Study K-200 November 4, 2002

First Supplement to Memorandum 2002-56

Comparison of Evidence Code with Federal Rules:
Comments of Prof. Méndez Regarding Dying Declarations

The last two issues discussed in Memorandum 2002-56 are: (1) whether admissibility of a dying declaration should be restricted to situations in which the declarant is unavailable, and (2) if a showing of unavailability is required, whether it is necessary to show that the proponent unsuccessfully attempted to depose the declarant. Prof. Méndez and the staff have exchanged a number of messages on this subject, which are attached for the Commission's consideration.

In his first message, Prof. Méndez concludes that unavailability should be required but an attempt to depose the declarant should not. Exhibit p. 1. In his second message, he reverses his position on the first issue. Exhibit pp. 2-3. Later, however, he reverts to his earlier position. Exhibit pp. 3-5. He comments that "The fact that I have bounced between two opposing positions says something, but I am not sure what — probably the need to reflect more on the problem."

The staff agrees that these issues might require additional research and analysis, particularly because they also arise in the contexts of statements of personal or family history and statements against interest. We could present material on these hearsay exceptions for the December meeting, and then the Commission could consider all three contexts at once. By then, the staff may be able to dig out some more legislative history or other information on the issues relating to the requirement of unavailability and the necessity of an attempt to depose the declarant. Prof. Méndez will not be present at the November meeting, but he might be able to attend the December meeting, in which case he could assist the Commission in reaching a decision with respect to all three contexts.

Respectfully submitted,

Barbara Gaal
Staff Counsel

Exhibit

10/29/02 EMAIL FROM PROF. MENDEZ

To: Barbara Gaal
From: Miguel Méndez

Barbara, thanks for sending me the memo. I think that I agree with all or most of what you say. I agree that the Code's unavailability provision should be amended to include the contumacious witness as well as the forgetful witness.

With respect to dying declarations, I conclude in my book (section 9.03) that a dying declaration is admissible in California even if the declarant survives. After all, dying declarations are not grouped with the exceptions requiring the proponent to show the unavailability of hearsay declarant. On the other hand, if the declarant does survive and can testify, one would expect the proponent to call the declarant as a percipient witness and not rely solely on the dying declaration. If that is so, then one can question whether a need exists in this situation for the dying declaration. If one concludes "no", then the federal position makes sense: the declaration should be excluded if the declarant survives unless the declarant is otherwise unavailable to testify as a percipient witness.

Conforming the Code to the Rules in this respect has the added value of diminishing the differences between the Code and the Rules. Although I have no strong preference, if pushed I would favor changing the Code.

I think that I agree with the Senate criticism of the deposition requirement with regard to the admissibility of hearsay where the proponent has to show the unavailability of some hearsay declarants. Requiring the proponent to attempt to take the declarant's deposition I think is designed to get the declarant's testimony under oath in a proceeding that affords the opponent an opportunity to cross examine the declarant. Presumably, the jury would be better off with the record of this testimony than just the kind of hearsay contemplated by the exception. But there is no guarantee that the deposition evidence would be admissible at trial over objection, and depositions can be costly and time consuming. Depositions, moreover, are rarely authorized in California criminal cases. I suppose that the response to this point is that the proponent of the hearsay would be excused from attempting to depose the hearsay declarant except in those instances where the rules of civil or criminal procedure authorize the taking of the deposition for the purposes contemplated by the hearsay exception.

10/31/02 EMAIL FROM PROF. MENDEZ

To: Barbara Gaal
From: Miguel Méndez

Barbara, the federal position on unavailability is "novel" to me, so I am not sure that I have thought it through as much as I would like. So thinking out loud again:

1. If the declarant dies, then the proponent would want to offer the declaration. This would be true if the proponent is also unavailable for the other reasons cited in the Rules and the Code. In these circumstances, the declaration most likely would be offered through someone who heard the declarant make the dying declaration, although given advances to today's technology one can imagine a recorded declaration.

In these circumstances, if one assumes that the foundation for admissibility can be laid, one would think that the opponent would want an opportunity to cross examine the declarant under oath. But, realistically, would a deposition offer that? If the injury was serious enough to cause the declarant to believe that death was around the corner, chances are that the declarant will die before a deposition can be scheduled. Similarly, if the injury was so serious as to preclude the declarant from appearing as a witness at the trial, then the injury might likewise preclude the declarant from appearing as a deponent. An additional complicating factor is that the procedural rules might not allow for the deposition to be taken even if it can be scheduled and the witness can be deposed. A further difficulty is that over objection admissibility of the deposition at the trial cannot be guaranteed.

2. If the declarant does not die, then in most cases the proponent would want to call the declarant as a witness. Testimony about the circumstances surrounding the attack is usually more powerful than a declaration reported at the trial by some other witness who was not present at the time of the attack. In these circumstances, concerns about unavailability disappear. But if the declarant survives and is unavailable to testify for some other reason, then the concerns in the preceding paragraph apply.

It seems as though the principal reason for conditioning the receipt of dying declarations on a showing of unavailability is the requirement of attempting to take the declarant's deposition. That favors the opposing party but only to the extent that a deposition can in fact be taken in the proceeding and that the most pertinent parts (most likely the examination by the adverse party) can be introduced at the trial. Given the costs of depositions, their limited availability especially in criminal proceedings, and the uncertainty over their admissibility at trial, I think that on balance I would retain the California position at least with respect to dying declarations. They should be admissible regardless of whether the proponent attempted to depose the declarant. Moreover, they should be admissible even if the declarant appears as a witness since the declarant can be cross examined under oath about his or her out of court declaration if the proponent offers the declaration in addition to the declarant's testimony regarding the circumstances of the attack. Dying declarations would be treated in the same manner as excited utterances. It is immaterial whether the excited utterance is offered through the declarant or through some other witness who overheard the utterance. Moreover, an exited utterance requires neither a showing of unavailability nor of an attempt to by the proponent to depose the declarant.

I realize that in my earlier memo I reached the opposition conclusion with regard to whether the proponent must establish the declarant's unavailability. But since the justification for requiring a showing of unavailability appears to be the requirement that the proponent attempt to depose the declarant, once the requirement is eliminated, the need to establish the declarant's unavailability seems to disappear.

Let me know if this makes sense to you.

11/1/02 EMAIL FROM B. GAAL TO PROF. MENDEZ, TOGETHER WITH HIS 11/2/02 RESPONSE

☞ **Staff Note.** Shown below is a message that the staff sent to Prof. Méndez. His response is interlineated in boldface.

To: Miguel Méndez
From: Barbara Gaal

I didn't respond to you yesterday because I needed some time to think about what you said. Am I correct that your bottom line is the same as Prof. Friedenthal's: (1) a dying declaration should be admissible regardless of whether the declarant dies, and (2) a dying declaration should be admissible regardless of whether the declarant is available to testify?

I've tried to think through various hypotheticals and figure out whether this approach works satisfactorily. I might not have thought of all of the possible ramifications, but it seems OK to me. As I see it, here are the possibilities:

(1) Declarant dies. A dead declarant is necessarily unavailable, so it does not matter whether the provision on dying declarations requires a showing of unavailability. The dying declaration is admissible even if such a showing is required.

(2) Declarant survives but can't testify due to poor health, memory loss, etc. Again, it doesn't matter whether the provision on dying declarations requires a showing of unavailability. The declarant is unavailable so the dying declaration is admissible even if a showing of unavailability is required.

(3) Declarant survives and is able to testify. As you point out, the party whose position is bolstered by the dying declaration is likely to call the declarant as a witness, because that testimony probably will be more powerful than the out of court statement. If the declarant testifies consistently with the dying declaration, the dying declaration will merely reinforce that testimony. Further, the other side will have an opportunity to cross-examine the declarant regarding both the in-court testimony and the out of court statement. Admitting the dying declaration should not cause any significant harm.

Yes, the calling party will use the dying declaration as a prior consistent statement, even though the credibility of the declarant has not been attacked. The declaration would be inadmissible as a prior consistent statement but would be admissible as a dying declaration.

If the declarant testifies inconsistently with the dying declaration, the party who called the declarant will have an opportunity to examine the declarant on that point and raise the inconsistency. Again, admitting the dying declaration should not cause any significant harm.

If the calling party knows that the declarant will testify inconsistently with his dying declaration, the calling party might choose to offer only the declaration if it is more useful. In theory, the opponent can call the declarant as a witness to give testimony inconsistent with the declaration. Of course, this assumes that the opponent knows that the declarant will testify inconsistently with the declaration. If California adopts the federal position (conditions the admissibility of dying declarations on a showing of the declarant's unavailability and an attempt to depose the declarant), the opponent might know this, if in fact the deposition was authorized and taken and the declarant's now changed position comes out at the deposition. But as I pointed my earlier memo, this is a lot of "ifs", especially when compared with the costs of requiring parties to take depositions.

Suppose the party whose position is bolstered by the dying declaration decides not to call the declarant, perhaps to save expenses. Then admitting the dying declaration would still be OK, because the other side can always call the declarant and subject the declarant to cross-examination on the content of the dying declaration. If the other side opts not to do call the witness, that is its choice. **This is correct.**

Obviously, what to do with dying declarations (and perhaps declarations against interest) presents a close question. To my knowledge, the California appellate cases do not disclose reasons to be concerned if California retains its practice of allowing the use of dying declarations irrespective of the declarant's availability and without requiring the proponent to attempt to depose the declarant. I don't follow the federal cases as closely, focusing primarily on U.S. Supreme Court opinions on the Federal Rules. Those opinions, which are few in number, do not disclose concerns with the federal requirements. But it may be that the sample -- U.S. Supreme Court opinions -- is simply too small.

I think it all boils down to:

-- How suspicious do we need to be dying declarations? Is it necessary to protect the jury from them even though the declarant is available (e.g., because a dying person may intend to tell the truth but may suffer from impaired perception)?

-- How much faith can we put in the process of cross-examination?

The more I think about it, the more inclined I am to trust in the jury's ability to properly evaluate a dying declaration when the declarant is available to testify. And when the declarant is unavailable, the necessity principle kicks in.

Your position is one that has occurred to me. Having the benefit of hindsight, why don't we impose an unavailability requirement at least in the case of those hearsay declarations which are oral? I happen to believe that the best way to test the reliability of evidence, especially testimony (e.g., an oral hearsay declaration), is by subjecting the witness to cross-examination under oath in the presence of the fact finder. That way the fact finder can take the cross into account in determining the weight to give to the witness's testimony. If we believe that the search for "truth" is advanced by such cross-examination, then as a general rule shouldn't we exclude most hearsay if the declarant can be produced as witness at the hearing?

This position has not taken hold, probably because of the Common Law's piecemeal development of the rules of evidence and their subsequent codification. If we were writing the rules for the first time with the benefit of hindsight, we would at

least give serious consideration to conditioning the admissibility of some or all hearsay on a showing of the declarant's unavailability.

Perhaps the best solution is to subject dying declarations (and maybe declarations against interest) to a showing of unavailability but dispense with the federal requirement that the proponent attempt to depose the declarant.

Now look at what has happened: I have come up again with the conclusion I reached in my first email to you on this subject!

I'm still curious to know more about what went on in Congress on this point. I suspect that it wasn't especially well thought through — the House may simply have been distrustful of dying declarations and thus decided that they should be admissible only if all other avenues for obtaining the evidence were exhausted (deposition as well as in-court testimony); the Conference Committee may simply have decided to let the House have its way on the point because the Senate was getting its way on something else.

If I ever have time, I'll try to check for legislative history besides the House report, Senate report, Conference Committee report, and advisory committee notes.