

FINAL REPORT OF THE STUDY COMMITTEE
ON REVISION OF THE LAW ON NOTARIAL ACTS
June 7, 2007 Draft

TO: Committee on Scope & Program

FROM: Study Committee on Revision of the Law on Notarial Acts
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The Study Committee on Revision of the Law on Notarial Acts was authorized at the 2006 Annual Meeting of the Conference following a proposal submitted by the United States Notary Association (USNA). It first met by conference call on December 20, 2006, has met by conference call a total of three times and conducted a Stakeholders' Meeting in April 2007. The notes of the first teleconference and of the Stakeholders' Meeting are attached to this memorandum and constitute a portion of the report of this Committee. Other memoranda submitted to the Committee or produced by the Committee have been posted to and are available from the Conference website.

I. Recommendation. The Study Committee on Revision of the Law on Notarial Acts recommends that the National Conference of Commissioners on Uniform State Laws form a drafting committee to prepare a uniform act revising and upgrading the Uniform Law on Notarial Acts (ULONA). Specifically, the Study Committee recommends that any revision should expand the scope of ULONA to include provisions regarding the governance, powers and responsibilities of notaries public.

II. Existing State of the Law. The Uniform Law on Notarial Acts (ULONA) was approved by the Conference in 1982 and has been enacted by 11 states. It was intended to replace the Uniform Acknowledgment Act (as amended) and the later Uniform Recognition of Acknowledgments Act. It was described in the Prefatory Note as “a consolidation, extension, and modernization of” the predecessor acts. ULONA includes definitions, describes “notarial acts,” specifies who may perform those acts and contains three provisions governing the recognition of notarial acts performed under federal authority, under the laws of foreign States or under the laws of other domestic States. The notarial acts described include taking an acknowledgment, receiving a verified oath or affirmation, witnessing a signature, certifying a copy of a document or other item and noting a protest of a negotiable instrument. Finally, it provides short form certificates for the various notarial acts.

Unfortunately, ULONA has not unified the law governing notarial acts. According to surveys reported by the USNA, at least twelve different notarial acts are authorized by the laws of the various States. In two States, notaries may perform marriages, in five they may witness the opening of vaults, safes or safe deposit boxes and in some cases they inventory and certify the contents. In the various States they may certify that something is true or an act has been performed, verify vehicle identification numbers, administer loyalty oaths, certify auction sales, issue proof of debt, witness absentee ballot applications and ballots, issue subpoenas, administer oaths to witnesses, affirm financial disclosures, receive renunciation of dower or inheritance, etc. The definitions of the generally recognized acknowledgments, affidavits, certificates and jurats vary from state to state and by commentator and the elements of the acts also vary widely from state to state. Requirements concerning seals, embossing, journals, equipment security, etc., vary widely amongst the states. As one person noted, the laws governing notaries vary from half a page in the statutory codification to thirty or more pages.

Complicating the lack of uniformity of law, the emergence of electronic commerce has generated a great deal of disarray and confusion. The Electronic Signatures in Global and National Commerce Act, 15 U.S.C. 7001 (E-Sign), Uniform Electronic Transactions Act (UETA) and Uniform Real Property Electronic Recording Act (URPERA) each specify that a seal is not necessary for the notarization of electronic records, but none of them provide further information or detail concerning notarization of electronic records. Some have proposed that electronic technologies could be used to enable witnessing signatures without the physical presence of the signer before the notary; the uniform reaction amongst observers was that this proposal was extremely ill-founded. The vacuum relating to notarization of electronic records has resulted in the enactment of new legislation in several States, including North Carolina, Virginia, and California, in the adoption of extensive media-specific regulations dealing exclusively with electronic records notarization (North Carolina and California), recommendations from the National Association of Secretaries of State, reports from such groups as the Section on Science and Technology of the American Bar Association, etc. The National Notary Association prepared a Model Law in 2002 containing separate provisions for notarizing paper records and for notarizing electronic records and is in the process of revising the same. The USNA estimated that it was tracking in excess of three dozen different pieces of legislation relating to notarization pending during the 2007 legislative session.

III. Reasons for Drafting a Uniform Law. The law governing notaries public traditionally has been within the purview of the individual states. The Conference has crafted at least two prior acts, most recently ULONA in 1982. Since then, technological change has generated new concern and the rise of increasingly nationwide financial institutions has increased the economic costs associated with broad diversity in local law and regulation. In addition to pointing to the existing ferment concerning notarization of electronic records, participants in our deliberations urged revision of the law relating to notaries public to rationalize the large disparities in the law of the different states. They pointed out that these disparities contribute to (i) public confusion about the role and responsibilities of notaries, (ii) regulatory disagreement and differences in the regulation

of notaries, (iii) confusion about the recognition and legal effect of records notarized in different states,¹ (iv) problems serving the needs of resident aliens and others dealing with foreign governments, amongst other things.

Further, industry representatives noted that the mortgage finance industry, particularly, is becoming nation-wide in scope and questions concerning notarization of real property conveyances and mortgages, amongst other records, have become hindrances to and increase the costs of transactions. Nationwide standards have been developed by the mortgage banking industry and Freddie Mac and Fannie Mae, yet local, disparate rules relating to notarization have slowed implementation of electronically-based transactions based on these standards. Michael Gordon, representing Freddie Mac, stated that they sought unification of state notarial law, noting that the notary is the only individual actually present to identify the customer. He stated that as high-dollar-amount transactions become more frequent and more widespread, the notary is central to the integrity of mortgage finance transactions. In states where notarizations are necessary for the transfer of interests in motor vehicles, local disparities also interfere with financing transactions. An overriding concern is avoiding imposition of undue or unreasonable costs on parties relying on notarial acts, i.e. avoiding 'friction' to transactions.

To summarize, industry desires uniform legal treatment so that it can implement nationwide processes and procedures without hindrance from purely local rules, regulators and other public officials desire uniform legal treatment so they can better understand their responsibilities and the effect of actions performed in other states, and both agree that uniform legal treatment would ease confusions which exist amongst the public, regulators and other officials and in relations with other nations.

IV. Solicitation of Views. Concerted efforts were made to invite the participation of interested parties in the deliberations of the Study Committee. Lists of participants and the entities they represented are provided in the notes from the first teleconference and in the Stakeholders' Meeting. In addition, Michael Gordon of Freddie Mac, Margo Tank of the Buckley, Kolar law firm, and Gail Hillebrand of Consumers Union participated in all or part of the third teleconference. Formal statements were submitted by USNA and NNA, and have been posted to the NCCUSL website. L.H. Wilson of the American Bankers' Association stated that his organization did not have a formal position but had observed that projects with a narrow scope had a better chance of enactment. With the exception of NNA, all participants expressed a strong desire for NCCUSL to undertake a drafting project that would address the law governing notaries public. The representatives of NNA stated that if a project was undertaken it would participate in and assist any drafting committee.

¹ See *Apsley v. Memorial Hospital*, ___ MI ___ (5/1/07, Matter No. 129134) (*en banc*, majority, two concurring and one dissenting opinion) (discussing relationship between Uniform Recognition of Acknowledgments Act and Michigan's Revised Judicature Act as applied to affidavit of merits of malpractice action notarized in Pennsylvania). One local county recorder commented, during the Stakeholders' Meeting, that inability to determine the laws governing out-of-state notarizations resulted in the acceptance for filing of documents which would have been rejected if notarized in the home state.

V. Scope. All participants, with the exception of NNA, expressed a strong desire to see a drafting project address the full range of issues relating to notaries public. A list of those issues, taken from the notes of the Stakeholders' Meeting, includes:

- Appointment, including
 - Eligibility to serve
 - Minimum standards
 - Training, including who should conduct the training and ability to outsource,
 - Classes
 - Testing
 - Auditing of performance of duties
 - Retesting
 - Fees and appointment process
 - Bonding
 - Commissioning requirements, including issuing seals or other tokens and oaths
- Responsibilities of notaries, including
 - Identification standards/practices
 - Notarization of electronic records
 - Journals and recordkeeping
 - Formalities for notarial act
 - Standard forms for jurats, etc.
 - Ethical standards, including witnessing relatives' signatures and conflicts of interest
 - Reasonable care standard
 - Satisfactory evidence
 - Disabled signers
 - Accountability of notaries
 - Fees
- Role/responsibility of those relying on or confronting notarized signatures
- Notarizing electronic records
 - Responsibility of notary [securing integrity of record?]
 - Biometrics
 - Should there be special requirements/training before authority to notarize electronic records?
 - Are issues/questions related to security or integrity of record or to signatures?
- Remedies for improper acts, by notaries and others, and authority to penalize unauthorized acts.

Particular attention will need to be paid by any drafting committee to the relationship between laying a statutory foundation or infrastructure governing notaries public and the authority of regulators to regulate the specifics. Participants in our deliberations expressed a strong desire for concurrent work on regulations and/or a statement of best practices. While such work is outside the scope of a drafting

committee, it should be possible to coordinate with and cooperate with any group the observers and other participants might form to work concurrently on regulations and/or best practices.

Finally, any drafting project will need to deal with the issue of notarization of electronic records, within the limits imposed by E-Sign and UETA. There was consensus that notaries public are responsible officials, regardless of the medium in which any record of their acts is contained. It was the strong sense of the participants that a drafting committee first should address medium-neutral issues relating to the law governing notaries in general, reserving medium-specific issues for later attention.

VI. Resources for Drafting a Uniform Law. USNA prepared and provided to all Study Committee members a volume of reference material which it states will be made available to any drafting committee. This volume includes ULONA, URPERA, UETA, E-Sign and UETA, the Model Notary Act (NNA, 2002), as well as tables of common notarial acts, notarial acts permitted by state, notarial acts permitted by statutes, and other tables derived from their database of state laws and regulations. It also includes a table of links to state government sites at which material relating to the regulation of notaries may be found, reports of the National Association of Secretaries of State and of the American Bar Association Section of Science and Technology Law, E-Trust Subcommittee, etc. In addition, USNA gave members of the Study Committee access to its proprietary database of state laws and regulations and indicated it would provide access to the members of any drafting committee. NNA stated it would make its revised Model Notary Act available when it is completed. Representatives of the National Association of Secretaries of State also indicated it would make its resources available to any drafting committee. The Study Committee did not explore whether or not any of the interested parties would be willing to contribute to the fiscal expense of a drafting committee. It does note that many of the participants are governmental entities or represent public officials; thus it assumes that, while continued participation is likely, funding is not apt to be forthcoming from such sources.

VII. Conclusion. To summarize, the Study Committee concludes that a drafting project to revise the Uniform Law on Notarial Acts governing notaries public should be authorized. It is satisfied that the requirements of the Statement of Policy Establishing Criteria and Procedures for Designation and Consideration of Acts have been satisfied:

- The subject matter is appropriate for state legislation.
- The subject matter is consistent with the objectives of the Conference to promote uniformity on subjects where uniformity is desirable and practicable
- There are real and practical reasons for undertaking a project at this point in time
- There is a reasonable probability that an Act would be enactable by a substantial number of jurisdictions and would promote uniformity indirectly
- Uniformity of law will produce significant benefits to the public, facilitating interstate economic and social goals and respond to needs common to many states.