#63 Revised 4/17/67

Memorandum 67-31

Subject: Study 63 - Evidence Code (Evidence Code Revisions)

The attached correspondence points out a problem that arises from the drafting of Evidence Code Sections 957 and 962. Section 957 provides:

> 957. There is no privilege under this article as to a communication relevant to an issue between parties all of whom claim through a deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction.

Section 962 provides:

> 962. Where two or more clients have retained or consulted a lawyer upon a matter of common interest, none of them, nor the successor in interest of any of them, may claim a privilege under this article as to a communication made in the course of that relationship when such communication is offered in a civil proceeding between one of such clients (or his successor in interest) and another of such clients (or his successor in interest).

In the attached correspondence, Mr. Haves points out that a question has been raised whether a difference in meaning is intended by the difference in language used. Under Section 957 the privilege does not protect communications relevant to an issue between parties who "claim" through a deceased client. Under Section 962, the privilege is unavailable in litigation between joint clients or their "successor[s] in interest."

Although it is not entirely clear from Mr. Haves letter, apparently his problem arises out of the following fact situation: A was married and had children. Apparently there was a will and agreement made by A on January 18, 1955, under which his children claim to be the legatees of A. After the death of his first wife, A remarried. A and his second wife jointly consulted B, an attorney, with respect to the drawing of their

wills. B drew wills for both A and his second wife which were later executed at the same time. A left everything to his second wife and nothing to his children by his first marriage. It appears that the second wife has offered A's second will for probate, the children are contesting that will and have offered the earlier will for probate. Probably, the children seek to enforce the 1955 agreement even if they are unsuccessful in contesting the second will. Mr. Haves, as attorney for the children, has asked attorney B concerning the conversation that A and his second wife had with him relating to the drawing of the mutual wills. Specifically, he wishes to know what the second wife said during the joint consultation. The second wife's attorney claims the conversation with B is privileged, while the children claim that the conversation is not privileged as to them because they are the successors in interest of A, who was one of the joint clients. The wife's attorney claims that the joint client exception is not applicable because the children are not the successors of A, for A left them nothing by his will.

The second will is being contested on the grounds of lack of testamentary capacity, lack of due execution, and undue influence. Mr. Haves may have overlooked Section 961 which creates an exception for statements relevant to the validity of a will. Moreover, the language of Section 957 seems applicable, for both the children and the second wife are claiming through a deceased client and the communications sought seem relevant to an issue between them. So far as we know, however, the exception expressed in Section 957 has never been applied to permit disclosure of the communications of someone other than the deceased client, and the court may have considered the exception

inapplicable to such communications. No such limitation appears in Section 957.

In any event, the question asked is whether Section 962 is applicable when it is not established unequivocally that the person invoking the exception is a successor in interest of one of the joint clients, i.e., when the person invoking the exception is claiming to be a successor in interest and that claim is to be determined in the litigation.

Scherb v. Nelson, 155 Cal. App.2d 184 (1957), indicates that a person claiming to be a successor could invoke this exception to the attorney-client privilege prior to the enactment of the Evidence Code. That case involved an alleged agreement for reciprocal wills. J, who was the plaintiffs' mother, married C. The plaintiffs claimed that J and C each agreed to leave his or her property to the other, but if the other was not surviving, to leave the property to the plaintiffs. After J and C made reciprocal wills, J died, leaving her property to C. Some years later C made a new will leaving all of his property to D. The plaintiffs brought an action to enforce the alleged agreement by impressing a trust on the property for the benefit of the plaintiffs. The plaintiffs called an attorney to testify concerning the agreement between J and C. The court held that the communications to the attorney were not privileged because of the joint client exception.

The question presented by Mr. Haves is whether the use of the word "claim" in Section 957 and the unqualified reference to "successor in interest" in Section 962 are intended to prevent a person claiming to be a successor in interest from relying on the joint client exception. So far as we know, there was no intent on the part of the Commission to overrule the principle of the Scherb case. We do not believe that we considered

the matter. The question now is whether to eliminate any implication that the law may have been changed by inserting a reference to a person "claiming" to be a successor in interest in Section 962.

A more difficult question is also posed by the fact situation presented by Mr. Haves. The question relates to the nature of the succession right that must be claimed to permit a person to rely on the joint client exception. In the Scherb case, the plaintiffs sought revelation of the conversation giving rise to their rights--the conversation at which J and C agreed that the survivor would leave his property to the plaintiffs. In Mr. Haves' case, he seeks revelation of a conversation at which both parties were attempting to defeat whatever claims might be asserted by Mr. Haves' clients--the conversation at which A and his second wife agreed that A's will would leave nothing to his children. In Scherb, the plaintiffs were asserting whatever interest the parties to the conversation had in seeing the agreement enforced. In Haves' case, the plaintiffs are asserting that the parties to the conversation had no right to do what they did in that transaction--their interest seems to be adverse to that of both parties to the conversation.

The question presented by this fact situation is: Can a person claiming to be a successor invoke the joint client exception when the claimant's interests are adverse to the interests that both of the clients had in communicating with their attorney? To put the matter another way, should a person who is alleged to have contracted to deliver certain property to the claimant have the right to discuss the claim with a lawyer while in the presence of another client interested in the same matter and still be able to protect his discussion with the lawyer from revelation to the claimant?

To illustrate the problem in another context, suppose this situation: A learns that P is claiming that A contracted to give P certain property. A denies the existence of any such contract and, even if there was an agreement of some sort, A claims the agreement is unenforceable because of the statute of frauds, the statute of limitations, and laches. A has entered into some admitted contractual arrangements in regard to the property with B. A and B go to attorney C to discuss P's claim and what might be done to protect their own interests and rights. P, claiming to be a successor to A's interest under the alleged contract, asserts that the attorney-client privilege does not protect the conversation of A and B with attorney C. In effect, under this view, A and B cannot even talk in a privileged relationship with C about their proposed defense to P's action.

Neither the existing California case law nor the rationale underlying the joint client exception seems to warrant such an application of the exception.

The following are the remaining California cases relating to the joint client exception: In In re Bauer, 79 Cal. 304 (1889), there was a dispute as to the right to distribution of an estate between the son of the decedent and the decedent's widow. The widow claimed the property involved by virtue of a homestead that had been declared during the decedent's lifetime. The widow claimed that the homestead was community property and, therefore, she was entitled to succeed to all of it. The son claimed as beneficiary under the will which gave him all of the decedent's separate property. The son claimed that three-fifths of the purchase price for the homestead had been separate funds. The attorney who drew the homestead declaration for the decedent and his wife was called as a

witness. The trial court refused to permit him to testify on the ground of privilege. The Supreme Court reversed, holding the joint client exception applicable. The son was entitled to invoke the exception because he was the successor to the decedent under the decedent's will.

In Harris v. Harris, 136 Cal. 379 (1902), the plaintiff brought an action against the heirs and legatees of a decedent to establish a resulting trust upon the property owned by the decedent at his death. The plaintiff had lived with the decedent for many years, supposing that she was his wife. She claimed that the money used to purchase the property involved was furnished by herself. The defendants claimed that she had surrendered her interest in the property in a separation agreement that had been executed by her during the decedent's lifetime. The heirs called the attorney who drew the agreement to testify concerning what was said during that transaction. The court held that this was not error because the joint client exception applied.

Clyne v. Brock, 82 Cal. App.2d 958 (1947), involved a note and mortgage that one child of the decedent had given to the decedent during the decedent's lifetime. The remaining children of the decedent brought the action to set aside a reconveyance allegedly obtained by the fraud and undue influence of the defendant. The attorney who had acted for the defendant child and for the decedent on various tax and property matters involving the property in question was called to testify by the plaintiff children. The court held the joint client exception applicable.

In the Bauer case, the son was plainly asserting the same interest that his father had at the time of the homestead declaration since it was undisputed that the son was entitled to the father's separate property.

In the Harris case, the heirs and legatees of the decedent had the same interest in determining the decedent's separate property that the decedent had when he entered into the separation agreement. In Clyne v. Brock, the plaintiff children were asserting whatever interest the decedent had in being free from fraud and undue influence.

Clyne v. Brock would support Mr. Haves' position insofar as his clients are claiming under the decedent's prior will, for they (like the plaintiff children in the Clyne case) are, in effect, asserting whatever interest the decedent had in being free from the fraud and undue influence of his second wife. But the contract claim to succession asserted by the children seems plainly adverse to the interest of the decedent in the joint consultation.

Little or no law can be found elsewhere that deals with this, McCormick touches but lightly on the subject. He states in a note:

> It has been held that the beneficiary of a contract made by the jointly consulting clients at the conference or discussed thereat, stands in the shoes of the parties and is entitled to disclosure. . . . So also as to personal representatives and others in privity. . . . Query as to judgment creditors, but seemingly they should be in like case. Note, 141 A.L.R. 558. [McCORMICK, EVIDENCE 193 n. 14 (1954).]

The A.L.R. note cited by McCormick gives the following statement of the rule:

> Where two or more persons consult an attorney as their common agent or adviser, their communications to him in the presence of each other, or his statements to them, are obviously not intended to be confidential as between themselves, and accordingly are not privileged as between the conferees, and either of them may introduce testimony concerning the same as against the other, or his heirs or representatives. Moreover, the right to introduce testimony concerning such communication is not limited to such conferees, but extends also to their heirs, devisees, and legatees, and to their executors, administrators, and assignees. [141 A.L.R. 553, 554-556.]
>
> The beneficiary of a contract between others is regarded as claiming under the contracting parties, and so, where the agreement

for his benefit was entered into by both parties in the presence of an attorney, it has been held that the latter may be required to testify as to such agreement at the request of the beneficiary. [141 A.L.R. at 557.]

As to whether a creditor of one of the participants in the conference, who brings a creditor's bill or seeks otherwise to subject alleged property of the debtor to his claim, is in privity with his debtor and is entitled to introduce testimony of his debtor's attorney concerning statements made by the debtor in the presence of the attorney and another concerning the property in question, there seems to be no express authority. However, in several cases, the courts have held that the creditor . . . of one of the conferees, was entitled to introduce testimony concerning such communications. [141 A.L.R. at 558.]

The cases cited in the note to the last sentence quoted above involved creditors seeking to set aside conveyances made by insolvent debtors. In each of the cases, the court held that the creditor could compel disclosure of the debtor's conversation with his attorney in the presence of the transferee of the property. A variety of unhelpful reasons appear. One case said that the presence of the third party rendered the conversation unprivileged. Another case said that the creditor was attempting to perpetrate a fraud and, hence, the attorney-client privilege did not apply.

The rationale of the joint client exception is that the joint clients did not intend confidentiality insofar as they themselves were concerned. See McCORMICK, EVIDENCE 193. This reasoning is extended to permit one who stands in the shoes or has the same interest of one of the clients to assert the client's rights in the transaction. Thus, a beneficiary of a contract is permitted to compel disclosure of the joint conversations relating to the contract. But, in the case given by Haves, the children claim as beneficiaries of the agreement with the first wife--not as beneficiaries of the agreement with the second; they are seeking to avoid the second agreement and the wills made at that time. It is almost inconceivable that the parties to the second agreement did not intend confidentiality

as to these claimants. The rationale of the exception, therefore, would limit it to those persons who claim an interest identical with that which one of the joint clients had in participating in the joint consultation.

Where the client is dead and the person claiming to be a successor claims that undue influence was exercised upon the client, the alleged successor may have a colorable claim that the client (if in full control of himself and his affairs) would really have preferred distribution to the alleged successor. This seems to be the rationale of Clyne v. Brock: the heirs were, in effect, the successors of the decedent's interest in being free from fraud and undue influence. At least in wills cases, a distinction can be drawn here between a successor claiming by inter vivos right and a successor claiming under a prior will or by intestate succession. Where the successor is claiming by will or intestate succession, it is inherent in the situation that he can recover only if he proves that the later will was not really the will of the client or that the property involved was not disposed of by the will. Thus, the claimed successor can urge that he really is asserting the interest of the client. Where the successor is asserting a right arising from an alleged contract only, it may be that he is seeking to defeat the actual intention of the client.

The Commission rejected this distinction when it extended the exception in Section 957 to permit anyone claiming under a deceased client by inter vivos right to claim the exception in litigation against another claiming under the client. The stated reason was that the person claiming by inter vivos right may actually be asserting the claim the client would have preferred had he been in full control of his faculties. But, nevertheless, the exception in 957 applies even when it is perfectly clear that the client did not want to honor the inter vivos claimant's rights.

Thus, under Section 957, a person who is claimed to have contracted to give property to a particular claimant cannot talk to an attorney about defeating the claim in the confidence that the conversation will be protected from disclosure to the claimant after the client's death. Perhaps the reason for applying the exception in such a case is that it is impossible to determine in advance which claimant really represents the client's interests and, in any event, the client cannot be seriously prejudiced by disclosure because he is dead.

But we do not think that two clients' conversation with an attorney concerning the claim of a third person to property in which the clients have a mutual interest should necessarily be unprivileged insofar as the third party is concerned when the clients are still alive. If one of the clients is dead and the third party is claiming the property through the deceased client, there may be justification for requiring revelation of the communications to the attorney; but we believe that the broad language of Sections 957, 960, and 961 provides whatever authority is needed in such a case.

The question presented now is whether Section 962 should be amended to indicate more clearly the nature of the interest to which a person must have succeeded to be qualified to invoke the joint client exception.

Perhaps Section 962 might be clarified by an amendment along the following lines:

> 962. Where two or more clients have ~~retained or~~ consulted a lawyer upon a matter of common interest, none of them, nor the successor in interest of any of them, may claim a privilege under this article as to a communication made in the course of that

relationship when such communication is offered in a civil proceeding between one of such clients (or ~~his~~ a person claiming to be a successor ~~in~~ to his interest in the consultation) and another of such clients (or ~~his~~ a person claiming to be a successor ~~in~~ to his interest in the consultation).

We sent a preliminary draft of this memorandum to Mr. Haves for his comments. In the last letter attached to this memorandum, Mr. Haves questions whether Sections 957, 960, and 961 are intended to reach the sort of case involved here. In Memorandum 67-31, we raise a question concerning the ambiguity of those sections in this sort of context. If the sections are clarified to make them inapplicable to conversations of persons other than the deceased client, then the problem presented by Mr. Haves becomes more acute. Mr. Haves suggests (with some justification) that the above sections probably will be construed narrowly to apply only to the decedent's communications. So construed, they would not meet his problem. To meet his problem, therefore, he recommends a revision of Section 962 that would make the joint client exception applicable after the death of one of the joint clients in litigation between the remaining joint client (or his successors) and persons claiming through the deceased joint client by succession or by inter vivos transaction. See the last page of the pink pages attached for Mr. Haves' statement highlighting the policy consideration he believes should be controlling.

Respectfully submitted,

John H. DeMoully
Executive Secretary

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December 9, 1966

Mr. John H. DeMoully
Executive Secretary
California Law Revision Commission
Room 30, Crothers Hall
Stanford University
Stanford, California 94305

Dear Mr. DeMoully:

Having "shared" the platform with Otto Kaus in the Continuing Education of the Bar lectures on the New Evidence Code, I learned, inter alia, that you are the man to whom I should tell my troubles in connection with the Evidence Code.

I already have a problem. Why does Section 962 refer to "successor in interest" while Section 957 refers to "parties all of whom claim through"? I am now being confronted by an argument which I believe is specious: that one becomes a "successor in interest" only if his title or right is unquestioned or established, whereas a person is "claiming through" if he is merely asserting a bona fide claim. It seems to me that the requirement of 962 should be the same as 957 and that a party should be entitled to enjoy the exception to the privilege under 962 if he is asserting a bona fide claim.

Cases such as In re Bauer, 79 Cal.304 (1889), Smith v. Smith, 173 Cal. 725 (1916) (both of which are discussed in Paley v. Superior Court, 137 Cal.App.2d 450) bear on the joint representation problem as well as on the Paley problem and seem to indicate that a bona fide claim is all that is required.

Why did Law Revision Commission make a difference in the language, as indicated above, in the two sections?

Sincerely yours,

ROBERT HAVES

RH:pk
cc: Justice Otto Kaus

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December 21, 1966

Mr. John H. DeMoully
Executive Secretary
California Law Revision Commission
School of Law
Stanford University
Stanford, California 94305

Dear Mr. DeMoully:

Thank you for your letter of December 13, 1966, with respect to the inquiry contained in my letter of December 9.

The exact fact situation is this: A and his second wife consulted B, an attorney, with respect to the drawing of their wills. On deposition, B testified that A and A's wife discussed their wills with him in the presence of each other. B drew wills for both A and his wife which were later executed at the same time. A is dead. A's wife is alive. A's will, mirabile dictu, leaves everything to his wife and nothing to his children. I represent his children. On deposition I asked B what A's wife said to him and what he said to her on the subject of wills, in the presence of A. Opposing counsel interposed the objection on the grounds of the attorney-client privilege. The witness was instructed not to answer and refused to answer. I brought on a motion to compel answer. At the conclusion of the hearing on the matter the judge announced that he was rather intrigued by the problem and would like additional briefing. Because but a short time was permitted (five days) I did not do a very thorough job. However, copies of two letters which I have written the court on the subject are enclosed for whatever assistance they may give the Law Revision Commission. The other side did not reply. The Cavanaugh and Petty cases referred to at the top of page two of my letter of December 5, 1966, may be found at 167 Cal. App. 2d 657 and 116 Cal. App. 2d 20, respectively.

I am delighted that the Law Revision Commission is within reach of the ordinary practicing attorney and for your interest.

I should comment that the matter is still under

submission in the discovery department of the Los Angeles County Superior Court.

Very truly yours,

ROBERT HAVES

RH:hls
Enclosures

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January 10, 1967

Mr. John H. DeMoully
Executive Secretary
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Dear Mr. DeMoully:

In connection with our recent correspondence, I enclose herewith a copy of the trial court's ruling on the issues presented. It appears that the court did not base its decision on section 962 of the Evidence Code or the cases which it codifies.

With many thanks for your interest in this matter, I am,

Very truly yours,

ROBERT HAVES

RH:hls
Enclosure

891749

Ralph Ferdinand Gassman, et al
vs
Herta Gassman, et al

Counsel for Plaintiff P 506888

Counsel for Defendant

IN THE MATTER OF THE ESTATE OF MARTIN SOLOMON GASSMAN, ST DECEASED

STATISTICAL CODE CLERKS USE ONLY	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16
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NATURE OF PROCEEDINGS:

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Motion of plaintiffs Ralph Ferdinand Gassman and Ursula Otillie Zandmer for order to require John J Baer to answer certain questions propounded at the taking of deposition (Submitted Dec 1, 1966)

Motion of contestents Ralph Ferdinand Gassman and Ursula Otillie Zandmer for order to require John J Baer to answer certain questions propounded at the taking of deposition (Transferred from Dept 9) (Submitted Dec 1, 1966)

MOTION GRANTED. UPON RESUMPTION OF HIS DEPOSITION ON TEN DAYS NOTICE THE WITNESS JOHN J BAER IS INSTRUCTED TO ANSWER THE FOLLOWING QUESTIONS:
"ASIDE FROM THE TWO WILLS THAT YOU TOLD US ABOUT PRIOR TO 1965, HERTA NEVER CONSULTED YOU IN REFERENCE TO ANY OTHER LEGAL MATTERS, IS THAT CORRECT?"
"WHAT DID YOU SAY AND WHAT DID SHE SAY WITH REFERENCE TO HER WILL IN THE PRESENCE OF MARTIN?"
"WHAT WAS SAID BY YOU AND WHAT WAS SAID BY HERTA ON THE SUBJECT OF A NEW WILL FOR HERTA IN THE PRESENCE OF MARTIN?"
AND ALL PROPER QUESTIONS FLOWING FROM THE ANSWERS GIVEN. ANY ANSWER GIVEN TO ANY OF THE QUESTIONS SHALL NOT BE DEEMED TO JUSTIFY OR REQUIRE AN ANSWER TO ANY QUESTION REGARDING ANY CONVERSATIONS BETWEEN THE WITNESS AND HERTA NOT IN THE PRESENCE OF MARTIN OR SOME OTHER THIRD PERSON WHOSE PRESENCE WOULD VOID THE CLAIM OF CONFIDENTIAL COMMUNICATION.

DEC 27, 1966 (1) DEPT 63

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January 24, 1967

Mr. John H. DeMoully
Executive Secretary
California Law Revision Commission
Stanford University
Stanford, California 94305

Dear Mr. DeMoully:

I have before me your letter of January 17, 1967, and the law revision commission's thoughtful analysis.

Since the analysis raises some questions with respect to the facts of my case, the following may be helpful to the commission:

The "second" will is being contested on each of the classical grounds--lack of testamentary capacity, lack of due execution and undue influence. The children's civil complaint seeks equitable enforcement of the 1955 agreement, declaratory relief, and contains a tort count charging the second wife with inducing A to breach the 1955 agreement.

The second wife's conversations with B in A's presence might reveal her knowledge of the existence of the 1955 contract; they might also reveal facts bearing on the issues of capacity and undue influence (e.g. "my idiot husband made this 1955 contract [showing it to the attorney]. I now want you to draw him a will that leaves everything to me, and I want to draw a will that leaves everything to my children. No one will ever find out about the 1955 agreement [or she states facts which, if true, would render the contract unenforceable] and that way I'll get everything. He'll do anything I say. He's so far gone he has no mind of his own left, but I'm sure that's the way he would want it." The above is hypothetical. There is no such evidence in our case--unfortunately).

LAW OFFICES
~~MENDELSOHN~~, HAVES & MILLER

Should that conversation be privileged?

I believe the suggestions made in the last paragraph on page 2 of the commission's analysis are not very useful unless sections 957 and 961 are interpreted to include, as exceptions, the communications of anyone (e.g. second wife independently consults a lawyer, without A coming along and makes the wished-for statements above-quoted). However, it would appear that sections 957, 960 and 961 apply to communications between the decedent and his lawyer. Section 956 probably doesn't help, either, although my hypothetical may approach fraud.

It seems to me that resolution of the problem should follow these lines:

The problems of proof increase greatly upon death of a participant in a transaction. The case law and the new code recognize this. Sections 957, 959, 960 and 961 are examples, as are sections 1227, 1260 and 1261. Certain policies of the law that would exclude evidence during the participant's lifetime must, upon his death, yield to other policies which seek to find the truth in a controversy, despite the obstacle of death. Thus, in the commission's example (on page 5), P could, in A's lifetime, call A as a witness, take his deposition, etc. in an effort to establish his claim. P has the usual range of evidence-producing procedures available to him, and A and B should have the full scope of the lawyer-client privilege available to them. But when A dies, the privilege that A formerly had will not apply, in a dispute between B and P (both of whom claim under A by inter vivos transaction)--section 957. Why then should B's statements, which are part of the entire transaction with the lawyer remain privileged? (cf. section 356.) They might throw some light--perhaps considerable light--on the entire transaction, particularly if P sues B for inducing breach of contract.

In short, I think the "successors in interest" problem under section 962 requires differentiation between the two quite different situations. It is, one might say, a matter of life or death.

Yours truly,

ROBERT HAVES