United States House of Representatives
Committee on the Judiciary
Subcommittee on Courts, the Internet and Intellectual Property

A Hearing on H.R. 1458, A Bill To Enhance Interstate Recognition of Notarized Documents

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INTRODUCTION AND BACKGROUND INFORMATION

I am pleased to appear and provide the following testimony before the subcommittee on Courts, the Internet, and Intellectual property in support of H.R. 1458 which would provide enhanced recognition of affidavits and other notarized documents. I appreciate the opportunity to testify today in support of legislation which would require recognition of notarized documents from state to state because, from my perspective and experience as a practicing attorney, this is an important issue that needs attention.

My law practice is located in Bloomfield Hills, Michigan, which is a suburb of Detroit. I have had the pleasure during my career to practice in several different legal areas, from clerking on the Michigan Supreme Court, to serving as Special Assistant to the Assistant Attorney General for the Criminal Division of the United States Department of Justice, to practicing commercial and other litigation. My current practice at The Googasian Firm is entirely in litigation, and I represent corporations and individuals in civil law suits. I am not a notary public, but I deal with and rely on notarized documents in my practice. In fact, notarized documents, and the recognition of notarized documents in courts in my state, are an integral part of my practice. Legislation requiring recognition of affidavits from other states is needed badly, and I am pleased the panel is considering this legislation.

THE NEED FOR LEGISLATION ENHANCING INTERSTATE RECOGNITION OF NOTARIZED DOCUMENTS

Many documents require notarization, including the affidavits that I and countless other lawyers rely on for a myriad of reasons in our daily practice. Black's Law Dictionary defines an affidavit as "[a] voluntary declaration of facts written down and sworn to by the declarant before an officer authorized to

administer oaths, such as a notary public." Black's Law Dictionary, 8th Ed, 2004. An affidavit becomes notarized when the notary public before whom the affidavit is sworn confirms on the face of the affidavit that the person signing the affidavit is actually the person identified by name in the affidavit. Affidavits and other notarized documents are used for numerous purposes in everyday business transactions, personal and real estate transactions, and in court proceedings as well. In court cases, affidavits are used at every stage of litigation as a means of putting sworn testimony before a court without the necessity of calling witnesses physically to appear and testify. Affidavits are required to support certain types of claims and defenses, as well as to support and oppose motions for summary judgment seeking to dismiss cases. *Id.* Affidavits are an efficient and expedient way to provide the factual testimony needed in many court proceedings and serve to reduce the cost of litigation and use of court time. The legislation under consideration by the committee would modernize and streamline the use of affidavits in state and federal courts.

Streamlining the use of affidavits and other notarized documents from state to state is important because we live in an age of national and global competition where speed is increasingly essential to success in business and litigation. The difference between accomplishing a goal or failing, closing a deal or letting it slip away, winning a customer or client or losing it to the competition, or prevailing in litigation is often determined by speed and efficiency. The advanced technology we enjoy and use in our professions, including our wireless phones, the internet, our pda's and other mobile handheld devices and laptop computers, is in large measure a result of this relentless demand for speed and efficiency.

We live in an electronic age and many of the transactions that we engage in on a daily basis are completed electronically. Today, the business, organization or government office without a website seems

the exception, rather than the rule. Consumers every year make an ever increasing portion of their annual purchases with their credit cards over the internet. The U.S. Census Bureau has reported that e-commerce for the fourth quarter of 2005 was $22.9 billion, an increase of 23% from the same period the year before. [1] Total e-commerce sales for 2005 were estimated to be more than $86 billion, an increase of more than 24% from the year before. *Id.*

No longer satisfied with dial-up internet access, which struck many users with awe and wonder when it first appeared, more and more Americans and others from around the world are now insisting on, and paying for, broadband high speed internet access. The Federal Communications Commission reported in December 2004 that the number of high speed internet lines was increasing at a rate of 38% per year.[2]

Speed and efficiency are the hallmark of effective business in 2006. In his book, Business @ The Speed of Thought, author Bill Gates wrote:

> If the 1980s were about quality and the 1990s were about reengineering, then the 2000s will be about velocity. About how quickly the nature of business will change. About how quickly business itself will be transacted. About how information access will alter the lifestyle of consumers and their expectations of business. Quality improvements and business process improvements will occur far faster.[3]

The ease and speed of technology in general and the internet in particular in this electronic age permeate every aspect of the government as well as the private sector. Twenty years ago if a constituent wanted to

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[1]U.S. Census Bureau Quarterly Retail E-Commerce Sales, 4th Quarter 2005, available at www.census.gov/mrts.www/ecomm.html.

[2]High-Speed Services for Internet Access: Status as of June 2004, FCC Industry Analysis and Technology Division, Wireline Competition Bureau, December 2004, available at www.fcc.gov/wcb/stats.

[3]www.microsoft.com/billgates/speedofthought/looking/chapter.asp.

find a particular government document she would write her representative and request it and a copy might be sent by mail or she might be able to obtain it by traveling to her local library. Today, that same constituent can obtain the document instantly and inexpensively, as I did in preparation for my testimony today, by simply accessing it through a high-speed internet connection.

In addition to its efforts to provide information electronically, our federal government has also put e-commerce to work in its own transactions. Effective October 10, 2000, federal legislation instructs that "[t]he head of each executive agency... shall establish, maintain, and use, to the maximum extent that is practicable and cost-effective, procedures and processes that employ electronic commerce in the conduct and administration of its procurement system." 41 U.S.C. 426.

Just as legislation exists that requires the heads of executive agencies to use e-commerce, many other laws on the federal and state level have been changed to keep up with velocity of electronic transactions. Congress has taken steps to ensure that advances in the speed of business aren't hindered by outdated laws. The Electronic Signatures in Global and National Commerce Act, located at 15 U.S.C. 7001, for example, sets forth certain principles to "promote the acceptance and . . . use of electronic signatures." 15 U.S.C. 7031. The first principle is to "remove paper-based obstacles to electronic transactions," to "[p]ermit parties to a transaction to have the opportunity to prove in court or other proceedings that their authentication approaches and their transactions are valid." In short, the act instructs that the secretary of commerce shall promote the ability to engage in electronic transactions and to have those transactions recognized and enforced in a court of law. *Id.*

The act also provides that a "a signature, contract or other record relating to [any transaction in or affecting interstate or foreign commerce] may not be denied legal effect, validity, or enforceability solely because it is in electronic form." 15 U.S.C. 7001. My home state of Michigan, along with approximately 40 other states, has adopted the Uniform Electronic Transactions Act. This important legislation provides, among other things, that an electronic signature is as good as a written signature, and that a record or signature shall not be denied legal effect simply because it is in electronic form.

Consistent with Mr. Gates' writings, state and federal courts have heeded the need for modernization and the efficiency offered by the digital age. Electronic filing is now in place in federal courts across the country. In the Eastern District of Michigan, where my practice is located, the federal court now accepts electronic filings, only, with limited exception. Michigan's state courts are rolling out electronic filing as well.

But with all the recognition and encouragement of e-commerce and the willingness of business, consumer, courts, and government alike to recognize and accept the validity of electronic transactions, and despite all of these technological advances and the changes in federal and state laws that have become necessary in order not to hamper business in the 21st Century, there is at least one area where we are still stuck in the 19th century. It is in the area of recognition of out of state notaries where some states are, sadly, 140 or 150 years behind the times.

Michigan is a prime example of why legislation that enhances the recognition of affidavits from other states is essential. In Michigan, a law written in 1879 governs the recognition of affidavits from other states. This post-civil war law has been held to provide that an affidavit notarized outside the state of

Michigan cannot be considered by a judge or admitted into evidence unless it has been " certified by the clerk of any court of record in the county where such affidavit shall be taken, under seal of said court." Mich. Comp. Laws § 600.2102. The "certification" required consists of an examination of an affidavit or other notarized document by a government official and confirmation by that official that the notary is a licensed, qualified notary and that the signature on the document is, in fact, that of a notary. In order to obtain certification, an affidavit must be taken or sent to the certifying official who must review it and make the certification, and the certified document returned. Depending on the identity of the government official, the backlog of documents awaiting certification, and the location of the government official, certifying an affidavit can take days or weeks to complete, making it very inefficient by today's technologically advanced standards.

Over the years organizations like the National Conference of Commissioners on Uniform State Laws ("NCCUSL") and the National Notary Association have recognized the need for modernizing and unifying state laws governing the recognition of affidavits and other notarized documents from other states. These groups have urged states to unify their laws to provide for the recognition of documents notarized outside the state without special certification or authentication of the type required by Michigan's 1879 statute. One of those efforts was the Uniform Recognition of Acknowledgments Act ("URAA"), which was proposed during the 1960's. In its prefatory note to the URAA, the NCCUSL explained the need for uniform legislation on recognition of notarial acts performed outside a particular state:

> Need for Uniformity. The major need for uniformity is the need of notaries and persons outside the enacting state who have been asked to notarize a document for use in the enacting state. . . [a] major use outside the enacting state is by personnel of the Armed

> Forces of the United States who are asked by persons connected with the Armed Forces installation to perform a notarial act for use elsewhere.
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> A uniform act on the subject of recognition of acknowledgments is becoming increasingly more imperative as more and more citizens of the United States are employed by the federal government and American industry away from their state of origin or property management. [Uniform legislation] would substantially help . . . .citizens and residents conduct affairs having significance in [one] state at places wherever they happen to be at the time the notarial act is performed.

The need for uniformity today is significantly greater than it was 40 years ago when the URAA was proposed because today, more of our citizens choose to locate or do business away from their home states and business is increasingly conducted outside state lines.

In 1969, Michigan adopted the URAA which provided that an affidavit notarized outside Michigan is valid and is to be recognized without further proof of the notary's authority if it was properly notarized in the state in which it was signed. MCL 565.262-263. Until recently, it was widely believed that the URAA had done away with any requirement that affidavits from other states required any authentication before they could be admitted into a Michigan court. In June of last year, however, the Michigan Court of Appeals ruled, despite the URAA, that Michigan's 1879 law controlled and that Michigan courts would not recognize affidavits from other states that have not been authenticated by the clerk of the court of the county in which the affidavit was notarized.[4]

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[4]Copies of the opinions from Michigan Court of Appeals are attached as Exhibits 1 and 2. Numerous groups submitted legal briefs urging that these decisions were erroneous. The witness briefed this issue on behalf of the State Bar of Michigan as well as the National Notary Association, urging the Court to rule that the affidavits were valid under the URAA.

Michigan's refusal to recognize affidavits from other states without certification creates both inefficiency and injustice. Certification is inefficient because it adds delay and expense to everyday transactions. Instead of being able to submit an affidavit directly, the affidavit must be sent to the certifying official. This entails first determining the identity of the certifying official which can be a difficult task in and of itself. Next, delay is caused while the document is sent to the official and certification is completed. Certification can be costly, particularly where delay is unacceptable and there is a need to expedite the certification process. And certification serves little, if any purpose.

But outdated state laws that refuse to accept affidavits and other notarized documents from other states may cause injustice as well. The literal language of Michigan's statute, for example, requires not just certification, but certification by a particular government official – the clerk of the court of the county in which the affidavit was notarized – from whom certification may not be available. This law was enacted in the late 19th century when, apparently, the clerks of local courts actually provided certification. In many states today, the clerk of the county court no longer authenticates affidavits. Today, authentication is in some states performed by the Secretary of State and in others is performed at the local level, but not by the clerk of a court. As a result, Michigan may refuse to recognize valid affidavits from many sister states.[5]

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[5]In 1981, the United States joined the Hague Convention and agreed, among other things, to recognize affidavits from other Hague Convention countries. Those countries joining the Hague Convention agreed to do away with the old system of requiring "legalization" of documents, and instead, to accept documents that had been authenticated by a certain public official and bear the "apostille." There are those who would argue that under current Michigan law even authentication from the highest levels of another states government – an apostille – may not be admissible in Michigan. This creates the potential and illogical situation that an affidavit from Florida that must be recognized by the governments of such far-flung countries as Armenia, Botswana, Figi, Serbia and Montenegro, Malta, and Tonga may be refused recognition in the state of Michigan. See www.state.gov/m/a/auth/c1267.htm and

A review of the U.S. Notary Reference Manual, published by the National Notary Association, reveals that in seven of the thirteen states whose representatives appear on this subcommittee, including California, Florida, Wisconsin, Massachusetts, Utah, Tennessee and New York, certification by the clerk of the local court is not available. As a result, Michigan may refuse to recognize valid affidavits from these states.[6]

The refusal of a state to recognize documents notarized out of state creates real world problems for lawyers, businesses, and individuals as well as the very real threat of injustice. A few examples may be helpful to illuminate just what problems may be caused:

Example #1: A troubling situation confronts creditors. Each year, retail creditors including large department stores, home centers, auto companies, and credit card companies are required to file thousands of lawsuits to collect millions owed to them. These businesses have extended credit to Michigan's consumers and need to enforce their accounts. The individual accounts are relatively small, but the total amount owed by these individual debtors to out of state creditors collectively is large. Lawyers for these creditors use Michigan's streamlined statutory scheme for collections by creditors which requires the submission of an affidavit verifying the debt owed. Mich. Comp. Laws § 600.2145. This affidavit must be filed within 10 days of its signing in order to create a statutory presumption that permits the entry of a default judgment. *Id.* Many creditors, including auto companies located in Michigan, have their credit

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www.state.gov/m/a/auth/c1268.htm.

[6]In response to arguments from the various organizations submitting briefs in support of recognition of out-of-state affidavits, the Michigan Court of Appeals indicated that the issue whether recognition of affidavits from states where the clerk of the court does not certify affidavits was a problem for the legislature to fix, not the courts.

operations in other states, and the employees who possess the knowledge necessary to sign the affidavit verifying the debt are located outside Michigan. Creditors now face the difficult, expensive, and inefficient task of obtaining authentication for each and every affidavit submitted to collect on a debt. The delay caused by obtaining authentication – which usually involves receiving the affidavit by mail, forwarding the affidavit by mail to the appropriate authenticating official, waiting for the official to receive and process the affidavit, then waiting for the affidavit to return by mail before it can be filed – may result in the affidavits being filed more than 10 days after their signing. This, in turn, may make Michigan's streamlined debt collection process unavailable to creditors and subject them to costly and inefficient litigation.

Example #2: A corporation located in California is sued in a Michigan state court based upon a belief that the corporation is the parent corporation of a local business with a similar name. The California corporation has no connection with the local business being sued and seeks to file a motion for summary judgment, supported by an affidavit from its CEO that there is no relation between the two corporations. Certification is not available from the court clerk in California, and the CEO may be forced to fly to Michigan (or another state where certification can be obtained from the court clerk) in order to execute an affidavit admissible in a Michigan court.

Example #3: A world renowned forensic expert is located within the state of New York, and a local county prosecutor in Michigan wants to retain that expert to provide an opinion on the validity of an audio recording. By statute in New York, authentication is no longer performed by the clerk of the local court, but instead by the Secretary of State, and the expert may therefore be unable to submit in a Michigan court an affidavit notarized in New York. The prosecutor may face the choice of either incurring the

expense of having the expert travel to Michigan to execute an affidavit or simply foregoing the use of the expert.

Example #4: A mother relocates to Florida with her children following a divorce. She and her ex-husband become involved in a custody dispute and the ex-husband files a motion in the Michigan court that granted the divorce seeking a change in custody. By Florida statute, authentication can only be performed by the Florida Secretary of State and the clerk of the court is no longer permitted to certify affidavits. Fla. Stat. Ann. § 117.103. The mother needs to provide evidence to the Court in order to preserve her parental rights, but the Michigan court may not recognize the affidavit she wishes to submit because she cannot obtain court-clerk authentication of her Florida affidavit.

Other examples of the problems caused by the refusal of states to recognize notarizations from other states are as innumerable as the situations where those documents are required.

CONCLUSION

Legislation like H.R. 1458 and the alternative that has been offered would greatly increase the efficiency of our courts and aid businesses and individuals alike. As a practicing lawyer, I encourage the subcommittee to further this legislation and strongly support its passage. I would again like to thank the committee for its attention today.

Respectfully submitted,

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