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Memorandum 67-53

Subject: Study 63 - Evidence Code

Attached to this memorandum is an article by Howard B. Miller, Beyond the Law of Evidence, reprinted from 40 So. Cal. L. Rev. 1 (1967).

Also attached as Exhibit I (pink) is a letter from John McDonough to Professor Miller commenting on the article.

The staff does not believe that Professor Miller has made a case for any changes in the Evidence Code. We agree with the McDonough analysis.

Respectfully submitted,

John H. DeMoully
Executive Secretary

Memo 67-53

EXHIBIT I

May 15, 1967

Professor Howard B. Miller
School of Law
University of Southern California
Los Angeles, Calif.

Dear Howard:

Thank you very much for sending me a reprint of your article "Beyond The Law Of Evidence." The article is certainly a provocative one. I believe that it is useful to have the Law Revision Commission's various work products subjected to this kind of critical scrutiny. On the other hand, I must say that I would have to disagree with many of your points.

In the first place, the Commission was, of course, faced with the task of devising an evidence code that would have some realistic chance of enactment. We quite deliberately declined to write a Model Code of Evidence which, whatever its intrinsic merit might be, would simply molder on law library shelves as the ALI's Model Code did. This pragmatic consideration necessarily conditioned, to some degree, what we undertook to do.

As you point out, we could have undertaken in the evidence code to write rules of admissibility designed to make pretrial preparation more comprehensive and effective; indeed, in an isolated area the Commission has done precisely this (See pages 19 through 29 of the Commission's 1967 Annual Report, which is enclosed). But this, it seems to me, is a collateral use of the law of evidence to accomplish other useful objectives, somewhat along the line of using exclusionary rules in respect of illegally obtained evidence to correct undesirable police practices. It really has nothing at all to do with what evidence ought to be admissible to establish disputed facts in a law suit.

As for hearsay, you simply have a quite different view of the intrinsic value of this kind of evidence than do most of the experienced California lawyers with whom I have dealt. Among other things, they do not seem to regard administrative proceedings as a model for court proceedings; indeed, their

reasoning tends to go the other way. One point that, among others, seemed clear to us was that, at a minimum, the hearsay rule should serve as a "best evidence" rule. That is, where the declarant is present and there is, therefore, a choice between putting him on the stand to tell his story, on the one hand, and getting that story before the trier of fact in the first instance in the form of a written statement prepared by a lawyer and signed by the declarant, the former is clearly the preferable way to get at the truth. I am a little surprised that you should have thought otherwise.

The hypothetical question no doubt does present a real problem. Your proposal to permit the expert to "observe the evidence" and state an opinion based on his observation would, of course, hardly work where there was any dispute between the parties relating to the underlying facts; in such a case, we must know which versions of the facts the expert has chosen to believe. This point applies as well, of course, when he is presented with a "specialized transcript of the underlying testimony."

I think some case can be made for having different rules of evidence in non jury cases. It is a difficult proposition to sell to the bar, however, for at least two reasons. In the first place, on the basis of their experience, they do not appear to have as much confidence in the capacity of judges to make the kind of discrimination you suggest between admissibility and weight. In the second place, most lawyers appear to feel more comfortable with the view that there is a single body of rules of evidence applicable to all proceedings and in the light of which they can prepare their cases with some confidence as to what they will have to meet.

All of which is to say, of course, that reasonable minds can disagree on complex subjects. The Law Revision Commission did not set out to "reform" the law of evidence, if by that is meant substantially to abandon the existing system for one in which virtually everything goes in and where objection "goes rather to weight than to admissibility". Rather, it set out to find, clarify and codify existing law with only such changes as seemed desirable and were generally consistent with traditional notions of trying cases in courts of law as distinguished

from conducting proceedings before administrative agencies. Hopefully, at the minimum the Commission produced a compilation of rules of evidence which will have considerable utility for judges and lawyers until the millennium arrives.

With best regards.

Sincerely yours,

John R. McDonough

JRM:mh

bcc: Richard Keatinge, Esq.
John Demoully, Esq.