6/15/61

First Supplement to Memorandum No. 19(1961)

Subject: Uniform Rules of Evidence (HEARSAY); RULE 62(6)(a)

At the May meeting of the Commission, concern was expressed that Rule 62(6)(a) may defeat a privilege otherwise provided by the URE privilege rules. Because of this concern, no decision was made in regard to the staff's recommended changes in C.C.P. § 2016 and Penal Code §§ 686, 1345 and 1362; for the Commission did not wish to substitute the "unavailable as a witness" standard contained in Rule 62(6)(a) for the standards of unavailability contained in the cited code sections unless it was sure that the substitution would not permit the admission of privileged information. This memorandum will discuss Rule 62(6)(a) and how it will operate in relation to the various privileges and hearsay exceptions.

Rule 62(6) defines the term "unavailable as a witness" as it is used in certain URE hearsay exceptions. Subdivision (6)(a) provides that a person is unavailable as a witness if he is exempted from testifying concerning the matter to which his statement is relevant on the ground of privilege.

A person must be "unavailable" within the meaning of the defined phrase as a condition for the admissibility of his out-of-court statement under the following exceptions to the URE hearsay rule:

1. Rule 63(3) - former testimony.
2. Rule 63(10) - declarations against interest.
3. Rule 63(12)(c) and (d) - statements relating to the making or nature of the declarant's will, statements of previous intent, plan, motive or design where such mental state is itself an issue.
4. Rule 63(23) - statements concerning the declarant's own family history.
5. Rule 63(24) - statements concerning pedigree of other members of declarant's family.

Rule 62(6)(a) probably will not be applied to any great extent insofar as the exceptions numbered 3, 4 and 5, above, are concerned. The declarants in those situations are more than likely to be dead. However, there may be many opportunities to apply the rule to permit admission of former testimony and declarations against interest. Hence, this memorandum will deal only with these exceptions. The memorandum will consider the operation of 62(6) in relation to the attorney-client privilege, the physician-patient and the privilege against self-incrimination. From a consideration of the operation of Rule 62(6)(a) in connection with these privileges, the Commission should be able to determine whether Rule 62(6)(a) is a desirable provision.

Attorney-client privilege

Case 1. D is charged with the commission of a sex offense against a child. D claims that the charge arises out of mistaken identity and that X actually committed the

offense. X has written a letter to Avaricious, a lawyer, for advice as to his legal rights, stating in the letter that he committed the offense. At the trial of D, X is called as a witness, but X denies his guilt. X is then asked to tell what he wrote to Avaricious. X invokes the attorney-client privilege, and his claim of privilege is upheld. Avaricious, too, is called, but X again invokes the privilege. Gumshoe, a private detective, is then called. Gumshoe relates that he rifled Avaricious' office and found the letter from X. Objections on the grounds of hearsay and privilege. D argues that the letter contains a declaration against penal interest and is admissible under Rule 63(10) because X is unavailable as a witness on the ground of privilege.

Ruling: Objection on the ground of privilege sustained. Under the Uniform Rules -- Rule 26(2)(c)(ii) -- this ruling is proper. The hearsay exception for declarations against interest does not make such declarations admissible; the exception declares that, if the declarant is unavailable at the trial because of privilege, the declaration is not inadmissible under the hearsay rule. Any other rule of exclusion is still operative. Here, there is another rule of exclusion. Rule 26 provides that the client has a privilege to prevent "any person from disclosing the communication if it came to the knowledge of such 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 . . . ." The communication

involved in the given case came to the knowledge of Gumshoe in a proscribed manner; hence, X, the client, has a privilege to prevent Gumshoe from disclosing the communication.

Case 2. Same case as in case 1. At the preliminary hearing, Avaricious testifies that he saw a person resembling D near the scene of the crime shortly before the crime was committed. Under cross-examination at the preliminary hearing, Avaricious -- having received no fee from X -- relates X's confession; however, he explains that X's confession is not credible because X is suffering from an emotional problem that causes him to confess falsely to antisocial conduct. X is not present at the hearing and does not consent to Avaricious' testimony. At the trial, D seeks to introduce the testimony of Avaricious at the preliminary hearing. D claims the testimony is admissible as former testimony under Rule 63(3) because Avaricious is now unavailable as a witness on the ground of privilege, that the declaration against interest of X to which Avaricious testified is admissible under Rule 63(10) because X is unavailable on the ground of privilege, and both such declaratins are now admissible under Rule 66 (multiple hearsay). Objection on the ground of privilege.

Ruling: Objection sustained. Under Rule 26(2)(c)(iii) the ruling is proper. Here, again, there is a rule of exclusion that prohibits the introduction of evidence that is not inadmissible under Rule 63. Rule 26 provides that the client has a privilege to prevent "any person from

disclosing the communication if it came to the knowledge of such person . . . (iii) as a result of a breach of the lawyer-client relationship." The communication was revealed at the preliminary hearing in violation of the lawyer-client relationship despite the nonpayment of the fee (People v. Singh, 123 C.A. 365 (1932)); hence, X, the client, has a privilege to prevent anyone from disclosing what Avaricious said concerning the communication at the preliminary hearing.

Physician-Patient

Case 3. D is also the defendant in a civil assault case arising out of the same offense involved in Cases 1 and 2. X has also consulted Headshrinker, a psychiatrist, in order to obtain psychiatric care and treatment so that he can be cured of his propensity for antisocial conduct of this sort. In order for Headshrinker to provide proper treatment, X has revealed the offense in a written narrative statement which he has given to Headshrinker. At the trial, D calls X as a witness and asks X concerning his statements to Headshrinker; but X invokes the physician-patient privilege. Headshrinker, too, is prevented from testifying by a timely invocation of the privilege. D then calls Gumshoe. Gumshoe relates that he rifled Headshrinker's office and found X's statement. D offers the statement in evidence. Objections on the grounds of hearsay and privilege.

Ruling: Objections overruled. Under Uniform Rule 27, the physician-patient privilege does not protect the patient

against disclosure of communications by persons who obtained knowledge or possession of the communication without the knowledge or consent of the patient. Rule 27 permits the patient to prevent disclosure of the communication by a witness if the witness is (i) the patient himself, (ii) the physician or (iii) "any other person who obtained knowledge or possession of the communication as the result of an intentional breach of the physician's duty or non-disclosure by the physician . . . ." Here, Gumshoe falls within none of the categories. Hence, in his hands the communication is not subject to the physician-patient privilege. Under the Uniform Rules, the evidence is not inadmissible hearsay. It is a declaration against penal interest under Rule 63(10) and the declarant is unavailable as a witness under Rule 62(6)(a) because of privilege.

It should be noted, though, that if 62(6)(a) were deleted from the rules, the statement -- even though not privileged -- would be inadmissible hearsay. If it is undesirable from a policy standpoint to permit the introduction of this type of evidence, the staff suggests that the privilege be broadened to protect it. But the evidence should not be excluded by the hearsay rule, for it is just as reliable as it would be if X had become unavailable because he left the vicinity or because of insanity.

Case 4. In the criminal trial of D, Headshrinker is called as a witness and asked about X's confession. Objections on the grounds of hearsay and privilege.

Ruling: Objections overruled. The physician-patient privilege does not apply in a criminal case under either the Uniform Rules or existing California law. However, the statement is hearsay and does not fall within the declaration against interest exception, for X is available as a witness and has testified by denying the commission of the offense. Nonetheless, the statement is admissible under Rule 63(1) as a prior inconsistent statement which may be received as proof of the truth of the matters stated.

Case 5. After D has been acquitted in the criminal trial as a result of Headshrinker's testimony, the civil action against D is brought to trial. D again calls Headshrinker to testify to X's confession. X, however, invokes the physician-patient privilege and the court properly refuses to permit Headshrinker to testify. D then offers Headshrinker's testimony in the previous criminal action. Objections on the grounds of hearsay and privilege.

Ruling: Objections overruled. As pointed out before, the physician-patient privilege allows the patient to prevent disclosure of a confidential communication only by (i) the patient himself, (ii) the physician or (iii) "any other person who obtained knowledge or possession of the communication as the result of an intentional breach of the physician's duty of nondisclosure by the physician . . . ." Headshrinker's prior testimony was not a breach of his duty of nondisclosure, for he had no duty of nondisclosure in the criminal case. The evidence here, whether in the form of

testimony by a person who heard the former testimony or in the form of an authenticated transcript, does not fall within the proscribed categories. Therefore, it is not subject to the privilege. The testimony is not inadmissible under the hearsay rule, for it is admissible as former testimony under Rule 63(3)(b).

Again, Headshrinker's former testimony would be inadmissible as former testimony if Rule 62(6)(a) were deleted. Even though not privileged, the evidence would be inadmissible hearsay because Headshrinker is not "unavailable as a witness." Again, if the Commission believes that it is desirable for policy reasons to exclude this evidence, the staff believes the privilege should be broadened. The evidence should not be excluded by the hearsay rule. If D were fortunate and Headshrinker were killed or if Headshrinker merely left the jurisdiction, the former testimony would come in despite X's assertion of privilege, for Headshrinker would clearly be "unavailable." This evidence is no less reliable merely because X can successfully invoke the physician-patient privilege to prevent Headshrinker from testifying.

Self-Incrimination

Case 6. The facts are the same as in the foregoing cases. But, when X is called at the criminal trial of D, X refuses to testify on the ground of self-incrimination. D calls Headshrinker to testify to X's confession. Objection on the grounds of hearsay and privilege (physician-patient).

Ruling: Objections overruled. The physician-patient privilege is not applicable in criminal cases. The statement is a declaration against penal interest and is admissible under Rule 63(10) because X is unavailable as a witness on the ground of privilege (self-incrimination).

If Rule 62(6)(a) were deleted, the statement would be inadmissible hearsay because X is not "unavailable as a witness." Peculiarly enough, if X had fled, that fact would have been admissible to prove X's guilt because that fact is not hearsay; if X had denied his guilt, his confession would have been admissible as an inconsistent statement without regard to unavailability; and if X had merely removed himself 150 miles -- beyond the court's subpoena power -- his confession would be admissible because he had become "unavailable." His prior confession is no less trustworthy when he appears and refuses to talk than it is when he refuses to come near enough so that he can be compelled to appear. Therefore, the confession -- subject to no privilege -- should not be excluded on the ground of hearsay.

Conclusion

The foregoing examples are sufficient to show that Rule 62(6)(a) does not operate to impair any of the privileges. If the privilege is broad, like the attorney-client privilege, the holder of the privilege is fully protected against

disclosures by eavesdroppers and against disclosures in violation of the confidential relationship. Nothing in 62(6)(a) impairs the protection given by the privilege. It does not permit the introduction of any evidence protected by the privilege. On the other hand, if the privilege is narrow, 62(6)(a) will at times permit confidential communications to be introduced -- but only because the evidence sought to be introduced is not within the privilege. In these situations, the evidence will be admitted if the declarant goes 150 miles away because the information is not privileged; but, unless 62(6)(a) is approved, the same unprivileged evidence will be excluded -- not on the ground of privilege, but on the ground of hearsay -- if the declarant appears at the trial and refuses to say anything.

The staff believes that 62(6)(a) declares a logical and desirable standard for "unavailability" and that it should be retained. If the protections provided by the privileges are not broad enough, the privilege rules should be revised to provide the protection desired.

Respectfully submitted,

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