

## MEMORANDUM

TO: Joint Editorial Board

FROM: U.S. Lawyers Abroad Committee

RE: Uniform Law on Notarial Acts (Proposed Reform); Interim Survey Findings

DATE: July 14, 2009

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This memorandum follows up on one of the action items discussed with ABA Uniform Law Commission representatives on June 3, 2009.

That conversation arose out of our Committee's work to urge legal reform based on a belief that certain notarial acts occurring outside the United States represented significant hardships to affiants. Under the current Uniform Law on Notarial Acts and the Model Notary Act of 2002, certain mechanisms exist to address notarial acts performed outside the United States. For example, the Uniform Law recognizes various sources of permissible foreign notarial acts that should be recognized in the states comprising the United States.<sup>1</sup> Nonetheless, most persons residing outside the U.S. are forced to choose between a consular authentication or a notarial act performed under the laws of the foreign state.

More recently, the Uniform Unsworn Foreign Declarations Act has provided a state-level counterpart to federal legislation already allowing for use of unsworn (i.e., un-notarized) declarations in state proceedings and transactions.<sup>2</sup> The UUFDA has been adopted by only a small handful of states and its utility requires a legal determination as to criminal perjury in the laws of the place where the declaration is given. While the UUFDA may prove useful as a basis to convince a court as to the validity and authenticity of a statement, as a practical matter persons and organizations requiring a notarial act too often prove reluctant to accept an unsworn statement. The UUFDA specifically excludes real estate transactions and, in private

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<sup>1</sup> See Art. 6 of Uniform Law on Notarial Acts (1982). The Model Notary Act does not explicitly address performance by notaries qualified in one state of notarial acts outside that state of qualification. Nonetheless, the qualifications imply the ability to perform outside of one's state or the United States so long as the notary resides or has a regular place of work or business in the state and resides legally in the United States. See Model Notary Act of 2002 Sec. 3.1(b).

<sup>2</sup> See Uniform Unsworn Foreign Declarations Act. (2008).

transactions or with documents being used by US legal persons for transactions outside the US, is unlikely to be a workable tool.

To help fill the gap between a U.S. notary's limited jurisdiction and the unsworn declaration, the Committee has proposed a reform of the Model Notary Act. The proposal would permit US licensed attorneys to perform notarial acts of attestation in certain situations outside the United States. The proposed reform would complement the Unsworn Foreign Declarations Act, while offering an alternative to consular authentication and a notarial act performed by a foreign professional.

To assess viability of the reform effort, the working group of the US Lawyers Abroad Committee has attempted to gain a broader understanding of practical instances in which gaps in current notary practice adversely affect business or the exercise of rights by individuals living outside the US over property and interests in the US. We solicited input from the approximately 500 members of the US Lawyers Abroad Committee and others who work on cross-border commercial, estate planning, family law or other matter that frequently require notarial practice. Responses strongly suggest that existing mechanisms do not resolve or adequately address a variety of situations. Consequently, permitting U.S. attorneys residing abroad to perform notarial acts in certain circumstances offers an alternative to facilitate the reliable and practicable attestation of documents outside the United States.

The survey framed the issue as follows:

*Have you had a client (US or non-US) who needed to get a document notarized for US transaction purposes, but ran into problems?*

*Were you a notary in your home state but now because you live abroad you no longer can act as a notary and have felt hindered in providing services to clients?*

*Have you had a US corporate client with business in your country of residence that needed to notarize US corporate documents for use in that country but the consulate was not accessible?*

*- Other similar problems?*

The following paragraphs summarize the responses received:

- 1) A *US – qualified attorney in the U.K.*, who also happens to be a Florida International Notary (Florida civil law notary), a U.K. solicitor and an English notary public, encounters consistent problems in notarizing documents abroad under current rules. As a Florida civil law notary, the attorney can notarize documents abroad to be returned to the state of Florida for use there.
  - This individual is frequently approached by people looking for a U.S. notary. He explains that U.S. notaries public are generally only entitled to notarize documents within state boundaries. He explains that he is a Florida civil law notary and an English notary and that he can notarize documents for use in Florida. It is his understanding that only Florida has notaries who can notarize documents outside of the U.S. Nonetheless, he is aware of only one other person practicing notarial services outside the U.S.
  - He explains that closing agents, banks and other U.S. entities that require U.K. residents to have documents notarized in the U.K. by U.S. notaries often are either unfamiliar or unclear on precise requirements. According to this attorney, most U.S. state laws allow notarization abroad by notaries of the resident country. Nonetheless, as a practical matter, these persons often insist on requiring an attesting person to travel to the U.S. Embassy located in London. For many, this is a hardship prompted by ignorance or a refusal to accept the law governing the execution of documents abroad (including the Hague Convention on authentication and use of documents executed in a foreign state).
  - In the U.K. there are only about 950 notaries for about 50 million people. Thus, even if a person convinces a receiving party of the legal use of a U.K. notary, this may require the person to wait days for an appointment or force that person to travel to obtain services.
  - The attorney stressed his contentment with the state of Florida in commencing the civil law notary program and how it has been very helpful with him running a Florida practice in the U.K. He is able to deal with the notarization of closing documents and wills and trusts he prepares for his

U.K. clients owning Florida properties. There were issues mentioned with regards to the laws regulating the practice of those seeking to practice as a general notary in the U.K. but he does not advertise himself as a general notary and only does work relating to Florida or documentation being returned to Florida.

- According to this attorney, the biggest problem is educating businesses in America to stop requiring foreign nationals and American citizens abroad from seeking U.S. notaries. Both the Hague Convention and often state law permit the use of notaries qualified in the individual's resident country to act. Not everyone lives in the capital of their country and has access to such resources. It is extremely inconvenient to have to tell U.S. citizens that they have to go to the foreign country's U.S. embassy for notarization, attestation or related services.

2) *A US – qualified attorney in the Paris, France.* Another attorney emphasized the difficulties of obtaining notarial services in Paris, France (her place of residence). She often receives phone calls from clients who need notarized documents on an urgent basis and who are unable to access consular services. Private individuals have complained about the cost of such services and the attorney mentioned her interest in being able to offer such a service to her clients.

- In Paris, persons have extremely limited access to notarial services at the Consulate. For U.S. citizens consular notarization services are provided only by online appointment and only performed Mondays, Tuesdays and Thursdays from 1:30 p.m. to 3:00 p.m. Restrictions are even more severe for non-U.S. citizens, who must also make online advance appointment but with access to services at the Consulate on Mondays, 1:30 p.m. to 3:00 p.m.
- If a document also needs to be witnessed, the individual must bring their own witness with them to the embassy, as consular officers and staff may not serve as witnesses for notarial purposes.

- 3) *An Attorney Practicing in Virginia.* U.S.-based practitioners also reported notarial gaps. This Virginia-qualified attorney reported situations whereby access to foreign attorneys is rare, expensive, and requires appointments to be made weeks in advance.
- He notes that speed is a problem when private process servers have to sign affidavits of service ([Virginia law requires that such affidavits be done within 72 hours after the defendant is served]), and in any other context where an individual's presence is transient or cooperativeness tenuous.
  - Expense and scarcity are a problem when trying to do out-of-court depositions, which, under Virginia law, require a notary to be present throughout the deposition. During his practice, he has been fortunate that clients doing relatively short no-fault divorce depositions have had friends who are local notaries or U.S. consular officers, who have been willing to be present while the client and witness talk to him and the stenographer by cell phone. But, on a recent case, when he was trying to arrange a lengthy deposition in London, the Embassy would not provide that level of notary service even for one of their own employees. Paying a British notary for several hours of his time—and arranging it before the scared witness disappeared—was a major stumbling block for his client and in fact was more expensive than bringing the witness to the U.S. to testify. The witness, a foreign nanny who was in a vulnerable situation, was his client's only available witness to the spouse's adultery, child abuse, asset dissipation and insurance fraud. Because he could not arrange a deposition promptly and the client could not foot the costs, the client was unable to memorialize otherwise favorable testimony before the witness disappeared.
  - A Virginia statute lets other local officials, including deputy court clerks, perform notarizations but he has yet to have a client successfully convince such officials to permit such to be done.
- 4) *A US – qualified attorney in Germany.* In Germany, one U.S. attorney likewise reported difficulties for attestations by German clients. He foresees the lack of notarial resources as becoming a much larger problem due to the increase in U.S.

citizens living abroad (including those working for the military) who are not eligible to use the U.S. military notaries.

- 5) *A U.S. notary in Guayaquil, Ecuador* who also happens to be an Ecuadorian lawyer, offers notarial services online. However, she also indicates that she practices in other areas, including social security and immigration. There is concern that she may be unlawfully practicing law in such areas, as notaries are not qualified attorneys. So called "notarial" practices of this kind are being scrutinized by the American Immigration Lawyers' Association.
- 6) *A U.S. citizen in The People's Republic of China* needed to have a power of attorney notarized and sent back to the U.S. Having gone through this before, he prepared the power of attorney in a similar form as a previous one the embassy in Beijing had notarized and made an appointment through American Citizen Services at the Embassy.

After waiting in a long line of applicants for new passports, social security cards, green card applications and other consular business, he finally presented the power of attorney to the consular staff and watched as the staff officer crossed out language on the document that had not posed any issues beforehand. It was apparent that whoever reviews documents for notarization has considerable subjectivity in deciding what language is permitted, even though two months ago the consulate had notarized the document without objection to the deleted language.

The entire procedure took well over an hour and while the fees were acceptable, the time it took to travel to the embassy, have the documents notarized and return to the office took roughly two hours. This, in light of the fact that an appointment had been made prior to visiting the consulate.

- 7) *A U.S.-based notary public* noted that any organization handling benefits, property, a declaration of fact and such should insist on third party verification for such organization's protection. It would be too easy to commit fraud otherwise and there would be no proper paper trail where such abuse occurs. This notary public expressed skepticism that organizations handling benefits or property would accept an unsworn declaration submitted pursuant to state adoption of the UUFDA, notwithstanding a statutory basis for so proceeding.

- 8) *A U.S.-qualified attorney seconded to the Hague* reported that in connection with the bar admission process several states require a notarized statement from each entity with which a bar admission applicant has worked in a legal capacity, including service as an intern. There may not be a “notarial officer” as defined in the bar admission rules and the U.S. consular offices may be unable or unwilling to complete notarial acts, particularly where the supervising attorney is not a U.S. attorney. The bar admission candidate may have to undertake difficult and sometimes costly measures to obtain notarized documentation to present credentials for bar admission. The attorney reported that in many foreign countries notarial services are a more involved and substantive legal process, which is performed exclusively by licensed attorneys, and as such can be more expensive than the nominal costs of notarial services in the U.S.