

LETTER OPINION
2000-L-132

July 14, 2000

Honorable Alvin A. Jaeger
Secretary of State
600 East Boulevard Avenue
Bismarck, ND 58505

Dear Secretary of State Jaeger:

Thank you for your letter asking several questions about the validity of notarial acts performed by notaries outside their territorial jurisdictions.

You first asked whether a notary public commissioned in this state may perform a notarial act outside of North Dakota. In Watson v. Kresse, 130 N.W.2d 602 (N.D. 1964), the North Dakota Supreme Court held that a North Dakota notary has no authority to take an acknowledgment outside of the state. Id. at 604. The court noted that "since the jurisdiction of a notary public appointed in the State of North Dakota is limited to acknowledgments taken within the State, the acknowledgment of the signature of the defendant . . . made before the North Dakota notary in the State of Minnesota would be of no effect." Id. at 607. Although this determination was based on some language in former N.D.C.C. § 44-06-01, which provided that a notary had the power and authority to take acknowledgments anywhere in the state, a similar provision is now contained in current N.D.C.C. § 47-19-13. That section provides:

The proof or acknowledgment of an instrument may be made at any place within this state before a . . . notary public.

Thus, the rationale for the decision is still in place, albeit in another statute. See also 66 C.J.S. Notaries § 13 (1998) ("The power of a notary to perform notarial functions is limited to the jurisdiction in which the commission issued, and an act done outside the territorial limits of the notary's jurisdiction is void."); 58 Am.Jur.2d Notaries Public § 14 (1989) ("Notaries public are usually appointed to act within a certain county or political division, which is the limit of their jurisdiction, although in some states, a notary duly commissioned in a county of the state has jurisdiction to act in any county of such state.") (citations omitted).

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Based on the foregoing, it is my opinion that a North Dakota notary has no authority to take an acknowledgment or perform any other notarial act outside of the state.

You next asked whether such an extraterritorial notarial act by a North Dakota notary would violate the provisions of N.D.C.C. ch. 44-06. N.D.C.C. § 44-06-13 provides that a "notary public who exercises the duties of a notary's office with knowledge that . . . the notary is disqualified otherwise is guilty of an infraction, and, if appropriate, the notary's commission must be revoked by the secretary of state using the procedure under chapter 28-32." It is my opinion that a North Dakota notary performing notarial acts outside the state of North Dakota may be violating the provisions of N.D.C.C. § 44-06-13, i.e., that the notary, by knowingly acting outside the scope of the notary's authority, may be "disqualified otherwise" from acting as a notary. However, before reporting such known instances of notarizations outside this state to appropriate law enforcement authorities or before taking revocation actions against the particular notary's commission, it may be advisable for you to alert and educate the notaries in this state, particularly in those areas where you know such practices are common.

You next asked about the validity of notaries from outside the state performing notarial acts within North Dakota. You specifically asked about the continuing validity of 1987 N.D. Op. Att'y Gen. 102 (Nov. 23 to Richard Wilkes) which stated that "N.D.C.C. § 47-19-14.1(1) allows, under certain circumstances, a notary public from another jurisdiction to perform notarial acts in North Dakota." That opinion indicated that due to a significant language change in N.D.C.C. § 47-19-14.1(1) dealing with recognition of notarial acts, and based on the legislative history of that change, the Legislature intended to allow non-North Dakota notaries to perform notarial acts in North Dakota if the "notary's home jurisdiction gives the notary the authority to act outside the jurisdiction." 1987 N.D. Op. Att'y Gen. at 103-04. You then asked whether any subsequent changes in North Dakota law would affect the continuing validity of that opinion.

N.D.C.C. § 47-19-14.1 has not been amended since 1987 N.D. Op. Att'y Gen. 102 was issued. Nor has the North Dakota Supreme Court or this office issued any opinions or decisions which would call into question the conclusions of 1987 N.D. Op. Att'y Gen. 102. Consequently, there is no reason to question or modify the opinion, and it remains the opinion of this office.

Finally, you asked that if 1987 N.D. Op. Att'y Gen. 102 is still valid, what your responsibilities are as a filing officer for certain

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notarized documents filed in your office. If you are presented with a document which was notarized by a non-North Dakota notary in North Dakota, it would be necessary for you to determine whether the laws of the notary's home jurisdiction give the notary the authority to act outside that jurisdiction. If that authority is present, the document presented should be filed as a matter of course. If it is determined that the notary's home jurisdiction does not give the notary the authority to act outside that jurisdiction, and if the document is required to be notarized, it is my opinion that you could lawfully reject the filing on the basis that the document is improperly notarized.¹ As indicated in 1987 N.D. Op. Att'y Gen. 102, "[s]hould such a [foreign] notary [i.e., one without statutory authority to act outside the notary's home jurisdiction] act in North Dakota, the act would be invalid because the notary, having exceeded the authority and jurisdiction given by the commissioning state, ceases to be an official capable of notarial acts. . . . The act would be just as invalid as is the act done by a notary whose commission has expired." Id. at 103.

Sincerely,

Heidi Heitkamp
Attorney General

jjf/vkk

¹ To aid your determination of whether the notary's home jurisdiction gives the notary the authority to act outside the jurisdiction, you could either request that the filer present you with a copy of the pertinent law of the notary's home jurisdiction or a citation thereto, or you could request that this office research the matter.