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#34

11/13/63

Memorandum 63-51

Subject: Study No. 34(L) - Uniform Rules of Evidence
(Article IX. Authentication and Content of Writings)

The Commission must approve this tentative recommendation for printing at the November meeting if we are to maintain our schedule. We wish to obtain comments on this tentative recommendation and the tentative recommendation on Hearsay Evidence so that they can be considered at the same time. The two recommendations are related.

It is important that we maintain our printing schedule. This permits us to spread the staff work on the printing program. More important, it will provide interested persons with an adequate opportunity to review our work.

The Northern Section of the State Bar Committee has advised us that it approves the tentative recommendation (except for one matter noted below). The comments of the Northern Section are set out as Exhibit I (pink sheets).

The Southern Section of the State Bar Committee does not plan to submit any comments on this tentative recommendation. The Southern Section has been unable to obtain a quorum for its meetings and plans to devote its remaining time to the privileges recommendation and other recommendations.

Please read the tentative recommendation (two copies attached) carefully prior to the meeting. Mark your suggested changes in the comments on one copy and turn it in to the staff at the meeting.

Listed below is the matter that the Northern Section believes should be reviewed and also several matters noted by the staff.

Relationship of Rule 68 to Subdivision (17) of Rule 63.

The staff suggests that the relationship of Rule 68 to subdivision (17) of Revised Rule 63 be considered. Subdivision (17) reads as follows:

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:

* * *

(17) ~~Subject to Rule 64,~~ (a) If meeting the requirements of authentication under Rule 68, to prove the content of ~~the record~~ a writing in the custody of a public officer or employee, a writing purporting to be a copy thereof. ~~of an official record or of an entry therein,~~

(b) If meeting the requirements of authentication under Rule 69, to prove the absence of a record in a specified office, a writing made by the public officer or employee who is the official custodian of the ~~official~~ records ~~of the~~ in that office, reciting diligent search and failure to find such record. ~~;~~

The above revision is contained in the tentative recommendation on the Hearsay Evidence Article. Note that paragraph (a) of subdivision (17) of Revised Rule 63 covers any writing in the custody of a public officer or employee, not merely the content of an official record.

Subdivision (17) was revised to include any writing in the custody of a public officer or employee in order to permit use of a certified copy of a writing that was not an official record. In several cases the issue has arisen as to whether certain documents were "public records" open to public inspection. In Coldwell v. San Francisco, 187 Cal. 510 (1921), plans, drawings, maps and other data were held not to be "public records," since they had not been approved by the engineer, but it also was held that they could be inspected under what is now Government Code Section 1227 as "other matters in the office of any officer," notwithstanding the tentative character of such data. The Commission originally revised subdivision (17) to make it clear that materials such as those involved in the Coldwell case were included under subdivision (17).

You will note that Revised Rule 63(17) refers to Rule 68. Either Rule 68 must be adjusted to conform to subdivision (17) of Revised Rule 63 or subdivision

(17) of Rule 63 must be revised to restore the original URE language which limited that subdivision to official records.

Attached as Exhibit II (yellow sheets) is a revised version of Rule 68. This exhibit contains Rule 68 as revised to conform to subdivision (17) of Revised Rule 63.

The policy question presented for Commission decision is: Should Rule 68 be revised as indicated in Exhibit II (with the additional complexity that the revision introduces) or should subdivision (17) of Revised Rule 63 be revised to conform to Rule 68? Does the rare case where some writing (not a public record) in the custody of a public officer or employee is needed in a law suit justify the complexity that Exhibit II would introduce into Rule 68?

Second Best Evidence Rule - Rule 70.

Under the URE, if a writing falls within one of the exceptions to the best evidence rule, any otherwise admissible secondary evidence of the content of the writing may be used.

Under the tentative recommendation, the proponent of the writing must use a copy of the writing if he has one in his possession or control. And, if the original is an official record or document or is a recorded document, the proponent must show in addition that he could not in the exercise of reasonable diligence have obtained a copy. Note that if the writing is not a matter of public record, the proponent does not have to show that he exercised reasonable diligence to obtain a copy.

The Northern Section of the State Bar Committee suggests that the proponent of a writing should, in every case, show that he could not in the exercise of reasonable diligence have obtained a copy. In effect, this is the second best evidence rule--the proponent, having shown that one of the exceptions to the

best evidence rule applies, must now show that he exercised reasonable diligence to obtain the second best evidence. The Commission took the position that this second showing would cause undue delay and controversy in the trial of an action and declined to make it applicable unless the writing was a public record, in which case a copy could easily be obtained.

See comment to subdivision (2) of Rule 70 on pages 23 and 24 of the tentative recommendation.

Repeals.

We inadvertently failed to include the repeal of Code of Civil Procedure Section 1940 in the tentative recommendation.

The following should be added following page 33 of the tentative recommendation:

Section 1940 provides:

1940. WRITINGS; PROOF OF EXECUTION; METHODS

Any writing may be proved either:
One--By any one who saw the writing executed; or,
Two--By evidence of the genuineness of the handwriting of the maker; or,
Three--By a subscribing witness.

This section should be repealed. It is superseded by Rule 71.

Respectfully submitted,

John H. DeMoully
Executive Secretary

Memo 63-51

EXHIBIT I

October 23, 1963

California Law Revision Commission
School of Law
Stanford University
Stanford, California

Attention: Mr. John H. DeMoully

Gentlemen:

The Northern Section of the Committee to Consider Uniform Rules of Evidence met on October 22, 1963 for the purpose of considering Article IX (Authentication and Content of Writings) of the proposed Uniform Rules of Evidence.

Rule 67: Authentication Required.

The chairman reported on Rule 67 and it was agreed by all present that this sets forth the present rule. The addition by the Law Revision Commission (hereinafter called "Commission") of language requiring authentication of the original or a copy of a writing before secondary evidence of its content may be received was considered to be sound.

The paragraph added by the Commission which requires any contest as to authenticity to be determined by the trier of fact, while probably not necessary, was considered to be a proper precautionary provision.

Rule 67 as revised by the Commission was therefore approved.

Rule 67.5: Authentication of Ancient Writings.

The chairman reported upon this rule and pointed out that it proposes a fundamental change in the California law in that under our present law an ancient document once authenticated is presumed to be authentic. The proposed rule would eliminate the presumption with the result that the trier of fact would not ultimately be required to find the document to be authentic even in the absence of contrary evidence. The Committee thought this to be a wise change.

It was then pointed out that due to the fact that authentication no longer results in a presumption, the provision of our law requiring a showing that the document be acted upon as genuine should be eliminated, particularly in view of the fact that such proof may often be impossible to obtain with documents other than dispositive instruments. The Committee agreed that this elimination was proper and further agreed with the Commission's addition of the requirement that the Judge find that the document is in such condition as to create no suspicion concerning its authenticity.

The Committee, therefore, approved Rule 67.5 as proposed by the Commission.

Rule 68: Authentication of Copies of Records.

The chairman reported upon Rule 68. It was pointed out that subdivision (1) of Rule 68 would extend our present law regarding publication of official documents to any writings so published, the present law being limited to executive and legistative action. The Committee could see no real reason for the present limitation and, therefore, approved the proposal.

Subdivision (2) is really only an extension of the principle of Rule 68 and it was, therefore, approved.

The chairman thereupon pointed out that subdivisions (c) and (d) of the original U.R.E. Rules (now numbered (3) and (4)) were revised by the Commission so as to conform with present California law in that under subdivision (3) mere certification of a writing as a correct copy of the record or entry by a person purporting to be an officer or the deputy of an officer having the legal custody of the record is sufficient to authenticate such copy of any state, or the United States or of a territory, district or possession in which the record is kept. The U.R.E. Rule would have limited this to California and with respect to other states would have required a statement by certain officers declaring that the person who had attested or certified the writing as a correct copy is the officer or deputy who has the custody of the record.

With respect to subdivision (4) it was pointed out that it retains the present California rule with respect to documents kept in foreign countries and thus requires a statement as to custody as above mentioned. The rule proposed by the Commission eliminates present requirement of an intermediate statement by an official of a foreign country thus confining the requirement only to a statement of a foreign service officer.

The Committee was of the opinion that the proposals of the Commission were sound and further approved the last sentence added by the Commission with regard to the prima facie establishment of the genuineness of the statment by the signature of the foreign service officer and the affixation of a seal purporting to be the seal of his office.

Rule 69: Certificate of Lack of Record.

Mr. Abramson reported upon this section and recommended its approval. The Committee accepted the recommendation.

Rule 70: Documentary Originals As The Best Evidence.

Mr. Abramson reported upon this rule. He stated that the proposed rule preserves the present California rule except for certain innovations.

With respect to subdivision 1(b) the proposed rule would do away with the California rule which recognizes a writing which is beyond the jurisdiction of the state as a lost document. The Commission's version would not have allowed secondary evidence of such a document unless it should be shown that it was not reasonably procurable by the proponent by use of the court's process or by other available means. Mr. Abramson was of the opinion that this was a reasonable requirement and recommended its approval. The Committee agreed.

Mr. Abramson then pointed out that subdivision 1(c) would change the California law in that it would require notice to produce an original notice as a condition to offering secondary evidence. He pointed out that there is no reason why an exception should have been made for a document which is a notice and recommended approval of the Commission's proposal. The Committee agreed.

Subdivision 1(d) dealing with collateral writings caused considerable discussion, but the Committee finally approved its inclusion.

Subdivisions 1(e), (f) and (g) presented no problems and were approved.

With respect to subdivisions 2(b) and (c), Mr. Abramson pointed out that these would now provide that with both private and public documents, "second best" evidence must be offered, if available, in preference to oral testimony. Mr. Abramson pointed out that the fundamental difference between (b), dealing with private writings, and (c), dealing with public writings, was that in respect to the latter the proponent must show that he could not in the exercise of reasonable diligence have obtained a copy. Mr. Abramson was of the opinion that there is no reason for this distinction and that the same requirement should be included in (b) with respect to private writings. The Committee agreed.

Subdivision 3, while probably not necessary, as hereinbefore noted with respect to a similar provision in Rule 67, was approved as a precautionary measure.

The result of the foregoing is that the Committee approves Rule 70 as revised by the Commission except that the Committee would suggest that the proponent be required to show the exercise of reasonable diligence to obtain a copy of a private writing as a condition to the introduction of oral testimony under 2(b).

Rule 71: Proof of Witnessed Writings.

The chairman pointed out that the language here was that of Code of Civil Procedure, Section 1940 rather than the proposal of U.R.E. The Committee approved this change.

Rule 72: Photographic Copies To Prove Contents Of Business And Public Records.

The Committee approved this rule as revised by the Commission.

Sincerely yours,

Lawrence C. Baker, Chairman
State Bar Committee on
Uniform Rules of Evidence

mtg.

Memo 63-51

EXHIBIT II

RULE 68. AUTHENTICATION OF COPIES OF [~~RECORDS~~] PUBLIC WRITINGS.

(1) As used in this rule, "public writing" means any writing in the custody of a public officer or employee.

(2) A writing purporting to be a copy of [~~an official record or of an entry therein,~~] a public writing meets the requirement of authentication as a copy of such public writing if [~~(a)~~] the judge finds that:

(a) The writing purporting to be a copy purports to be published by authority of the nation, state or subdivision thereof, in which the [~~record~~] public writing is kept; or

(b) Evidence has been introduced sufficient to warrant a finding that the writing purporting to be a copy is a correct copy of the [~~record or entry~~] public writing; or

(c) The office in which the [~~record~~] public writing is kept is within [~~this state~~] the United States or any state, territory, district or possession thereof and the writing purporting to be a copy is attested or certified as a correct copy of the [~~record or entry~~] public writing by a person purporting to be [~~an officer, or a deputy of an officer,~~] a public officer or employee having the legal custody of the [~~record~~] public writing; or

(d) [~~if~~] The office in which the public writing is kept is not within the [~~state~~] United States or any state, territory, district or possession thereof and the writing purporting to be a copy is attested or certified as required in [~~clause~~] paragraph (c) and is accompanied by a [~~certificate~~] statement declaring that [~~such~~] the person who attested or

certified the writing as a correct copy is the public officer [~~,~~] or employee who has the custody of the [~~record~~] public writing. [~~If the office in which the record is kept is within the United States or within a territory or insular possession subject to the dominion of the United States, the certificate may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of his office. If the office in which the record is kept is in a foreign state or country,~~] The [~~certificate~~] statement may be made only by a secretary of an embassy or legation, consul general, consul, vice consul, or consular agent or by any officer in the foreign service of the United States stationed in the foreign state or country in which the [~~record~~] public writing is kept, [~~and~~] authenticated by the seal of his office. The genuineness of the statement shall be prima facie established by the signature of a person purporting to be an officer authorized by this rule to make the statement and the affixation of a seal purporting to be the seal of his office.

COMMENT

Rule 68 in General.

Under existing law, a copy of certain official records may be authenticated for the purpose of introduction into evidence by showing that it was published by official authority or by showing that certain requisite seals and signatures appear on the copy. The rules are complex and detailed and appear for the most part in Article 2 (beginning with Section 1892) of

Chapter 3, Title 2, Part 4 of the Code of Civil Procedure.

Revised Rule 68 substitutes for these rules a uniform rule that can be applied to all public writings found within the United States and another applicable to all public writings found outside the United States. To conform to subdivision (17) of Revised Rule 63, Rule 68 has been revised so that it applies to all "public writings"-- i.e., official records and other writings in the custody of a public officer or employee. See Tentative Recommendation on Article VIII (Hearsay Evidence), p. 329.

The preliminary language of subdivision (2) has been revised to make clear that this rule sets forth the method of authenticating only the copy offered in evidence; this rule does not provide the procedure for authenticating the public writing itself. Under Revised Rule 63 (17),[6] however, the authenticated copy is evidence of the content of the public writing. In the case of an official record, the authenticated copy necessarily, therefore, is evidence that there is an official record and it is that being proved by the copy. Thus, authentication of the copy of an official record under Rule 68 supplies at the same time sufficient evidence to authenticate the official record as the official record. In some cases, the person may be seeking to prove not only that there is an official record that corresponds to the copy offered in evidence, but also that the official record was signed by certain persons or that the official record is a correct copy of another document signed by certain persons. In such instances, introduction of the authenticated copy of the official record may not supply the requisite authentication, for merely offering evidence that there is an official record and that it corresponds to the copy offered does not necessarily supply evidence that the official record is

[6] See note 4 supra.

all that the proponent claims it is--a document signed by certain persons or a correct copy of another document signed by certain persons. In the case of a recorded deed, Rule 63(19)[7] makes the official record itself evidence of the content and due execution of the original deed; hence, no further evidence would be necessary to authenticate the original deed. But in the absence of some presumption, hearsay exception, or other rule of law giving the official record the effect of supplying the further authentication required, the proponent would be required to offer some further authenticating evidence.

Subdivision (2).

Paragraph (a). Paragraph (a) provides that a public writing purporting to be published by official authority is sufficiently authenticated. Under Section 1918 of the Code of Civil Procedure, the acts and proceedings of the executive and legislature of any state, the United States or a foreign government may be proved by documents and journals published by official authority. Paragraph (a) in effect makes applicable these provisions of Section 1918 to all public writings. This extension of the means of proving public writings is recommended, for it will facilitate the proof of many official documents the authenticity of which is presumed (subdivision 35, Code of Civil Procedure Section 1963) and is seldom subject to question.

Paragraph (b). Paragraph (b) merely provides that a copy of a public writing may be authenticated by the admission of evidence sufficient to sustain a finding that it is a correct copy. Under this paragraph, a copy made by anyone of a public writing would be admissible if the copyist

[7] See note 5 supra.

testified directly that it was a correct copy. The paragraph is thus but a special application of the second sentence of Rule 67. Existing statutes recognize the rule in some specific situations (see, for example, subdivision 1 of Code of Civil Procedure Section 1907). It is included in Rule 68 in order to make the provisions of the rule complete insofar as the authentication of copies of public writings is concerned.

Paragraphs (c) and (d) generally. Paragraphs (c) and (d) set forth the rules for admitting attested or certified copies of public writings. The URE provisions relating to documents found within the State require "attestation" by a person purporting to be the legal custodian. Documents found outside the State require such attestation and, in addition, a certificate attesting that the person attesting the copy is in fact the custodian of the original record. The word "attest" is seldom found in existing California statutes. A person who "attests" a document merely affirms it to be true or genuine by his signature. Existing California statutes require documents to be "certified". The term is defined in Section 1923 of the Code of Civil Procedure as a statement that the certified copy is a correct copy of the original signed by the certifying officer under his seal of office if he has one. Thus, the only difference between the words is that the statutory definition of "certified" requires the use of a seal if the authenticating officer has one while "attested" does not. The rule has been revised to include the use of the statutorily defined word "certified" as it is the more familiar term in California practice.

Paragraph (c). In some respects, existing California procedures for authenticating copies of official documents are simpler than those recommended in the URE and in other respects they are more complex. Under

existing law, copies of many records of the United States government and of the governments of sister states may be authenticated simply by the signature of the custodian under his official seal if any. For example, see Sections 1901, 1905 and 1918, subdivisions 1, 2, 3 and 9, of the Code of Civil Procedure, and Section 6600 of the Corporations Code. Under the URE, such copies would be required to be attested by the custodian, and that the attesting officer is the custodian would be required to be attested by the certificate of another officer. The existing procedures have worked well in practice and there appears to be no reason for introducing additional complexity into the California law in this regard. Therefore, under the revised rule, the simple provisions of paragraph (c)--which require merely attestation or certification by the custodian--have been made applicable to copies of all public writings found within the United States or its possessions. The more complex procedures required by the URE for out-of-state documents have been limited to documents found in foreign countries.

Paragraph (d). Because paragraph (d) has been limited to foreign public writings, much of the language of the URE rule has been eliminated as superfluous. The procedure specified in the revised rule for authenticating a copy of a foreign document is generally simpler than the procedures available under existing statutes. Under existing statutes, it is usually necessary to obtain the certificate of the custodian, a certificate from another official that the document has been certified by the legal custodian and, finally, a certificate from a foreign service officer of the United States. See, for example, subdivision 8 of Code of Civil Procedure Section 1918. Under the revised rule, the signature of the legal custodian is required and, in addition, the signature of a foreign service officer

of the United States under the seal of his office. Revised Rule 68 (2)(d) will substitute one simplified procedure for authenticating foreign public writings for the complex procedures set forth in several long and complicated sections.

In one respect, the proposed authentication procedure will be somewhat more complex than that required by existing law. Under Section 1901 of the Code of Civil Procedure a copy of a public writing of any state or country may be authenticated by the attestation or certificate of the custodian under the state or national seal. See also subdivision 4 of Code of Civil Procedure Section 1918. The revised rule does not recognize the national seal of a foreign country as sufficient authentication unless the certificate of a United States foreign service officer is also obtained. However, the revision is desirable so that the authenticity of copies of foreign documents may be established by one reasonably simple and uniform procedure.

The last sentence of paragraph (d) has been added to clarify the URE rule. The policy underlying this rule and the existing statutes is that documents certified to be copies of official records should "prove themselves", that is, it should be unnecessary to call the custodian himself as a witness to give evidence as to the authenticity of the document and it should be unnecessary to call witnesses to establish the authority of the authenticating officers. Paragraphs (c) and (d) express this policy by providing that a copy is authenticated by a signature purporting to be that of an authorized officer. The last sentence has been included to make clear that the required statement, too, will "prove itself." Of course, the opposing party may attack the authenticity of the statement

or the copy itself by other evidence, and in such a case, the trier of fact must resolve the conflict in the evidence.