

REPORT WITH RECOMMENDATION

Recommendation

RESOLVED, that the American Bar Association urges the addition of the following paragraph [(?)] to Section 6 of the Uniform Law on Notarial Acts and appropriate amendment of the Model Notary Act of September 1, 2002, to which the Uniform Law on Notarial Acts is appended:

§ 6. Foreign Notarial Acts

...

(?) In addition to the preceding, a notarial act performed by an attorney who is licensed to practice law and is in good standing and active status in a state, district, or territory of the United States of America, and who is resident in the foreign jurisdiction where the notarial act is performed, has the same effect under the law of this State as if performed by a notarial officer of this State.

Report

I. INTRODUCTION AND SCOPE OF PROJECT

A working group sponsored by the U.S. Lawyers Abroad Committee of the Section of International Law of the ABA has been formed to propose an amendment to the Uniform Law on Notarial Acts and The Model Notary Act of 2002 (together, the “Act”) regarding the ability of a U.S. Attorney (as defined below) to [undertake “notarial acts” as defined in the Act] [provide notarial services of signature certification] with respect to documents for which notarization is required for submission to a state, district, or territory of the United States, or to the federal government, or any governmental or quasi-governmental agency thereof (“State”) or for other legal purposes in the State where the document is to be submitted, filed or utilized. The proposed amendment endeavors to address the situation where a U.S. citizen or other person residing in a foreign country has a need for notarization of his/her signature or other attestation of a document to be submitted by such person to or in a State and obtaining the services of an appropriate “notarial officer” as defined in the Act is unreasonable, impractical, or impossible, while at the same time ensuring the security of the notarization process by requiring that it be certified by a U.S. Attorney who is subject to regulation and sanction under U.S. law.

The proposed rule would allow an attorney who is licensed to practice law and is in good standing and active status in a state, district, or territory of the United States of America (“U.S. Attorney”) to complete an attestation in lieu of notarial officer (“Attestation”). In performing such an Attestation, the U.S. Attorney will comply with the provisions of the Act in establishing the identity of the maker of the signature, maintain a log of attestations in lieu of notarial officer, and ensure the security of the log. The U.S. Attorney acting in such capacity will be subject to the rights and duties of a notarial officer under the Act, in addition to any sanctions and disciplinary action that might be warranted under the laws of the bar in which the U.S. Attorney is licensed, in respect of such Attestation or other notarial act.

Such Attestation shall be evidenced by a “Certificate of Attestation” (see attached model form) which shall, in addition to briefly setting out the content of the matter attested in the accompanying instrument, document, or statement requiring notarization (which may be completed without a seal), set out the reason why a notarial officer is not available, acknowledge that the attesting attorney is subject to the Act, state the bar where the U.S. Attorney performing the Attestation is admitted and his/her bar admission number, state that the U.S. Attorney is in good standing and active status in the jurisdiction of admission, and set out the address and contact information for the U.S. Attorney.

An instrument, document, or statement requiring notarization that is accompanied by a Certificate of Attestation shall be deemed to have the legal status of a document notarized within the relevant State in accordance with the provisions of the Act. The Certificate of Attestation would be valid ~~only~~ in the state, district or territory in which the document is to be submitted.

II. THE PROBLEM

Under the Act, the provision of notarial acts by a notarial officer is restricted to the jurisdiction where the notary is commissioned, and a notarial officer cannot offer notarial services at a location outside the commissioning State. In addition, the Act requires that a notarial officer must resign her/his commission once he/she is no longer resident in the commissioning State or no longer maintains a regular place of business there. As a result, a notarial officer commissioned in a specific State will not be regularly available to provide notarial services outside the relevant State, and especially not in a foreign country. This means that persons in a foreign country requiring notarial services in respect of a document for a specific State must utilize the notarial services provided at an US embassy or consulate, or have the relevant document attested in accordance with the notarization procedures of the foreign jurisdiction and have it authenticated by apostille (if the country is party to the Hague Convention of 1961) or by consular legalization of the host country. Unfortunately, it is often difficult and/or expensive for a person to get to an US embassy or consulate, or complete the apostille procedures.

In today's global economy, U.S. citizens and/or permanent residents and their foreign spouses are frequently living in foreign countries for work, retirement, recreation and other reasons. Such persons can be adversely affected by the inability to easily access notarial services in various contexts, including with respect to state bar and similar professional organization affidavits (for example, with respect to an applicant's work experience), voting registrations, execution of corporate documents, wills and estate related documents, filing of documents with the US Social Security Administration and other federal agencies, and other similar service situations. This can lead to denial or delay of claims for social security benefits, disenfranchisement for an absentee ballot, and high costs (both monetary and time) to obtain necessary notarial services – in essence a tax or penalty on a person who, in good faith, is making every effort to comply with the applicable formality imposed by the relevant State.

From the point of view of the State where the document will be submitted, the security of the notarial certification is another important aspect. Although there are some circumstances where a State may accept a document under the seal and signature of a foreign person in place of the normally required notarization, the authenticity of the document, and the signature and seal, can be difficult to verify. For some foreign jurisdictions, even the security of the apostille procedures might be of questionable veracity.

III. THE SOLUTION

The use of an Attestation by a U.S. Attorney could significantly improve access to needed notarial services by persons in foreign countries, and would significantly contribute to ensuring the security of the notarial acts.

As is clear from the membership of the ABA International Section, an U.S. Attorney can be found in many diverse and far-flung locations. Many of those locations, even in a developed country, do not have a convenient U.S. consulate for notarial services, and the U.S. Attorney could fill the gap. The availability of the services of a U.S. Attorney would help to eliminate the excess cost involved in obtaining notarial services in a foreign country. The fact that the U.S. Attorney is also subject to regulatory and disciplinary control of a State helps ensure the validity of the notarial procedures and improve the verifiability of signatures made in an overseas environment.

This proposal is consistent with the general purposes and principals of the Act, particularly to promote, serve, and protect the public interest and to enhance cross-border recognition of notarial acts. Notarization is utilized to deter fraud, authenticate signatories, and provide an impartial witness to certain acts evidenced by documentation. A U.S. Attorney is well equipped to substitute for ~~the a~~ notary officer and act as an impartial witness.

The following are some practical examples known to members of this committee where the implementation of this proposal would be very beneficial:

1) One direct benefit of adopting this proposal would be the removal of a barrier for completion of the bar admission process for law students who attend U.S. law schools and participate in valuable opportunities to intern in legal offices abroad, with NGOs and in international venues. Although, in many instances, these internships are unpaid, there is a recognized benefit to these internships, leading to the development of skills which will be marketable once the law admission applicant completes the admission process.

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. However, there may not be a “notarial officer” as defined in the bar admission rules, and the U.S. Embassy or Consulate 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 in order to obtain the necessary documentation to accurately present their credentials for bar admission. 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..

2) A U.S. citizen living in Western Japan needed to have certain documents notarized for a real estate transaction. Although there was a U.S. Attorney living in the same town, the closest U.S. consulate was 2 hours away, making a notarization procedure a whole-day affair that requires significant extra expense for the travel.

3) [etc.?)

CERTIFICATE OF ATTESTATION

I, [name of US Attorney], the undersigned attorney, hereby certify that:

1. The attached [name of document] was signed by [name of signatory] (“Signatory”) in my presence on [, 200[]], at [location]. Signatory personally appeared before me and proved his/her identity by submission of [proof of identity].
2. Signatory is unable to obtain the services of a notarial officer because [explain].
3. I confirm that I am an attorney at law admitted and registered in good standing and active status to the Bar of the State of [name of state], with registered attorney number []. I further confirm that my present contact information is as set out under my signature below.
4. I acknowledge that I am subject to the Uniform Law on Notarial Acts and The Model Notary Act of 2002 (together, the “Act”) in respect of this Certificate of Attestation.

Date:

Name:

Title (if applicable):

Member of the Bar of [state]

Attorney Number: