#34(L) 6/5/64

Memorandum 64-38

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

Article IX of the URE, revised by the Commission, is now located in Division 11 (beginning with Section 1400) of the Evidence Code. Attached to this memorandum is a revision of Article 11 of the Evidence Code. The discussion in this memorandum will refer to the appropriate Evidence Code sections instead of the Revised URE rules.

Attached to this memorandum are the following exhibits:

Exhibit I (yellow paper) Report of Committee of Conference of California Judges

Exhibit II (blue paper) Letter from Los Angeles District Attorney

Exhibit III (pink paper) Letter from Lassen County Bar Association

Exhibit IV (white paper) Proposed amendment to Rule 44 of the FRCP

Exhibit V (green paper) Recommendation of the New York Law Revision Commission relating to authentication of notaries' seals

The following matters should be considered:

Section 1400 (formerly Rule 67)

The judges suggest that the section be revised as follows:

> Authentication of a writing as used in this article means establishing its genuineness or execution sufficiently to admit it in evidence. Before a writing or secondary evidence of its contents may be received in evidence, the writing must be authenticated unless otherwise provided by law.

The most significant part of the proposed revision appears to be the inclusion of a definition at the beginning of the section. The remainder of the section raises a problem we have been over before: the revised section does not clearly

require both the original and the secondary evidence to be authenticated. Section 1400 seems superior in this respect.

The definitional sentence proposed by the judges seems defective in that it assumes that one knows how sufficiently the genuineness or execution of a writing must be established to admit it into evidence. The sentence in Section 1400 that this would replace, on the other hand, states specifically that the proponent may either introduce sufficient evidence to sustain a finding of authenticity or may rely on any other authentication procedure provided by law. Section 1400, therefore, seems somewhat clearer and more precise than the judges' draft.

Nonetheless, the judges' suggestion indicates that Section 1400 might be improved. The problem with Section 1400 seems to be that it assumes that everyone understands what "authentication" means. The section provides merely that "authentication may be by evidence . . . of . . . authenticity. . . ." The comment to Rule 67 spells out the meaning with some precision. It states:

> Before any tangible object may be admitted into evidence, the party seeking to introduce the object must make a preliminary showing that the object is in some way relevant to the issues to be decided in the action. When the object sought to be introduced is a writing, this preliminary showing always entails some proof that the writing is genuine--that is, it is the document that the proponent claims it is; hence, the showing is usually referred to as "authentication" of the writing. When the showing has been made, the judge may admit the writing into evidence for consideration by the trier of fact. But, the fact that the judge permits the admission of the evidence does not necessarily establish the authenticity of the writing. All that the judge has determined is that there has been a sufficient showing of the authenticity of the writing to permit the trier of fact to find that it is authentic; and, if the trier of fact does not believe the evidence of authenticity, it may find that the document is not authentic despite the fact that the judge has determined that it was "authenticated." 7 WIGMORE, EVIDENCE §§ 2129-2135 (3d ed. 1940).

Section 1400 might be improved if the essence of this paragraph could be stated in statutory form. To accomplish this, we suggest the following,

which incorporates part of our original section as well as part of the section suggested by the judges:

> (a) Authentication of a writing means the introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is and that it was made or signed by the person the proponent of the evidence claims made or signed it or the establishment of such facts by any other means provided by law.
>
> (b) Authentication of a writing is required before it may be received in evidence. Authentication of a writing is required before secondary evidence of its content may be received in evidence.

Section 1401

Section 1401 was approved at the May meeting.

The certificate of acknowledgement referred to in the section is presumed to be genuine (a Thayer presumption) under Section 1415. However, there is no hearsay exception in our division on hearsay evidence to permit such a certificate to be received over a hearsay objection. Technically, the certificate is hearsay. It is a statement made out of court (by the notary) offered to prove the truth of its content (that the maker of the writing acknowledged that the signature was his). In fact, it involves double hearsay, for the maker's statement of acknowledgement is also offered to prove that he did in fact sign the writing. The presumption of genuineness doesn't help--it merely establishes that the certificate is genuine hearsay. Hence, some hearsay exception is needed comparable to those in Sections 1273, 1274, 1275, and 1276. We suggest the following:

> A certificate of the acknowledgement of a writing other than a will, or a certificate of the proof of such a writing, is not made inadmissible by Section 1200 when offered to prove the truth of the facts recited in the certificate and the genuineness of the signature of each person by whom the writing purports to have been signed if the certificate meets the requirements of Article 3 (commencing with Section 1181) of Chapter 4, Title 4, Part 4, Division 2 of the Civil Code.

If such a provision is added to the hearsay division, Section 1401 is unnecessary. The certificate is presumed genuine under Section 1415, and the certificate is the evidence of genuineness needed to permit introduction of the writing under Section 1400.

Section 1402

Section 1402 was approved at the May meeting.

In Memo 64-31 we pointed out that the language in Section 1402 does not correspond with the language in Section 1280, even though they are intended to refer to the same thing.

Section 1280 is defective in its wording. It was intended to make the official record of a document affecting property admissible evidence, not only of the content of the original document, but also of the execution and delivery of the original document by each person by whom it purports to be executed. Section 1951 does this now. However, all that Section 1280 says is that a recorded document is not inadmissible under the hearsay rule when offered to prove the execution and delivery of the original. Under existing law, a recorded instrument affecting property is evidence of execution and delivery. Thomas v. Peterson, 213 Cal. 672, 674 (1931). To accomplish our intended purpose, Section 1280 should be amended to read:

> Notwithstanding Section 1200, the official record of a [~~document~~] writing purporting to establish or affect an interest in property is [~~not made inadmissible by Section 1200~~] admissible [~~when offered~~] to prove the content of the original recorded [~~document~~] writing and its execution and delivery by each person by whom it purports to have been executed if:
>
> (a) The record is in fact a record of an office of a state or nation or of any governmental subdivision thereof; and
>
> (b) A statute authorized such a [~~document~~] writing to be recorded in that office.

If Section 1280 is amended as suggested, and if the new section relating to certificates suggested under Section 1401, above, is approved, Section 1402 will be unnecessary and may be deleted. The certificate of acknowledgement is presumed valid under Section 1415, and, under the certificate sectior suggested above, the certificate is the evidence of authenticity needed to warrant admission of the writing. If the writing has been recorded, the record is admissible under Section 1280, above, to prove execution and delivery of the original instrument.

In the suggested amendment of Section 1280, above, should "prima facie evidence of" be substituted for "admissible to prove"? Under existing law, recording gives rise to a presumption of execution and delivery. Thomas v. Peterson, 213 Cal. 672 (1931).

Section 1280 makes admissible records of writings affecting property to prove the original writings. Should a section be added making the official record of any recorded document evidence of the content of the original? Such a section might read:

> Notwithstanding Section 1200, the official record of a writing is admissible to prove the content of the original recorded writing if:
>
> (a) The record is in fact a record of an office of a state or nation or of any governmental subdivision thereof; and
>
> (b) A statute authorized such a writing to be recorded in that office.

Section 1403 (formerly Rule 68)

Section 1403 declares that a purported copy of an official document is sufficiently authenticated to be admitted in evidence. If it is admitted, then what? Is there sufficient evidence to sustain a finding of authenticity? What is the evidentiary effect of the authentication procedure spelled out in Section 1403?

In Section 1415, we met some of these problems by creating a Thayer presumption. The staff suggests that Section 1403 be modified, too, to provide a Thayer presumption of authenticity. The opening paragraph of the amended section would read:

> A purported copy of a writing in the custody of a public employee, or of an entry in such a writing, is presumed to be a copy of such writing or entry if:

If this preliminary paragraph is approved, subdivision (b) would be deleted. It merely duplicates Section 1400 anyway.

In connection with this section, note the proposed revision of FRCP Rule 44 in Exhibit IV. The comment points out that in foreign countries the legal custodian is not necessarily the official authorized to attest copies. Therefore, the proposed revision permits the attested copy to be obtained from any person authorized under the law of the foreign country to make the attestation. The American foreign service officer is then required to attest to the genuineness of the signature and official position of the attesting officer. If a foreign officer cannot do so, the document may be authenticated by a series of certificates from higher and higher officials until one is reached whose signature and official position can be certified by an American foreign service officer. For good cause, the court may dispense with the final certificate of authenticity. Should Section 1403 be amended to provide for these procedures?

Section 1405 (formerly Rule 67.5)

You will recall that when we discussed the presumptions aspect of the ancient documents rule, we became involved in an argument over the consequences of failure to prove each element of the rule as set forth in Section 1405.

For example, if the proponent proves that the document is and has been in proper custody, is unsuspicious in appearance, and is 29 years old, does Section 1405 forbid its reception in evidence--or may the judge find that this is sufficient evidence of authenticity to permit the jury to decide whether it is authentic? The existing ancient documents rule in California is a presumption only. It does not purport to define the minimum showing necessary to permit an inference of authenticity. New Jersey felt that to define the minimum showing requisite to give rise to an inference of authenticity would be too restrictive; hence, the ancient documents rule was deleted from its version of Rule 67.

The staff believes that it is unwise to create, in effect, a statutory inference of authenticity. To do so implies (but does not state) that a substantially similar showing that does not quite fulfill all of the elements is an inadequate showing. Yet, there may be no contrary evidence and the authenticity of the document may not be seriously doubted. We think that whether sufficient evidence to sustain a finding of authenticity has been introduced should be left to the courts to decide in each case. Circumstances will vary. In some cases, we think that a document 15 years old might properly be found to be authentic, while in others a document 20 years old might not be properly found to be authentic. We believe our presumption of authenticity from possession pursuant to a document for 30 years is the only statutory statement of the ancient documents rule needed. We therefore recommend the deletion of Section 1405.

Section 1415 (formerly Rule 67.7)

The judges recommend a revision of this section as set out in Exhibit I. The revision would make the following substantive changes:

1. The presumptions of authenticity of official seals and signatures would be limited to seals and signatures on certificates purporting to authenticate writings.

Comment: The provisions of Section 1415 are broader because they are superseding provisions in existing law relating to judicial notice. Judicial notice of seals and signatures is conclusive and is not limited to seals and signatures on certificates made to authenticate writings.

The presumptions were created in part to facilitate proof of original official documents issued over the signature or seal of one of the officials listed in the section. Such a document might not have a "certificate purporting to establish the authenticity" of the writing attached to it. Section 1415 provides a presumption of authenticity for such documents, the judges' revision apparently would not.

2. A signature listed in the section is presumed authentic only if accompanied by a statement declaring that the person who affixed the signature is the officer he purports to be. In the case of foreign documents, the statement must be made by an American foreign service officer.

Comment: Under the revision, the presumption of authenticity applies only to the signature and seal on a certificate purporting to establish the authenticity of a writing. Hence, the accompanying statement referred to must be a statement in addition to the certificate. The revision does not indicate who should make the statement in the case of domestic documents.

The URE, Rule 68, required accompanying statements for certificates authenticating writings. We abandoned the requirement as too cumbersome and unnecessary for domestic documents. We retained the requirement for foreign documents only. See Section 1403. It would be inconsistent to reintroduce the requirement here.

3. The presumption applies to the signature of lower officers of foreign governments, not merely to the signature of the sovereign or a principal officer of such a government.

Comment: Inasmuch as subdivision (c) requires an accompanying certificate verifying the official capacity of officer signing the writing, there appears to be no reason not to extend subdivision (c) to the lower officers and employees. Section 1403 provides that such lower officer and employee signatures are self-authenticating when accompanied by such a certificate. The provision here is analogous. If this revision is made, Section 1404 is unnecessary and should be deleted.

If the signature of a sovereign or principal officer of a foreign government is accompanied by the seal of the sovereign or of the nation (presumed affixed pursuant to lawful authority under subdivision (a)(3)), should the accompanying certificate of the foreign service officer be required? Under existing law, the seal is judicially noticed. C.C.P. § 1875.

Sections 1403 and 1415 (miscellaneous problems)

Note the reference in Exhibit IV to territories of the United States. Where we use "in any state, territory, or possession of the United States" or "within the United States or any state, territory, or possession thereof",

should we substitute the rather precise language appearing in proposed FRCP Rule 44: "within the United States, or any state, district, commonwealth, territory, or insular possession thereof, or with the Panama Canal Zone, the Trust Territory of the Pacific Islands, or the Ryukyu Islands".

Note the problem to which the New York Law Revision Commission addressed itself in Exhibit V. Our references to "notary public" in Section 1415 are unqualified in any way. Should we limit those references to notary publics "within the United States . . ." and let the provisions relating to foreign seals and signatures apply to foreign notaries?

Section 1420 (formerly Rule 70)

The Los Angeles District Attorney suggests that subdivision (c) be modified to require that any at-hearing request for the production of an original document be made out of the presence of the jury in a criminal action. See Exhibit II. The subdivision now merely requires the request to the defendant to be made out of the jury's presence.

Section 1550 (formerly Rule 72)

The Los Angeles District Attorney, in Exhibit II, refers to this section by the number under which it appeared in the previous draft, 1460.

The Los Angeles District Attorney suggests that the section is too limited in that it only applies to photographic copies made in the regular course of business. He indicates that businesses frequently will produce their original records together with photostatic copies, and after the foundation is laid the originals will be returned and the photostatic copies admitted into evidence.

We do not believe that Section 1550 will affect this procedure. Section 1550 is a simplified version of Code of Civil Procedure Section 1953i which also requires the photographs admissible under its provisions to have been made in the regular course of a business. Section 1550 and its predecessor section are exceptions to the Best Evidence Rule and deal with the situation where the original is not produced in court. When the original is available in court, the problem at which the Best Evidence Rule is directed does not exist.

The District Attorney's comment, however, indicates that Section 1420 may be defective. Should an additional exception to the Best Evidence Rule be added to read as follows:

(h) The writing has been produced at the hearing and made available for inspection by the adverse party.

Miscellaneous comments

The Lassen County Bar's comments (Exhibit III) are not directed at any specific provision of the recommendation relating to writings. It suggests that legislation be enacted authorizing the recording of certain kinds of information so that certified copies of it could be readily obtained. The matter seems too complex to take up in connection with a revision of the law relating to authentication and content of writings.

The Lassen County Bar also suggests that all of the miscellaneous provisions providing for the admission of evidence that are found in the various codes be gathered into the Evidence Code. When we wrote the hearsay recommendation we said:

> These provisions are too numerous and too enmeshed with the various acts of which they are a part to make specific repeal a desirable or feasible venture.

The staff believes that this is still a valid judgment.

Respectfully submitted,

Joseph B. Harvey
Assistant Executive Secretary

64-38

EXHIBIT I

REPORT OF THE SPECIAL COMMITTEE OF THE CONFERENCE OF CALIFORNIA JUDGES TO WORK WITH THE CALIFORNIA LAW REVISISION COMMISSION ON THE STUDY OF THE UNIFORM RULES OF EVIDENCE RELATIVE TO

AUTHENTICATION OF CONTENTS OF WRITING

The committee approves the tentative recommendations of the commission on all rules relative to authentication and contents of writing not specifically mentioned herein.

RULE 67

AUTHENTICATION REQUIRED

The committee recommends that the title to Rule 67 be amended to read as follows:

AUTHENTICATION: DEFINITION AND REQUIREMENT

The committee further recommends that Rule 67 be amended to read as follows:

Authentication of a writing as used in this article means establishing its genuineness or execution sufficiently to admit it in evidence. Before a writing or secondary evidence of its contents may be received in evidence, the writing must be authenticated unless otherwise provided by law.

RULE 67.7

OFFICIAL SEALS AND SIGNATURES: PRESUMPTION OF AUTHENTICITY

The committee recommends that the title to Rule 67.7 be amended to read as follows:

PRESUMPTION OF AUTHENTICITY

The committee further recommends that Rule 67.7 be amended to read as follows:

The seal and signature of any certificate purporting to establish the authenticity of any writing is presumed to be genuine and authorize if:

(a) The seal impressed or attached to said certificate is the seal of any agency of Government in the United States, local, state or national, or of any foreign nation or governmental sub-division thereof recognized by the President of the United States, or a Court of Admirality or Maritime jurisdiction or a notary public, and

(b) The signature of the person executing said certificate is the signature of an officer of any agency of Government in the United States, local, state or national or any foreign nation or governmental sub-division thereof, recognized by the President of the United States, and the writing to which the signature is affixed is accompanied by a statement declaring that the person who affixed his signature thereto is such officer, and if said statement relates to an officer of such a foreign nation or governmental sub-division thereof, said statement must also be approved and executed by a secretary of an embassy or legation, Consul General, Consul, Vice-Consul, Consular Agent or by any other officer in the foreign service of the United States stationed in such foreign nation on which the seal of his office has been impressed or attached.

DATED: MAY 8, 1964.

Respectfully submitted,

Justice Mildred Lillie
Judge Mark Brandler
Judge Raymond J. Sherwin
Judge James C. Toothaker
Judge Howard E. Crandall
Judge Leonard A. Diether, Chairman

Memo. 64-38

EXHIBIT II

COUNTY OF LOS ANGELES

Office of the District Attorney

Los Angeles, Calif. 90012

May 27, 1964

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

Attention: Mr. John H. DeMoully

Gentlemen:

The following comments are submitted on Authentication and Content of Writings as reflected in the proposed new Evidence Code.

1420 (c). When Secondary Evidence Admissible

It is submitted that in criminal actions the request for production of documents to the adverse party should not be limited or restricted solely for the benefit of the defendant. There are occasions when the defendant may request the production of documents in the possession of the People and the same restriction that such requests be made outside the presence of the jury should be applicable in that situation. It might be prejudicial to the rights of the People if the demands were made for documents which in and of themselves were privileged and for which a defendant had no right either of inspection or production.

1460. Photographic Copies of Business Records

Under the practice in Los Angeles County when a subpoena duces tecum is served on a bank for the production of their records such as ledger sheets, the bank at that time has those records photostated and brings the original and the photostatic copy into court. The District Attorney then presents the proper foundation, returns the original records to the bank and presents in evidence the photostatic copies. Such photostatic copies obviously are not in conformity with the language of section 1460 as they are not "made and preserved as a part of the record of a business in the regular course of such business." It is suggested that the language as set forth in the section is too narrow in its scope.

* * *

Very truly yours,
/s/ Joseph T. Powers
JOSEPH T. POWERS
Assistant Chief Trial Deputy

64-38

EXHIBIT III

PAULA A. TENNANT
Attorney At Law
Susanville, California

March 31, 1964

Mr. John H. DeMoully
Executive Secretary
California Law Revision Commission
Room 30, Crothers Hall
Stanford University
Stanford, California 94305

Dear Mr. DeMoully:

This will acknowledge receipt of your letter of transmittal together with the California Law Revision Commission tentative recommendation and study of "authentication and contents of writings".

This section has generally met with more approval by the local Bar than did the previous one on the hearsay evidence rules.

It was the general feeling that the law covering the admissibility of records needed to be relaxed and the section covering the authenticity of foreign documents was especially approved. Not covered in this study but one which was discussed at the last meeting was that of the introduction of the type of record which would be an outstanding balance, the designation of an officer, official or employee in their capacity in an organization, or such other incidental information which might be necessary or important to the preparation and presentation of a case, but the cost of production under the present written interrogatory section of CCP be prohibited by cost. One suggestion was that this type of evidence might be recorded and a certified copy of the records forwarded under subpoena to the party requesting it. However, the exact mechanics of such a procedure would have many side problems and would of necessity be one which could not be determined at first blush.

The Bar again expressed its concern and disapproval of the manner in which certain rules in evidence will be retained in the specific codes to which they pertain. They again wish me to emphasize their feeling of the great necessity for the inclusion of these sections in the proposed code of evidence as well as a cross index referring to them in the specific code.

Yours very truly,

(Mrs.) Paula A. Tennant
President
Lassen County Bar Association

PAT/dc

T-1
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[Topic T: Proof of Official Record]

Rule 44. Proof of Official Record*

(a) AUTHENTICATION ~~OF COPY~~.

(1) Domestic. An official record kept within the United States, or any state, district, commonwealth, territory, or insular possession thereof, or within the Panama Canal Zone, the Trust Territory of the Pacific Islands, or the Ryukyu Islands, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by his deputy, and accompanied by a certificate that such officer has the custody. ~~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~~ 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 may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent or by any~~

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* These amendments were developed collaboratively by the Advisory Committee on Civil Rules, the Commission and Advisory Committee on International Rules of Judicial Procedure (see Act of Sept. 2, 1958, 72 Stat. 1743), and the Columbia Law School Project on International Procedure.

~~officer in the foreign service of the United States stationed in the foreign state or country in which the record is kept, and authenticated by the seal of his office.~~

(2) Foreign. A foreign official record, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof; or a copy thereof, attested by a person authorized to make the attestation, and accompanied by a final certification as to the genuineness of the signature and official position (i) of the attesting person, or (ii) of any foreign official whose certificate of genuineness of signature and official position relates to the attestation or is in a chain of certificates of genuineness of signature and official position relating to the attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of the documents, the court may, for good cause shown, (i) admit an attested copy without final certification or (ii) permit the foreign official record to be evidenced by an attested summary with or without a final certification.

(b) ~~PROOF OF~~ LACK OF RECORD. A written statement ~~signed by an officer having the custody of an official record or by his deputy~~ that after diligent search no record or entry of a specified tenor is found to exist in the records ~~of his office,~~ designated by the statement,

~~accompanied by a certificate as above provided,~~ authenticated as provided in subdivision (a)(1) of this rule in the case of a domestic record, or complying with the requirements of subdivision (a)(2) of this rule for a summary in the case of a foreign record, is admissible as evidence that the records ~~of his office~~ contain no such record or entry.

(c) OTHER PROOF. This rule does not prevent the proof of official records or of entry or lack of entry therein by any other method authorized by law. ~~any applicable statute or by the rules of evidence at common law.~~

ADVISORY COMMITTEE'S NOTE

Subdivision (a)(1). These provisions on proof of official records kept within the United States are similar in substance to those heretofore appearing in Rule 44. There is a more exact description of the geographical areas covered. An official record kept in one of the areas enumerated qualifies for proof under subdivision (a)(1) even though it is not a United States official record. For example, an official record kept in one of these areas by a government in exile falls within subdivision (a)(1). It also falls within subdivision (a)(2) which may be availed of alternatively. Cf. Banco de Espana v. Federal Reserve Bank, 114 F. 2d 438 (2d Cir. 1940).

Subdivision (a)(2). Foreign official records may be proved, as heretofore, by means of official publications thereof. See United States v. Aluminum Co. of America, 1 F. R. D. 71 (S.D.N.Y. 1939). The rest of subdivision (a)(2) aims to provide greater clarity, efficiency, and flexibility in the procedure for authenticating copies of foreign official records.

The reference to attestation by "the officer having the legal custody of the record," hitherto appearing in Rule 44, has been found inappropriate for official records kept in foreign countries where the assumed relation between custody and the authority to attest does not obtain. See 2B Barron & Holtzoff, Federal Practice & Procedure §992 (Wright ed. 1961). Accordingly it is provided that an attested copy may be obtained from any person authorized by the law of the foreign country to make the attestation without regard to whether he is charged with responsibility for maintaining the record or keeping it in his custody.

Under Rule 44 a United States foreign service officer has been called on to certify to the authority of the foreign official attesting the copy as well as the genuineness of his signature and his official position. See Schlesinger, Comparative Law 57 (2d ed. 1959); Smit, International Aspects of Federal Civil Procedure, 61 Colum. L. Rev. 1031, 1063 (1961); 22 C.F.R. §92.41 (a), (e) (1958). This has created practical difficulties. For example, the question of the authority of the foreign officer might raise issues of foreign law which were beyond the knowledge of the United States officer. The difficulties are met under the amended rule by eliminating the element of the authority of the attesting foreign official from the scope of the certifying process, and by specifically permitting use of the chain-certificate method. Under this method, it is sufficient if the original attestation purports to have been issued by an authorized person and is accompanied by a certificate of another foreign official whose certificate may in turn be followed by that of a foreign official of higher rank. The process continues until a foreign official is reached as to whom the United States foreign service official (or a diplomatic or consular officer of the foreign

country assigned or accredited to the United States) has adequate information upon which to base a "final certification." See New York Life Ins. Co. v. Aronson, 38 F. Supp. 687 (W.D. Pa. 1941); 22 C.F.R. §92.37 (1958).

The final certification (a term used in contradistinction to the certificates prepared by the foreign officials in a chain) relates to the incumbency and genuineness of signature of the foreign official who attested the copy of the record or, where the chain-certificate method is used, of a foreign official whose certificate appears in the chain, whether that certificate is the last in the chain or not. A final certification may be prepared on the basis of material on file in the consulate or any other satisfactory information.

Although the amended rule will generally facilitate proof of foreign official records, it is recognized that in some situations it may be difficult or even impossible to satisfy the basic requirements of the rule. There may be no United States consul in a particular foreign country; the foreign officials may not cooperate; peculiarities may exist or arise hereafter in the law or practice of a foreign country. See United States v. Grabina, 119 F. 2d 863 (2d Cir. 1941); and, generally, Jones, International Judicial Assistance: Procedural Chaos and a Program for Reform, 62 Yale L. J. 515, 548-49 (1953). Therefore the final sentence of subdivision (a)(2) provides the court with discretion to admit an attested copy of a record without a final certification, or an attested summary of a record with or without a final certification. See Rep. of Comm. on Comparative Civ. Proc. & Prac., Proc. A.B.A., Sec. Int'l. & Comp. L. 123, 130-31 (1952); Model Code of Evidence §§517, 519 (1942). This relaxation should be permitted only when it is shown that the

party has been unable to satisfy the basic requirements of the amended rule despite his reasonable efforts. Moreover it is specially provided that the parties must be given a reasonable opportunity in these cases to examine into the authenticity and accuracy of the copy or summary.

Subdivision (b). This provision relating to proof of lack of record is accommondated to the changes made in subdivision (a).

Subdivision (c). The amendment insures that international agreements of the United States are unaffected by the rule. Several consular conventions contain provisions for reception of copies or summaries of foreign official records. See, e.g., Consular Conv. with Italy, May 8, 1878, art. X, 20 Stat. 725, T.S. No. 178 (Dept. State 1878). See also 28 U.S.C. §§1740-42, 1745; Fakouri v. Cadais, 149 F. 2d 321 (5th Cir. 1945), cert. denied, 326 U.S. 742 (1945); 5 Moore's Federal Practice ¶44.05 (2d ed. 1951).

EXHIBIT V

RECOMMENDATION OF THE LAW REVISION COMMISSION
TO THE LEGISLATURE

Relating to Requirement that Authentication of Certificate of Acknowledgment of Notary Public of Another State Include Authentication of Genuineness of Notary's Signature and Genuineness of Impression of Notary's Seal

Section 299 of the Real Property Law authorizes a notary public, among other officers, to take the acknowledgment or proof of a conveyance of real property situate in New York where the acknowledgment or proof is made outside the state but within the United States, or within any of its territories, possessions or dependencies, or within any place over which it has or exercises jurisdiction, sovereignty, control or a protectorate.

Section 311, subdivision 2, of the Real Property Law provides that a conveyance so acknowledged or proved before a notary public may not be read in evidence or recorded within the state unless the certificate of acknowledgment or proof is authenticated (a) by the certificate of the clerk or other certifying officer of a court in the district in which such acknowledgment or proof was made under the seal of the court, or (b) by the certificate of the clerk, register, recorder or other recording officer of the district in which such acknowledgment or proof was made, or (c) by the certificate of the officer having charge of the official records of the appointment of such notary or having a record of his signature.

The contents of a certificate of authentication are prescribed by section 312 of the Real Property Law, which applies when authentication is required, whether the acknowledgment or proof be made within or without the state or the United States and whether it be made before a notary public or

some other authorized officer. The authenticating officer must specify (a) that the officer making the certificate of acknowledgment or proof was, at the time the certificate purports to have been made, such officer as he purports to be; (b) that the authenticating officer is acquainted with the handwriting of the officer making the original certificate, or has compared the signature of such officer upon the original certificate with a specimen of his signature filed or deposited in the office of the authenticating officer, or recorded, filed or deposited elsewhere pursuant to law; and (c) that the authenticating officer believes the signature of such officer upon the original certificate is genuine. Section 312 also provides that if the original certificate is required to be under seal, the authenticating officer must also certify that he has compared the impression of the seal affixed thereto with a specimen impression thereof filed or deposited in his office or recorded, filed or deposited pursuant to law in any other place and believes that the impression of the seal on the original certificate is genuine.

The requirements of section 312 with respect to authentication of genuineness of the signature of the officer who took the acknowledgment are conformable with the New York statutes relating to records of qualification of notaries public and filing of specimens of their signatures. (Executive Law, section 131, subdivision 3, which provides that a notary public shall qualify by filing his oath of office and his official signature with the county clerk of the county in which he resides.) They are incompatible, however, with the laws of a number of the states in which the authentication must be obtained, since the statutes in these states make no provision for filing of an official signature in the office of the

authenticating officer who maintains the records of names of notaries public. . . .

The requirement in section 312 that the authenticating officer attest to the genuineness of the impression of the seal of the officer who executed the original certificate has less importance with respect to authentication of certificates of notaries public of other states, since many states, like New York, have abolished the requirement that the acts of a notary public be under seal. However, where the laws of the state in which the notary was appointed do require that his notarial seal be affixed to a certificate of his official acts, the difficulties described above with respect to authentication of the genuineness of the notary's signature arise as well with respect to authentication of his seal.

* * * * *

While the New York statute permits the use of certificates of acknowledgment or of oaths made before certain other officers of other states, the most convenient and usual practice is to have an acknowledgment or an oath administered before a notary. So far as they apply to notaries public of other states, therefore, the provisions of section 312 of the Real Property Law requiring authentication of genuineness of signature and seals of officers of other states may thus impose undue hardship and expense to citizens of this state in a substantial number of cases, either because a complying authentication cannot be obtained for a certificate that has been executed by a notary public or because specific instructions must be sent in the first instance to have the acknowledgment or oath certified by some other officer in order to obtain a certificate that can be authenticated.

The Commission believes that section 312 of the Real Property Law should be amended to make its provisions requiring authentication of signatures and

seals inapplicable where the certificate of acknowledgment or proof is made by a notary public, without the state but within the United States or any territory, possession, or dependency of the United States, or any place over which the United States exercises jurisdiction, sovereignty, control or a protectorate. Under the amendment proposed by the Commission, section 312 would instead provide, in such cases, that the certificate of authentication must state in substance that at the time when the original certificate purports to have been made, the person whose name is subscribed to the certificate was such officer as he is therein represented to be.

A corresponding change in the language of the present provisions of section 312 requiring the authenticating officer to certify that "the officer" making the original certificate "was in fact such officer as he purports to be" seems advisable, as well, so that the authentication in all cases would state in substance that "the person whose name is subscribed to the certificate" was at the time the original certificate purports to have been made, "such officer as he is therein represented to be."

In conformity with the proposed amendment of Real Property Law, section 312, providing separately for the content of a certificate of authentication of a certificate of acknowledgment made by a notary public outside the state but within the United States, an amendment is also required in paragraph (c) of section 2309 of the Civil Practice Law and Rules . . . . The amendment proposed by the Commission makes clear that the certificate required by that paragraph is the certificate that would be required to entitle a deed to be recorded if it had been acknowledged before the particular officer who administered the oath. Since the statutes providing for acknowledgments of deeds to be recorded within the state dispense in some instances with

any requirement of authentication, and thus require only a single "certificate" (see Real Property Law, section 300), the amendment of paragraph (c) of section 2309 of the Civil Practice Law and Rules, proposed by the Commission also changes the word "certificate" to "certificate or certificates."

The Commission therefore recommends:

I. The following amendment of section 312 of the Real Property Law:

§ 312. Contents of certificate of authentication.

1. An officer authenticating a certificate of acknowledgment or proof must subjoin or attach to the original certificate a certificate under his hand.

2. When the certificate of acknowledgment or proof is made by a notary public, without the state but within the United States or within any territory, possession, or dependency of the United States, or within any place over which the United States, at the time when such acknowledgment or proof is taken, has or exercises jurisdiction, sovereignty, control, or a protectorate, the certificate of authentication must state in substance that, at the time when such original certificate purports to have been made, the person whose name is subscribed to the certificate was such officer as he is therein represented to be.

In every other case [Such] the certificate of authentication must [specify] state in substance (a) that, at the time when such original certificate purports to have been made, the [officer making it was in fact such officer as he purports] person whose name is subscribed to the original certificate was such officer as he is therein represented to be; (b) that the authenticating officer [(1)] is acquainted

with the handwriting of the officer making the original certificate, or [(2)] has compared the signature of such officer upon the original certificate with a specimen of his signature filed or deposited in the office of such authenticating officer, or recorded, filed, or deposited, pursuant to law, in any other place [; (c) that he], and believes the signature [of such officer] upon the original certificate is genuine; and (c), if the original certificate is required to be under seal, [such] that the authenticating officer [must also certify (d) that he] has compared the impression of the seal affixed thereto with a specimen impression thereof filed or deposited in his office, or recorded, filed, or deposited, pursuant to law, in any other place [;], and [(e) that he] believes the impression of the seal upon the original certificate is genuine.

3. When such original certificate is made pursuant to subdivision five of section two hundred ninety-nine of this chapter, such certificate of authentication must also specify that the person making such original certificate, at the time when it purports to have been made, was authorized, by the laws of the state, District of Columbia, territory, possession, dependency, or other place where the acknowledgment or proof was made, to take the acknowledgment or proof of deeds to be recorded therein.

4. When such original certificate is made pursuant to subdivision seven of section three hundred one of this chapter, such certificate of authentication must also specify that the person making such original certificate, at the time when it purports to have been made, was authorized, by the laws of the country where the acknowledgment or proof was made, to take acknowledgments of conveyances of real estate or to administer oaths in proof of the execution thereof.

II. The following amendment of subdivision (c) of section 2309 of the Civil Practice Law and Rules:

(c) Caths and affirmations taken without the state. An oath or affirmation taken without the state shall be treated as if taken within the state if it is accompanied by such certificate or certificates as [are] would be required to entitle a deed acknowledged without the state to be recorded within the state if such deed had been acknowledged before the officer who administered the oath or affirmation.

STATUTORY NOTE

(Note: These are amendments recommended by the Law Revision Commission. See Leg. Doc. (1963) No. 65 (I). Their purpose is to simplify the authentication of certificates of notaries of other states and of territories and possessions of the United States. A conforming change is made in section 2309(c) of the Civil Practice Law and Rules.)