

Date of Meeting: December 18-19, 1959
Date of Memo: December 10, 1959

Memorandum No. 3

Subject: Uniform Rules of Evidence - Hearsay Evidence Division.

Attached is the text of the Uniform Rules of Evidence -- Hearsay Evidence Division -- as revised to date by the Commission.

This material is to be used with Memorandum No. 4 (December 10, 1959). Memorandum No. 4 indicates the action already taken on each of the rules in the Hearsay Evidence Division and the problems still to be resolved by the Commission.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

10/20/59

Note: This is Uniform Rule 62 as revised by the Commission. Changes in the Uniform Rule (other than the mere shifting of language from one part of the rule to another) are shown by underlined material for new material and by bracketed and strike out material for deleted material.

RULE 62. DEFINITIONS.

As used in [~~Rule 63 and its exceptions and in the following rules,~~]

Rules 62 to 66, inclusive:

(1) [~~(2)~~] "Declarant" is a person who makes a statement.

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

(3) [~~(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.~~]

(a) In this State, an officer or employee of the State or of any county, city, district, authority, agency or other political subdivision of the State.

(b) In other states and in territories of the United States, an officer or employee of any public entity that is substantially equivalent to those included under subparagraph (a) of this paragraph.

(4) [~~(5)~~] "State" includes each of the United States and the District of Columbia.

(5) [~~(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.

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

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

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

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

(d) Absent beyond the jurisdiction of the court to compel appearance by its process. [~~y-or~~]

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

(7) For the purposes of paragraph (6) of this rule, [But] a witness is not unavailable:

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

(b) If unavailability is claimed [~~under-clause-(a)-of-the-preceding paragraph~~] because the witness 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-probable-importance-of-the-testimony-is-such-as-to justify-the-expense-of-taking-such-deposition.~~]

[(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.]

Note: This is Uniform Rule 63 as revised by the Commission. Changes in the Uniform Rule (other than the mere shifting of language from one part of the rule to another) are shown by underlined material for new material and by bracketed and strike out material for deleted material.

RULE 63. HEARSAY EVIDENCE EXCLUDED -- EXCEPTIONS.

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

(1) ~~[A statement previously made by a person who is present at the hearing and available for cross-examination with respect to the statement and its subject matter, provided the statement would be admissible if made by declarant while testifying as a witness;]~~ When a person is a witness at the hearing, a statement made by him, though not made at the hearing, is admissible to prove the truth of the matter stated if the statement would have been admissible if made by him while testifying and the statement:

(a) Is inconsistent with his testimony at the hearing and is offered in compliance with Rule 22; or

(b) Is offered after evidence of a prior inconsistent statement or of a recent fabrication by the witness has been received and the statement is one made before the alleged inconsistent statement or fabrication and is consistent with his testimony at the hearing; or

(c) Concerns a matter as to which the witness has no present recollection and is a writing which was made at a time when the facts

recorded in the writing actually occurred or at such other time when the facts recorded in the writing were fresh in the witness's memory and the writing was made (i) by the witness himself or under his direction or (ii) by some other person for the purpose of recording the witness's statement at the time it was made.

(2) [Affidavits-to-the-extent-admissible-by-the-statutes-of-this State;] To the extent otherwise admissible under the law of this State:

(a) Affidavits.

(b) Depositions taken in the action or proceeding in which they are offered.

(c) Testimony given by a witness in a prior trial or preliminary hearing of the action or proceeding in which it is offered.

(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;] Subject to the same limitations and objections as though the declarant were testifying in person, testimony

given under oath or affirmation as a witness in another action or proceeding conducted by or under the supervision of a court or other official agency having the power to determine controversies or testimony taken by deposition taken in compliance with law in such an action or proceeding, but only if the judge finds that the declarant is unavailable as a witness at the hearing and that:

(a) Such testimony is offered against a party who offered it in evidence on his own behalf in the other action or proceeding or against the successor in interest of such party; or

(b) In a civil action or proceeding, the issue is such that the adverse party in the other action or proceeding had the right and opportunity for cross-examination with an interest and motive similar to that which the adverse party has in the action or proceeding in which the testimony is offered; or

(c) In a criminal action or proceeding, the present defendant was a party to the other action or proceeding and had the right and opportunity for cross-examination with an interest and motive similar to that which he has in the action or proceeding in which the testimony is offered except that the testimony given at a preliminary hearing in the other action or proceeding is not admissible.

(4) Subject to Rule 65A, a statement:

(a) Which the judge finds was made while the declarant was perceiving the event or condition which the statement narrates, describes or explains; [,] or

(b) Which the judge finds [was-made-while-the-declarant-was

~~under the stress of a nervous excitement caused by such perception, or]~~

(i) purports to state what the declarant perceived relating to an event or condition which the statement narrates, describes or explains and (ii) was made spontaneously while the declarant was under the stress of a nervous excitement caused by such perception.

~~[(e)--if the declarant is unavailable as a witness, a statement narrating, describing or explaining an event or condition which the judge finds was made by the declarant at a time when the matter had been recently perceived by him and while his recollection was clear, and was made in good faith prior to the commencement of the action,]~~

(5) Subject to Rule 65A, a statement by a person unavailable as a witness because of his death if the judge finds that it was made upon the personal knowledge of the declarant, under a sense of impending death, voluntarily and in good faith and [while the declarant was conscious of his impending death and believed] in the belief that there was no hope of his recovery. [;]

(6) ~~[In a criminal proceeding as against the accused, a previous statement by him relative to the offense charged if, and only if, the judge finds that the accused when making the statement was conscious and was capable of understanding what he said and did, and that he was not induced to make the statement (a) under compulsion or by infliction or threats of infliction of suffering upon him or another, or by prolonged interrogation under such circumstances as to render the statement involuntary, or (b) by threats or promises concerning action to be taken by a~~

~~public-official-with-reference-to-the-crime,-likely-to-cause-the-accused-~~
~~to-make-such-a-statement-falsely,-and-made-by-a-person-whom-the-accused-~~
~~reasonably-believed-to-have-the-power-or-authority-to-execute-the-same;]~~
Subject to Rule 65A, in a criminal action or proceeding, as against the
defendant, a previous statement by him relative to the offense charged,
unless the judge finds pursuant to the procedures set forth in Rule 8
that the statement was made:

(a) Under circumstances likely to cause the defendant to make a
false statement; or

(b) Under such circumstances that it is inadmissible under the
Constitution of the United States or the Constitution of this State.

(7) Subject to Rule 65A and except as provided in paragraph (6)
of this rule, as against himself, a statement by a person who is a party
to the action or proceeding in his individual or [a] representative
capacity. [and-if-the-latter,-who-was-acting-in-such-representative
capacity-in-making-the-statement;]

(8) Subject to Rule 65A, as against a party, a statement:

(a) By a person authorized by the party to make a statement or
statements for him concerning the subject matter of the statement; [,]
or

(b) Of which the party with knowledge of the content thereof
has, by words or other conduct, manifested his adoption or his belief
in its truth. [,]

(9) As against a party, a statement which would be admissible if made by the declarant at the hearing if:

(a) The statement concerned a matter within the scope of an agency or employment of the declarant for the party and was made before the termination of such relationship; [,] or

(b) ~~[the party and the declarant were participating in a plan to commit a crime or a civil wrong and the statement was relevant to the plan or its subject matter and was made while the plan was in existence and before its complete execution or other termination,]~~ The statement is that of a co-conspirator of the party and (i) the statement was made prior to the termination of the conspiracy and in furtherance of the common object thereof and (ii) the statement is offered after proof by independent evidence of the existence of the conspiracy and that the declarant and the party were both parties to the conspiracy at the time the statement was made; or

(c) In a civil action or proceeding, one of the issues between the party and the proponent of the evidence of the statement is a legal liability of the declarant, and the statement tends to establish that liability. [+]

(10) ~~[Subject to the limitations of exception (6),]~~ Subject to Rule 65A, if the declarant is not a party to the action or proceeding and is unavailable as a witness, and if the judge finds that the declarant had sufficient knowledge of the subject, a statement which the judge finds was at the time of the ~~[assertion]~~ statement so far contrary to the declarant's pecuniary or proprietary interest or so far

subjected him to civil or criminal liability or so far rendered invalid a claim by him against another or created such risk of making him an object of hatred, ridicule or social disapproval in the community that a reasonable man in his position would not have made the statement unless he believed it to be true. [;]

~~[(11)--A-statement-by-a-veter-concerning-his-qualifications-to
vote-or-the-fact-or-content-of-his-vote;]~~

(12) Subject to Rule 65A, unless the judge finds it was made in bad faith, a statement of the declarant's:

(a) Then existing state of mind, emotion or physical sensation, including statements of intent, plan, motive, design, mental feeling, pain and bodily health, but not including memory or belief to prove the fact remembered or believed, when such a mental or physical condition is in issue or is relevant to prove or explain acts or conduct of the declarant. [, -er]

(b) Previous symptoms, pain or physical sensation, made to a physician consulted for treatment or for diagnosis with a view to treatment, and relevant to an issue of declarant's bodily condition. [;]

(13) ~~[Writings-offered-as-memoranda-or-records-of-acts,-condi-
tions-or-events-to-prove-the-facts-stated-therein,-if-the-judge-finds-that
they-were-made-in-the-regular-course-of-a-business-at-or-about-the-time
of-the-act,-condition-or-event-recorded,-and-that-the-sources-of-informa-
tion-from-which-made-and-the-method-and-circumstances-of-their-preparation~~

~~were-such-as-to-indicate-their-trustworthiness;~~ A writing offered as a record of an act, condition or event if the custodian or other qualified witness testifies to its identity and the mode of its preparation and if the judge finds that it was made in the regular course of a business, at or near the time of the act, condition or event, and that the sources of information, method and time of preparation were such as to indicate its trustworthiness. As used in this paragraph, "a business" includes every kind of business, profession, occupation, calling or operation of institutions, whether carried on for profit or not.

(14) Evidence of the absence [~~of-a-memorandum-or-record~~] from the [~~memoranda-or~~] records of a business (as defined in paragraph (13) of this rule) of a record of an asserted act, [~~event-or~~] condition [,] or event, to prove the non-occurrence of the act or event, or the non-existence of the condition, if the judge finds that:

(a) It was the regular course of that business to make [such memoranda] records of all such acts, [~~events-or~~] conditions or events, at or near the time [~~thereof-or-within-a-reasonable-time-thereafter~~] of the act, condition or event, and to preserve them; and

(b) The sources of information and method and time of preparation of the records of that business are such as to indicate the trustworthiness of the records.

(15) Subject to Rule 64, statements of fact contained in a written report [~~s-or-findings-of-fact~~] made by a public [~~official~~] officer or employee of the United States or by a public officer or employee of a state or territory of the United States, if the judge finds

that the making thereof was within the scope of the duty of such
[official] officer or employee and that it was his duty to:

- (a) [x] Perform the act reported; [] or
- (b) [x] Observe the act, condition or event reported; [] or
- (c) [x] Investigate the facts concerning the act, condition or
event. ~~[and-to-make-findings-or-draw-conclusions-based-on-such-investiga-~~
~~tions;]~~

(16) ~~[Subject-to-Rule-64,]~~ writings made by persons other than
public officers or employees as a record, report or finding of fact, if
the judge finds that:

(a) The maker was authorized by a statute of the United States
or of a state or territory of the United States to perform, to the
exclusion of persons not so authorized, the functions reflected in the
writing, and was required by statute to file in a designated public
office a written report of specified matters relating to the performance
of such functions; [] and

(b) The writing was made and filed as so required by the
statute. [x]

(17) ~~[Subject-to-rule-64,]~~ (a) If meeting the requirements of
authentication under Rule 68, to prove the content of the record, a
writing purporting to be a copy 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 official custodian of the official records of the office, reciting diligent search and failure to find such record. [;]

(18) [~~Subject to Rule 64,--certificates~~] A certificate that the maker thereof performed a marriage ceremony, to prove the truth of the recitals thereof, if the judge finds that:

(a) The maker of the certificate was, at the time and place certified as the time and place of the marriage, [was] authorized by law to perform marriage ceremonies; [,] and

(b) The certificate was issued at that time or within a reasonable time thereafter. [;]

(19) [~~Subject to Rule 64~~] The official record of a document purporting to establish or affect an interest in property, to prove the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the judge finds that:

(a) The record is in fact a record of an office of a state or nation or of any governmental subdivision thereof; [,] and

(b) An applicable statute authorized such a document to be recorded in that office. [;]

(20) Evidence of a final judgment adjudging a person guilty of a felony, to prove, against such person, any fact essential to sustain the judgment unless such fact is admitted. [,]

(21) To prove the wrong of the adverse party and the amount of damages sustained by the judgment creditor, evidence of a final judgment if:

(a) Offered by a judgment debtor in an action or proceeding in which he seeks to recover partial or total indemnity or exoneration for money paid or liability incurred by him because of the judgment; and [, -provided]

(b) The judge finds that the judgment was rendered for damages sustained by the judgment creditor as a result of the wrong of the adverse party to the present action or proceeding. [+]

(22) To prove any fact which was essential to the judgment, evidence of a final judgment determining the interest or lack of interest of the public or of a state or nation or governmental subdivision thereof in land, if offered by a party in an action or proceeding in which any such fact or such interest or lack of interest is a material matter. [+]

(23) Subject to Rule 65A, a statement of a matter concerning a declarant's own birth, marriage, divorce, legitimacy, relationship by blood or marriage, race-ancestry or other similar fact of his family history, even though the declarant had no means of acquiring personal knowledge of the matter declared, if the judge finds that the declarant is unavailable as a witness. [-;-]

(24) Subject to Rule 65A, a statement concerning the birth, marriage, divorce, death, legitimacy, race-ancestry, relationship by blood or marriage or other similar fact of the family history of a person

other than the declarant if the judge finds that the declarant is unavailable as a witness and finds that:

(a) ~~[finds-that]~~ The declarant was related to the other by blood or marriage; or

(b) ~~[finds-that-he]~~ The declarant was otherwise so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared [,] and made the statement (i) as upon information received from the other or from a person related by blood or marriage to the other [,] or (ii) as upon repute in the other's family. ~~[, and-(b)-finds-that-the-declarant-is-unavailable as-a-witness;]~~

(25) ~~[A-statement-of-a-declarant-that-a-statement-admissible under-exceptions-(23)-or-(24)-of-this-rule-was-made-by-another-declarant, offered-as-tending-to-prove-the-truth-of-the-matter-declared-by-both-declarants,-if-the-judge-finds-that-both-declarants-are-unavailable-as witnesses;]~~

(26) Evidence of reputation among members of a family, if:

(a) The reputation concerns the birth, marriage, divorce, death, legitimacy, race-ancestry or other fact of the family history of a member of the family by blood or marriage; and

(b) The evidence consists of (i) a witness testifying to his knowledge of such reputation or (ii) such evidence as entries in family bibles or other family books or charts, engravings on rings, family portraits or engravings on urns, crypts or tombstones.

(27) Evidence of reputation in a community as tending to prove the truth of the matter reputed, if ~~[-(a)-]~~ the reputation concerns:

(a) Boundaries of, or customs affecting, land in the community [,] and the judge finds that the reputation, if any, arose before controversy. [,-er]

(b) ~~[the-reputation-concerns]~~ An event of general history of the community or of the state or nation of which the community is a part [,] and the judge finds that the event was of importance to the community. [,-er]

(c) ~~[the-reputation-concerns]~~ The date or fact of birth, marriage, divorce [,] or death[,legitimacy,-relationship-by-blood-or-marriage, ex-race-ancestry] of a person resident in the community at the time of the reputation. [,-er-some-other-similar-fact-of-his-family-history-or of-his-personal-status-or-condition-which-the-judge-finds-likely-to-have been-the-subject-of-a-reliable-reputation-in-that-community;]

(28) If a person's character or a trait of a person's character at a specified time is material, evidence of his general reputation with reference thereto at a relevant time in the community in which he then resided or in a group with which he then habitually associated, to prove the truth of the matter reputed. [;]

(29) Subject to Rule 64, evidence of a statement relevant to a material matter, contained in:

(a) A deed of conveyance or a will or other ~~[document]~~ writing purporting to affect an interest in property, offered as tending to prove

the truth of the matter stated, if the judge finds that the matter stated would be relevant upon an issue as to an interest in the property [;] and that the dealings with the property since the statement was made have not been inconsistent with the truth of the statement. [+]

(b) A writing more than 30 years old when the statement has been since generally acted upon as true by persons having an interest in the matter, if the writer could have been properly allowed to make such statement as a witness.

(30) Evidence of statements of matters of interest to persons engaged in an occupation contained in a list, register, periodical [;] or other published compilation to prove the truth of any relevant matter so stated if the judge finds that the compilation is published for use by persons engaged in that occupation and is generally used and relied upon by them. [+]

(31) A published treatise, periodical or pamphlet on a subject of history, science or art to prove the truth of a matter stated therein if the judge takes judicial notice, or a witness expert in the subject testifies, that the treatise, periodical or pamphlet is a reliable authority on the subject.

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RULE 64. DISCRETION OF JUDGE UNDER CERTAIN EXCEPTIONS TO HEARSAY
RULE TO EXCLUDE EVIDENCE.

Any writing admissible under [~~exceptions~~] paragraph (15) [~~, (16), (17), (18), and (19)~~] or (29) of Rule 63 shall be received only if the party offering such writing has delivered a copy of it, or so much thereof as may relate to the controversy, to each adverse party a reasonable time before trial unless the judge finds that such adverse party has not been unfairly surprised by the failure to deliver such copy.

Note: This is Uniform Rule 65 as revised by the Commission. Changes in the Uniform Rule (other than the mere shifting of language from one part of the rule to another) are shown by underlined material for new material and by bracketed and strike out material for deleted material.

RULE 65. CREDIBILITY OF DECLARANT.

Evidence of a statement or other conduct by a declarant inconsistent with a statement of such declarant received in evidence under an exception to Rule 63 [,] is admissible for the purpose of discrediting the declarant, though he had no opportunity to deny or explain such inconsistent statement or other conduct. Any other evidence tending to impair or support the credibility of the declarant is admissible if it would have been admissible had the declarant been a witness.

(34(L))

Revised 12/10/59
10/22/59

Note: This is a new rule proposed by the Law Revision Commission.

RULE 65A. QUALIFICATION OF DECLARANT. [NEW]

Any statement otherwise admissible under paragraph (4), (5), (6), (7), (8), (10), (12), (23) or (24) of Rule 63 is inadmissible if the judge finds that at the time of making the statement the declarant was incapable of understanding the duty of a witness to tell the truth. The burden of establishing that a statement is inadmissible because of the provisions of this section is upon the person objecting to the admission of the evidence.

Note: This is Uniform Rule 66 as revised by the Commission. Changes in the Uniform Rule (other than the mere shifting of language from one part of the rule to another) are shown by underlined material for new material and by bracketed and strike out material for deleted material.

RULE 66. MULTIPLE HEARSAY.

A statement within the scope of an exception to Rule 63 [~~shall~~] is not [~~be~~] inadmissible on the ground that it includes a statement made by another declarant and is offered to prove the truth of the included statement if such included statement itself meets the requirements of an exception.