

3/6/63

File: URE Authentication  
Article

Memorandum No. 63-20

Subject: Study No. 34(L) - Uniform Rules of Evidence (Rules 67-72,  
Authentication and Content of Writings)

With this memorandum we are sending you another loose-leaf binder in which you may keep your materials relating to the article of the Uniform Rules of Evidence relating to Authentication and Content of Writings. From time to time we will send you additional and replacement pages. Each time we do so we will include an instruction sheet to indicate how the materials are to be filed in this binder.

In this binder you will find a rough copy of the study prepared by Professor Chadbourn relating to the URE article on documentary evidence. You should read the study and also the portion of the study on hearsay evidence relating to Rule 63(17) found on pages 527-34.

We have enclosed in this binder mimeographed pages containing the URE rules so that you may make notes of possible changes that might be made in the rules. The considerations which are presented by the study are as follows:

Rule 67.

Professor Chadbourn suggests that the first sentence of Rule 67 shall be amended to read:

Authentication of a writing is required before it or secondary evidence of its terms may be received in evidence.

See page 1 of the study. See also page 10.

Professor Chadbourn notes a difference between the ancient documents rule states in Rule 67 and the California ancient documents rule. The requirements of the two statements of the ancient documents rule are as follows:

Ancient Documents Rule

A writing is authenticated under the ancient documents rule if:

- | URE Rule 67                                                                                            | Calif. CCP § 1963-34                                                                         |
|--------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------|
| (1) It is at least 30 years old.                                                                       | (1) It is more than 30 years old.                                                            |
| (2) It is in such condition as to create no suspicion concerning its authenticity.                     | (2) It has been generally acted upon as genuine by persons having an interest in the matter. |
| (3) It was, at discovery, in a place where such a document, if authentic, would be likely to be found. | (3) Its custody has been satisfactorily explained.                                           |

Requirements (1) and (3) of the two rules amount to about the same thing. Requirement (2) of the URE rule, however, is not in the California statement of the rule; and requirement (2) of the California rule is not in the URE.

The consultant points out that requirement (2) of the California rule seems to require, in the case of property instruments, that the parties be in possession who would be entitled to possession if the instrument were genuine. No such requirement is contained in the URE rule.

The consultant argues that the requirement that the document was "generally acted upon as genuine by persons having an interest in the

question" is not needed. Therefore, he recommends the URE version of the rule. See the argument on pages 1 and 2 of the study.

The Commission's recommendation on hearsay contains a provision very similar to the existing California rule in regard to ancient documents. Subdivision 29.1 of Rule 63 provides that hearsay evidence is not inadmissible if it is:

A statement contained in 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.

The question to be resolved by the Commission is whether the requirement that the document be "generally acted upon as genuine by persons having an interest in the question" should be retained.

Rule 68 .

Subdivision (a). The consultant reports that subdivision (a) declares existing California law so far as certain specified (in Code of Civil Procedure Section 1918) official records are concerned. The question for the Commission to resolve is whether to extend the principle of the existing law to all official records as provided in the URE.

Subdivision (b). The consultant reports that this subdivision does not change existing California law. However, it creates a new exception to the hearsay rule when used in conjunction with subdivision (17) of Rule 63. The combined effect of these rules is explained at pages 532-33 of the hearsay study. Professor Chadbourn there points out that Rule 63(17) makes admissible to prove the content of a writing in official custody any copy of the writing, whether an official copy or not. Rule 68(b) provides that such copies may be authenticated by the introduction of

"evidence . . . sufficient to warrant a finding that the writing is a correct copy of the record or entry." The consultant then points out that this description may include some evidence which is not admissible under existing law for the purpose of proving the content of an original official writing. The question for the Commission is whether this modest extension of the means for proving the content of an official writing is desirable.

Subdivision (c). Subdivision (c) relates to authentication of copies of official records kept within the state. It requires that the writing be attested as a correct copy by a person purporting to be the legal custodian. Present California law requires "certification" by the legal custodian in Sections 1893, 1905, 1918-5, 1918-6 and 1919 of the Code of Civil Procedure. Section 1923 of the Code of Civil Procedure provides that a "certification" is a statement that the copy is a correct copy of the original and must be under the certifying officer's seal "if there be any". The main differences between the URE and the existing law seem to be that the URE requires the custodian to "attest" that the copy is a correct copy whereas the existing California law requires the custodian to "certify" that the copy is correct, the URE requires no seal but the existing law does if the custodian has a seal, and the URE has no provision spelling out the required contents of an attestation such as Code of Civil Procedure Section 1923.

The question for the Commission is whether, in each of these areas of differences, to accept the URE rule or to retain the California rule.

Subdivision (d). Subdivision (d) relates to out-of-state official records. Subdivision (d) requires the legal custodian to attest that the copy is a correct copy and requires a certificate that the person attesting to the correctness of the copy has the custody of the record. The balance of URE Rule 68 is devoted to a statement of the persons who may make the certificate required by subdivision (d). Within the territorial jurisdiction of the United States the certificate may be made by the judge of a court of record authenticated by the seal of the court or by any public officer having a seal of office authenticated by such seal. In a foreign country the certificate may be made by various specified officers in the foreign service of the United States stationed in such country authenticated by the seal of office of such officer.

The consultant recommends that California law be retained insofar as its requirements are simpler than those of the URE. On the other hand, he recommends that Rule 68(d) be adopted insofar as its procedures are simpler than those specified in the Code of Civil Procedure. He points out that the simpler provisions of existing California law refer for the most part to Federal records. Hence, he suggests that subdivision (c) of Rule 68 be amended to include Federal records, and that subdivision (d) be amended to exclude Federal records.

The consultant's amendment, however, would not completely accomplish his aim of adopting the simpler provisions of existing California law; for there are some provisions relating to other types of out-of-state records that are simpler than URE Rule 68(d).

The question for the Commission is to what extent should the existing California law be retained in preference to the provisions of Rule 68(d). To facilitate consideration of this problem, consideration should be directed toward various categories of documents:

Authentication required

Type of evidence	California law	URE Rule 68(d)
Copy of a public writing of any state or country	Attestation by the certificate of officer having charge of original, under public seal of the state or country (CCP § 1901)	Attestation of legal custodian plus certificate that attesting officer is custodian made by (within the U.S.) judge of court of record under seal of court or by any public officer having seal of office under such seal or (outside of U.S.) foreign service officer of U.S. under seal of his office.
Copy of judicial record of U.S.	Certification* of clerk or other legal custodian (CCP § 1905)	Attestation of legal custodian plus certificate that he is legal custodian made by judge under seal of court or by public officer under seal of office.
Copy of judicial record of sister state	Attestation of clerk under seal of court, if there be any, plus certificate of chief judge that attestation is in due form (CCP § 1905)	Same as above

\* See note, page 10.

Copy of judicial record of foreign country

Substantially the same as for sister state, above, plus authentication of signature of chief judge by certificate of specified foreign service officers of U.S. (CCP § 1906)

Attestation of legal custodian plus certificate that he is legal custodian made by foreign service officer of U.S. under seal of office

or

Oral testimony by witness that copy is same as original and that original was in custody of court or other legal custodian and copy is attested by seal "which is proved to be" the seal of the court or, if there be no seal, by the signature of legal custodian (CCP § 1907)

Under Rule 68(b), the direct testimony of a witness would seem to be sufficient. See study, p. 5.

Acts of executive of U.S.

Records of the state dept. of U.S. certified by the head of the dept. (CCP § 1918-1)

Attestation of legal custodian plus certificate that he is such made by judge under seal of court or by public officer under seal of office.

[ Probably means records of state dept. showing acts of executive may be shown by copies certified by head of dept.]

Copies of journals of Congress or statutes or resolutions of Congress

Certification by clerk (CCP § 1918-2)

Attestation of legal custodian plus certificate that he is such made by judge under seal of court or by public officer under seal of office

Copies of documents in departments of U.S. government

Certificate of legal custodian (CCP § 1918-9)

Attestation of legal custodian plus certificate that he is such made by judge under seal of court or by public officer under seal of office

Acts of executive or journals, statutes, or resolutions of legislatures of sister states	Certification by clerk (CCP § 1918-3)	Same as above
Copies of journals of foreign countries	Certification under seal of the country or sovereign (CCP § 1918-4)	Attestation of legal custodian plus certificate that he is such made by foreign service officer of U.S. under seal of office
Copies of record or docket of justice of peace of sister state	Certification of justice of peace plus certificate of county clerk or prothonotary, under seal of county or of county court, as to genuineness of justice's signature and status (CCP §§ 1921-1922)	Attestation of legal custodian plus certificate that he is such made by judge under seal of court or by public officer under seal of office
Copy of articles of incorporation of foreign corporation	Certification by secretary of state or other competent official of jurisdiction where incorporated (Corp. C. § 6600)	Attestation of legal custodian of original plus certificate that he is such made by judge under seal of court or by public officer under seal of office
Copy of public record of private writings (recorded documents)	Certificate of legal custodian of record (CCP § 1919) [the section does not indicate whether it applies only to documents recorded within the state or to all recorded documents; the cases annotated all deal with intrastate records; CCP §§ 1888 and 1889 define extrastate recorded documents as private writings; hence, it may be argued that § 1919 is inapplicable thereto since all of these sections deal with authentication of public writings]	Attestation of legal custodian of record plus appropriate certification for intra-U.S. or extra-U.S. documents

Copies of any other documents in sister state

Certification by legal custodian plus certification that original certifying officer is legal custodian by secretary of state, specified judges, or a mayor of a city (CCP § 1918-7)

Attestation of legal custodian plus certificate that he is such made by judge under seal of court or by public officer under seal of office

Copies of any other documents in foreign country

Certification by legal custodian plus certificate, under seal, of the country or sovereign that the document is a document of country and copy is certified by legal custodian (certification of country or sovereign may be made by chief executive or head of state department of political subdivision of country) plus certificate of U.S. foreign service officer authenticating signature of sovereign or chief executive or head of state dept of political subdivision (CCP § 1917-8)

Attestation of legal custodian plus certificate that he is such made by foreign service officer of U.S. under seal of office

Copies of church records (such records are admissible as an exception to hearsay rule under CCP § 1919a) kept within U.S.

Certification by clergyman or other custodian plus certification as to genuineness of signature and custody of original made by bishop, district superintendent or similar regional church official under seal of office, if any, or by notary public, plus certificate of genuineness of signature and status of bishop, etc. or notary made by secretary of state

No provision

Copies of church records in foreign countries

Same as above, but in lieu of certificate from secretary of state certificate must be from sovereign or chief executive or head of state department, under seal of country or state department, and in addition there must be certification of authenticity of sovereign's, chief executive's, etc. signature by foreign service officer. Instead of certification of sovereign, chief executive, etc., signature of similar official of political subdivision, state, etc. of foreign country may be used (CCP § 1919b)

No provision

\*

Wherever California statutes require a copy to be certified, they require a seal if the certifying officer has one. CCP § 1923 provides:

"1923. Whenever a copy of a writing is certified for the purpose of evidence, the certificate must state in substance that the copy is a correct copy of the original, or of a specified part thereof, as the case may be. The certificate must be under the official seal of the certifying officer, if there be any, or if he be the clerk of a court having a seal, under the seal of such court."

There is no comparable provision in the URE.

Rule 69.

The problems in connection with this rule have been considered in connection with Rule 68, since the provisions of Rule 68 are incorporated in Rule 69 by reference.

Rule 70 .

Rule 70 states the URE version of the best evidence rule. The California counterpart appears for the most part in Sections 1855, 1937 and 1938 of the Code of Civil Procedure. See the study at pages 6-20. The following matters should be considered by the Commission:

General rule. There is apparently little difference between the URE statement of the general rule and the California law on the subject. The Commission should consider, however, whether the exception to the general rule stated in Rule 70, "except as otherwise provided in these rules," is a broad enough exception. Should the exception be worded "except as otherwise provided by statute"? There seem to be statutes in various places which give copies of documents the effect of originals under the best evidence rule. See for example Section 1947 of the Code of Civil Procedure:

When an entry is repeated in the regular course of business, one being copied from another at or near the time of the transaction, all the entries are equally regarded as originals.

If such statutes are not repealed, it would be desirable to make clear that their effect is unimpaired.

The exception in Rule 70(1)(a). Should the URE statement of the exception to the best evidence rule be approved? The consultant points out that it is a more accurate statement of the existing California

law than is the equivalent exception stated in Section 1855 of the Code of Civil Procedure.

The exception in Rule 70(1)(b). Although no comparable exception appears in the California statutes, the courts have nonetheless recognized this exception. The consultant reports, however, that under California law it is uncertain whether the proponent of secondary evidence must have attempted to secure the original of the document from a third person by the use of a subpoena. The URE rule appears to require an attempt to obtain the document by subpoena.

The consultant also notes that the existing California law apparently permits a proponent to introduce secondary evidence of an out-of-state document even if the document is subject to his direction or control. The consultant prefers the URE version of the rule.

The consultant raises a question in connection with in-state documents that are beyond the reach of the process of the court in which the action is pending. Does the URE require the proponent of the document to take the possessor's deposition and require him to produce the document pursuant to a subpoena duces tecum in connection with the deposition. He does not feel that this is the intent of Rule 70(1)(b). Should the rule be amended to make the intent clear?

The exception in Rule 70(1)(c). The consultant suggests that the exception be reworded as follows:

that, at a time when the writing was under the control of the opponent, the opponent has been expressly or impliedly notified, by the pleadings or otherwise, that the writing would be needed at the hearing and on request at the hearing the opponent has failed to produce such writing.

Present California law (CCP § 1938) does not require the notice to produce where the writing is itself a notice or where it has been wrongfully obtained or withheld by the adverse party. Should either or both of these exceptions be stated in the rule? The consultant recommends against both of them. See the study at page 14.

Rule 70(1)(c) requires both pretrial notice and at trial request. The consultant recommends that these requirements be made inapplicable to documents in the possession of a defendant in a criminal action. This is existing California law. The consultant suggests that exception (f) be added as follows:

(f) In a criminal action that sufficient evidence has been introduced to warrant a finding that the document is in the possession of the accused or his attorney.

Should the requirement of pretrial notice only be made applicable as against the accused in a criminal action.

The exception in Rule 70(1)(d). Should California adopt this exception to the best evidence rule?

The exception in Rule 70(1)(e). Subdivisions 3 and 4 of Section 1855 of the Code of Civil Procedure seem broader than the comparable provisions in Rule 70. Rule 70 refers to "an official record" or "a writing affecting property authorized to be recorded and actually recorded". Subdivision 3 of Section 1855 refers to "a record or other document in the custody of a public officer" and subdivision 4 refers to any recorded writing. Should the broader provisions of Section 1855 be incorporated into Rule 70.

Numerous documents exception. The consultant recommends that the

numerous documents exception expressed in subdivision 5 of Section 1855 of the Code of Civil Procedure be added to the list of exceptions in Rule 70. There is no comparable provision in the URE.

The admissions exception. Should there be an admissions exception to the best evidence rule? The consultant recommends against it. It is not in the URE and the scant authority that the consultant has found in California indicates that California may not recognize the exception either.

The next best evidence rule. So far as recorded documents and official records are concerned, should any type of secondary evidence be admissible in all cases--as under the URE rule--or should a certified copy of the document or record be required--as under the existing California law. The consultant recommends that the California limitation on secondary evidence of official records be incorporated into the URE by adding to Rule 70(1)(e):

and that the evidence offered is a copy of such official record admissible under Rule 63(17) or is the record of such writing admissible under Rule 63(19) or a copy of such record admissible under Rule 63(17).

So far as other types of documents are concerned, should there be an evidentiary preference for copies of the documents over other types of secondary evidence of the contents of the documents? The URE does not recognize any "next best evidence rule" and the consultant believes that the existing California statute, insofar as it pertains to private writings, does not recognize a "next best evidence rule"; however, such a rule has been recognized within recent years by the California courts. See study pages 17-19.

Subdivision (2)--functions of judge and jury. This subdivision is designed to meet a problem that apparently has not arisen in the appellate decisions in California. Does the Commission approve of this provision?

Rule 71--Proof of attested writings.

Rule 71 would not change the existing California law. The consultant recommends a technical amendment to fit the provisions of Rule 71 into the California Codes. As revised, the rule would read:

Except as provided in Sections 329 and 372 of the Probate Code, when the execution of an attested writing is in issue, no attester is a necessary witness even though all attestors are available.

Existing California law (CCP § 1940) refers to a "subscribing witness." Section 1935 of the Code of Civil Procedure defines a subscribing witness as follows:

A subscribing witness is one who sees a writing executed or hears it acknowledged, and at the request of the party thereupon signs his name as a witness.

There is no comparable provision in the URE. If Section 1935 is retained, it would appear desirable to use the defined term in appropriate places in the rules. Thus, in Rule 71 the term "subscribing witness" might be used instead of "attester."

Rule 72.--photographic copies.

Rule 72 is intended to state the substance of the Uniform Photographic Copies of Business and Public Records as Evidence Act. For comparison, the California version of the uniform act is stated below:

CCP § 1953i. If any business, institution, member of a profession or calling, or any department or agency of government, in the regular course of business or activity has kept or recorded any memorandum, writing, entry, print, representation or combination thereof, of any act, transaction, occurrence or event, and in the regular course of business has caused any or all of the same to be recorded, copied or reproduced by any photographic, photostatic, microfilm, microcard, miniature photographic, or other process which accurately reproduces or forms a durable medium for so reproducing the original, such reproduction, when satisfactorily identified, is as admissible in evidence as the original itself in any judicial or administrative proceeding whether the original is in existence or not and an enlargement or facsimile of such reproduction is likewise admissible in evidence if the original reproduction is in existence and available for inspection under direction of court. The introduction of a reproduced record, enlargement or facsimile, does not preclude admission of the original.

Respectfully submitted,

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