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7/5/61

Fourth Supplement to Memorandum No. 19(1961)

Subject: Study No. 34(L) - Uniform Rules of Evidence (Hearsay)
Rule 63(3)

In Memorandum No. 19(1961) and the second supplement thereto, Rule 63(3) was discussed and several problems were pointed out. In this memorandum, Rule 63(3) is revised to reflect the changes suggested in the previous memoranda. To accommodate all of the suggested changes, Rule 63(3) has been broken up into three subdivisions -- one dealing with former testimony introduced against the party who previously introduced it, one dealing with former testimony from a declarant that a party had the opportunity to cross-examine on a previous occasion and one dealing with former testimony from a declarant that another person had an opportunity to cross-examine on a previous occasion. The text of the three subdivisions may be considerably shortened if the terms "former testimony" and "former action or proceeding" are defined. The staff recommends that definitions of these terms be added to Rule 62. Although the organization of Rule 63(3) has been substantially altered, the changes in language are not drastic and are shown by strikeout and underline. Following each subdivision, there is a comment indicating the reasons for the language used. Attached to this memorandum on pink paper are the revised rules and comments thereon as they will appear in the Commission's recommendation if the staff recommendations are adopted.

The proposed revisions are as follows:

Rule 62. As used in Rules 62 through 66:

* * *

(8) "Former testimony" means testimony given under oath or affirmation as a witness in [another] a former action or proceeding conducted by or under the supervision of a court or other official agency having the power to determine controversies or testimony in a deposition taken in compliance with law in such an action or proceeding.

COMMENT: This definition is that now stated in the preliminary language of Rule 63(3). The alterations shown are changes from the preliminary language of Rule 63(3) as now approved. The language of Rule 63(3) set forth above will be indicated by an omission (. . .) in the text of the rules set forth below.

(9) "Former action or proceeding" means not only another action or proceeding but also a former hearing or trial of the same action or proceeding in which the hearing is being conducted.

COMMENT: This definition is, in substance, that recommended by the staff at pages 1-3 of Memorandum No. 19(1961). It clarifies the status of former testimony given in the same action under Rule 63(3). The term "the hearing" used in this definition appears in several places in Rules 62-66 and is defined in the general URE definition section, Rule 1, as follows: "The hearing' unless some other is indicated by the context of the rule where the term is used, means the hearing at which the question under a rule is raised, and not some earlier or later hearing."

Rule 63. Evidence of a statement which is made other than by a witness while testifying at the hearing and is offered to prove the truth of the matter stated is hearsay evidence and is inadmissible except:

* * *

(3) [~~Subject-to-the-same-limitations-and-objections-as-though-the declarant-were-testifying-in-person,~~] Former testimony [. . . but-only] if the judge finds that the declarant is unavailable as a witness at the hearing and that [~~such~~] the former testimony is offered against a party who offered it in evidence on his own behalf in the former action or proceeding or against the successor in interest of such party.

COMMENT: This rule is now contained in Rule 63(3)(a). The omitted language, which is indicated here by the deletion (. . .), is the language used to define "former testimony" in Rule 62(8), above. The evidence involved here is not "subject to the same limitations and objections as though the declarant were testifying in person" because the evidence is offered against the person who previously offered it. If the evidence is sufficiently competent to establish such person's claim against another, he should not be heard to complain when another uses such evidence to establish a claim against him.

(3a) Subject to ~~[the same limitations and objections as though the declarant were testifying in person,]~~ any objection the party against whom the former testimony is offered could have taken and did not fail to make at the time the former testimony was given, former testimony [. . . but only] if the judge finds that the declarant is unavailable as a witness at the hearing and that ~~[in a criminal action or proceeding,]~~ the party against whom the testimony is offered was a party to the ~~[other]~~ former action or proceeding and had the right and opportunity for cross-examination with an interest and motive similar to that which he has at the hearing [in the action or proceeding in which the testimony is offered] except that the testimony given at a preliminary examination, but not received in evidence at the trial, in [the other] a criminal action or proceeding other than the action or proceeding in which the testimony is offered is not admissible under this subdivision.

COMMENT: This subdivision states in substance the rule now found in Rule 63(3)(c). The criminal action limitation is removed so that the subdivision may apply to all cases in which the evidence is offered against a person who was a party to the former action.

The provision for objection has been related to the time the former testimony was given. This is certainly the existing rule insofar as objections going to the mental competency of the witness are concerned. (See Chadbourn's study on "Whether rules which disqualify certain persons as witnesses also disqualify hearsay declarants" dated September 29, 1958, pp. 4-5.) Whether this is the existing law insofar as objections based upon the Dead Man's Statute are concerned is not clear, although the later cases indicate that it is. (See Second Supplement to Memorandum

No. 19(1961), note 2, page 7.) The proposed revision may change the law insofar as objections based upon the spouse disqualification rule are concerned, but here also the existing law is not clear. (See Second Supplement to Memorandum No. 19(1961), note 1, page 7.) The objection provision has also been limited so that a party may not raise objections that he failed to raise when the former testimony was given. The word "taken" is used in the objection provision in the same manner as it is used in Penal Code §§ 1345 and 1362, which provide for the admission of depositions in criminal actions,

Testimony in depositions taken, but not offered in evidence, in former actions is admissible under this subdivision, for there is no requirement that the former testimony be offered for or against anyone in the prior action. This appears to be existing law. (Briggs v. Briggs, 80 Cal. 253 (1889).)

Although evidence given at the preliminary hearing of a different criminal action is not admissible under this subdivision, the defendant in a criminal action may introduce such evidence against the prosecution under subdivision (3) above, and anyone may introduce such evidence in a civil action under subdivision (3b) below.

(3b) Subject to [~~the same limitations and objections as though the declarant were testifying in person,~~] any objection the party against whom the former testimony is offered could have taken at the time the former testimony was given, former testimony [. . . but only] if the judge finds that the declarant is unavailable as a witness at the hearing, [~~and~~] that the former testimony is offered in a civil action or proceeding or against the people in a criminal action or proceeding and that the issue is such that [~~the party against whom the testimony was offered in the other~~] a party to the former action or proceeding had the right and opportunity for cross-examination with an interest and motive similar to that which the party against whom the testimony is offered has at the hearing. [~~in the action or proceeding in which the testimony is offered~~]

COMMENT: This subdivision restates the rule now contained in Rule 63(3)(b). Under this revision, the former testimony with which it is concerned may be introduced against the prosecution in a criminal proceeding. Thus, as under existing law, the defendant has as much right to introduce

evidence in a criminal proceeding as he does in a civil proceeding, for the prosecution is not protected by any right of confrontation. (See Second Supplement to Memorandum No. 19(1961) pp. 13-15.)

As under (3a), testimony in depositions taken, but not offered in evidence, in a former action is admissible under this subdivision for there is no requirement that such former testimony be offered for or against anyone.

As the party against whom the testimony may be admitted under this subdivision may not have been a party to the former action, he is given the right to raise any objection to the former testimony that he could have raised at the time the former testimony was given.

Respectfully submitted,

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RULE 62. DEFINITIONS.

Rule 62. As used in [~~Rule 63 and its exceptions and in the following rules,~~] Rules 62 through 66:

(1) "Statement" means not only an oral or written expression but also non-verbal conduct of a person intended by him as a substitute for words in expressing the matter stated.

(2) "Declarant" is a person who makes a statement.

(3) "Perceive" means acquire knowledge through one's [~~own~~] senses.

(4) "Public [~~official~~]" officer or employee of a state or territory of the United States includes [~~an official of a political subdivision of such state or territory and of a municipality,~~] an officer or employee of:

(a) This State or any county, city, district, authority, agency or other political subdivision of this State.

(b) Any other state or territory of the United States or any public entity in any other state or territory that is substantially equivalent to the public entities included under paragraph (a) of this subdivision.

(5) "State" includes each of the United States and the District of Columbia.

~~[(6) -- "A business" as used in exception (13) shall include every kind of business, profession, occupation, calling or operation of institutions, whether carried on for profit or not.]~~

(6) [(7)] Except as otherwise provided in subdivision (7) of this rule, "unavailable as a witness" [includes situations where] means that the [witness] declarant is:

(a) Exempted on the ground of privilege from testifying concerning the matter to which his statement is relevant. [y-er]

(b) Disqualified from testifying to the matter. [y-er]

(c) Dead or unable [~~to-be-present-er~~] to testify at the hearing because of [~~death-er-then-existing~~] physical or mental illness. [y-er]

(d) Absent beyond the jurisdiction of the court to compel appearance by its process and the proponent of his statement could not in the exercise of reasonable diligence have secured the presence of the declarant at the hearing. [y-er]

(e) Absent from the [~~place-of~~] hearing [~~because~~] and the proponent of his statement does not know and with reasonable diligence has been unable to ascertain his whereabouts.

(7) For the purposes of subdivision (6) of this rule, [Dat] a [witness] declarant is not unavailable as a witness:

(a) If the judge finds that [~~his~~] the exemption, disqualification, death, inability or absence of the declarant is due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the [~~witness~~] declarant from attending or testifying; [y] or [~~to-the-culpable-neglect-of-such-party,-er~~]

(b) If unavailability is claimed [~~under-clause-(d)-of-the-preceding-paragraph~~] because the declarant is absent beyond the jurisdiction of the court to compel appearance by its process and the judge finds that the deposition of the declarant could have been taken by the proponent by the exercise of reasonable diligence and without undue hardship [y] or expense. [~~and-that-the-preable-importance-of-the-testimony-is-such-as-to-justify-the-expense-of-taking-such-deposition.~~]

(8) "Former testimony" means testimony given under oath or affirmation as a witness in a former action or proceeding conducted by or under the supervision of a court or other official agency having the power to determine controversies or testimony in a deposition taken in compliance with law in such an action or proceeding.

(9) "Former action or proceeding" means not only another action or proceeding but also a former hearing or trial of the same action or proceeding in which the hearing is being conducted.

COMMENT

This Rule defines terms used in Rules 62-66. The Rule as proposed by the Commissioners on Uniform State Laws has been considerably revised in form in the interest of clarity of statement.

The significance of the definition of "statement" contained in URE 62(1) is discussed in the comment to the opening paragraph of Rule 63.

URE Rule 62(6) has been omitted because "a business" is used only in subdivisions (13) and (14) of Rule 63 and the term is defined there.

Rule 62 defines the phrase "unavailable as a witness," and this phrase is used in URE Rules 62-66 to state the condition which must be met whenever the admissibility of hearsay evidence is dependent upon the present unavailability of the declarant to testify. The admissibility of evidence under certain hearsay exceptions provided by existing California law is also dependent upon the unavailability of the hearsay declarant to testify. But the conditions constituting unavailability under existing law vary from exception to exception without apparent reason. Under some

exceptions the evidence is admissible if the declarant is dead; under others, the evidence is admissible if the declarant is dead or insane; under others, the evidence is admissible if the declarant is absent from the jurisdiction. For these varying standards of unavailability, Rule 62 substitutes a uniform standard.

The phrase "unavailable as a witness" as defined in Rule 62 includes, in addition to cases where the declarant is physically unavailable (dead, insane, or absent from the jurisdiction), situations in which the declarant is legally unavailable (exempted from testifying on the ground of privilege or disqualification). There would seem to be no valid distinction between admitting the statements of a dead, insane or absent declarant and admitting those of one who is legally not available to testify. Of course, if the out-of-court declaration is itself privileged, the fact that the declarant is unavailable to testify at the hearing on the ground of privilege will not make the declaration admissible. The exceptions to the hearsay rule that are set forth in the subdivisions of Rule 63 do not declare that the evidence described is necessarily admissible. They merely declare that such evidence is not inadmissible under the hearsay rule. If there is some other rule of law -- such as privilege -- which renders the evidence inadmissible, the court is not compelled to admit the evidence merely because it falls within an exception to the hearsay rule. Rule 62, therefore, will permit the introduction of hearsay evidence where the declarant is unavailable because of privilege only if the declaration itself is not privileged or inadmissible for some other reason.

The last clause of URE Rule 62 has been deleted by the Commission for it adds nothing to the preceding language.

Subdivisions (8) and (9) have been added to permit convenient use of the defined terms in the former testimony exceptions, Rule 63(3), (3a) and (3b). The definition of former action or proceeding given in subdivision (9) is the same as that given by the California courts to the term "former action" contained in subdivision 8 of Code of Civil Procedure Section 1870.

Subdivision (3): Testimony in Former Action or Proceeding.

(3) [~~Subject to the same limitations and objections as though the declarant were testifying in person, (a) testimony in the form of a deposition taken in compliance with the law of this state for use as testimony in the trial of the action in which offered, or (b) if the judge finds that the declarant is unavailable as a witness at the hearing, testimony given as a witness in another action or in a deposition taken in compliance with law for use as testimony in the trial of another action, when (i) the testimony is offered against a party who offered it in his own behalf on the former occasion, or against the successor in interest of such party, or (ii) the issue is such that the adverse party on the former occasion had the right and opportunity for cross-examination with an interest and motive similar to that which the adverse party has in the action in which the testimony is offered;~~ Former testimony if the judge finds that the declarant is unavailable as a witness at the hearing and that the former testimony is offered against a party who offered it in evidence on his own behalf in the former action or proceeding or against the successor in interest of such party.

COMMENT

The Commission recommends against the adoption of URE 63(3)(a). This paragraph would make admissible as substantive evidence any deposition taken "for use as testimony in the trial of the action in which it is offered" without the necessity of showing the existence of any such special

circumstances as the unavailability of the deponent. In 1957 the Legislature enacted a statute (C.C.P. §§ 2016 - 2035) dealing comprehensively with discovery and the circumstances and conditions under which a deposition may be used at the trial of the action in which the deposition is taken. The provisions then enacted respecting admissibility of depositions are narrower than URE 63(3)(a). The Commission believes that it would be unwise to recommend substantive revision of the 1957 discovery legislation before substantial experience has been had thereunder. Rule 63(32) and Rule 66A will continue in effect the existing law relating to the use of a deposition as evidence at the trial of the action in which the deposition is taken. Under existing law, the admissibility of depositions in other actions is apparently governed by the former testimony exception to the hearsay rule contained in subdivision 8 of Code of Civil Procedure Section 1870. Under the Uniform Rules as revised by the Commission, the admissibility of depositions in other actions will be governed by the former testimony exception contained in subdivisions (3), (3a) and (3b) of Rule 63.

The Commission recommends a substantial modification of URE 63(3)(b). URE 63(3)(b) as proposed by the Commissioners on Uniform State Laws has two important preliminary qualifications of admissibility: (1) the declarant must be unavailable as a witness and (2) the testimony is subject to the same limitations and objections as though the declarant were testifying in person. The Law Revision Commission recommends that the first qualification be retained but that the second be substantially modified. Under the Commission's modification, the extent to which former testimony is objectionable depends upon whether the party against whom the evidence is

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introduced was a party to the former proceeding and, if so, whether he permitted the evidence to be introduced at that time without objection. To accommodate this revision, the Commission has proposed three subdivisions dealing with former testimony: subdivision (3) which covers former testimony which is offered against a person who previously offered the testimony in his own behalf, subdivision (3a) which covers former testimony which is offered against a person who had the right and opportunity to cross-examine the declarant at the time the former testimony was given and subdivision (3b) which covers former testimony which is offered against a person whose motive for cross-examination is similar to that of a person who had the right and opportunity to cross-examine the declarant at the time the former testimony was given.

These provisions narrow the scope of the former testimony exception to the hearsay rule which is proposed by the Commissioners on Uniform State Laws. At the same time, they go beyond existing California law which admits testimony taken in another legal proceeding only if the proceeding was a former action between the same parties or their predecessors in interest, relating to the same matter, or was a former trial or a preliminary hearing in the action or proceeding in which the testimony is offered. The testimony is made admissible only in the quite limited circumstances described in subdivisions (3), (3a) and (3b). The Commission believes that with these limitations and safeguards it is better to admit than to exclude the former testimony because it may in particular cases be of critical importance to a just decision of the cause in which it is offered.

Subdivision (3a): Testimony in Former Action or Proceeding.

(3a) Subject to any objection the party against whom the former testimony is offered could have taken and did not fail to make at the time the former testimony was given, former testimony if the judge finds that the declarant is unavailable as a witness at the hearing and that the party against whom the testimony is offered was a party to the former action or proceeding and had the right and opportunity for cross-examination with an interest and motive similar to that which he has at the hearing except that testimony given at a preliminary examination, but not received in evidence at the trial, in a criminal action or proceeding other than the action or proceeding in which the testimony is offered is not admissible under this subdivision.

COMMENT

This subdivision is discussed in the comment to subdivision (3).

Subdivision (3b): Testimony in Former Action or Proceeding.

(3b) Subject to any objection the party against whom the former testimony is offered could have taken at the time the former testimony was given, former testimony if the judge finds that the declarant is unavailable as a witness at the hearing, that the former testimony is offered in a civil action or proceeding or against the people in a criminal action or proceeding and that the issue is such that a party to the former action or proceeding had the right and opportunity for cross-examination with an interest and motive similar to that which the party against whom the testimony is offered has at the hearing.

COMMENT

This subdivision, together with subdivisions (3) and (3a), is discussed in the comment to subdivision (3). Former testimony is admissible in criminal cases under subdivision (3b) only against the prosecution. This limitation has been made to preserve the right of the person accused of crime to confront and cross-examine the witnesses against him. When a person's life or liberty are at stake -- as they are in a criminal trial -- the Commission does not believe that the accused should be compelled to rely on the sufficiency of prior cross-examination conducted on behalf of some other person.