

#63

1/4/67

First Supplement to Memorandum 67-1

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

Attached to this memorandum as Exhibit I is a letter to John R. McDonough from Mr. Francis J. McTernan relating to the drafting of the Evidence Code.

Mr. McTernan likes our Section 1454 and, presumably, our Section 1530, because of the simplified procedure they create for authenticating foreign documents. He points out, however, that there is a possible inconsistency between the provisions of Evidence Code Section 1454 and Civil Code Section 1183 as amended in 1963.

Evidence Code Section 1454 provides that any foreign official signature is presumed to be genuine if it is accompanied by a statement certifying the genuineness of the signature and the official position of the person who made the signature. This accompanying statement must be made by an American consular or foreign service officer. Section 1454 also provides for a chain of authenticating certificates where the American foreign service officer does not know the author of the original official signature. A literal reading of Section 1454 would appear to include notaries public among those officials whose signatures can be authenticated in this fashion. However, Section 1451 says that a certificate of acknowledgement of a writing or a certificate of proof authenticates the writing if the certificate meets the requirements of the Civil Code. Civil Code Section 1183 provides insofar as foreign notaries public are concerned

If the proof or acknowledgement is made before a notary public, the signature of the notary public must be proved or acknowledged before a minister, consul, vice-consul or consular agent of the United States or a judge of a court of record of the country where the proof or acknowledgement is made.

If the signature of a foreign notary public is not subject to authentication under Section 1454 and must be proved or acknowledged as required in Civil Code Section 1183, Mr. McTernan asserts that "the distinction seems to be inconsistent and unnecessary." He recommends that the simplified procedure of Section 1454 be made applicable to the proof of the signatures of notaries public as well as to the proof of the signatures of other foreign officials.

Mr. McTernan's point seems to be well taken. We believe that his purpose could be accomplished simply by repealing the language that was added to Section 1183 in 1963. Section 1454 of the Evidence Code would then clearly apply and provide the means for proving the notary public's signature.

Respectfully submitted,

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Dec. 21, 1966

John R. McDonough, Jr., Chairman
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Dear John,

You may recall that we had several meetings concerning the Law Revision Commission's recommendations to revise section 259 of the Probate Code. Although we disagreed on those occasions, the encounter left me with a high respect and admiration for you as a person and as a legal scholar, which has been much enhanced by your monumental achievement in revising and bringing up to date the California Evidence Code.

My purpose in writing to you today is to nit-pick at the new code.

As you recall, our firm frequently represents foreign heirs to California estates. In connection with that representation, we have encountered problems in authenticating foreign documents. Section 1454 of the new Evidence Code sets up an uncomplicated, straightforward procedure, by which official documents such as death, birth and marriage certificates can now be authenticated.

Problems still remain, however, in connection with the authentication of private writings such as affidavits and powers of attorney. These documents are normally sworn to or acknowledged before a notary public. Under section 1451 of the new Evidence Code, the certificate of acknowledgement of such a document must be done in accordance with section 1183 of the Civil Code. This section, as amended in 1963, places a more burdensome requirement on the proof of the genuineness of the notary's signature, than is placed upon the proof of the genuineness of other official signatures provided for in section 1454.

The distinction seems to be inconsistent and unnecessary. As you know, a notary public in a civil law country is a much more important official than a notary public under our system. But even so, in California a notary public is considered a state "officer" (see: Code Commission notes preceding section 8200 of the Government Code, West Annotated California Codes). It would seem, therefore, in principle, that the requirements for the proof of the genuineness of the notary's signature should be no more burdensome than that required for other officers under section 1454 of the new Evidence Code.

John R. McDonough, Jr.
Dec. 21, 1966

-2-

Finally, it would seem that there is something of a conflict between section 1451 and section 1454. Section 1454, by its terms, governs the requirements of the proof of the genuineness of any official's signature, whether his signature is appended to a public or a private document, provided it is done in his official capacity. When a notary certifies to a signature, or to an oath, he is acting in his official capacity as a notary. Thus, the question arises whether his signature must be proved in accordance with 1183 of the Civil Code, or whether it may be proved in accordance with section 1454 of the Evidence Code.

I offer the foregoing comments not as criticism of the wonderful job you have done with the Evidence Code, but merely to let you know of my thoughts with the hope that they might be helpful to you in the next go-around on the Evidence Code.

Warmest regards.

Sincerely yours,


Francis J. McTernan

FJM:jf