilege should be vested in the client.

The word "person" has been substituted for "witness" in subparagraph (c) because "witness" is suggestive of testimony at a ~~trial~~^{trial} whereas the existence of privilege would make it possible for the client to prevent a person from disclosing the communication at a pretrial proceeding as well as at the trial.

(5) In paragraph (3) of the revised rule the substance of the last sentence of Uniform Rule 26(1) reading "the privilege may be claimed by the client in person or by his lawyer, or if incompetent, by his guardian, or if deceased, by his personal representative" has been incorporated with some changes. An introductory clause has been inserted to make it clear that the right to claim the privilege for the client is subject to the waiver provision (Rule 37) and to the other exceptions under which a confidential communication between a lawyer and a client is admissible. Under

subparagraph (a) of paragraph (3) of the revised rule, the "holder of the privilege" may claim the privilege. The holder of the privilege is the person designated in the definition contained in paragraph (1)(c) of the revised rule. Under subparagraph (b) of paragraph (3) of the revised rule, specific provision is made for persons who are authorized to claim the privilege to claim it. Thus the guardian, the client or the personal representative (when the "holder of the privilege") may authorize another person, such as his attorney, to claim the privilege. Under subparagraph (c) the substance of what is now contained in Uniform Rule 26(1) is set out more clearly. Rule 26(1) now provides the privilege may be claimed by "the client in person or by his lawyer." Under the revised rule in subparagraph (c), the lawyer is entitled to claim the privilege on behalf of the client provided certain conditions exist. Note that the conditions that are required to be satisfied are: (1) the client must be living; (2) no other person has claimed the privilege; and (3) the privilege has not been waived. Subparagraph (c) of the revised rule will allow the lawyer to claim the privilege and impose on the person seeking to have the substance of the communication admitted in evidence the burden of establishing that the privilege has been waived or that the client is dead. The Commission believes that this is exactly what is intended to be provided by that part of Uniform Rule 26(1) that provides that privilege may be claimed by the client in person "or by his lawyer."

(6) Under a dictum in a California case a judge can, on his own motion, exclude a confidential attorney-client communication. This is probably because the California statute provides that the communication to the lawyer by the client shall not be disclosed "without the consent of

his client." However, the Uniform Rule is based on a theory that the communication is to be admitted unless the privilege is claimed by a person designated in the statute. The Commission adopts the Uniform Rule with the realization that the confidential communication will be admitted as evidence unless someone entitled to claim the privilege of the client does so.

EXCEPTIONS.

Crime or fraud. In paragraph (4) of the revised rule an exception is stated that the privilege does not apply where the judge finds that sufficient evidence, aside from the communication, has been introduced to warrant a finding that the legal service was sought or obtained in order to enable or aid the client to commit or plan to commit a crime or to perpetrate or plan to perpetrate a fraud. California recognizes this exception insofar as future criminal or fraudulent activity is concerned. Uniform Rule 26 extends this exception to bar the privilege in case of consultation with a view to commission of any tort. The Commission has not adopted this extension of the traditional scope of this exception. Because of the wide variety of torts and the technical nature of many, the Commission believes that to extend the exception to include all torts would present difficult problems for an attorney consulting with his client and would open up too large an area of nullification of the privilege.

Other Exceptions. In paragraph (5) of the revised rule, the substance of the other exceptions to Uniform Rule 26 has been retained. None of these exceptions is expressly stated in the existing California statute. Each is, however, more or less recognized to some extent by

judicial decision. The exception provided in paragraph (5) (a) of the revised rule provides that the privilege does not apply on an issue between parties all of whom claim through the client. Under the existing California law, all must claim through the client by testate or intestate succession; a claim by inter vivos transaction is not within the exception. The Uniform Rule would change this to include inter vivos transactions within the exception and the Commission approves this change. Accepting the rule of non-survivorship when all parties claim through a deceased client by testate or intestate succession, the Commission can perceive no basis in logic or policy for refusing to have a like rule when one or both parties claim through such deceased client by inter vivos transaction.

The Eavesdropper Exception. Let us suppose that a switchboard operator listens in on a confidential statement made by a client to his lawyer in the course of a telephone conversation. Or suppose the client mails a confidential letter and an interceptor steams the letter open and reads it. Or suppose a wrongdoer breaks into and enters the lawyer's office and steals the letter.

Under the so-called "Eavesdropper Exception," the switchboard operator, the interceptor and the wrongdoer all could testify. We may have the eavesdropper exception in California, but the Uniform Rule would abolish it. The Commission approves the Uniform Rule provision (contained in paragraph (2) (c) of the revised rule) which would permit the client to prevent the switchboard operator, interceptor or wrongdoer from testifying as to the communication. The client who consults a lawyer is in danger of eavesdropping, bugging and other such forms of foul play. Eavesdropping is a real and proximate menace to clients. To encourage full disclosure by the

client to his attorney, the Commission believes that the client should not be required to run the risk of the switchboard operator, interceptor or wrongdoer testifying as to the confidential communication. Therefore, the Commission approves the Uniform Rule provision.

TERMINATION OF PRIVILEGE OF CORPORATION, ASSOCIATION OR OTHER ORGANIZATION UPON DISSOLUTION.

In paragraph (6) of the revised rule, the substance of the last sentence of Uniform Rule 26(1) is contained. It has been slightly restated to conform to the definition of client as stated in the revised rule.