

## First Supplement to Memorandum 2003-26

**Comparison of Evidence Code with Federal Rules: Input of State Bar Trusts and Estates Section on Evidence Code Section 1260**

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Memorandum 2003-26 raises the possibility of amending Evidence Code Section 1260 to recognize a hearsay exception for a statement relating to the *terms* of the declarant's will, as well as for a statement relating to the execution, revocation, or identification of the declarant's will. This would conform to the federal approach. We solicited input on the proposed amendment from the State Bar Trusts and Estates Section, which has taken the time to review the matter and provide comments. See Exhibit pp. 1-2.

The Trusts and Estates Section "agrees that a proposed amendment to include 'the terms of the declarant's will' as a matter not made inadmissible by the hearsay rule (provided that the conditions set forth in the statute are met) would be consistent with the manner in which such statements are generally treated in probate and trust proceedings." *Id.* at 1. The group provides some background information and legal analysis to support that point. *Id.* at 1-2.

The Trusts and Estates Section also states that Section 1260 should apply not only to a will, but also to a trust or other testamentary instrument. The group has not yet resolved, however, whether the provision "should apply to 'wills and trusts,' 'at-death transfers' (as defined in Probate Code § 21104), or some other category of instruments." *Id.* at 2. The group requests additional time to consider that question.

That request is easy to accommodate, because the Commission is still in the process of preparing a tentative recommendation on the hearsay issues. We will bring the issue back to the Commission once the Trusts and Estates Section provides further input on what types of testamentary instruments to cover in Section 1260.

Respectfully submitted,

Barbara Gaal  
Staff Counsel

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**THE STATE BAR OF CALIFORNIA**

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September 11, 2003

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Re: Evidence Code Section 1260

Dear Ms. Gaal:

On behalf of the Trusts and Estates Section of the State Bar of California, I am responding to your letter of August 4, 2003, requesting our Section's input concerning a proposed amendment to Evidence Code Section 1260 (Statement Concerning Declarant's Will).

Our Section has had the opportunity to review the proposed amendment to Section 1260 and agrees that a proposed amendment to include "the terms of the declarant's will" as a matter not made inadmissible by the hearsay rule (provided that the conditions set forth in the statute are met) would be consistent with the manner in which such statements are generally treated in probate and trust proceedings. We note that former Probate Code Section 105, which excluded the oral declarations of a testator from the range of extrinsic evidence that was potentially admissible to interpret an ambiguous provision of a will, was repealed in 1983 (see 16 Cal.Law Rev. Comm. Report at 2503 (November 1982)), following extensive criticism of

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the rule by the courts (*Estate of Fries* (1963) 221 Cal.App.2d 725; *Estate of Kime* (1983) 144 Cal.App.3d 246). By confirming that the oral declaration of the testator is acceptable as extrinsic evidence to interpret a will, it seems safe to say that the courts and legislature have considered those declarations to be exempt from the hearsay rule. The proposed amendment to Section 1260 makes that exemption explicit in the Evidence Code.

We note that Section 1260 is currently directed only to a "will." We see no reason why Section 1260 should not apply equally to a trust or other testamentary instrument. In fact, many provisions of the Probate Code apply far more broadly than just to wills (e.g., Division 11, Prob.Code §§21101 et seq. – "Construction of Wills, Trusts, and Other Instruments"). Likewise, Evidence Code Section 1260 should apply more broadly than just to "wills." However, our section has not had the time to consider whether Section 1260 should apply to "wills and trusts," "at-death transfers" (as defined in Probate Code §21104), or some other category of instruments. We would like to have additional time to consider this question and submit our comments to the Commission.

If it would assist the Commission in its deliberations, Christopher Moore can be available to attend the Commission meeting on either September 18 or 19, 2003, on behalf of our Committee if you believe his attendance will be useful to the Commission. Mr. Moore can be reached at (310) 540-8855 or at [chris@mbslawcorp.com](mailto:chris@mbslawcorp.com). Thank you for your consideration of these comments.

Very truly yours,



Charles P. Wolff

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