

I. ANTHONY D. MARTIN

**ATTORNEY
COUNSELOR-AT-LAW**

November 29, 2021

Mr. Neil Turpin,
Chief Clerk,
The Faculty Office,
1 The Sanctuary,
Westminster, London SW1P 3JT.

Dear Neil:

Notaries' PI Insurance Issues - USA

I was invited by Ian Blaney to submit a 'paper' for consideration at the forthcoming meeting of the Master's Advisory Board. 'Paper' may be too grand a word but I hope this memorandum will be useful.

Policies commonly 'bundle' the USA and Canada together. I am not legally-qualified in any Canadian jurisdiction and have therefore confined my comments to US matters.

1. Background

I have prepared this memorandum in the context of the following:

- 1.1 An Inspector appointed under The Notaries (Inspections) Regulations 2014 reported that a Notary whose practice was inspected earlier this year had notarised documents for the USA. However, when details of the Notary's PI cover were checked, it was found that 'North American claims' were excluded: even though the Notary had made it clear to the Insurers that the Notary carried out work for the USA.

The circumstances are referred to in more detail in #2.2 in this memorandum.

- 1.2 During another inspection, the same Inspector found that a Notary had undertaken work for the USA without PI cover. The Inspector considered that the policy was perfectly clear in its terms and this was confirmed by the Insurers. This was a situation in which the Notary simply did not understand the terms of cover.

- 1.3 Another Inspector was told that the PI cover for the practice of the Notary being inspected was 'Worldwide, with the exclusion of the USA and Canada'; that the Notary had asked for the insurers to extend the cover to the USA and Canada and that, in the meantime, the Notary was not taking on any matters involving the USA or Canada.

The Brokers' comments are referred to in #2.3 in this memorandum.

Alderley House,
Andertons Mill,
Heskin,
Lancashire PR7 5PY,
United Kingdom.

Telephone: +44-01257-451383
Fax: +44-01257-450130
Email: iadmartin@aol.com

- 1.4 A note in 'Notary News' circulated by the Notaries Society to its Members earlier this month:

"PI Insurance and USA work"

For those notaries whose PI insurance is covered through their solicitor's PI insurance, please double check the extent of the cover or the lack thereof for notarial work relating to USA and Canada. Some solicitor's PI insurance purports to cover US documents but the accompanying clarification from the insurer to the Notary was:

Re your US notarial work. The SRA minimum terms will cover what you are doing if it is notarisng as opposed to drafting documents or advising. It would also need to be for something that was taking place in the UK as opposed to in the US, and your policy is subject to England and Wales jurisdiction - i.e. you would only be defended and the policy would only react if something went wrong if it were subject to home legal processes.

The insurer in the instance above will cover the US work which is notarised here in the UK but only defend any claim which is pursued through England and Wales Jurisdiction, thus any claim arising in the US Jurisdiction would not be insured. For example, a claim brought by a UK citizen for a sale of a time share or property in Florida could still be brought in a US court and any subsequent judgement and reward [sic] would be issued by the US court. Whilst the Document would be notarised here in the UK and would fall under UK work, the insurers would look at where the complaint is raised and within what jurisdiction the claim is brought and any reward/compensation sanction by a court of Law.

Please therefore check your PI insurance to make sure that the cover for US work will extend to claims being brought outside of the UK."

- 1.5 In an email to me on November 9, Ian Blaney mentioned that "We are aware of some diversity of opinion including some notaries who consider that the notarisation in England or Wales of a US prepared document for application in the US would not give rise to an insurable US event."

2. **Notarial Acts for the USA - Position of PI Insurers**

- 2.1 The other Inspectors have kindly given me details of their cover in respect of the USA work; and Christopher Vaughan, the Secretary of the Notaries Society, has kindly passed on to me a note from Trevor Solis, of Howden Group's A-plan | Corporate Insurance. Mr. Solis has commented separately that "Professional Indemnity insurance contracts can vary significantly from insurer to insurer and broker to broker and it there is no way of summarising generally what cover is for US and Canada as a market".

- 2.2 The PI policy of the Notary referred to in #1.1 in this memorandum excluded "North American claims" in these terms:

"North American Jurisdiction and Operations

A) damages or other monetary awards judgments or negotiated settlements claimant's costs and expenses and Defence Costs connected with or arising out of any North American Claim.

B) the enforcement upholding or registration against the Insured by any arbitrator tribunal or court outside North America of any damages or other monetary awards judgments or negotiated settlements claimant's costs and expenses and Defence Costs connected with or arising out of any North American Claim.

C) the operations of the Insured or any principal partner Member director Employee agent branch subsidiary or parent company of the Insured in North America.

North America means the United States of America and Canada and in each case its territories and possessions and any state or political subdivision thereof.

North American Claim means each and every Claim brought against the Insured in North America or which is instituted or pursued before an arbitrator or tribunal or in courts in North America (whether for enforcement of judgment or otherwise) or in which it is contended that the laws of any country state or political subdivision in North America should apply."

[The Inspector was alerted to this issue by the low premium for this Notary's PI cover. The Insurers had asked questions relating to the Notary's terms and conditions of business being signed in the UK. The Insurers then renewed the PI policy and sent it to the Notary with confirmation that it met the Notary's requirements. This confirmation was not correct as the policy clearly did not cover the Notary's US work].

- 2.3 In response to the request by the Notary referred to in #1.2 in this memorandum for the insurers to extend the cover to the USA and Canada the Brokers replied:

"It depends on the nature of the insured's contract with his client. If it is a UK client dealt within the UK then any claim would be English law. That said, the policy responds to where a claim is brought. If it is brought in the USA then the insured will need the cover for that. Is the insured dealing with North American clients or in North American affairs?

Our opinion is that we would not see the need to extend the policy to worldwide jurisdiction (including USA and Canada). This would be on the understanding that the insured is working for UK clients only and that the legal contract between he and the

"clients to whom he is providing the service, is under UK Law, and not written / signed under USA Law. The other point that we would make is that the insured has no representation in the USA. If this is the case then my view is that it would be extremely unlikely that the US judicial system would pursue a claim against the insured in a USA court. However, if the insured is concerned it may be prudent for them to seek advice from their own legal advisers."

[After receiving this response, the Notary cancelled the policy and obtained appropriate cover for US and Canadian work with other Insurers].

- 2.4 The note in 'Notary News' speaks for itself; in particular, the statement that "[t]he insurer in the instance above will cover the US work which is notarised here in the UK but only defend any claim which is pursued through England and Wales Jurisdiction, thus any claim arising in the US Jurisdiction would not be insured".
- 2.5 Mr. Solis (and Ms. Jenny Screech, Legal Professions Consultant with the Howden Group Solicitor Practice PI team) gave the following expanded guidance following consideration of the note in 'Notary News' referred to in #1.4 in this memorandum:

"Notary Practising within a SRA-regulated Firm"

I believe there has been some confusion around cover if notarised documents are used in USA/Canada and you are practising under your solicitor's PII policy as a Notary. PII for SRA-regulated firms must comply with the SRA's Minimum Terms and Conditions (MTCs) and the MTCs will always prevail in the event of any inconsistency between them and the policy wording issued by a broker/insurer. Following my recent conversation with my solicitors' PII team, our understanding is that the definition of "private legal practice" under the SRA's MTCs includes work undertaken by notaries.

The definition is as follows:

Private Legal Practice

Means the Provision of services in private practice as a solicitor or REL in an authorised body including, without limitation

- a. providing such services in England, Wales or anywhere in the world in a recognised sole practice, a recognised body or a licensed body (in respect of an activity regulated by the SRA in accordance with the terms of the body's licence);
- b. the provision of such services as a secondee of the insured firm;
- c. any insured acting as a personal representative, trustee, attorney, **notary**, insolvency practitioner or in any other role in conjunction with a practice;
- d. the provision of such services by any employee; and
- e. the provision of such services pro bono;

"but does not include:

- a. discharging the functions of any of the following offices or appointments:
 1. judicial office;
 2. Under Sheriffs;
 3. members and clerks of such tribunals, committees, panels and boards as the Council may from time to time designate but including those subject to the Tribunals and Inquiries Act 1992, the Competition Commission, Legal Services Commission Review Panels, Legal Aid Agency Review Panels and Parole Boards;
 4. Justices' Clerks; or
 5. Superintendent Registrars and Deputy Superintendent Registrars of Births, Marriages and Deaths and Registrars of Local Crematoria.

"The other relevant clauses and definitions under the MTCs are as follows:

1. a) Clause 1.1 of the MTCs indemnifies "each insured against civil liability to the extent that it arises from *private legal practice* in connection with the *insured firm's practice*...."
2. b) "Insured firm's practice" is defined in the glossary as "the legal *practice* carried on by the insured firm as at the commencement of the period of insurance....." ; and
3. c) "practice" is defined as "the whole or such part of the private legal practice of an authorised body as is carried on from one or more offices in England and Wales". Accordingly provided the work (in this case the notarising) was carried out from an office in England and Wales, there is cover under the policy subject to policy terms and conditions. There is no restriction in relation to where proceedings against an insured are issued. The only exclusion permitted under by the MTCs are those that are set out in clause 6 and the only relevant exclusion on this issue is under clause 6.7 of the MTCs which excludes cover for an award of punitive, exemplary or like damages under the law of the United States of America or Canada, other than in respect of defamation.

The provision reads as follows:

6. Exclusions

The insurance must not exclude or limit the liability of the insurer except to the extent that any claim or related defence costs arise from the matters set out in this clause 6.
.....

7. Fines and penalties

Any:

- (a) fine or penalty; or
- (b) **award of punitive, exemplary or like damages under the law of the United States of America or Canada, other than in respect of defamation;** or
- (c) order or agreement to pay the costs of a complainant, regulator, investigator or prosecutor of any professional conduct complaint against, or investigation into the professional conduct of, any insured.

"There is an England and Wales law and jurisdiction provision in the MTCs or policy wording, but this only relates to disputes or claims in relation to the MTCs themselves. It does not impact *Claims* as defined under the MTCs. It reads as follows:

8. Law and Jurisdiction

These MTC and any dispute or claim (including non-contractual disputes or claims) arising out of or in connection with them or their subject matter or formation shall be governed by and construed in accordance with the law of England and Wales and subject to the jurisdiction of the courts of England and Wales.

Notary Practicing Independently and not within a SRA-regulated firm

A Professional Indemnity policy will generally have an operating Jurisdiction and/or Geographical area in which the insurers are stipulating within which region the policy would act to provide legal expenses cover (Defence Costs) & compensation in the event of a claim brought against you.

In my experience, if the Jurisdictions and/or Geographical limits are noted as follows, the insurers are providing the following:

1. Geographical &/or Jurisdiction is noted as UK - The insurer is providing cover against claims brought against you in the UK and Channel Islands only.
2. Geographical &/or Jurisdiction is noted as Worldwide excluding US & Canada - The insurer is providing cover against claims brought against you in the anywhere in the world excluding US & Canada.
3. Geographical &/or Jurisdiction is noted as Worldwide - The insurer is providing cover against claims brought against you in the anywhere in the world.

Please noted that an insurer may provide a variation of Geographical Limits and Jurisdiction limits, as per the example below:

Jurisdiction: Worldwide excluding US and Canada.
Geographical: Worldwide

In this example the insurer is covering documents issued worldwide, however they will not cover judgements or legal defence costs brought against you within a US/Canada court.

During a recent conversation with a number of Notaries this week, we discussed the potential for a judgement or court claim being brought against a UK Notary at length. During our conversation we summarised that the acts a Notary are undertaking are generally for UK residents and therefore as such should a claim arise the court action would likely be registered in a UK court, even if the document Notarised was for use in the US, for example a time share property sale in Florida. In the event of a claim

"arising the likely chances of a claim being brought before a US/Canada court in these circumstances are slim but not impossible.

The client in example above would have a right to determine in which country to bring the litigation. If the UK notary is covered for the US/Canada within the terms of the policy and the client appoints a US solicitor and actions through the US Court, the Notary unwittingly would find themselves in very difficult position, trying to defend themselves and hold a reserve of funds for any potential compensation award.

The more prevalent risk of a claim being brought against a UK notary for specific documents used in the US is when you are dealing with a US citizen or registered/based company. For example, US army personally [*personnel?*] based here in the UK sending their verified tax returns to the US. The claim or loss to the US citizen may not occur until several years later, by which time they have returned to the US. If the UK notary is at fault for this loss, the US client is more likely to raise the claim in a US court.

Summary

To summarise if you're trading as a Notary within a SRA regulated firm the MTC extension should cover your acts. We would always recommend however for complete assurance you speak with your solicitor PI insurer or broker to get their confirmation.

If you are trading as an independent Notary outside of a regulated SRA firm or SRA practicing certificate, you will need to ensure that your Notary PI Insurance is extended to include US/Canada works."

- 2.6 In addition to variations in the cover offered by PI insurers for Notarial work, there are also some differences in the nature and extent of information requested from Notaries by Insurers/Brokers on taking out/renewing policies. These differences appear to relate to whether the Notary is also a Solicitor; is also a Solicitor but has a separate PI policy in respect of the Notarial practice; or is not a Solicitor-Notary.
 - 2.6.1 Last year, I carried out an inspection of the practice of a Solicitor-Notary in a large, multi-office, regional firm of Solicitors, which had two other Notaries. In the application for renewal of cover for that year, the firm's PI insurers had not asked for any information whatever about the Notarial work carried on by them. The fee income generated from Notarial work appeared to be regarded as insignificant; regardless of the nature of the Notarial work undertaken.
 - 2.6.2 Although that was not typical in relation to PI cover for Notaries in a Solicitors' firm, my experience from inspections that I have carried out in the past five years is that, on annual renewal of cover, less information (financial and otherwise) is requested in relation to the work carried out by these Solicitor-Notaries.

- 2.6.3 By contrast, Brokers arranging cover for one of the Inspectors (not in practice as a Solicitor) ask for the gross income from Notarial work in the last completed financial year and the estimated gross income for the forthcoming financial year; with a percentage split of the income in the last completed financial year between commercial and private Clients. If cover is required for the USA or Canada, then an estimate of the percentage of the income in the last completed financial year "which may be exposed to claims first brought in the USA or Canada" is required. The Brokers ask for the Insured to "outline the exposure you have in these jurisdictions in a covering letter".
- 2.6.4 The Insurers for another Inspector (a Solicitor-Notary but with separate PI policy in respect of the Notarial practice) ask for similar information in relation to the last 12 months period: asking for a geographical split of the income between the UK; the EU; USA/Canada not subject to USA/Canada jurisdiction; USA/Canada subject to USA/Canada jurisdiction; and 'Rest of World'; plus, the value of largest invoice in the past 12 months. The Insurers specifically note that the Insured must make a "fair presentation of the risk to us at inception, renewal and variation of your Policy. This means that you must tell us about all facts and circumstances which may be material to the risks covered by your Policy in a clear and accessible manner or give us sufficient information to alert us of the need to make enquiries about such facts or circumstances. Material facts are those which are likely to influence us in the acceptance of or assessment of the terms or pricing of your Policy. If you are in any doubt as to whether a fact is material, you should tell us about it."
- 2.6.4 The other Inspector (again a Solicitor-Notary but with a separate PI policy in respect of the Notarial practice) is also asked for similar information: fee income in the previous year; the last complete year; the current year and an estimate for the year of cover; with for a geographical split of the income in these years between work carried out for UK Clients; work carried out for US/Canadian Clients not subject to USA/Canada jurisdiction; work carried out for US/Canadian Clients subject to USA/Canada jurisdiction; and work carried out for Clients 'anywhere else in the World' (with details of the countries concerned). Additionally, the Insurers ask whether contracts are entered into that are not subject to "UK/EU law" and, if they are, then which countries and jurisdiction.

This policy - similar to my own (see below) - is a policy for general professions.

- 2.6.5 So far as my own insurance arrangements have been concerned, I retired from practice as a Solicitor in 2011 and my PI cover was changed from a policy (issued by Zurich) from a Policy of Qualifying Insurance under the Solicitors' Indemnity Insurance Rules 2003 - including cover for work as a Notary - to cover under a Zurich 'Professional Indemnity for General Professions (Civil Liability)' Policy.

Under the Solicitors' Policy of Qualifying Insurance, I dealt directly with Zurich and was asked for gross fee income for the last three completed accounting period and an estimate for the current accounting period, apportioned between

Clients in the UK; the USA/Canada; and elsewhere. I was required to provide details of Clients outside the UK, the work undertaken for them and whether "the work involved advice on UK, US, Canadian or other law" (with details). I was also to state whether any one Client or group of Clients generated 20% or more of my annual fee income and, as that was the case, to give details of the Clients; the fees earned and the work undertaken.

Since 2011, I have had to apply through Brokers for my current cover under Zurich's 'Professional Indemnity for General Professions (Civil Liability)' Policy. The Brokers ask for my gross fee income in the current financial year; the previous year and an estimate for the forthcoming year: apportioned between work where the notarised documents will be used in the UK; in Europe; in the USA or Canada; and in 'Other Countries' and including the split between commercial and private Clients. In relation to work where the notarised documents will be used in the USA/Canada and in 'Other Countries', I give, on a country-by-country basis, the number of invoices and the total fees for the countries concerned.

Additionally, between 2011 and 2018, and in addition to my Notarial acts, I advised Clients on commercial transactions as a Notary. During those years, I was required to provide Zurich (with the Clients' consent) with summary information on the matters concerned and the amount of each invoice.

I am required to confirm each year that, in respect of my Notarial work, I "will only engage under the Law of England and Wales".

3. General Observations

3.1 Documents

In principle, the range of documents 'connected' with the USA that a Notary in England or Wales might be called on to notarise is no different from those 'connected' with any other country. Some documents will be notarised for Clients who are nationals of the UK or a third country; others for Clients who are US citizens who are temporarily in this country or who are permanently resident here.

(In passing, the guidance prepared by Mr. Solis and Ms. Screech which is reproduced in # 2.5 referred to notarisation of tax returns of US army personnel based in the UK. This seems unlikely. The US Internal Revenue Form 1040 (U.S. Individual Income Tax Return) is a self-declaration made by the taxpayer 'under penalties of perjury'. It is not notarised. Separately, as a general matter, US military personnel based here are unlikely to go to a local Notary for any notarisation work as, under US federal law (10 U.S. Code § 1044a) US military officers and other employees of a military department designated by US regulations or by statute have the general powers of a notary public in the USA and of US Consuls to perform any notarial act executed by members of any of the US uniformed services and for 'persons serving with, employed by or

accompanying the US armed forces outside the United States'. Of particular practical importance (!), § 1044a provides that 'no fee may be paid to or received by any person for the performance of a notarial act authorized by this section.'

Some - perhaps - many of these documents 'connected' with the USA will pose no, or insignificant, risk to a Notary or an Insurer: for example, an application by a US parent to renew a minor's passport; an application to renew a driving license issued by a US state; a parent's consent for a child to travel to, and in, the USA with a grandparent; verification that a person is still alive for the purposes of the receipt of a pension from a US source; applications for certificates of birth, marriage or death in a US state; and so on.

The risk inherent in other documents that might perhaps be described as being of 'more substance' - such as documents prepared in connection with commercial, real estate or probate matters - will generally be alleviated by the fact that the document concerned has been prepared by, or under the supervision of, Counsel in the USA.

This is not to deny that liability may exist; or that the issue is a 'storm in a teacup'.

3.2 Liability issues

3.2A Liability in respect of a US document notarised by a Notary in England and Wales can arise:

3.2A.1 Under contract law, or the law of negligence, of England and Wales.

3.2A.2 Under state laws in the USA. (Liability might also arise in the particular circumstances of a document governed by US federal law but that is beyond the scope in this memorandum).

3.2A.3 It is also said that Notaries in England and Wales 'owe a duty to the transaction'.

3.2B As to liability under US state laws, Alfred E. Piombino - then described as 'the nation's, and New York's, leading expert on Common law Notarial practice' - summarised the position as follows in his Notary Public Handbook (National Edition, 1997):

"A subject of great concern to many notaries public revolves around the issue of legal liability in connection with performing notarial acts. The notary public assumes full legal responsibility for all of his actions. However, the best method, of limiting his liability is a complete understanding of his duties and responsibilities.

Frankly speaking, if a notary public performs his duties correctly and carefully, he can be reasonably assured that he will not expose himself to significant legal liability. Virtually every civil suit and criminal charge involving a notarial act is the direct result of the notary public acting in a careless or negligent manner. Notary public errors and omission insurance coverage is available. However, in the event that a notary

"public acted dishonestly, fraudulently or maliciously, the insurance coverage would likely not protect him. Before purchasing any insurance policy, a notary public should request a sample policy to review with his attorney.

As an officer authorized to take the acknowledgment or proof of execution of conveyances/instruments or certify acknowledgments or proofs, the notary public is personally liable for damages to persons injured as the result of any wrongdoing on his part.

[...]

A notary public commits malfeasance if he performs an act which he has no legal right or authority to do so. All activities which are positively unlawful such as giving legal advice, drawing legal papers for another person, forgery, etc., are examples of malfeasance.

Misfeasance is committed when a notary public improperly performs a legally authorized act. Examples include issuing a false certificate, post or pre-dating an official certificate, charging a fee in excess of the lawful amount, taking an affidavit known to be false, etc. Nonfeasance is committed when a notary public has omitted an act which he has a duty to perform. It can represent a total neglect of duty.

Examples include a notary public not requiring an affiant to sign an affidavit or deposition before him, or the act of a notary public merely attaching his official signature and notary rubber stamp to a paper presented to him without performing any of his legally required duties.

Negligence is committed if a notary public fails to use the necessary standard or degree of care required in a situation. A key element in the determination of negligence is the question of whether or not another notary public, acting reasonably and prudently, would perform similarly in an identical situation. An example of negligence would be a notary's failure to identify [an appearer] who is not personally known to him."

In #1.5 in this memorandum, I mentioned Ian Blaney's comment that the Faculty Office is aware of some diversity of opinion including some notaries who consider that the notarisation in England or Wales of a US prepared document for application in the US would not give rise to an insurable US event." Additionally, some insurers seem to focus solely on England and Wales and a contractual governing law (between the Notary and a Client).

These are, misconceptions in my view, which results from the following propositions. A court in the United States may have 'personal jurisdiction': the ability to exercise power over a particular defendant (in this context, the Notary) but always subject to two over-riding restrictions from the Due Process Clause of the US Constitution. First, the defendant must have such contacts with the forum state that the exercise of jurisdiction would be fair and reasonable; and, secondly, that the defendant must be given appropriate notice of the action and the opportunity to be heard.

The defendant must have 'such minimum contact' with the forum state that the exercise of jurisdiction would be fair and reasonable [*International Shoe Co. v. Washington* 326 U.S.310 (1945)]. The defendant's contact with the forum state must result from 'purposeful availment' with that forum; not by accident. 'Purposeful availment' can include making money from a transaction related to the forum state (in this context, earning a fee for notarising a transaction document). It must be foreseeable that the defendant's activities make the defendant amenable to suit in the forum state and the defendant must know, or reasonably anticipate, that the defendant's activities render it foreseeable that the defendant may be 'haled into court' there.

The US Supreme Court in *International Shoe* required that the exercise of 'personal jurisdiction' must not offend 'traditional notions of fair play and substantial justice'. Although the Court did not discuss that factor in detail, one factor amongst those it listed as being relevant in the assessment of whether the exercise of jurisdiction by a forum state would be fair and reasonable was a plaintiff's interest in obtaining convenient and effective relief. So - it would be said in the case of the Notary defendant - if other parties are already before the forum court on an issue in which it is argued, for example, that the Notary's alleged negligence caused or contributed to loss suffered by the plaintiff, the plaintiff should not be put to the inconvenience and expense of instituting separate proceedings against that Notary in England and Wales. The Notary defendant (or Insurers, if there are any) would no doubt complain that the US forum is inconvenient. However, the US Supreme Court has stated that the Due Process Clause of the US Constitution does not require that the forum elected by the plaintiff should be the best of several possible choices. The forum is constitutionally acceptable unless it is 'so gravely difficult and inconvenient that a party is unfairly put at a severe disadvantage in comparison to his opponent [*Burger King v. Rudzewiez* 471 U.S. 462 (1985)].

That is my reasoning. Of course, it can always be said that one Attorney is wrong in any litigation.

3.3 The Practicalities

Aside from the issues of malfeasance and misfeasance mentioned referred to in #3.2B in this memorandum, it seems to me that, in practice, a Notary may become liable for a claim in respect of a Notarial Act in two principal situations. The first - to borrow an A-ML phrase - is by becoming 'involved in the underlying transaction': either by altering a document without reference to the US document provider (perhaps at a weekend or in a situation where the Notary's Client needs a document notarised and returned to the USA as a matter of urgency in view of an imminent real estate closing) or by giving advice. As to the latter, in my continuing education course and materials on "US Documents - A Practical Approach" for 'Year 1' Notaries under supervision, I deal with a situation where, in a letter to the Client, a Document Provider requires the Notary to explain the effect of the document to the Client (which is not an uncommon situation), I warn against doing so, with these comments: "If the document is governed

"by NY state law and it is within my competence as a NY Attorney then I will explain the effect of the document but I am a commercial attorney - not a real estate attorney - and I certainly would not give advice to a Notarial Client on NY real estate documents or security interests; or any document governed by the laws of a US state other than NY. Of course, it's in most people's natures to try to be helpful but in your individual cases, I suggest you ask yourselves two simple questions: am I competent to do it and am I insured to do it?"

With the best of intentions, Notaries may stray into either of these minefields: altering documents 'in an emergency' or giving advice.

The second of my principal situations in which a Notary may become liable for a claim in respect of a Notarial Act is where there is a factual error in a document which the Notary should have picked up but did not. Liability may arise under the Notary's contract with the Client or to a third party in negligence (or perhaps in respect of a breach of the so-called 'duty to the transaction'). The situation is perhaps best explained by an example that I warn against in my 'US Documents' materials:

"A Client sent me copies of a number of documents that had been sent to her by her Attorney in Florida and which she required notarising in connection with her sale of a Florida property. Among them was a 'Closing Affidavit' which included the following paragraph:

"Seller understands that Section 1445 of the Internal Revenue Code provides that a Buyer of a United States real property interest must withhold tax if the Seller is a foreign person. To inform the Buyer that withholding of tax is not required upon purchase of the above-described property, Seller certifies the following:

*a. Seller is **not a non-resident** [my emphasis] alien individual, foreign corporation, foreign partnership, foreign trust or foreign estate for purposes of United States federal income taxation.*

[b.-d. other matters omitted]

Seller understands the Buyer of the described property intends to rely on the foregoing representations in connection with the United States Foreign Investment in Real Property Tax Act (FIRPTA). Seller understands this certification may be disclosed to the Internal Revenue Service by the Buyer and that any false statements contained in this certification may be punished by fine, imprisonment or both. Seller has authority to sign this certification as either individual Seller or on behalf of an entity Seller. Under penalty of perjury, Seller states that this declaration was carefully read and is true and correct."

The Client was a UK citizen: resident and tax resident in the UK (not the USA). The double negative "Seller is not a non-resident alien individual" obviously came from the Attorney's standard-form document but was totally incorrect in relation to this Client.

The withholding tax is (subject to certain *de minimis* provisions, or where clearance against the withholding tax is obtained – which does not seem to happen in practice) 15%. The property concerned sold at a substantial price.

The consequences of making an unwitting false declaration are obvious. If the IRS managed to claim back from the US Buyer the amount of tax that should have been withheld, the Buyer could or would claim against the Seller for recovery of the amount, interest and costs. And somewhere along the line – maybe because the Seller wants to claim an indemnity or maybe because the Seller just cannot be found – someone will decide to have a go at the Notary in the UK who administered the Affidavit.

On the basis – not that we should be giving advice on the content of the document; let alone foreign laws – but that we have a duty to make sure that a Client understands what s/he is signing, my view is we should all be looking out for this tax issue.”

I have seen affidavits containing this particular double-negative on a number of occasions.

4. Closing Comments

- 4.1 In their guidance (refer to #2.5 in this memorandum) Mr. Solis and Ms. Screech helpfully explain Insurers’ use of ‘Geographical’ and ‘Jurisdiction’ in relation to cover.
- 4.2 I do not think it is appropriate for Brokers to give any advice on the scope of cover needed by a Notary. In the situation referred to in # 1.2 of this memorandum (and refer also to #2.3), the Brokers concerned gave an opinion that they “did not see the need to extend the policy to worldwide jurisdiction (including USA and Canada). This would be on the understanding that the insured is working for UK clients only and that *[sic]* the clients to whom he is providing the service is under UK law and not written/signed under USA Law.”

My co-Inspector colleague who dealt with that inspection pointedly asked the question, in a note to me, “[would] the brokers regard their statement as legally binding to the extent that they would indemnify [the Notary] if he were to be sued successfully in connection with a matter for the USA/Canada?” Clearly not.

Separately, in the part of the Solis/Screech guidance related to “Notary Practicing Independently and not within a SRA-regulated firm” there is an attempt to summarise where a claim might be made against a Notary:

“... the acts a Notary are undertaking are generally for UK residents and therefore as such should a claim arise the court action would likely be registered in a UK court, even if the document Notarised was for use in the US, for example a time share property sale in Florida. In the event of a claim the likely chances of a claim being brought before a US [...] court in these circumstances are slim but not impossible”.

The Solis/Screech guidance also referred to circumstances in which the authors considered “the more prevalent risk of a claim being made against a UK Notary for specific documents used in the US”.

Concentrating on the general issue of claims being brought in the USA where there is some alleged fault on the part of a Notary, I do not see how it is helpful to categorise the chances of a claim as 'slim'; alternatively, 'more prevalent'. My personal assessment is that - always assuming that the potential claim is of sufficient value to make it worth bringing in the first place - if it is only against the English/Welsh Notary or only against the Notary and another party or parties resident here, then the claim will likely be brought in the courts here (particularly in view of what is referred to in the USA as 'the English rule on costs' which is not of general application in the USA). However, if the claim is against a party or parties resident in the USA, or known to the US plaintiff to have assets in the USA, then the US plaintiff will file suit in a US court and if there is alleged fault on the part of the Notary, then an application will likely be made to add the Notary as a defendant. (There will be a supposition on the part of the US plaintiff's advisers that the Notary is insured).

The Solis/Screech guidance also stated that "the client [my emphasis] would have the right to determine in which country to bring the litigation". If the claim against the Notary is simply a claim in contract by the Notary's Client, then that may be so: subject, of course, to the provisions of the contract. However, if there is alleged fault on the part of the Notary and another person has suffered loss, then the claim by that person will be in negligence and that person will have the opportunity to choose the jurisdiction in which the claim is brought. The Notary's Client will not necessarily have control over the matter.

In #3.2B in this memorandum, in explaining why I thought that the view of some Notaries, as expressed to the Faculty Office, that notarisation of a US prepared document for application in the US would not give rise to an insurable US event was misconceived, I dealt with the circumstances in which a US court could take 'personal jurisdiction' in relation to a claim against a Notary here. It is not necessary, for the purposes of this memorandum, to go into whether the suit would be brought in federal court or a state court.

- 4.3 In the note in the November 'Notary News', the Notaries Society advised its Members to check PI insurance to be sure that the cover for US work will extend to claims being brought outside of the UK. Clearly, it is more than prudent to do so.

Whether this issue of the extent of cover for US (and Canadian) work should be taken further and, for example, become a regulated matter is obviously not a matter for me. However, as I said at the outset, I hope this memorandum will be useful to the Advisory Board.

Yours sincerely,

