

File: URE - Privileges Article

1/21/63

Memorandum 63-5

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

Background

Since the Commission's decision to reconsider the Uniform Rules relating to privilege, the Commission has reconsidered Rule 26. Its present form reflects the changes made in the rule by the Commission at the September 1961 meeting. The language of the changes has not been approved. The language of subdivision (4) is new, and expresses the principle approved by the Commission that the lawyer should be required to claim the privilege. The language of subdivision (7) is new, and has been added to the rule in accordance with the instruction of the Commission to include a provision similar to that appearing in the last sentence of subdivision (2) as it was approved in New Jersey. The New Jersey version reads:

Where two or more persons have employed a lawyer to act for them in common, none of them can assert such privilege as against the others as to communications with respect to that matter.

Scope of Rule

The Commission should consider whether this privilege is to apply in all proceedings or in judicial proceedings only. If the latter, the Commission should also consider whether there should be any privilege in other kinds of proceedings.

Drafting Problems

There are inexplicable differences in the drafting of Rules 26, 27 and

29 in the original URE. As these rules have been revised by the Commission, the differences have been compounded. Rule 27.1, which was added by the Commission, is different from all of the others. These rules--26, 27, 27.1 and 29--are all similar in that they are privileges designed to protect confidential communications made in the course of certain professional relationships from public disclosure. Rules 27, 27.1 and 29 define the confidential communication involved in the first subdivision of the rule. In the substantive portion of the rule each of these rules requires the court to find that the communication was a confidential communication as defined in the rule. Rule 26, on the other hand, does not define confidential communication in the first subdivision, but in the substantive subdivision--subdivision (2)--requires the judge to find that the communication was in the course of a lawyer-client relationship and in professional confidence. Rules 26, 27, 27.1 and 29 use varying phraseology for giving a person a privilege to refuse to disclose the confidential communication. Rules 26, 27 and 29 all require the court to find that the witness who is to be prevented from revealing the communication fits within a defined class. The purpose for the limitation in Rule 29 is quite clear. There is an eavesdropper exception to that rule. The study does not make clear why it is necessary for the court to find that the person about to reveal the confidential communication fits within a defined class so far as Rules 26 and 27 are concerned. Under the original URE Rule 27, there was an eavesdropper exception; hence, there may have been a need to define the type of witness involved in that case. But the Commission has deleted the eavesdropper exception. When the Commission reviewed Rule 27.1, it did not deem it necessary to define the type of person who may be silenced by a claim of

privilege. It is difficult to understand why it is necessary to define such persons in Rules 26 and 27. (It may be noted in passing that the Commission changed the word "witness" in subdivision (2)(c) of Rule 26 to "person" but did not make similar changes in Rules 27 and 29.) The most probable reason for defining the type of person who may be silenced by a claim of privilege is to cover the problem of waiver. But if that is the reason for defining the person, the matter should be covered in Rule 37 relating to waiver.

The person who is entitled to claim the privilege is described in Rule 26 in subdivisions (3) and (4); but he is described in Rules 27, 27.1 and 29 in subdivision (2) which states the matters the judge must find in ruling on a claim of privilege. There is no apparent reason for the varying techniques of describing the person who can claim the privilege. Rule 26 uses three subdivisions to describe the exceptions to the rule; Rule 27 uses five subdivisions to describe the exceptions to the rule; and Rule 27.1 uses one subdivision to describe the exceptions to the rule.

The only point involved in describing the different drafting techniques used in the various rules is that there is no apparent reason for using the various techniques. It would seem that when precisely the same thing is sought to be accomplished in two separate rules, precisely the same language should be used. Otherwise, a court might feel it necessary to decide that the rules must mean different things because different language is used. It is recommended, therefore, that to the extent that it is possible to do so within the framework of the various rules the privileges should be described in identical language. Then it would be more likely that they would receive uniform construction if that is in fact the intent

of the Commission. The format used in Rules 27.1 and 29 is the simplest format used. It is recommended, therefore, that a similar format be used in the other similar rules. If this recommendation is approved, Rule 26 would read as follows (strikeout and underscore reflect changes from approved version):

RULE 26. LAWYER-CLIENT PRIVILEGE

(1) As used in this rule:

(a) "Client" means a person, corporation, association or other organization (including this State and any other public entity) that, directly or through an authorized representative, consults a lawyer ~~[ex-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 ~~[ex-the-lawyer's representative]~~ or (ii) whose guardian so consults the lawyer ~~[or-the-lawyer's representative]~~ in behalf of the incompetent.

(b) "Confidential communication between client and lawyer" means information transmitted between a client and his lawyer in the course of that relationship and in professional confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those reasonably necessary for the transmission of the information or the accomplishment of the purpose for which it is transmitted, and includes advice given by the lawyer in the course of representing the client. [and includes disclosures of the client to the lawyer's representative 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, (iii) the personal representative of the client if the client is dead and (iv) a

successor, assign or trustee in dissolution of a corporation, partnership, association or other organization if dissolved.

(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.

~~[(a)--"Lawyer's representative"--includes a partner, associate or employee of the lawyer.]~~

(2) Subject to Rule 37 and except as otherwise provided in this rule, ~~[if a communication is found by the judge to have been between a lawyer and his client in the course of that relationship and in professional confidence, the client has a privilege to:]~~ a person, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a communication if he claims the privilege and the judge finds that ~~[(a)--Refuse to disclose the communication.]~~ the communication was a confidential communication between client and lawyer and that the claimant is:

(a) The holder of the privilege, or

(b) [Prevent his lawyer, or the lawyer's representative from disclosing the communication.] A person who is authorized to claim the privilege by the holder of the privilege, or

(c) The person who was the lawyer at the time of the confidential communication, who, except as otherwise provided in this rule, unless there is no holder of the privilege in existence, shall claim the privilege under this rule for the client unless otherwise instructed by the holder of the privilege or his representative.

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

(3)--Subject to Rule 37 and except as otherwise provided in this rule, the privilege under this rule may be claimed for the client by the holder of the privilege or a person who is authorized to claim the privilege by the holder of the privilege.

(4)--Subject to Rule 37 and except as otherwise provided in this rule, unless there is no holder of the privilege in existence, the lawyer who received or made the communication shall claim the privilege under this rule for the client unless otherwise instructed by the holder of the privilege or his representative.

(5)--The privilege under this rule does not extend to a communication]

(3) There is no privilege under this rule:

(a) If the judge finds that the [legal service was] services of the lawyer were sought or obtained [in order] to enable or aid [the client] anyone to commit or plan to commit a crime or to perpetrate or plan to perpetrate a fraud.

[(6)]--The privilege under this rule does not extend to a communication relevant to:

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

[(b)] (c) As to a communication relevant to an issue of breach of duty

by the lawyer to his client or by the client to his lawyer.

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

~~[(7)]~~ (4) Where two or more clients have retained a lawyer to act for them in common, none of them may claim a privilege under this rule as against the others as to communications made in the course of that relationship.

Explanation of Proposed Revision

Subdivision (1). The definition of "confidential communication" is taken from Rule 27, the physician-patient privilege. The words "between a lawyer and his client in the course of that relationship and in professional confidence" are taken from subdivision (2) of Rule 26, the lawyer-client privilege, as now approved.

Please refer to the study at pages 68 and 69 where the consultant discusses "Physician's Nurse, Stenographer or Clerk." It appears from this discussion that the definition of "confidential communication" in the physician-patient privilege is designed to protect communications to a "doctor's representative." If that is so for Rule 27, the use of the same language in Rule 26 should obviate the necessity for referring to or defining "lawyer's representative." Hence the definition added by the Commission as subdivision (d) has been deleted as have all references to a "lawyer's representative." The Commission may feel that the suggested revision of Rule 26 does not adequately protect communications to a lawyer's representative, but if that is so it does not adequately protect communications to a doctor's or psychotherapist's representative in Rules 27 and 27.1. If

there is a need for a definition of a "representative" in Rule 26, such a definition should be added to all three of these rules.

Subdivision (2). The preliminary language of subdivision (2) is taken from Rules 27 and 27.1. Rule 27 provides that a person may prevent a "witness" from disclosing a confidential communication, while Rule 27.1 provides that a person may prevent "another" from disclosing a confidential communication. The latter language has been used here because of its broader scope. The deleted language of the preliminary portion of the subdivision has been incorporated in the definition of "confidential communication" and is no longer necessary.

Subdivisions (b) and (c) have been deleted as there seems to be no particular reason for specifying the persons who may be silenced by an exercise of the privilege. If the Commission believes that there is such a need, it would seem that there is an equal need in Rule 27.1 and comparable provisions should be added to that rule. In any event, the rules should be the same in this regard. The added subdivisions (a) and (b) of subdivision (2) are taken from Rules 27 and 27.1.

Former subdivisions (3) and (4). The subject matter of subdivisions (3) and (4) has been included in subdivision (2)(b). In this regard this rule now follows the format of Rules 27 and 27.1.

Former subdivisions (5) and (6)--new subdivision (3). The exceptions to the lawyer-client privilege have been gathered into one subdivision--new subdivision (3). The basic language is similar to that used in subdivision (3) of Rule 27, which begins "there is no privilege under this rule as to any relevant communication"

Subdivision (a) has been modified slightly to conform to the language appearing in subdivision (7) of Rule 27. You will note that the exception

is considerably broadened by the change in language, for under Rules 27 and 27.1 the exception extends to communications made when the services were sought to enable anyone to commit or plan to commit a crime.

Subdivision (7)--new subdivision (4). Ideally this exception should also appear as one of the tabulated items under subdivision (3). However, the drafting problems would be made more difficult by this procedure. Using a new subdivision to express this exception permits us to use language almost identical to that used in the New Jersey statute.

Respectfully submitted,

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