

Acknowledgements

By: Steven Farber and Michael Kelly

Published in the New York Law Journal on June 7, 1999

As underwriting counsel for a title insurance company, we are constantly asked by our clients to review various forms of real property instruments to ensure their recordability. One of the most important aspects of our review is to make sure that the correct form of acknowledgement is used. It is well known that the register's offices throughout the state of New York demand strict compliance with the recording statutes and they [the register's offices] will not accept instruments for recordation without the correct form of acknowledgement being attached to the real property instrument. Using the correct form of acknowledgement sometimes causes confusion to practitioners because of the different guidelines that each of our register's offices throughout the state of New York may have. This is especially true when taking acknowledgements outside of the state.

In an attempt to alleviate the confusion and simplify the requirements for acknowledging real property instruments, the New York State Real Property Law was amended by Chapter 179 of Laws of 1997 and Chapter 596 of Laws of 1998, to add sections 309-a and 309-b to Article 9 ("Recording Instruments Affecting Real Property"). RPL 309-a prescribes the use of two new uniform forms of acknowledgments to be used when taking acknowledgments within the state of New York. RPL 309-a provides that these new forms may be used now, but requires the use of them on and after September 1, 1999. There is a certificate of acknowledgement to be used when the person executing the particular instrument appears before the individual taking the acknowledgement. There is also a certificate for a proof of execution by a subscribing witness.

The universality of use of the acknowledgement was accomplished by defining the term "person" very broadly:

The term "person" means any corporation, joint stock company, estate, general partnership (including any registered limited liability partnership or foreign limited liability partnership), limited liability company, professional service limited liability company (including a professional service limited liability company), foreign limited liability company (including a foreign professional service limited liability company), joint venture, limited partnership, natural person, attorney in fact, real estate investment trust, business trust or other trust, custodian, nominee or any other individual or entity in its own or any representative capacity.

As a result of this all-encompassing definition, practitioners no longer have to be concerned with using different forms of acknowledgments for individuals, corporations, limited partnerships, limited liability companies or power of attorneys, etc. Instead, they can (and must after September 1, 1999) use the uniform forms with all real property instruments. It is important to note that RPL 309-a and 309-b contain the phrase "conform substantially" when prescribing the uniform forms. While a strict interpretation would permit the alteration of these uniform forms, it is suggested to



***First American
Title Insurance Company
of New York***

use the forms as is. The register's offices throughout the state are already familiar with the forms and appear to prefer the forms to remain unchanged. Accordingly, our experience tells us to simply add the new uniform forms of certificate of acknowledgement and certificate for a proof of subscribing witness into your word processors. The one caveat to this suggestion is to supply the register's offices with the prior recording information for a previously recorded power of attorney. With the use of these new forms of acknowledgement, acknowledging instruments within New York should be a relatively simple process.

In this global economy, however, practitioners must often deal with documents executed outside of New York. The procedure for having these documents acknowledged so that they can be recorded in New York is a minefield that can trap the unwary. The legislature attempted to simplify this procedure, but problems remain. The problems can arise in two general areas, the first being the form of acknowledgement used, and the second being the person or officer actually taking the acknowledgement.

In general, the form of acknowledgement must conform either to the laws of New York, or to the laws of the place where the acknowledgement was taken. This being the rule, selecting the proper form used to be a relatively simple matter. Either one would send a standard New York document out of state to be executed and acknowledged using the printed form of acknowledgement already on the document, or the standard form for the particular jurisdiction was used and completed according to local law and custom. After the passage of RPL 309-a, however, the Secretary of State of New York expressed some doubt that the new form of acknowledgement, although conforming to the Laws of the State of New York, could be used for acknowledgements outside New York, particularly with reference to corporations. In response to those concerns, a new section 309-b was enacted, which sets forth a form of acknowledgement that may be used after September 1, 1999. The difference between a 309-a acknowledgement and a 309-b is that 309-b omits the second line from the customary venue heading and adds a line on the end stating "that such individual made such an appearance before the undersigned in the _____" with directions to insert the place where the acknowledgement was taken. The reason for this change is unclear. Section 309-b also established a form for an acknowledgement by a subscribing witness taken out of state, with the same changes from the 309-a form. What is important to note is that the 309-a and 309-b forms are neither identical nor interchangeable.

The question then arises as to what form of acknowledgement to use when sending New York documents out of state for execution after September 1, 1999. Certainly a 309-b form would be acceptable, but the introductory paragraph in that statute says that the form may be used, in contrast to 309-a which states that form must be used. 309-b (3) also specifically states that it does not modify the choice of laws afforded by RPL 299-a and RPL 301-a. Since one of the choices in those statutes is conformity with the laws of New York, does that include a 309-a form. Although a reasonable interpretation of the statutes may imply that, a county clerk or New York City Register probably would not accept it for recording, based on the directive from the Secretary of State, *supra*. In addition, there are many non-statutory forms of acknowledgement that are widely accepted in New York, relating to partnerships, powers of attorney, fiduciaries, and the like. It would seem that these are no longer acceptable after September 1, 1999. Until the Secretary of



***First American
Title Insurance Company
of New York***

State sends a new directive to the County Clerks as to what is acceptable, the safest course would be to use the 309-b form.

However, many acknowledgements will not conform to RPL 309-b or any other New York form, but instead will be in conformity with the laws of the jurisdiction in which they are executed. As mentioned above, this is acceptable, but it is not enough to get the document recorded. If the document is executed outside New York, but within the United States, a Certificate of Conformity, certifying that the acknowledgement conforms to the laws of that Jurisdiction, is also required. This certificate can be executed by an attorney at law admitted in New York and a resident of that jurisdiction, or an attorney at law admitted in that jurisdiction. If the acknowledgement was taken by an official other than a Notary Public, or a Judge or presiding officer of a court having a seal, a Certificate of Authentication, attesting to the powers of that official, must also be obtained. The procedure for such a certificate is detailed and the statute should be consulted.

Similar rules govern an acknowledgement taken outside the United States. If the form does not conform to RPL 309-b, a Certificate of Conformity must be obtained. In this situation, the persons who can execute this certificate include an attorney at law admitted in New York and resident of the foreign country, a consular official of the United States resident in that country, and a consular official of that country resident in the State of New York. It does not include an attorney at law admitted only in that foreign country. Certain officials other than a Notary Public are permitted to take the acknowledgement. If the official taking the acknowledgement is other than a diplomatic or consular agent of the United States, or a judge or presiding officer of a court with a seal, a Certificate of Authentication must also be obtained. (A Notary Public in Canada is excepted from this rule.) In lieu of these certificates of conformity or authentication, many countries have subscribed to the Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents, which has established a common certificate, called an Apostille, which, when affixed to a document, will entitle it to be recorded.

This is by no means the end of the possibilities for the acknowledgements of documents executed out of state. Acknowledgements may be taken pursuant to Federal statutes, and these types of acknowledgements also entitle documents to be recorded notwithstanding the state statutes. There is no Federally proscribed form of acknowledgement, (although some federal forms such as a Military Power of Attorney have a generic form of acknowledgement) so these statutes deal primarily with the officials empowered to take the acknowledgement. Members of the armed Forces can avail themselves of various officers and officials for notarial services, as can persons serving with or employed by the Armed Forces outside the territory of the United States. However, members of the Coast Guard can obtain notarial services from their officers only in time of war or national emergency, or in Alaska or areas beyond the continental limits of the United States. It should be noted that New York State has similar, but not identical provisions for acknowledgements by persons in the Military. Prisoners incarcerated in, and persons employed by Federal Prisons can have documents acknowledged by Wardens, superintendents, and similar officials. Acknowledgements taken outside the United States are commonly taken by United States Consular officials, acting within the limits of the Consulate. An important exception to this is



*First American
Title Insurance Company
of New York*

Taiwan, with whom we have no official relations, but the American Institute in Taiwan provides the similar services there.

We must remember that taking acknowledgements, although appearing to be a routine task, is an integral part of the instruments that we draft and must be dealt with carefully and accurately.



*First American
Title Insurance Company
of New York*

UNIFORM FORM CERTIFICATE OF ACKNOWLEDGMENT
(Within New York State)

State of New York)
County of _____) ss.:

On the ____ day of _____ in the year ____ before me, the undersigned personally appeared _____, personally known to me or proved to me on the basis of satisfactory evidence to be the individual(s) whose name(s) is (are) subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their capacity(ies), and that by his/her their signature(s) on the instrument, the individual(s), or the person upon behalf of which the individual(s) acted, executed the instrument.

Signature and Office of individual
taking acknowledgment



First American
Title Insurance Company
of New York

UNIFORM FORM CERTIFICATE OF ACKNOWLEDGMENT
(Outside of New York State)

State, District of Columbia, Territory, Possession, or Foreign
Country _____) ss.:

On the ___ day of _____ in the year _____ before me, the undersigned, personally appeared _____, personally known to me or proved to me on the basis of satisfactory evidence to be the individual(s) whose name(s) is (are) subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their/ capacity (ies), that by his/her/their signature(s) on the instrument, the individual(s), or the person upon behalf of which the individual(s) acted, executed the instrument, and that such individual made such appearance before the undersigned in the _____. (Insert the city or other political subdivision and the state or country or other place the acknowledgment was taken).

(Signature and office of individual taking acknowledgment.)



First American
Title Insurance Company
of New York

UNIFORM FORM CERTIFICATE OF PROOF OF EXECUTION
BY A SUBSCRIBING WITNESS
(Within New York State)

State of New York)
County of _____) ss.:

On the ____ day of _____ in the year ____ before me, the undersigned personally appeared _____, the subscribing witness to the foregoing instrument, with whom I am personally acquainted, who, being by me duly sworn, did depose and say that he/she/they reside(s) in _____ (if the place of residence is in a city, include the street and street number, if any, thereof); that he/she/they know(s) _____ to be the individual described in and who executed the foregoing instrument; that said subscribing witness was present and saw said _____ execute the same; and that said witness at the same time subscribed his/her/their name(s) as a witness thereto.

Signature and Office of individual taking proof



First American
Title Insurance Company
of New York

UNIFORM FORM CERTIFICATE OF PROOF OF EXECUTION
BY A SUBSCRIBING WITNESS
(Outside of New York State)

State, District of Columbia, Territory, Possession, or Foreign
Country _____) ss.:

On the __ day of _____ in the year ____ before me, the undersigned, personally appeared _____, the subscribing witness to the foregoing instrument, with whom I am personally acquainted, who, being by me duly sworn, did depose and say that he/she resides in _____ (if the place of residence is in a city, include the street and street number, if any, thereof); that he/she knows _____ to be the individual described in and who executed the foregoing instrument; that said subscribing witness was present and saw said _____ execute the same; that said witness at the same time subscribed his/her name as a witness thereto; and that said subscribing witness made such appearance before the undersigned in _____. (Insert the city or other political subdivision and the state or country or other place in which the proof was taken.)

(Signature and office of individual taking proof.)



First American
Title Insurance Company
of New York