File:URE - Privileges Article

Current Memoranda

3/12/63

Memorandum No. 63-22

Subject: Study No. 34(L) - URE (Rule 26)

When you receive this memorandum you will also receive a revised Rule 26 that contains the revisions made by the Commission at the February meeting. You should review the revised rule and the revised explanation so that you will be in a position to suggest further revisions and to approve the revised language. You should also compare the revised language with comparable provisions in later rules so that you may decide which provisions you prefer as these rules are considered. New language that the Commission has not reviewed appears in subdivisions (3), (4)(d) and (e)

Subdivision (3) contains the provision requiring the lawyer to claim the lawyer-client privilege.

Subdivision (4)(a) contains the exception for communications made for the purpose of committing or planning to commit a crime or fraud. At the last meeting the Commission replaced the foundational requirement that had been previously deleted. The discussion at that time indicated that this foundation requirement might well eliminate this exception as a practical matter and that this exception is not particularly desirable anyway. Some indicated that occasion for the exception probably never arises in practice.

Actually the problem seems to arise fairly frequently. A large number of cases are collected at 125 ALR 508 and in the ALR bluebooks supplementing that annotation. A review of these cases indicates that

there may be a problem in connection with the present statement of the rule. As it now reads, is it necessary that there be sufficient evidence, aside from the communication, that the communication itself related to future criminal conduct? Or is it enough to establish the future criminal conduct and then to ask the attorney about conversations relating to that conduct? If the latter is the proper interpretation of (4)(a), it is probably a statement of the existing law. But, if the former is the proper statement of (4)(a), it is probably a substantial change in the existing law.

In Abbott v. Superior Court, 78 Cal. App.2d 19 (1947), Abbott sought a writ of prohibition to prevent his trial upon an indictment that he claimed was based on privileged evidence. [Interestingly, Arthur Sherry, Assistant District Attorney for Alameda County, is listed among those appearing for the respondent.] Abbott, a lawyer, was named a codefendant in the indictment with his client, Stern, for the operation of an abortion mill. The evidence, other than communications, against Abbott was assumed by the court to be insufficient to support the indictment. It showed that he was present immediately after one of the abortions and that he had sent a pregnant woman to Stern. The asserted confidential communication took place between Abbott and a female employee of Stern, named Tracy. Stern sent Tracy to Abbott's office with the message that one Metzger, a boyfriend of Tracy, had learned of the illegal operations and had informed Oakland police. Abbott told Tracy to get Metzger out of town as he would go to City Hall and keep talking until he ruined their protection. Abbott told Tracy to tell Metzger that she was pregnant by him, that Stern had

left town, and that he and she should leave the state together. Abbott told Tracy to get off the train at Sacramento where he would meet her, and in the meantime he would contact a policeman to see what could be worked out.

The court held Tracy's testimony as to this conversation was not privileged because the communications were made in furtherance of the criminal conspiracy. The entire discussion of the foundational requirement is as follows:

> 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. . . . The evidence of Stern's criminal activities was detailed and voluminous. . . . The privilege, where it exists, 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. Here the client's privilege does not exist and the attorney is in no position to assert a privilege on his own behalf. [78 Cal. App.2d at 21, citations omitted.]

It is apparent that the court was concerned about the preliminary showing of the criminal activities of the client; but there is no evidence recited by the court indicating that the communication related to the criminal conspiracy other than the communication itself.

In United States v. Bob, 106 F.2d 37 (2d Cir. 1939), the defendant was convicted of mail fraud involving the fraudulent sales of corporate stock. Error was claimed in the admission of testimony of one Griffin, attorney for Bob. Griffin testified at length about Bob's control and manipulation of the companies involved and about conversations with Bob. The court held the testimony admissible as communications during the commission and in furtherance of fraud. The Court said:

> It has always been settled that communications from a client to an attorney about a crime or fraud to be committed are not privileged. . . . There must, of course, be first established a prima facie

> case; the mere assertion of an intended crime or fraud is not enough to release the attorney. . . . But here such a case had already been established against Bob through Israel, named as a co-conspirator, who testified before Griffin took the stand as to details of the stock-selling campaign.

Again, it appears that the court was concerned with the preliminary showing of criminal conduct on the part of the defendant; but it is difficult to see from the court's brief exposition where there was any evidence, aside from the communications, that the communications were in furtherance of the criminal conspiracy.

Cole v. State, 298 Pac. 892 (Okl. 1931), is also illustrative. Cole and Hunt were charged with murder of a man named Irby. Hunt pleaded guilty and testified against Cole. Prior to the murder prosecution, Cole, together with Irby and one Woods, was indicted for violation of federal prohibition laws./ Irby and Woods threatened to testify against him. Hunt testified at the murder trial that he was a lawyer and Cole had told him of a well-paying job Cole would have with an oil company if he could get out of the federal prosecution. Cole asked Hunt how this could be done. Hunt further testified that they both went to see another lawyer, Wyatt (whose testimony was attacked on appeal as privileged), to ask what the effect on the prosecution would be if Irby and Woods failed to appear. Hunt further testified that they then went to Irby, attempted to get him to change his testimony or leave the state, and when Irby refused to do so they killed him and dumped his body in a lake. As Hunt and Cole were the last ones seen with Irby, they were arrested when Irby's body floated to the surface and was found 3 weeks later.

Wyatt was then asked to testify. (Under URE Rule 37, Hunt's testimony as to the conversation with Wyatt would not have waived Cole's

privilege with respect to that conversation.) Cole objected, and after some discussion out of the presence of the jury, the court announced:

> Well, I will only allow such testimony in relation to future crimes, and not any testimony in relation to past offenses. Do not ask anything about the Federal Court case. Just ask him whether or not he was consulted in relation to future offenses. The law is pretty plain on that. Tell the jury to come in.

The following questioning of Wyatt then took place:

> Q. Did you have any conversation with Paul Cole and Frank Hunt on the 19th of March, 1930? A. Yes sir.
>
> Q. Whom did you talk to, Mr. Wyatt, or did you talk to both of them together at the same time? A. Oh, I think Mr. Hunt came into my private office first and said a few words, and then Mr. Cole came there with him.
>
> Q. Mr. Cole came in with him? A. Yes sir, the conversation that we had, all three of us were present.
>
> Q. Did defendant talk to you in relation to the commission of some future crime? A. Let me advise you privately first before I answer the question. (Whereupon court and counsel hold a private conversation out of the hearing of the jury.) A. In the closing of the conversation he asked me what would be the effect on a certain case he had pending if a certain witness was out of the way.
>
> The Court: Q. What did he tell you? A. Tom Woods and Ernest Irby.
>
> Q. Was that before or after the death of Ernest Irby? A. That was before the death of Ernest Irby.
>
> Mr. Bishop: Q. Mr. Wyatt, in the general conversation that you had with the defendant, Paul Cole and Frank Hunt, state whether or not they told you why, for what reason it was necessary to get these witnesses out of the way to beat the case in the Federal Court? A. Yes sir.
>
> Q. What was the statement made with reference to why it was necessary to get the witnesses out of the way to beat their case in the Federal Court? A. Mr. Cole said that he had a job offered him with the Sun Ray Oil Company at a salary of eighteen thousand dollars a year and that he had to get rid of this matter before he could go to work for the Sun Ray Oil Company, that Frank Hunt would have a job with him. That was the substance of the conversation.

> Q. At the time they asked you what would be the effect on the case in the Federal Court if Ernest Irby and Tom Woods were gotten out of the way, what did you tell them? A. I told them that that was a matter I didn't want to discuss, but that if that was the only witness against Cole it would probably end the litigation against them. That if they persisted in that line of endeavor they would be in a worse predicament than they would be over a bootlegger case and would be up against it for obstructing justice in the Federal Court.
>
> Q. What was said in that subsequent conversation about moving or transporting either Ernest Irby or Tom Woods to any place? The last conversation, I think it was on the morning of the 24th of March, 1930, to the effect that Tom Woods--Tom Woods had agreed to take the rap, that was the statement. And that Ernest Irby had agreed to get out of the way and stay out of the way. And they told me in one other conversation that Ernest Irby had gone. They never did tell me where he had gone to, or where he was going or where he had agreed to go.

Again, there was ample evidence of the criminal activities of the defendant. But the only evidence (other than Wyatt's testimony) as to the purpose of the conversation with Wyatt was the evidence of that conversation given by Hunt.

The annotation at 125 ALR 508, 519, summarizes these authorities 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.

The language now in (4)(a) seems to be subject to the interpretation that the independent evidence must go to the subject matter of the communication itself. It seems also subject to the interpretation that the independent evidence must go to the future criminal conduct of the client. The former revision was intended to clarify this ambiguity; but apparently did not do so and was misunderstood. Under the former rule,

after a prima facie showing of criminal activities on the part of the client, the attorney could be asked--as he was in the Cole case--if the preceding conversations related to those activities; and, after an affirmative answer, the nature of the communications could be discovered. Whether or not the Commission intends to keep this evidence admissible, the ambiguity in the rule should be eliminated.

We are uncertain at the moment as to the Commission's intent in this regard, and, if the Commission will clarify its intent, we will attempt to revise the language once more to clear up the ambiguity.

In considering the question, you should consider the following examples (these are not hypothetical, they actually happened):

In a grand jury proceeding, Client's employee is asked concerning information he transmitted between Attorney and Client. As there is no one present in the grand jury room to claim the privilege, Client's employee answers that the communications related to Attorney's efforts to bribe a judge in a case pending against Client. Although it is clear enough that the communications are not really privileged, must the indictment be dismissed because there is no evidence of the illegal purpose of the communication other the communication itself? [This, in substance, was the Abbott case.]

K, a public official, is accused of accepting bribes. D is accused of giving one of the bribes. K tells Attorney Upright that D never gave K any bribes, but K will aid the prosecution against D by testifying that D did in fact give bribes if the prosecutor will dismiss some of the pending charges against K. K wants Attorney Upright to approach the

prosecutor with the offer to testify. Upright refuses to have anything to do with the plan, but makes a note of the conversation. D is later tried and K testifies against him. It is clear enough that the conversation is not privileged, but, even though there is some evidence that K committed perjury, may Upright relate the conversation, or must it be excluded because there is no evidence of the criminal nature of the conversation other than the communication itself? [The statement was held admissible in Petition of Sawyer, 229 F. 2d 805 (3d Cir. 1956).]

J is the apparent heir of the estate of his brother. After brother's death, V, a son of the brother appears and claims his estate. J goes to Attorney Good with a proposition that V be falsely accused of a capital crime and asking the attorney to act as a special prosecutor in the case. J's purpose is to have V hanged. Good refuses. J goes to Attorney Fine with the same proposition and is turned down. After several such visits, he finds Attorney Lowdown willing to undertake the job in return for a substantial fee. May any of these attorneys go to the police or grand jury with their stories in an effort to protect V? If these attorneys testify before a grand jury, may an indictment be sustained? In an action by V against J to recover his inheritance, may any of these attorneys testify? [The case is Annesley v. Earl of Anglesea, 17 How. St. Tr. 1229; see the opinion of Mounteney, B., quoted in 8 Wigmore (McNaughton Rev.) § 2298, p. 577.]

Subdivisions (4)(d) and (e). Paragraphs (d) and (e) were revised at the February meeting after some discussion of the existing law. As that discussion indicated that there are some uncertainties concerning existing

law, the following material is provided for your consideration before approval of the revised language.

There are apparently several rules relating to this subject that are applied by various courts. One rule is

> that an attorney who draws a will is a competent witness, after the death of the testator, to testify to all matters leading up to the execution of the will including statements of the testator, his mental condition, and to facts relating to the issue of undue influence and other matters affecting the validity of the will. [Denver Nat. Bank v. McLagan, 133 Colo. 487, 298 P.2d 386, 66 ALR2d 1297 (1956).]

This seems to be the broadest version of the rule. Our new subdivision (e) would express this rule and would extend its principle to other dispositive instruments if a reference to "competence" were included, or if the words "state of mind" were substituted for "intention."

Some courts require something more to be shown and hold that there is no privilege among claimants under the testator but the privilege remains as to adverse claimants. This rule is expressed in subdivision (4)(b). Paley v. Superior Court, 137 Cal. App.2d 450 (1955), stands for this proposition. There, H and W acquired a substantial amount of property while outside of California, and then moved to California. W thereafter died and left a will. H claimed that much of W's separate property was quasi-community property and, therefore, he was entitled to a share despite the provisions of the will. H also claimed to be the owner of much separate property over which W had no power of testamentary disposition. W's attorney refused to answer H's questions on deposition because of the attorney-client privilege. The trial court sustained objections to the questions because of the privilege, which remained applicable because H was a stranger to the will. The DCA reversed.

The court pointed out some confusion in the California cases. Some early cases held that a person claiming under an inter vivos deed or declaration of homestead is claiming under the testator so that no privilege applies. Later cases, however, indicated that privity with the estate is not established by inter vivos transaction. (Subdivision (4)(b) will restore the earlier rule.) The court then held, however, that Probate Code Section 201.5 is strictly a succession statute and that a claimant under its provisions is claiming under the estate. Hence, H had sufficient privity to be able to secure the answers of W's attorney. The court went on to say that the privilege having been opened, the attorney could be asked other related questions. "This issue of quasi-community property having opened the privilege it is opened fully as to conversations about the preparation of the will or the property upon which it is to operate." (137 Cal. App.2d at 461-2.)

The Paley decision also points out that most courts requiring privity with the testator also hold that the privilege remains insofar as claimants adverse to the testator or the estate are concerned.

Other courts hold that there is no privilege where the attorney is a subscribing witness. This is paragraph (d). Others hold that there is no privilege when the attorney is a mere scrivener and his advice and counsel have not been sought. Obviously, this exception receives little use, for attorneys are rarely consulted in so limited a capacity.

Subdivision (e) would probably extend the existing California exception, for there is no requirement of privity in subdivision (e). This, however, may be desirable. A comment surveying the cases in this field in 8 UCLA L. Rev. 616 (1961) points out:

> It is doubtful that the source of a party's claim determines whether a client desires perpetual secrecy at the time he makes the communication. Professor McCormick has criticized the propriety of distinguishing between persons in privity with the deceased and strangers because it is questionable "whether the deceased would have been more likely to desire that his attorney's lips be sealed after his death in the determination of such claims than in the case of a controversy over the validity of a will." It is further asserted that the attorney's testimony is generally reliable, and if true, "presumably the deceased would have wanted to promote, rather than obstruct the success of the claim." [At p. 623.]

The comment writer suggests that the posthumous privilege be abolished entirely except for statements made to an attorney in preparation for litigation.

For a collection of cases setting forth the various theories upon which this exception has been based, see 66 ALR2d 1302. The foregoing material is submitted so that you will know how various courts have resolved these problems before you finally approve (4)(d) and (e).

In connection with (e), you might also consider whether the exception should also be broadened to apply to cases where the client is incompetent. The need for the evidence seems to be as great, but possibly there would be more opportunity for abuse.

Respectfully submitted,

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