June 12, 1961

Memorandum No. 20(1961)

Subject: Study No. 34(L) - Uniform Rules of Evidence (Privileges Article - Rule 26)

This memorandum concerns Rule 26 relating to the Lawyer-Client Privilege.

Attached as Exhibit I (white pages) is Rule 26 as revised to date by the Commission (together with an explanation of the rule as revised by the Commission).

Attached as Exhibit II (pink pages) is an extract from the Minutes of the Northern Section of the State Bar Committee. The Southern Section of the State Bar Committee has not yet considered this rule.

Also attached is a copy of our research consultant's study on Rule 26. References in this memorandum to "Study" are the research consultant's study.

The following matters should be considered in connection with Rule 26:

1. The entire rule, as revised by the Commission, should be carefully examined in view of the comments attached to the revised rule.

2. The Northern Section objects to the theory of the Uniform Commissioners (approved by the Commission) that a privilege must be claimed or the evidence will come in. Accordingly, the Northern Section would delete subdivision (3) of the revised rule and replace it with the following:

(3) The privilege under paragraph (2) of this rule exists unless and until it is waived by the holder of the privilege and no privileged communication under this rule is admissible without the consent of the holder of the privilege.

The proposed subdivision would create serious problems in the case of a deceased client. Our consultant discusses this matter as follows (pages 13-14 Study):

> There was much difference of opinion among the draftsmen of the Model Code and the members of the Institute as to the effect upon the lawyer-client privilege of the death of the client. Some, such as Professor Morgan and Judge Learned Hand, advocated the view that the privilege should not survive the death of the client. Others thought that the privilege should survive death and that the personal representative, devisee or heir should be entitled to claim the privilege. Still others thought that the privilege should survive but should be vested only in the personal representative. This last is the view that prevailed and which was incorporated in the Model Code and later in the Uniform Rules. (Rule 26, second sentence, provides in part: "The privilege may be claimed by the client . . . , or if deceased, by his personal representative . . . .".
>
> It may be that the current California view is not any of the three views stated above but is, rather, a fourth view to this effect: the privilege survives the death of the client and nobody can waive the privilege in behalf of the deceased client. (Or, to put it another way, any party is entitled to claim the privilege in behalf of the deceased client.)
>
> This is the view California has adopted concerning the physician-patient privilege and the marital privilege for confidential communications. It may, therfore, be the view in force by analogy respecting the lawyer-client privilege. If so, there could today be no waiver in such cases as the following: action by an administrator for wrongful death of his intestate; plaintiff administrator calls intestate's lawyer to testify to intestate's relevant confidential communication to lawyer; defendant's objection on the basis of C.C.P. § 1881(2) sustained.
>
> If this is the California view, it would clearly be changed (meritoriously so, we think) by adopting the U.R.E. view. Under that view the executor or administrator is the sole-holder of the posthumous privilege of the testate or intestate. As such holder, he could, of course, elect (under Rule 37) to waive the privilege.

It should be noted that subdivision (3) of the revised rule indicates who may claim the privilege under Rule 27. The Commission previously revised the rule to permit the lawyer to claim the privilege on behalf of a living client where no other person is present to claim the privilege.

3. The Commission revised subdivision (4) of revised Rule 26 to delete the language "sufficient evidence, aside from the communication, has been introduced to warrant a finding that." The Northern Section would restore this language. At the request of the Commission, our consultant made a study of this foundational requirement and concluded that "there is little case or text authority on the foundation requirement of 26(2)(a)" and that "such authority as there is does not made a convincing case in support of the requirement." A copy of the supplemental memo by the consultant is attached as Exhibit III (yellow pages).

4. In subdivision (5)(a) of revised Rule 26, the Northern Section would insert "a deceased" for the word "the" between the words "through" and "client." Our consultant's comments concerning this matter are (in part) as follows (Study page 23):

> In the remarks just made we have, however, been thinking only of situations in which the client is deceased - as apparently was the court in Paley. Now let us compare the following: let us suppose an action by P v. D to quiet title to Blackacre. P claims under a deed from C. D likewise claims under a deed from C. D contends his deed is prior to P's. P contends D's deed was never delivered. C has made a confidential communication to his lawyer relating to the issue between P and D. Under exception (b) the communication is not privileged, even though C is alive and stoutly resists disclosure by the lawyer.
>
> Probably in most such cases waiver would be found. However, in the case (probably rare) of C being alive and resisting disclosure, we believe the interests of P and D in obtaining a settlement of their controversy in the light of all the facts should override C's interest in preserving secrecy and non-disclosure. Therefore, we approve of exception (b) unqualifiedly. If, however, it is desired to limit this exception along more traditional lines, this could be simply done by changing the expression "the client" to "a deceased client."

Respectfully submitted,

John H. DeMoully
Executive Secretary

Exhibit I

Revised October 1, 1959
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 other] 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 ~~[s]~~ 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) ~~[to]~~ Prevent his lawyer, or the lawyer's representative, associate or employee, from disclosing the communication. ~~[it,-and]~~

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

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

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

(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, [~~or~~] association or other organization under this rule terminates upon dissolution of the corporation, association or other organization.

Revised October 1, 1959
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 Uniform 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 the witness" have been deleted from subparagraph (a) because these limiting words are not a desirable limitation. Note that under Uniform Rule 2, the rules "apply in every proceeding, both criminal and civil, conducted by or under the supervision of a court, in which evidence is produced."

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 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. The Commission believes that this is in substance 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 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 of 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.

The Uniform Rule requires that the judge must find 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 a tort." The Commission has not retained this requirement that as a foundation for the admission of

such evidence there must be a prima facie showing of the criminal or tortious activities of the client. There is little case or text authority in support of the foundation requirement and such authority as there is fails to make a case in support of the requirement. The Commission believes the foundation requirement is too stringent and prefers that the question (as to whether the legal service was sought or obtained to enable or aid the client to commit or plan to commit a crime or to perpetrate or plan to perpetrate a fraud) be left to the judge for determination under the provisions of Uniform Rule 8.

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.

EXHIBIT II

EXTRACT OF MINUTES OF

NORTHERN SECTION OF STATE BAR COMMITTEE

Mr. Bates then presented his report on Rule 26.

Mr. Bates expressed his view that by and large Professor Chadbourn's thinking regarding this proposed rule is sound.

He called attention to the fact that the Law Revision Commission has recast Rule 26 which gives him the impression that the Commission is thinking of codifying our law and bringing it up to date rather than attempting to adopt a uniform rule.

In accordance with this suggestion the Committee expressed the caveat that we question the advisability of the Commission's recasting these sections in such manner as to get away from the proposed uniform rules.

Mr. Bates stated that Professor Chadbourn had said that there was some ambiguity in the California law as to whether the privilege belonged exclusively to the client. The uniform rules would definitely make it the privilege of the client.

The definition of the meaning of the term "lawyer" as found in subdivision (3) was considered and approved by the Committee.

The question of leaving the privilege only in the hands of the personal representative of the client after his death was considered. The Committee concluded that this was too restrictive since many cases could arise after distribution of an estate in which the heirs or legatees of the deceased client should be

able to assert the privilege. The Committee could not see any reason or logic in confining the exercise of the privilege to the relatively short period of time involved in probating the deceased client's estate.

The question of extending to torts the exception found in subsection (a) of subdivision (2) was discussed and deferred for later consideration.

The exception expressed in subsection (b) of subdivision (2) was considered and approved except that the Committee believed that a living client should at all times be able to assert the privilege and voted therefore to recommend that exception (b) be confined to a deceased client and that the language of exception (b) therefore be modified by eliminating the word "the" appearing before the word "client" and substituting therefor "a deceased".

The Committee voted to approve the elimination of the "eavesdropper" exception, as found in subdivision (1) of the rules.

Mr. Bates then turned to subsection (a) of subdivision (3) and noted that Professor Chadbourn and the Law Revision Commission had recommended the inclusion of an incompetent who consults a lawyer as a person who falls within the meaning of the word "client". Mr. Lasky pointed out that this was unnecessary in view of the fact that the first part of subsection (a) defines a client as a person, corporation, or other association that, directly or through an authorized representative, consults

a lawyer. Mr. Lasky stated that in his opinion this would include an incompetent. The Committee agreed and therefore voted to disapprove any express reference to an incompetent in subsection (a).

Mr. Bates then took up Professor Chadbourn's recommendation that subsection (b) of subdivision (1) be expanded to allow the client to prevent disclosure by the lawyer's representative, associate or employee, as well as the lawyer. The Committee generally felt that this was a wise addition and therefore recommended its adoption.

Mr. Bates then pointed out that Professor Chadbourn had criticized the next to the last sentence of subdivision (1), which provides that the privilege may be claimed by the client in person or by his lawyer, in that it appeared to confer the privilege upon the lawyer as well as the client, contrary to the intent that the privilege should be that of the client alone. The Committee agreed with this criticism but believed that neither the revision as proposed by Professor Chadbourn nor that of the Law Revision Commission adequately met the sought for objective. It was decided that attempted revision should be left for the next meeting.

At the suggestion of Mr. Bates the Committee reconsidered its decision taken at the previous meeting that the claim of privilege of a deceased client should extend beyond his personal representative to his heirs and legatees. Members of the Committee expressed the view that this might cause complications where one

heir or legatee would wish to claim the privilege and another would wish to waive it. The Committee rescinded its previous action and approved the provision as now set forth in Section 26, as prepared by the Commissioners on Uniform State Laws.

The Committee then took up the question which was pending at the close of the previous meeting as to how to redraft the next to the last sentence of Section 1 of the Rule so as to eliminate the inference that the lawyer has the privilege as well as the client. Mr. Pattee called attention to the fact that the whole section seemed to be cast in terms of claiming the privilege whereas the privilege actually exists. He suggested that the sentence in question should be recast in terms of waiving the privilege which would probably facilitate redrafting. The Committee generally approved and Mr. Bates stated that he would redraft the sentence for presentation at the next meeting.

Mr. Bates then called attention to the fact that the Law Revision Commission had rearranged the order of the section by placing the definitions at the beginning of the section rather than at the end. The Committee decided to take no position on this deeming the location of these definitions to be immaterial.

The Committee approved the addition by the Law Revision Commission of the State within the definition of "client". The Committee then approved the following revisions of the Law Revision Commission:

1. Section 1 (c) which adds the definition of a "holder of a privilege".

2. The revisions made by Sections 2 (a), (b) and (c) of the Commission's proposed draft.

With respect to Section 3 of the Commission's draft this is involved in the draft which Mr. Bates agreed to present to the next meeting, as hereinbefore set forth.

Mr. Bates proceeded with discussion of Rule 26. He pointed out that heretofore the Committee has approved the revision by the Law Revision Commission up to paragraph (3) of the Commission's draft. He pointed out that at the previous meeting of the Committee Mr. Pattee had suggested that the lawyer-client privilege exists until waived and that the draft of the Commissioners on Uniform Laws had approached the privilege in paragraph (1) of their draft from the standpoint of claiming the privilege rather than waiving it.

In accordance with the approach proposed by Mr. Pattee, Mr. Bates proposed that paragraph (3) of the Law Revision Commission's draft be revised to read as follows:

> "(3) The privilege under paragraph (2) of this rule exists unless and until it is waived by the holder of the privilege and no privileged communication under this rule is admissible without the consent of the holder of the privilege."

Mr. Bates pointed out that subdivision (2) of Section 1881 of the Code of Civil Procedure indicates that the privilege is an existing thing.

After further discussion the revision of paragraph (3) as proposed by Mr. Bates was approved.

Mr. Bates then took up paragraph (4) of the revision of the Law Revision Commission and called attention to the fact that this revision had eliminated the exception proposed by the Commissioners on Uniform Laws which would prevent extension of the privilege to a communication if the legal service was sought or obtained in order to enable or aid the client to commit a tort and instead had substituted an exception which would apply to the seeking of legal service to enable or aid the client "to perpetrate or plan to perpetrate a fraud". Mr. Bates suggested that in his opinion the tort provision of the Commissioners on Uniform Laws should be reinstated. Mr. Lasky argued that to make an exception for either tort or fraud would result in making the privilege vulnerable to gradual erosion. After discussion Mr. Lasky offered to examine the cases to determine how and in what manner the exception here involved had actually been raised in the courts. Accordingly the question of paragraph (4) of the Law Revision Commission draft was postponed until a later meeting.

Paragraphs (5) and (6) of the Law Revision Commission draft were approved by the Committee except that in subparagraph (a) of paragraph (5) the words "a deceased" were substituted for the word "the" between the words "through" and "client" in accordance with the conclusion reached at a previous meeting of the Committee.

The Committee took up consideration of paragraph (4) of Rule 26 as revised by the Law Revision Commission. Several

members of the Committee expressed doubt as to the wisdom of the exception embodied in this paragraph because of the difficulty of drawing the line between legitimate communications between attorney and client and those which would clearly contemplate the commission of a crime or fraud. The Committee agreed, however, that since the exception seems to have been in existence since the inception of the rule it should be retained.

The Law Revision Commission's amendment to eliminate the exception for tort and to substitute an exception for fraud was accepted. The Committee felt, however, that the Law Revision Commission's action in eliminating the requirement that there be sufficient evidence aside from the communication that the legal service was sought to enable the commission of a crime or fraud was ill advised. The Committee therefore agreed that paragraph (4) should read as follows:

> "(4) The privilege under paragraph (2) of this rule does not extend 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 or plan to commit a crime or to perpetrate or plan to perpetrate a fraud."

[Summary of Action on Rule 26] This concludes the consideration of the Northern Section of Rule 26 and its action may be summarized as follows:

The Committee approves Rule 26, as revised by the Law Revision Commission, except that the Committee would revise paragraph (3) of the Commission's draft to read as follows:

"(3) The privilege under paragraph (2) of this rule exists unless and until it is waived by the holder of the privilege and no privileged communication under this rule is admissible without the consent of the holder of the privilege."

and would revise paragraph (4) to read as hereinbefore set forth and would insert the words "a deceased" for the word "the" between the words "through" and "client" in subparagraph (a) of paragraph (5).

EXHIBIT III

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,

JAMES H. CHADBOURN

JHC:cz

I N T R O D U C T I O N

This memo is a study of Rule 26 on Lawyer-Client Privilege and of Rule 37, insofar as the latter Rule relates to Lawyer-Client Privilege. The text of these two Rules is as follows:

"Rule 26. Lawyer-Client Privilege.

(1) General Rule. Subject to Rule 37 and except as otherwise provided by Paragraph 2 of this rule communications found by the judge to have been between lawyer and his client in the course of that relationship and in professional confidence, are privileged, and a client has a privilege (a) if he is the witness to refuse to disclose any such communication, and (b) to prevent his lawyer from disclosing it, and (c) to prevent any other witness from disclosing such communication if it came to the knowledge of such witness (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. 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. The privilege available to a corporation or association terminates upon dissolution.

(2) Exceptions. Such privileges shall 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 or plan to commit a crime or a tort, or (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, or (c) to a communication relevant to an issue of breach of duty by the lawyer to his client, or by the client to his lawyer, or (d) to a communication relevant to an issue concerning an attested document of which the lawyer is an attesting witness, or (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.

(3) Definitions. As used in this rule (a) 'Client' means a person or corporation or other association 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 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) '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."

"Rule 37. Waiver of Privilege by Contract or Previous Disclosure. A person who would otherwise have a privilege to refuse to disclose or to prevent another from disclosing a specified matter has no such privilege with respect to that matter if the judge finds that he or any other person while the holder of the privilege has (a) contracted with anyone not to claim the privilege or, (b) without coercion and with knowledge of his privilege, made disclosure of any part of the matter or consented to such a disclosure made by any one."

It will be noted that Rule 26 is in three parts as follows: (1) General Rule; (2) Exceptions; (3) Definitions.[1] In the first division of this memo we consider the general rule. In this connection we compare the general rule formulated by 26 (1) with the general rule presently in force in this State, namely, C.C.P. § 1881 (2) and the judicial construction thereof. In the second division of the memo we consider exceptions to the General Rule, comparing 26 (2) with the California exceptions. In the third division we

recommend certain clarifying and corrective amendments of Rule 26. In the fourth division we consider Rule 37.

G E N E R A L R U L E

For convenience of discussion we shall consider the following portion of Rule 26 (1) to be the U.R.E. "General Rule" of Lawyer-Client Privilege.

> ". . . communications found by the judge to have been between lawyer and his client in the course of that relationship and in professional confidence, are privileged, and a client has a privilege (a) if he is the witness to refuse to disclose any such communication, and (b) to prevent his lawyer from disclosing it. . . . 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. . . ."

The California general rule is partially legislative and partially decisional. The legislation is C.C.P. § 1881 (2) which provides as follows:

> "There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person can not be examined as a witness in the following cases: . . . (2) An attorney can not, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment; nor can an attorney's secretary, stenographer, or clerk be examined, without the consent of his employer, concerning any fact the knowledge of which has been acquired in such capacity."[2]

Under the ensuing italicized sub-titles we compare the U.R.E. and California general rules in the respects indicated by each sub-title.

Client's communication--Lawyer's advice.

Both rules cover "communications" by the client to the lawyer. Both also cover the lawyer's "advice" to the client. C.C.P. § 1881 (2) does so directly. Rule 26 does so indirectly by defining the term "communication" as including "advice given by the lawyer in the course of representing the client." (Rule 26, subdivision (3) (b).)

Professional relationship.

Both rules require as a condition of privilege that client's communication and lawyer's advice be in the course of professional lawyer-client relationship. (Rule 26: "in the course of that relationship"; C.C.P. § 1881 (2): "in the course of professional employment").

Confidentiality.

26 (1) refers to "communications . . . in professional confidence." [Italics added.] C.C.P. § 1881 (2) refers to "any communications made by the client to [his attorney] . . .". [Italics added.] Despite the broader reference of § 1881 (2), the section is limited by construction to confidential communications.[3]

Coerced disclosure by client.

26 (1) (b) provides "a client has a privilege . . . to prevent his lawyer from disclosing" the communications there described. § 1881 (2) provides "an attorney can not, without the consent of his client, be examined as to" the communication

or advice there described. Thus under both provisions the client may prevent the attorney from testifying to the client's statements or to the attorney's advice.

What, however, is the situation if disclosure of client's statement or attorney's advice is sought from the client as witness? Rule 26 (1) (a) explicitly extends privilege in this situation in these terms: "a client has a privilege if he is the witness to refuse to disclose". C.C.P. § 1881 (2) is silent on this aspect of the privilege. However, judicial decisions expand the privilege to this extent.[4]

The privilege belongs solely to the client.

Under § 1880 (2) the attorney does not possess the lawyer-client privilege.[5] Rather the privilege is the client's and his alone. Thus if the attorney is tried upon a criminal charge, he has no valid objection when his former client voluntarily reveals relevant matters hitherto confidential between client and himself.[6] As is said in People v. Riodan:

> "It was no concern of [defendant] if his former client waived the right to treat their transactions and conversations as confidential"
>
> because
>
> "the secrecy [thrown] about communications of this character is a legal protection to the client [and] there is no bar to its revelation, if the client chooses to waive the rule."[7]

A clear expression of the same view is the following taken from Abbott v. Superior Court:[8]

> "The privilege . . . is the client's, not the attorney's, and if it results in the protection of the attorney it does so only accidentally as a result of the assertion of the client's right."

In keeping with this modern view of the privilege the A.L.I. Model Code Rules were premised on the basis that the privilege is the client's and his only (Rule 209 (c) (1)). That the draftsmen of the U.R.E. intend the same unilateral basis of the privilege is indicated by their Comment on Rule 26 which, they say,"embodies the subject matter of the [A.L.I.] Model Code Rules".

Procedure in ruling claim of privilege.

The privilege stated in 26 (1) is applicable only when the conditions requisite for its existence (e.g., lawyer-client relationship - professional confidence) are "found by the judge". Rule 8 provides that when "a privilege is stated in these rules to be subject to a condition and the fulfillment of the condition is in issue, the issue is to be determined by the judge, and he shall indicate to the parties which one has the burden of producing evidence and the burden of proof on such issue as implied by the rule under which the question arises." Thus, if a question arises as to whether the lawyer-client relationship existed when a given communication took place or if the question is whether a given communication was intended to be confidential, it seems that the judge is not bound by the mere statement of the privilege-claimant of his conclusion on such questions. On the contrary, the judge must investigate and decide the question.

What is "implied" by Rule 26 as to who has the burdens referred to in Rule 8? We hazard the guess that the

proponent of evidence of the communication does not possess the burdens to negate privilege, but, instead, the privilege-claimant possesses the burdens to establish privilege. (This guess is prompted by the fact that such is the law today. See page eight.)

C.C.P. § 1881 (2) does not spell out any of the procedural principles adverted to in the two preceding paragraphs. However, the decisional law of this state seems to be in accord with these principles.[10] Thus in Hager v. Shindler, the court states that "whether a communication by a client to his attorney was made in confidence, is a question of fact, to be disposed of on principles applicable universally to questions of that character." The court then assumes that "the court below passed upon the point as involving matters of fact". The court then considers "the finding [below] to be well sustained by the evidence".[11]

The following excerpt from a later case clearly reveals the U.R.E. procedure as the proper procedure:[12]

> "The first assignment of error argued by plaintiff relates to the ruling of the court admitting evidence of certain statements made by him to an attorney at law over the objection that they were privileged. When this objection was made, and before passing upon it, the court took the testimony of witnesses to determine whether or not these statements were made in the course of professional employment. This was the proper procedure. The court found that the statements were not so made. It being within the province of the trial court to pass upon this, like any other question of fact, and the evidence being conflicting, the conclusion of the trial court will stand as final."[13]

As to who possesses the burden with reference to privilege, we have the following explicit statement in Sharon v. Sharon[14]: "The burden is upon the party seeking to suppress the evidence to show that it is within the terms of the statute" (§ 1881 (2)).

Common problems under both U.R.E. and California Rule.

Insofar as the general matters above considered are concerned, there is substantial identity of principle between the U.R.E. and California law. Therefore, if we were to adopt Rule 26, much of our case law would in no wise be affected.

To illustrate:

The question whether an attorney was consulted in a professional or a non-professional capacity has arisen frequently. As stated in Ferguson v. Ash[15], the governing principle here is as follows:

> "There are many cases in which an attorney is employed in business not properly professional and where the same might have been transacted by another agent. In such cases the fact that the agent sustains the character of an attorney does not render the communication attending it privileged and that may be testified to by him as by any other agent."

The application of this standard has produced a considerable body of precedent.[16] If we adopted Rule 26 these cases would be germane to the question of what constitutes communication "in the course of [lawyer-client] relationship" in the sense of Rule 26.

Likewise many cases have arisen which turn on the point of whether communication was intended to be confidential.[17] If we adopted Rule 26, these cases would be germane to the question of what constitutes "professional confidence" in the sense of Rule 26.

Furthermore, problems have arisen as to the extent to which the client can avoid disclosure of documents in discovery proceedings by turning such documents over to his lawyer[18] -- also the extent to which the client by choosing an agent to investigate and report to the attorney can disable such agent from disclosing either what he has discovered or reported to the lawyer or both.[19] We do not pause here to analyze and discuss these decisions.[20] We do, however, emphasize our opinion that since these decisions were reached by construing and applying principles substantially the same as those stated in Rule 26, adoption of this Rule would not ex proprio vigore affect such decisions.

The lawyer's clerk.

C.C.P. § 1881 (2) provides in part:

> "[A]n attorney's secretary, stenographer or clerk [cannot] be examined, without the consent of his employer, concerning any fact, the knowledge of which has been acquired in such capacity."

This was added to the section by amendment in 1893.[21] The evident purpose of the amendment was to extend lawyer-client privilege to the attorney's secretary, stenographer or clerk. Here, however, the privilege is expressly given to the attorney rather than to the client. Possibly this vesting of

the privilege in the attorney was a legislative inadvertence which will be corrected by construction.[22] At any rate it seems fairly clear that it is the intent of Rule 26 both to extend privilege to the attorney's secretary, stenographer or clerk, and to vest such privilege in the client. (However, as we suggest hereinafter, a clarifying amendment of the Rule is desirable in this regard. See page 28, infra.)

Who is a lawyer?

26 (3) (c) defines a lawyer as follows for purposes of the lawyer-client privilege:

> "'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."

We have found little local law on this aspect of lawyer-client privilege.[23] We are, however, convinced of the fairness of this U.R.E. concept of "lawyer" in the context of lawyer-client privilege. To require a client to run the risk that one he reasonably believes qualified to practice law is in fact disqualified would seem incompatible with the purpose of the privilege.[24]

Guardian and ward.

26 (1) second sentence provides in part as follows: "The privilege may be claimed by the client . . . , or if incompetent, by his guardian . . ." Rule (1) (9) defines the terms "guardian" and "incompetent" as follows:

> "'Guardian' means the person, committee, or other representative authorized by law to protect the person or estate or both of an incompetent [or of a sui juris person having a guardian] and to act for him in matters affecting his person or property or both. An incompetent is a person under disability imposed by law."

Rule 26 (3) (a) provides in part as follows: "As used in this rule (a) 'Client' . . . includes an incompetent whose guardian . . . consults the lawyer or the lawyer's representative in behalf of the incompetent."

All of these provisions are based upon parallel provisions of the A.L.I. Code. Thus 26 (1) parallels A.L.I. Rule 209 (c) (1); 1 (9) parallels A.L.I. Rule 1 (6), and 26 (3) (a) parallels A.L.I. 209 (a).

The history of the U.R.E. 26 (3) (a) and A.L.I. 209 (a) provision defining the concept client to include an incompetent is as follows. During the debate on the Code Senator Pepper posed this question:

> "In the case in which there is infancy, and the guardian of a minor and a lawyer is retained by the guardian and the minor makes a disclosure to the lawyer retained by the guardian, Query upon attaining age has the minor the privilege, . . . ?" [25]

The Institute then voted to instruct the Reporter (Professor Morgan) to redraft 209 (a) to make it clear that "the privilege may be asserted by the person formerly under disability." [26] For this purpose Professor Morgan apparently chose the language quoted above from U.R.E. 26 (3) (a).

Let us suppose, then, that the guardian of a twenty year old infant consults a lawyer in behalf of the infant. The

former infant has now reached his majority and is party to an action. Now the former infant may claim the privilege. Under 26 (3) (a) he is a "client". As such, he may claim the privilege under 26 (1), second sentence ("The privilege may be claimed by the client in person . . .").

By way of contrast, however, let us suppose the twenty year old infant himself consulted the lawyer. Upon reaching majority, should he not be regarded as the holder of privilege? In our opinion the answer is "Yes". We doubt, however, whether Professor Morgan's language covers this situation and we propose therefor to amend 26 (3) (a) as follows (new matter underlined):

> "Client . . . includes an incompetent <u>who himself consults</u> <u>or</u> whose guardian so consults . . . "

We have found no California authority on the matters discussed in this section. However, it seems to us entirely reasonable to provide that during guardianship the guardian has control of the privilege which he may accordingly claim or waive[27] and that after guardianship is terminated the former ward has control of the privilege.[28]

<u>Exclusion by judge on his own motion.</u>

Let us suppose thecriminal action of People v. D. D offers attorney L to testify to a confidential communication made by one C to L. The prosecution does not object. L (who no longer represents C) does not object. The court, however,

on its own motion refuses to permit L to testify to the communication.

Under the following provision (Rule 105 (e)) of the Model Code the judge's conduct was proper:

> "The judge . . . in his discretion determines . . . (e) whether to exclude, of his own motion, evidence which would violate a privilege of a person who is neither a party nor the witness from whom the evidence is sought . . ."

29

Under a dictum in People v. Atkinson the judge's conduct would likewise be proper California practice.

The U.R.E. omit Model Code Rule 105 (e). We do not, however, regard this omission as indicative of an intent to negate the judge's power to act on his own motion. Our guess is that the Commissioners would regard the power in question as an inherent power of the court and, as such, not necessary to be stated in the Rules. If this be so, there is, of course, no difference between the U.R.E. and California as to the judge's power to act ex mero motu.

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Death of client - effect on privilege.

There was much difference of opinion among the draftsmen of the Model Code and the members of the Institute as to the effect upon the lawyer-client privilege of the death of the

client. Some, such as Professor Morgan and Judge Learned Hand, advocated the view that the privilege should not survive the death of the client.[31] Others thought that the privilege should survive death and that the personal representative, devisee or heir should be entitled to claim the privilege.[32] Still others thought that the privilege should survive but should be vested only in the personal representative.[33] This last is the view which prevailed and which was incorporated in the Model Code and later in the Uniform Rules. (Rule 26, second sentence, provides in part: "The privilege may be claimed by the client . . . , or if deceased, by his personal representative . . .".)

It may be that the current California view is not any of the three views stated above but is, rather, a fourth view to this effect: the privilege survives the death of the client and nobody can waive the privilege in behalf of the deceased client. (Or, to put it another way, any party is entitled to claim the privilege in behalf of the deceased client.)

This is the view California has adopted concerning the physician-patient privilege[34] and the marital privilege for confidential communications.[35] It may, therefore, be the view in force by analogy respecting the lawyer-client privilege. If so, there could today be no waiver

in such cases as the following: action by an administrator for wrongful death of his intestate; plaintiff administrator calls intestate's lawyer to testify to intestate's relevant confidential communication to lawyer; defendant's objection on the basis of C.C.P. § 1881 (2) sustained.

If this is the California view, it would clearly be changed (meritoriously so, we think) by adopting the U.R.E. view. Under that view the executor or administrator is sole-holder of the posthumous privilege of the testate or intestate. As such holder, he could, of course, elect (under Rule 37) to waive the privilege.

EXCEPTIONS TO GENERAL RULE

26 (1) sets up a general rule of privilege. 26 (2) sets forth five lettered exceptions to the general rule. These exceptions are in large part presently operative in California. None of these exceptions is expressly stated in C.C.P. § 1881 (2). Each is, however, more or less firmly recognized to some extent by

judicial decision. Below we note the terms of these exceptions and the extent of their present existence in this State.

Exception (a).

This exception is that the lawyer-client privilege is inapplicable "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 or plan to commit a crime or a tort".

California clearly recognizes this exception insofar as future criminal or fraudulent activity is concerned.[36] Note, however, that exception (a) would bar privilege in case of consultation with a view to commission of any tort. This seemingly extends the traditional scope of this exception. Wigmore refers to the "inclination to mark the line at crime and civil fraud." Then he attacks this limitation in the following terms:

> "Yet it is difficult to see how any moral line can properly be drawn at that crude boundary [i.e., crime and civil fraud], or how the law can protect a deliberate plan to defy the law and oust another person of his rights, whatever the precise nature of those rights may be."[37]

(Wigmore § 2298.) McCormick is of like opinion.

Exception (b).

This exception makes the lawyer-client privilege inapplicable "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."

Let us suppose T dies. A paper-writing purporting to be his will leaves all of his property to P. P propounds the writing for probate. D, T's heir, contests the writing. Prior to his death T made a statement to his attorney indicative of the validity (or invalidity) of the writing as a will. Here we have a "communication relevant to an issue between parties all of whom claim through the client . . . by testate or intestate succession." Under exception (b) such communication is not privileged. Under the rule generally prevailing today such communication is not privileged. Likewise under California law such communication is not privileged. As is said in the recent leading case of Paley v. Superior Court:

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"The rule is well established in this state, as elsewhere, that the privilege does not survive the testator's death when the matter of his conversations or instructions arises in will contest, petitions to determine heirship, petitions to construe an ambiguous will, or any other type of controversy involving only the heirs or next of kin and the legatees or devisees of the testator. [Citations omitted.] . . . Though varying explanations of the reason for this rule have been given,[39] it is a court made principle based upon considerations of public policy [Citations omitted.] . . . and is limited to controversies between persons in privity with the testator's estate. Between persons claiming under testator and others who are not in privity with his estate the privilege survives. This is a generally accepted proposition. . . . The rule is usually stated in terms of application to 'strangers' or persons claiming adversely to the estate."

Now let us suppose an action by P v. D, executor of T. The action is for damages for injury to P allegedly inflicted by T's negligence. At the trial P calls T's attorney to testify to T's confidential communications respecting P's injuries. Objection Sustained. This, in our opinion, is a clear case of survivorship of the privilege. As is pointed out in the preceding quotation, the rule of non-survivorship "is limited to controversies between persons in privity with the testator's estate". As is also there pointed out, the privilege survives in a controversy between a person claiming under decedent and one not "in privity" with decedent's estate - a so-called "stranger". In our case, we think P is clearly a "stranger" in this sense.

By way of contrast let us now suppose that P as sole heir of T sues D to have a grant deed from T to D declared a mortgage. Is D "in privity" with the estate so that the privilege does not survive or is D a "stranger" so that the privilege does survive? Outside of California the authorities are conflicting. Within California the question is involved in obscurity. Such out-of-state conflict and in-state confusion may best be revealed by a long quotation from the opinion in Paley. With apologies for its length we now set forth that quotation as follows:

> "But the question of who fall within this category ["stranger"] is involved in some obscurity, especially in California. Whether one who claims under contract with or conveyance from the testator is a 'stranger' within the rule has met with diverse answers in the courts. [Citations omitted.] . . .
>
> In California the first case on the subject appears to be In re Bauer, 79 Cal. 304, 312 [21 P. 759]. That was a contest over final distribution, decedent's son claiming as sole devisee and the widow under a homestead declaration upon alleged community property. It was held error to exclude testimony of the attorney who prepared the declaration of homestead. At page 312 the court said: 'One other point remains to be considered. The attorney at law who drew the declaration of homestead, and was at the time apparently acting for the deceased and his wife in the matter, was interrogated on behalf of contestant as to whether the recital in the declaration of homestead was explained to Mrs. Bauer, if she understood it, what explanation was given, and what she knew about the matter. This was objected to on the ground that it called for a privileged communication between attorney and client, and was sustained and excepted to. The objection should have been overruled. When two persons address a lawyer as their common agent, their communications to the lawyer, as far as concerns strangers, will be privileged, but as to themselves they stand on the same footing as to the lawyer,

and either can compel him to testify against the other as to their negotiations.' In effect the holding was that the son stood in the position of the deceased father with respect to the matter of privilege. Concerning this case the court said in Smith v. Smith, 173 Cal. 725, 733 [161 P. 495]: 'It will be remembered that in the Bauer case the contest was between a son asserting title to property as an heir and his mother claiming under a hom[e]stead, and it was held that the statements of his father and mother, made to the attorney who prepared the declaration of homestead were not privileged.'

Smith v. Smith, supra, was an action to quiet title, etc., brought by the sons of Uriah Smith, deceased, against their stepmother Ella R. Dooley Smith. Plaintiffs claimed under two deeds which their father had placed in escrow to be delivered to them upon his death. Later he conveyed the same properties and others to Ella R. Dooley who thereupon married him. One of the issues was that of knowledge on her part of the escrowed deeds at the time she received her conveyance. Attorney Russell, who drew her deed, testified to a conversation with her and Uriah in which the fact of the existence of those escrowed deeds was mentioned. It was claimed that this was error as the conversation was privileged. The court said at page 732: 'It is asserted also that Mr. Russell was attorney and common agent for both grantor and grantee named in the deed which he prepared, and that therefore the communications made to him when they were present were privileged so far as plaintiffs were concerned. There was no proof that Mr. Russell was acting for Mrs. Dooley. He was employed by Mr. Smith and acted under his orders. Nevertheless appellant contends that the statements of Mr. Russell come within the rule of privilege applying where, for example, an attorney acts for a husband and wife in preparing a declaration of homestead. (In re Bauer, 79 Cal. 304-312 [21 P. 759].) But that rule only operates against strangers. The sons claiming title under the deeds which have been placed in escrow were not within that category. "It is generally considered that the rule of privilege does not apply in litigation, after the client's death, between parties, all of whom claim under the client." (40 Cyc., p. 2380.) Among the citations supporting this text are Kern v. Kern, 154 Ind. 29 [55 N.E. 1004],

Phillips v. Chase, 201 Mass. 444-448 [87 N.E. 755, 131 Am.St. Rep. 406], and Glover v. Patten, 165 U.S. 394-406 [17 S.Ct. 411, 41 L.Ed. 760]. 'Then follows the observation about the Bauer case which we have quoted. This ruling seems to rest upon the theory that the sons, claiming under the deeds, were not strangers but were in privity with decedent and his estate.

Collette v. Sarrasin, 184 Cal. 283 [193 P. 571], throws considerable doubt upon this conclusion however. It was an action brought by the sole heir of a decedent to have his grant deed to defendant declared to be a mortgage. The attorney who drew the deed was precluded by court rulings from giving any testimony as to the transaction, and defendant's attorney was prevented from making any offer of proof or any statement of what he expected to prove by the witness. The court, in reversing, held that the record as made did not disclose whether the relationship of attorney and client existed in fact or whether there was any confidential communication; that the rulings were reversible error. The court then added: 'The mere fact that both parties claim under the deceased does not, in our opinion, make the communication admissible, for under our code (Code Civ. Proc., § 1881) the privileged communication cannot be received unless that privilege is directly or inferentially waived by the client.' (P. 289) Though Smith v. Smith is not mentioned this seems to be directed toward the argument presented by respondent in his petition for hearing in Supreme Court, which sought to explain away the Smith decision. The quoted language clearly was not necessary to the ruling, but, as it was responsive to an argument presented by counsel and probably intended for guidance of court and attorneys upon a new trial, it probably cannot be put aside as mere dictum. (Cf. People's Lbr. Co. v. Gillard, 5 Cal.App. 435, 439 [90 P. 556]; Chamberlain Co. v. Allis-Chalmers Mfg. Co., 74 Cal.App.2d 941, 943 [170 P.2d 85]; 13 Cal. Jur2d § 135, p. 666; People v. Bateman, 57 Cal.App.2d 585, 587 [135 P.2d 192].) Counsel have cited no later cases on this point and we have found none. Neither the Smith case nor Collette dealt with the administration of a decedent's estate; the Bauer decision did pass upon that very problem. But in all three instances the effect of death upon the privilege

> was expressly or impliedly presented. And we must assume that the Collette decision represents presently prevailing law of this state. It merely abolishes the concept that the privity of estate created by an inter vivos transaction is enough to do away with the privilege of attorney and client and leaves unimpaired the principle that in probate matters privity with the decedent's estate under administration is enough to render the privilege inoperative."[40]

Now it will be remembered that exception (b) makes the lawyer-client privilege inapplicable "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" (italics added).

One effect of adopting this in California would be, it seems, to reestablish in this State "the concept that the privity of estate created by an inter vivos transaction is enough to do away with the privilege of attorney and client". As we read the long excerpt above from Paley, the court there regards Bauer and Smith as establishing this concept and Collette as abrogating it. In this light, we view exception (b) as a proposal to "reestablish the concept".

In our opinion it is desirable thus to reestablish the concept. Accepting the rule of non-survivorship when all parties claim through a deceased client by testate or intestate succession, we 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.

In the remarks just made we have, however, been thinking only of situations in which the client is deceased - as apparently was the court in Paley. Now let us compare the following: let us suppose an action by P v. D to quiet title to Blackacre. P claims under a deed from C. D likewise claims under a deed from C. D contends his deed is prior to P's. P contends D's deed was never delivered. C has made a confidential communication to his lawyer relating to the issue between P and D. Under exception (b) the communication is not privileged, even though C is alive and stoutly resists disclosure by the lawyer.

Probably in most such cases waiver would be found. However, in the case (probably rare) of C being alive and resisting disclosure, we believe the interests of P and D in obtaining a settlement of their controversy in the light of all the relevant facts should override C's interest in preserving secrecy and non-disclosure. Therefore we approve of exception (b) unqualifiedly. If, however, it is desired to limit this exception along more traditional lines, this could be simply done by changing the expression "the client" to "a deceased client".

Exception (c).

This exception is that the lawyer-client privilege is inapplicable "to a communication relevant to an issue of breach of duty by the lawyer to his client, or by the client to his lawyer".

Let us suppose an attorney enters into a certain stipulation. Later the client discharges the attorney and attempts to repudiate the stipulation on the basis of want of the attorney's authority. In order to defend his integrity the attorney must, of course, be free to reveal the client's communications to him. Let us suppose, further, a client refuses to pay his lawyer's fee and the lawyer brings an action. It may be that in order to establish his right to the fee claimed the lawyer must reveal the client's communications. These, it seems, are the types of situations envisioned by exception (c). There is little authority in this state on this exception but such as it is the authority suggests the existence of this exception.[41] It is well recognized elsewhere.[42]

Exception (d).

This exception is that the lawyer-client privilege is inapplicable "to a communication relevant to an issue concerning an attested document of which the lawyer is an attesting witness." This exception has been recognized in cases in which the lawyer is attesting witness to a will.[43] Presumably it would be extended by analogy to cases in which the lawyer is attesting witness to other documents.

Exception (e).

This exception is that the lawyer-client privilege is inapplicable "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."[44]

This exception seems established in this State.

The Eavesdropper Exception.

Under 26 (1) (c) (i) (ii) "a client has a privilege . . . to prevent any . . . witness from disclosing [communications described in 26] if [such communication] came to the knowledge of such witness (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."

Let us suppose a client makes a confidential statement to his lawyer in the course of a telephone conversation. The switchboard operator listens in, or, suppose, the client mails a confidential letter and an interceptor steams the letter open and reads it. These, it seems, are cases of knowledge of the communication coming to the knowledge of the witness (switchboard operator, letter-interceptor) "in the course of its transmittal between the client and the lawyer". Suppose the client mails a confidential letter to his lawyer. The lawyer places the letter in a locked file in his office. Wrongdoers break and enter the lawyer's office, rifle the files and steal the letter. This, it seems, is not a case of knowledge of the wrongdoer gained in the course of transmittal of the letter. That is, it is not a 26 (1) (c) (i) case. It is, however, a case of knowledge gained "in a manner not

reasonably to be anticipated by the client." That is, it is a 26 (1) (c) (ii) case.

Under the widely prevailing and so-called "Eavesdropper Exception" the switchboard operator, the interceptor, and the wrongdoer all could testify, non constat lawyer-client privilege.[45] There is some doubt whether we have this exception in California.[46] There is no doubt, however, that the Commissioners intend by 26 (1) (c) (i) (ii) to abrogate the eavesdropper doctrine.[47]

In our opinion the eavesdropper doctrine is incompatible with the purpose of the privilege. We, therefore, approve and endorse the abrogation of that doctrine proposed by 26 (1) (c) (i) (ii).[48]

SUGGESTED CLARIFYING AND CORRECTIVE AMENDMENTS

Amendment of 26 (1) (a).

Let us suppose a collision occurs between P's car and D's car. P consults an attorney. P makes oral confidential statements to the attorney. At the attorney's direction P also writes out a statement in duplicate. P retains the carbon. Upon the trial of the action of P v. D, P testifies upon direct examination as to the circumstances of the collision. Upon cross-examination D then asks P what statements P made to P's attorney. P's objection would, of course, be sustained either under present law or U.R.E. 26 (1) (a). Although C.C.P. § 1881 (2) expressly provides only that the attorney cannot reveal the client's statements, it

is settled, that the privilege extends to revelation by the client as well as the revelation by the attorney. Under U.R.E. 26 (1) (a) "a client has a privilege (a) if he is the witness to refuse to disclose . . ." [Italics added.]

We believe, however, that the restriction in 26 (1) (a) above italicized is unwise and is probably inadvertent. To bring out our point, let us suppose that prior to the trial of the above action of P v. D, D sought a discovery order requiring P to produce for D's inspection carbons of written statements prepared by P for P's lawyer. In the discovery proceeding P is not technically a witness and is not therefore strictly within the protection of 26 (1) (a). We regard it as indisputable that the production sought should not be required. In order to clarify 26 (1) (a) on this point, we therefore recommend that the language above italicized be stricken from 26 (1) (a).

Amendment of 26 (1) (b).

Let us suppose a client sends his lawyer a confidential letter. The lawyer turns the letter over to his stenographer with instructions to file it. This is a privileged "communication" in the sense of 26 (1) because 26 (3) (b) defines "communication" as including "disclosures of the client to a representative associate or employee of the lawyer incidental to the professional relationship." Under 26 (1) (a) the client may refuse disclosure. Under 26 (1) (b) the client may "prevent his lawyer from disclosing . . .". The rule, however, omits to provide that the client may prevent

the stenographer from making disclosure. We think this apparent oversight should be corrected by amending 26 (1) (b) to read as follows (new matter in italics):

"(b) to prevent his lawyer or the lawyer's representative, associate or employee, from disclosing it."

Amendment of 26 (1), second sentence.

This sentence now reads as follows:

"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."

This sentence might be thought to vest the lawyer with privilege in his own right. As pointed out above, this is not the intent of the Commissioners. However, to remove the misleading implication we recommend the following redraft of the sentence:

"The privilege may be claimed by the following persons (a) the client, when he is competent; (b) the guardian of a client who is incompetent as defined in Rule 1 (9); (c) the personal representative of a deceased client; (d) any person when authorized by such competent client, such guardian or such personal representative to claim the privilege."

R U L E 37

Subdivision (b).

[N.B. We treat the subdivisions in inverse order.]

This subdivision is as follows:

> "A person who would otherwise have a privilege to refuse to disclose or to prevent another from disclosing a specified matter has no such privilege with respect to that matter if the judge finds that he or any other person while the holder of the privilege has . . . (b) without coercion and with knowledge of his privilege, made disclosure of any part of the matter or consented to such a disclosure made by any one."

So far as lawyer-client privilege is concerned the "specified matter" of Rule 37 is, of course, the "communications" described in Rule 26 (1). Thus the bearing of Rule 37 on lawyer-client privilege seems to be this:

1. If a client, knowingly possessed of privilege under Rule 26, voluntarily testifies in an action as to any part of the privileged communications, he or his attorney must then testify fully respecting the communications.[49]

California agrees with this as a general proposition.[50] Thus the court states as follows in Rose v. Crawford:

> ". . . where . . . a client voluntarily testifies as a witness to confidential communications made by him to his attorney, he thereby waives the privileged character of such communications, and both he and his attorney may then be fully examined in relation thereto".

There is, however, some uncertainty as to what constitutes voluntary testimony to confidential communication in this sense.[51]

2. If a client testifies as stated in paragraph 1, supra, he thereby waives privilege not only in the action in which he testifies but also in any subsequent judicial proceeding.[52]

This is probably California law. See a suggestion to this effect in Wilson v. Superior Court.[53]

3. If a client without coercion and with knowledge of his privilege makes an out-of-court disclosure of all or part of a Rule 26 (1) communication, thereafter the communication is not privileged.[54]

In this respect California law is in accord with the Rule.[55]

We conclude that California law is in accord with Rule 37 subdivision (b), insofar as that subdivision relates to lawyer-client privilege.

Subdivision (a).

This subdivision is as follows:

> "A person who would otherwise have a privilege to refuse to disclose or to prevent another from disclosing a specified matter has no such privilege with respect to that matter if the judge finds that he or any other person while the holder of the privilege has (a) contracted with anyone not to claim the privilege . . ."

Insofar as lawyer-client privilege is concerned it seems to be the intent of subdivision (a) to provide waiver of privilege in a situation like the following. Let us suppose the civil action P v. D. P and D enter into a stipulation that upon the trial of the action neither will interpose any objection on the basis of privilege to any evidence offered by the other. Before this action of P v. D is tried, the criminal action of People v. D comes to trial. There are issues common to both actions. Upon the trial of

the criminal action the DA calls D's attorney to testify to D's communications respecting one of the aforementioned common issues. Under subdivision (a) D's objection should, it seems, be overruled.

Subdivision (a) is derived from A.L.I. Code Rule 231 (b). The official A.L.I. commentary on the latter is, in part, as follows:

> "This clause goes further than any known case. Under it, when a person contracts with anyone, whether or not a party to the action, to waive a privilege as to a particular matter, the privilege is gone with reference to that matter, completely and forever and it is immaterial that the other contracting party has no interest in, or connection with, the action in which the privilege is claimed. The theory underlying this clause is that a personal privilege to suppress the truth is not the subject of piecemeal waiver by bargain or otherwise."

Is this theory sound, or to rephrase the question, is subdivision (a) desirable? In our opinion the answer is "Yes". Note that in our illustrative case above, if the civil action had been tried first and if pursuant to the stipulation D's attorney had testified, this would be a waiver under subdivision (b). To hold that the contract has the same effect in terms of waiver seems to us a slight and reasonable concession to the interest of adjudication in the light of all relevant facts.

S U M M A R Y

The above review shows that enactment in this State of Rule 26 would have the following effects on existing law:

1. The privilege respecting the attorney's secretary, stenographer, or clerk would be vested in the client. Presently the privilege may be vested in the lawyer. (See pp. 9 and 10 above.)
2. Lawyer-client privilege would exist when the person consulted was reasonably believed to be a lawyer, though in fact he was not. Today it is uncertain whether privilege exists in these circumstances. (See p. 10 above.)
3. In cases of guardianship, the guardian would possess the privilege during guardianship. Thereafter the former ward would possess the privilege. We are not certain whether this is law today. (See pp. 10 - 12 above.)
4. After death of the client only his personal representative would possess the privilege. Query as to present law. (See pp. 13 - 15 above.)
5. The present exception to lawyer-client privilege concerning consultation in aid of future fraud or crime would be

expanded to cover consultation in aid of any future tort. (See p. 16 above.)

6. The present exception respecting parties all of whom claim through the client by testate or intestate succession would be expanded to cover not only such parties but also parties who claim through the client by inter vivos transaction. (See pp. 17 - 23 above.)

7. The eavesdropper exception would be abrogated. Probably this exception exists in California today. (See pp. 25 - 26 above.)

R E C O M M E N D A T I O N

We recommend as follows:

1. That Rule 26 be amended as suggested above on the following pages: 12, 27, and 28.

2. That Rule 26 as so amended be approved.

At this point we make no recommendation respecting Rule 37. This Rule is applicable to all privileges. It would, therefore, seem desirable to withhold judgment on this Rule until all of the U.R.E. privileges have been reviewed.

Respectfully submitted,

James H. Chadbourn

FOOTNOTES

1. In their Comment on Rule 26 the Commissioners state that the "rule embodies the subject matter of [American Law Institute] Model Code Rules 210, 211, 212, and 213."

The A.L.I. Comment on Rule 210 gives the following concise statement of the history and reason for the privilege:

> ". . . This privilege originally belonged to the lawyer. He was not required to disclose a confidential communication from a client, although the client by a bill of discovery might be compelled to reveal it. The notion back of the rule was that a lawyer ought not to be forced to violate his obligation as a gentleman to keep secret a matter told him in confidence. That notion has long since been outmoded. The privilege is no longer that of the lawyer but that of the client. And the continued existence of the privilege is justified on grounds of social policy. In a society as complicated in structure as ours and governed by laws as complex and detailed as those imposed upon us, expert legal advice is essential. To the furnishing of such advice the fullest freedom and honesty of communication of pertinent facts is a prerequisite. To induce clients to make such communications, the privilege to prevent their later disclosure is said by courts and commentators to be a necessity. The social good derived from the proper performance of the functions of lawyers acting for their clients is believed to outweigh the harm that may come from the suppression of the evidence in specific cases."

2. Enacted in 1872 and derived from Civil Practice Act § 396 which read as follows:

> "An Attorney or Counsellor shall not, without the consent of his client, be examined as a witness as [to] any communication made by the client to him, or his advice given thereon, in the course of professional employment."

See West's Anno. Calif. Codes, C.C.P. § 1881, Historical Note.

In Murphy v. Waterhouse, 113 C. 467, 472 (1896), C.C.P. § 1881 (2) is said to be "a declaration without any substantial modification of a principle that has always obtained."

The ethical duty of the attorney respecting the privilege is stated as follows in B. & P. Code § 6068 (e): "It is the duty of an attorney . . . (e) To maintain inviolate the confidence, and at every peril to himself to preserve the secrets, of his client."

3. "The argument here seems to assume that every communication between attorney and client is privileged. This is not the law. To be privileged the communication must be confidential and so regarded, at least by the client, at the time." People v. Hall, 55 C.A.2d 343, 356 (1942). See also City and Co. of S.F. v. Superior Court, 37 C.2d 227 (1951).

4. I.E.S. Corp. v. Superior Court, 44 C.2d 559 (1955) (attorney's advice); Verdelli v. Gray's Harbor Commercial Co., 115 C. 517 (1897) (client's communication); 10 Stanf. L. Rev. 297, 300 (1958).

5. Except possibly with respect to disclosures by his secretary, stenographer or clerk. See, infra, p. 9.

6. 79 C.A. 488, 498 (1926).

7. See to the same effect Stafford v. State Bar, 219 C. 415 (1933).

8. 78 C.A.2d 19, 21 (1947).

9. See note 1, supra, to the effect that the privilege originally belonged to the lawyer.

10. 29 C. 47, 64 (1865).

11. By way of contrast two earlier cases -- Landsberger v. Gorham, 5 C. 450 (1855) and Gallagher v. Williamson, 23 C. 331 (1863) -- seem to suggest that the attorney must decide what is and what is not privileged.

12. Stewart v. Douglass, 9 C.A. 712, 714 (1909).

13. See to the same effect: Reese v. Bell, 7 C. W. 73, 71 Pac. 87 (1902).

Query: Suppose in the action of P v. D, D calls P's former attorney to testify to P's communication to the attorney. P objects. Objection Sustained. May D now make an offer of proof, thus revealing the communication? In Collette v. Sarrasin, 184 C. 283 (1920) the trial judge sustained plaintiff's claim of privilege and refused to permit defendant to make an offer of proof. The court held that the claim was improperly sustained and spoke as follows with reference to the refusal to allow the offer of proof:

"[Plaintiff] claims that the offer of proof was particularly objectionable because the effect of the offer would be to reveal the very matter that was privileged. If this contention be upheld it is obvious that counsel are thereby precluded from showing or offering to show that the particular conversation or communication was within any of the well-recognized exceptions to the rule excluding privileged communications, and would be also prevented from offering any proof as to whether or not the witness was in fact acting as an attorney. It is true that an offer of testimony which incorporated privileged communications of such a character that it would reflect upon the client, if proved in evidence, might be nearly as objectionable as the proof itself, but something should be left to the judgment of the attorney making the offer and to the witness, who, of course, is aware of his obligations as an attorney. . . . It is proper to ask the attorney whether or not with relation to the transaction under inquiry he was acting as the attorney for the person making the statements. If either of the parties are not satisfied with the answer of the witness, the dissatisfied party can ask such questions as are essential to enable the court to determine whether or not the relationship existed. If the relationship is established to the satisfaction of the court, it remains to be determined whether or not the communication was of such a character as comes within any of the exceptions to the rule concerning communications between attorney and client. The burden of showing that the confidential relation existed was upon the [plaintiff]. The showing made being insufficient for that purpose, the rulings excluding the testimony were for that reason erroneous and the judgment must be reversed . . ."

14. Sharon v. Sharon, 79 C. 633, 677 (1889). See to the same effect Collette v. Sarrasin, 184 C. 283 (1920).

15. 27 C.A. 375, 379 (1915).

16. Estate of Perkins, 195 C. 699 (1925) (attorney's advice "in the nature of business rather than legal advice");

Delger v. Jacobs, 19 C.A. 197 (1912) (attorney acted "rather as a scrivener than attorney"); McKnew v. Superior Court, 23 C.2d 58 (1943) (attorney's service was to witness client's deposit in a bank -- "This service did not require any particular legal knowledge . . . It could have been performed as well and as effectively by a layman as by a lawyer"). See also cases collected in 10 Stanf. L. Rev. 297, 301 notes 22-29 (1958).

Some of the above cases also involve the question whether confidence was intended. See, infra, note 17.

17. Sharon v. Sharon, 79 C. 633 (1889) (The "communication that took place was on a public street, and in the presence of and mostly with a third party, and was not, for that reason, in any sense confidential"); Mission Film Corp. v. Chadwick Pictures Corp., 207 C. 386 (1929) (defendant gives his attorney statement to be submitted to plaintiff's attorney); People v. Gilbert, 26 C.A.2d 1 (1938) (client's mental condition); Ex parte McDonough, 170 C. 230 (1915) (identity of client); Brunner v. Superior Court, 51 A.C. 616 (1959) (same).

For an extensive collection of cases on the question of presence of a third party as negating confidentiality, see 10 Stanf. L. Rev. 297, 308 (1958).

Some of the above cases also involve the question whether attorney-client relationship existed. See, supra, note 16.

18. If the document is brought into being solely as a communication to the attorney, such as a confidential letter from client to attorney, it is, of course, privileged. New York Casualty Co. v. Superior Court, 30 C.A.2d 130 (1938); Federated Income Properties v. Hart, 84 C.A.2d 663 (1948); Hardy v. Martin, 150 C. 341 (1907). If, on the other hand, the document was not created either wholly or partially as a communication to the attorney, it is not within the attorney-client privilege and so far as this privilege is concerned the document is subject to discovery. As is said in Myers v. Kenyon, 7 C.A. 112, 115 (1907):

> "It would be a strange doctrine that a client could deliver a map, deed, contract or other document into the hands of his attorney, and then prevent such map or other document from ever being brought to light or produced, for the reason that such delivery was a privileged communication."

See, also, People v. Rittenhouse, 56 C.A. 541, 546 (1922).

In between these two extremes are situations in which the document is created, in part as a communication to the lawyer and in part for some other purpose. Holm v. Superior Court, 42 C.2d 500 (1954) (action against City and employee of City for injuries received on a bus operated by City. Plaintiff seeks order allowing

inspection of employee's accident report rendered to City and now in hands of City's attorneys -- also of photographs taken by City and now in lawyer's hands. Held, the order should be refused because the "dominant purpose" of creating such documents was communication to lawyer). See, also, Jessup v. Superior Court, 151 C.A.2d 102 (1957).

19. Webb v. Francis J. Lewald Coal Co., 214 C. 182 (1931); City and Co. of S.F. v. Superior Court, 37 C.2d 227 (1951); Wilson v. Superior Court, 148 C.A.2d 433 (1957). Cf. People v. Heart, 1 C.A. 167 (1905).

20. For an excellent discussion see 10 Stanf. L. Rev. 297 (1958).

21. West's Anno. Calif. Codes, C.C.P. § 1881, historical note.

22. See the following comment in 10 Stanf. L. Rev. 297, 300 n. 17:

> "Despite the literal wording of § 1881 (2), the client would probably also control the disclosure of any confidential communication by the attorney's secretary or clerk. To leave control with the attorney would detract from rather than effectuate the purpose of full disclosure by the client. The court has never had to decide this problem, and cases involving an attorney's employees have allowed the testimony on various other grounds. McIntosh v. State Bar, 211 Cal. 261, 294 Pac. 1067 (1930) (knowledge not acquired in capacity as secretary of attorney); Mitchell v. Towne, 31 Cal.App. 2d 259, 87 P.2d 908 (1st Dist. 1939) (clerk acted as witness); People v. Eiseman, 78 Cal.App. 223, 248 Pac. 716 (1st Dist. 1926), appeal dismissed per curiam, 273 U.S. 663 (1927) (knowledge not acquired in capacity as secretary of attorney."

23. In Carroll v. Sprague, 59 C. 655, 659-660 (1881) the court speaks as follows:

> "The communication which Eckert made to Burt in regard to the ownership of the property in dispute was privileged, if made for the purpose of obtaining the professional advice or aid of the latter in some matter relating to said property, and that would be so if Eckert supposed at the time that Burt was his attorney, although in fact he was not."

24. "Since full disclosure is encouraged by an assurance to the client that his communications will not be disclosed, the client's reasonable belief that the person he is consulting is an attorney should be sufficient." 10 Stanf. L. Rev. 297, 301 (1958).

25. XIX Proceedings, A.L.I., 150.

26. XIX Proceedings, A.L.I., 151.

27. As to waiver by guardian, see Yancy v. Erman, 99 N.E.2d 524 (Ohio, 1951) which the court states is a case of first impression in the United States.

28. See Wigmore § 2330, new text in 1957 Pocket Supp.

29. 40 C. 284, 285 (1870).

30. McCormick regards the power of the court to act in behalf of the absentee privilege holder as well-established and points out that the power may be invoked upon request of a party. McCormick, §§ 73, 96.

31. XIX Proceedings, A.L.I., 138, 143-4.

32. XIX Proceedings, A.L.I., 156-7.

33. XIX Proceedings, A.L.I., 158.

34. See memo on Physician-Patient privilege pp. 9 - 12.

35. Emmons v. Barton, 109 C. 662, 669-670 (1895).

36. ". . . The continous and unbroken stream of judicial reasoning and decision is to the effect that communications between attorney and client having to do with the client's contemplated criminal acts, or in aid or furtherance thereof, are not covered by the cloak of this privilege. . . . [Citations omitted.]

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." Abbott v. Superior Court, 78 C.A.2d 19 (1947).

"When the client seeks advice that will serve him in the contemplated perpetuation of a fraud there is no privilege", Wilson v. Superior Court, 148 C.A.2d 433 (1957) (dictum). See to the same effect Agnew v. Superior Court, 320 P.2d 158 (1958); Ex parte McDonough, 170 C. 230 (1915).

37. McCormick § 99. Compare, however, the following criticism in 45 Calif. L. Rev. 75, 77 (1957):

"This rule [i.e., U.R.E. Rule 26 (2) (a)] has extended the exception to the attorney-client privilege to include communications in furtherance of any tort (the cases have generally drawn the line at fraud), as well as of a crime. In spite of impressive authority which seems to advocate this extension of the exception (8 Wigmore, Evidence § 2298 (3d ed. 1940)), it is submitted that perhaps this language is too broad considering the technical nature of some torts. This rule would go far towards eradicating a valuable right of the citizen who is seeking legal advice and would tend to make it even more difficult for the attorney to secure the information he needs to defend his client's legitimate interests."

This criticism is repeated in 10 Stanf. L. Rev. 297, 312 n. 91 (1958).

38. 137 C.A.2d 450, 457 (1955).

39. McCormick § 98 summarizes the various rationales as follows:

> "The accepted theory is that the protection afforded by the privilege will in general survive the death of the client. But under various qualifying theories the operation of the privilege has in effect been nullified in the class of cases where it would most often be asserted after death, namely, cases involving the validity or interpretation of a will, or other dispute between parties claiming by succession from the testator at his death. This result has been reached by different routes. Wigmore argues, as to the will-contests, that communications of the client with his lawyer as to the making of a will are intended to be confidential in his life-time but that this is a 'temporary confidentiality' not intended to require secrecy after his death and this view finds approval in some decisions. Other courts say simply that where all the parties claim under the client the privilege does not apply. The distinction is taken that when the contest is between a 'stranger' and the heirs or personal representatives of the deceased client, the heirs or representatives can claim privilege, and they can waive it. Even if the privilege were assumed to be applicable in will-contests, it could perhaps be argued that since those claiming under the will and those claiming by intestate succession both equally claim under the client, each should have the power to waive."

40. 137 C.A.2d 450, 457-460 (1955).

41. "In the case now engaging our attention the professional conduct of appellants' former attorney was attacked by them. It would be a sad commentary upon our boasted concept of fairness and the right to defend one's reputation and integrity, were it possible for the accuser to silence the accused by invoking the doctrine of privileged communication. . . ." Pac. Tel. & Tel. Co. v. Fink, 141 C.A.2d 332, 335 (1956).

In many cases the communication could be revealed simply because it was not confidential. In such cases there is, of course, no need for exception (c). See 10 Stanf. L. Rev. 297, 310, n. 80 (1958).

42. McCormick, § 95.

43. The rationale is stated as follows in In re Mullin, 110 C. 252, 254-5 (1895):

> "When a testator has requested his attorney to become an attesting witness to his will, he thereby expressly waives the privilege. It is so held by the court of appeals of New York, under the provisions of section 835 of their Code of Civil Procedure, which, in substance, is identical with section 1881, subdivision 2, of our own. As is said in Alberti v. New York etc. R.R. Co., 118 N.Y.: 'But, although dead, he may leave behind him evidence which indicates an express intention to waive the privilege; as, for instance, where he requests his attorney to sign the attestation clause of his will, he, by so doing, expressly waives the provisions of the statutes and makes him a competent witness to testify as to the circumstances attending its execution, including the mental condition of the testator at the time. (In the Matter of Coleman, 111 N.Y. 220.)'
>
> It is true that the New York code, in section 836, now expressly authorizes an attorney who has become a subscribing witness to a will to testify to its preparation and execution, but this provision was inserted by amendment adopted in 1892, and merely followed the judicial declaration to that effect.
>
> In the Estate of Flint, 100 Cal. 395, our code provisions and the policy of the law are fully considered, and In re Wax, 106 Cal. 343, adopts the interpretation above quoted."

This rationale is, however, questioned in 10 Stanf. L. Rev. 297, 313 (1958).

44. Harris v. Harris, 136 C. 379 (1902); De Olazabal v. Mix, 24 C.A.2d 258 (1937).

Where, however, codefendants, A and B, in a criminal action have a common attorney and B then decides to turn against A, A may prevent the attorney from repeating A's conversation had with the attorney in the joint conference. People v. Kor, 129 C.A.2d 436 (1954). Undoubtedly, this would also be so under exception (e). That is, such a situation would not be regarded as "an action between . . . such clients" in the sense of exception (e).

Furthermore, it seems that A could also prevent B from testifying to A's communication to the attorney. See 10 Stanf. L. Rev. 297, 309 (1958). It is there suggested that the same result would obtain under U.R.E. 26 (1) (c).

45. McCormick, § 79.

46. Dicta in the following cases suggest California adopts the eavesdropper's rule: People v. Durrant, 116 C. 179, 219-220 (1897); People v. Rittenhouse, 56 C.A. 541, 546 (1922); City & Co. of S.F. v. Superior Court, 37 C.2d 227, 236 (1951).

However, dicta in these two cases create some doubt: Kelsey v. Miller, 203 C. 61, 92 (1928); People v. Castiel, 153 C.A.2d 653, 659 (1957).

Penal Code § 653i makes it a felony to eavesdrop on an attorney-client conversation when the client is held in custody. Query: will the policy underlying this provision be enforced by excluding the evidence? See 10 Stanf. L. Rev. 297, 312 (1958).

47. "This rule . . . [prevents] disclosure of communications overheard by eavesdroppers . . ." COMMENT on Rule 26.

48. Wigmore defends the Eavesdropper Exception in the following terms:

> "All involuntary disclosures, in particular, through the loss or theft of documents from the attorney's possession, are not protected by the privilege, on the principle (post, § 2326) that, since the law has granted secrecy so far as its own process goes, it leaves to the client and attorney to take measures of caution sufficient to prevent the overhearing of third persons; and the risk of insufficient precautions is upon the client. This principle applies equally to documents.
>
> § 2326. Third Persons Overhearing. The law provides subjective freedom for the client by assuring him of exemption from its processes of disclosure against himself or the attorney or their agents of communication. This much, but not a whit more, is necessary for the maintenance of the privilege. Since the means of preserving secrecy of communication are entirely in the client's hands, and since the privilege is a derogation from the general testimonial duty and should be strictly construed, it would be improper to extend its prohibition to third persons who obtain knowledge of the communications. One who overhears the communication, whether with or without the client's knowledge, is not within the protection of the privilege. The same rule ought to apply to one who surreptitiously reads or obtains possession of a document in original or copy (ante, § 2325)."

Wigmore §§ 2325 (3), 2326.

On the other hand the Exception is attacked and the U.R.E. view supported by the following extract from 10 Stanf. L. Rev. 297, 311 (1958):

> "Any extension of the eavesdropping rule to include mechanical eavesdropping and recording devices is unwarranted. The rationale of the exception was developed when a person had to be close enough to hear a conversation and mechanical devices were unknown. But regardless how diligent the attorney and client may be in providing for privacy when they communicate, neither can prevent the gathering of evidence by modern electronic devices. Widespread use of such evidence could effectively destroy the privilege because a client could not have confidence that he would not be confronted in the courtroom with statements he desired to be strictly confidential.
>
> Moreover, it is difficult to rationalize the purpose of the privilege with the admission of evidence gained by one who simply overhears a conversation. In fact, there is no justification for the admission of evidence which is gathered by an eavesdropper when the attorney and client have no control over where they hold their conversation. In the case where the attorney and client are merely careless, the reasons for not admitting eavesdropping evidence are not so obvious as in the cases of mechanical eavesdropping or where there is no control over place of conversation; but it does seem that the penalty being imposed for mere negligence is rather severe."

49. The same result would, of course, follow if the client consented to the otherwise privileged testimony of others, such as the attorney, or the client's agent.

50. 37 C.A. 664, 666 (1918). See to the same effect People v. Ottenstror, 127 C.A.2d 104 (1954).

51. Thus in People v. Kor, 129 C.A.2d 436 (1954) neither the client's statement on direct examination that he "told the attorney what happened" nor his response on cross-examination as to whether he had told his attorney a certain fact was operative as waiver of privilege. The decision has been much criticized. See 2 U.C.L.A. L. Rev. 573 (1955); 10 Stanf. L. Rev. 297, 315 (1958).

52. The same result would, of course, follow if the testimony were that of the attorney or agent with the client's consent.

53. 148 C.A.2d 433, 446 note 9 (1957). Cf. People v. Abair, 102 C.A.2d 765 (1951) in which the client was not present at the first trial and thus had no opportunity to object and it was held that he was not foreclosed from asserting privilege in later proceedings.

54. The same result would, of course, follow if the disclosure were by another (such as attorney or client's agent) with the client's consent.

55. Title Ins. Co. v. Calif. Dev. Co., 171 C. 173, 220 (1915); Seeger v. Odell, 64 C.A.2d 397, 405 (1944). Each of these cases involved voluntary out-of-court disclosure of the contents of a confidential letter.