

NOTES ON UNIFORM RULES OF EVIDENCE RULE 62(7)

62(7) defines "unavailable as a witness."

The following exceptions to Rule 63 require that the declarant be "unavailable" in the sense of 62(7):

63(3) (as amended by Commission)

63(5)

63(10) (as amended by Commission)

63(23)

63(24)

63(25)

If we were to adopt 62(7) and the foregoing subdivisions of 63 we would change present law as follows:

1. Presently declarations against interest seem to be admissible only if the declarant is dead (CCP §§ 1853, 1870(4), 1946). Adoption of 63(10) (as amended by Commission) and 62(7) would make such declarations admissible not only when declarant is dead but also when declarant is unavailable in any of the other senses stated in 62(7).

Illustration: Defendant calls W and asks re a matter adverse to W's interest. W refuses to answer on ground of self-incrimination. Defendant may now prove W's out-of-court statement respecting the matter. W is "unavailable" because of his claim of privilege.

2. Presently certain pedigree declarations are admissible only if declarant is dead or "out of the jurisdiction" (CCP §§ 1852, 1870(4), first clause). Adoption of 63(23) (24) and (25) plus 62(7) would make such declarations admissible not only when declarant is dead or out of the jurisdiction but also (for example) when declarant is unable to testify because of physical or mental

illness. However, adoption of the Uniform Rules of Evidence provisions indicated would qualify the out-of-the-jurisdiction condition presently stated in CCP § 1852. Under 62(7) out-of-the-jurisdiction is "unavailable" only if the judge excuses the failure to take declarant's deposition on the basis stated in 62(7) second paragraph.

3. 63(3) as amended by Commission plus 62(7) would create a new hearsay exception. Unavailability is a feature of the exception. But since the whole exception is new we have nothing in our present law respecting the unavailability feature.

Evaluation:

If we are willing to accept certain hearsay declarations of a hearsay declarant when he is unavailable because dead, it would seem we should be willing to accept these same declarations when declarant is unavailable for any of the reasons stated in 62(7). I recommend approval of 62(7) as revised by State Bar Committee. (This revision makes no substantive changes but does improve the form.)

Respectfully submitted,

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