#63

2/27/74

Memorandum 74-13

Subject: Study 63 - Evidence Code (Section 1223)

Attached is a letter from Judge Homer H. Bell concerning Evidence Code Section 1223, which provides:

> **1223.** [redacted] Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if:
>
> (a) The statement was made by the declarant while participating in a conspiracy to commit a crime or civil wrong and in furtherance of the objective of that conspiracy;
>
> (b) The statement was made prior to or during the time that the party was participating in that conspiracy; and
>
> (c) The evidence is offered either after admission of evidence sufficient to sustain a finding of the facts specified in subdivisions (a) and (b) or, in the court's discretion as to the order of proof, subject to the admission of such evidence.

Judge Bell suggests two revisions of Section 1223 to make more evidence admissible:

> The first . . . consists of the elimination of the limitation contained in the words "in furtherance of". The second is . . . that evidence of statements of a co-conspirator may be used by the tryer of fact not only to show what was said or done in furtherance of the conspiracy, but also to establish the conspiratorial agreement itself . . . .

Respectfully submitted,

John H. DeMoully
Executive Secretary

Memo 74-13 EXHIBIT I

The Superior Court

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February 7, 1974

California Law Revision Commission
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Attention: John D. Miller, Chairman

Dear Mr. Miller:

Re: Evidence Code Section 1223

Over the years I have carried on a substantial amount of correspondence with your Commission and have made a few suggestions for your consideration, to which your spokesman has indicated a favorable reaction. Of course, in some instances, it was explained to me that on some of the items your committee was not yet scheduled to take up the particular subject matter.

The purpose of this letter is to recommend to your attention the "in furtherance of" provision of Evidence Code 1223, relating to conspiracy.

Although I spent a major portion of my eight years as a federal attorney, prosecuting conspiracy cases (first in the Antitrust Division and later in the United States Attorney's office) I found that in a 4-1/2 month conspiracy trial over which I presided, I was compelled to do even further research. Among other things, I encountered the provisions of Evidence Code Section 1223 which purports to embody the case law permitting the admission of certain statements against a member of a conspiracy in spite of the hearsay rule.

For the past two years I have been a member of the Legislative Committee of the Los Angeles Superior Court. Last year I was chairman of a sub-committee assigned to recommend code changes or additions. I came up with approximately 34 of my own. This year I have been appointed chairman of the Legislative Committee, and it has occurred to me, as well as to several members of my committee that I establish contact with you for whatever cooperation or assistance we may be able to lend each other. My suggestion for the improvement of E. C. 1223 is set forth below:

While I concede that there is a considerable amount of case law supporting the language in sub-paragraph (a) which requires that the statements be made "in furtherance of" the objective of that

conspiracy", I am convinced that both that code section and the decisions upon which it is based are unduly restrictive. The Model Code and Uniform Rules reject this limitation and allow declarations "relevant to the plan or its subject-matter". See Witkin, Calif. Evidence (2d.Ed). p.493, § 521.

To eliminate all of the words spoken by the co-conspirators during the time that they were carrying out the conspiracy except those words which were "in furtherance of" the conspiracy would virtually make their conversations unintelligible. Take any statement and censor substantial portions of it, and you will get a garbled, unintelligible, and probably misleading verbal residue as a result. This narrow limitation overlooks the fact that the prosecution in a conspiracy case must show much more than the words or acts which actually were uttered or performed "in furtherance of" the conspiracy. For example, among other things, the prosecution must show the following:

> That each defendant KNEW the nature of the acts that were taking place, or were planned.
>
> That the defendants each had a SPECIFIC INTENT.
>
> That each defendant AGREED or ACQUIESCED in the acts or the plans of the others.
>
> That his statements, or silence, gave some degree of encouragement to the others, even though the statements involved were not themselves strictly "in furtherance of" the conspiracy. For example, a member of the group sits in a group while the existence, the methods, and the preceding and current activities of the group are discussed, and the member in question goes along from day to day with the group, participating in some of its activities. Such conversations would be properly admitted for several reasons. In addition to those mentioned above, it would show that the activities of the group and its purposes were ILLEGAL, and would dispel the contention that the activities were either legal, or that the defendant involved believed them to be legal.
>
> Moreover, general, and seemingly innocuous conversations of the conspirators form a matrix for the incriminating statements and the statements which are actually in furtherance of the conspiracy, which cause these otherwise isolated statements to become intelligible, and have meaning.

Thus I would suggest that some study be given to the possibility of broadening the conditions under which otherwise hearsay statements could be admitted against co-conspirators. Statements such as those above are not all "in furtherance of" the conspiracy,

but certainly form a relevant and integrated part of the conversations, and above all constitute some of the elements which the prosecution must prove. The language from the Model Code and Uniform Rules cited above, might be used to rectify the constrictive language of 1223.

I think §1223 also fails to recognize that there are two phases in a conspiracy trial, insofar as the admission of the statements of co-conspirators against other co-conspirators is concerned. Section 1223 provides for the activation of the section permitting such admission of statements either by the prior admission of evidence sufficient to sustain the findings of facts specified in sub-division (a) and (b), or in the court's discretion as to the order of proof, subject to the subsequent or concurrent admission of such evidence. [See sub-section (c)]. In other words, when there is what amounts to a prima facia showing, either to the satisfaction of the court or of the jury, depending upon which approach is used, the statements become admissible. But what is normally overlooked is the fact that after this point is reached, such statements of co-conspirators may now be used to prove the conspiracy. (See People v. Goldberg 152 Cal.App.(2d) 562 at 568, where the court says in part, "When an agreement is not in writing, parol evidence is admissible to prove its contents, and where the conspiracy was oral, proof of the conversation of the parties tending to establish their agreement is evidence of the very fact to be proved and is therefore a part of the res gestae.") (I don't think that waste-basket of legal undertainty - res gestae - has anything to do with it.)

My more recent research into this subject brings out both in the comments to the Model Code of Evidence and in the Annual Survey of American law, as well as in the language of some California cases, that our former rule under C.C.P. 1870 (b) used the language "relating to" rather than "in furtherance of." I feel that the later, more restrictive, verbiage is unduly restrictive, extremely illogical, and just plain bad.

Thus, there are two aspects of Section 1223 which might be strengthened. The first is described above and consists of the elimination of the limitation contained in the words "in furtherance of". The second is that set forth in the paragraph above, namely, that evidence of statements of a co-conspirator may be used by the tryer of fact not only to show what was said or done in furtherance of the conspiracy, but also to establish the conspiratorial agreement itself, as set forth in Goldberg.

I feel that a real contribution to the advancement of the law of conspiracy could be made by the suggested changes.

I sincerely appreciate this opportunity to express my views to you, and I hope that the Commission will see fit to undertake a study of them.

Cordially yours,

Homer H. Bell

HHB:hh