

9/24/59

Supplemental Memorandum on

Rule 26(2)(a)

26(2)(a) is in substance the same as Model Code Rule 212.

The Comment on the latter states: "Only a few cases discuss the showing which must be made as a preliminary to compelling the disclosure. The Rule is in accord with the statement of Mr. Justice Cardozo in *Clark v. U.S.*, 289 U.S. 1, 15 (1933)."

Cardozo's statement in Clark is the following dictum:

There is a privilege protecting communications between attorney and client. The privilege takes flight if the relation is abused. A client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law. He must let the truth be told. There are early cases apparently to the effect that a mere charge of illegality, not supported by any evidence, will set the confidences free. . . . But this conception of the privilege is without support in later rulings. "It is obvious that it would be absurd to say that the privilege could be got rid of merely by making a charge of fraud." O'Rourke v. Darbishire, [1920] A.C. 581, 604. To drive the privilege away, there must be "something to give colour to the charge"; there must be "prima facie evidence that it has some foundation in fact." O'Rourke v. Darbishire, loc. cit., supra; also pp. 614, 622, 631, 633. When that evidence is supplied, the seal of secrecy is broken.

Apparently Wigmore does not discuss the foundation problem.

McCormick does so only briefly, citing 26(2)(a), Clark, and O'Rourke.

(McCormick, pp. 200 - 202.)

Only one reference to the foundation problem has been found in California. In *Abbott v. Superior Court*, 78 C.A.2d 19, 21 (1947), the

court refers to the many decisions holding that consultation to perpetrate crime or fraud is without the privilege. Then the court adds the following in re foundation:

Some of the cases hold that as a foundation for such evidence there must be a prima facie showing of the criminal activities of the client. (See 125 A.L.R. 519.)

(The court adds that in the case before it there was "detailed and voluminous" evidence of this character.)

The A.L.R. reference (125 A.L.R. 519 (1959)) cited in Abbott states as follows:

The mere assertion, by one seeking to apply the exception under consideration, of an intended crime or fraud on the part of the client will not destroy the privilege ordinarily accorded communications between attorney and client, for to destroy the privilege there must be something to give color to the charge; there must be prima facie evidence that it has some foundation in fact.

In support of this proposition, the following are cited: Clark, O'Rourke and a few cases from states other than California.

Conclusions.

1. There is little case or text authority on the foundation requirement of 26(2)(a).
2. Such authority as there is does not make a convincing case in support of the requirement.

Respectfully submitted,

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