

**Michigan Supreme Court**  
State Court Administrative Office  
309 N. Washington Square, P. O. Box 30048  
Lansing, Michigan 48909  
(517) 373-4835  
John D. Ferry, Jr., State Court Administrator

**M E M O R A N D U M**

**DATE:** July 26, 2002

**TO:** Chief Judges  
**cc:** Circuit Court Administrators, Probate Court Administrators, Probate Registers,  
District Court Administrators

**FROM:** John D. Ferry, Jr.

**SUBJ:** SCAO Administrative Memorandum 2002-09  
Consular Notification and Access

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**Introduction**

The United States is subject to various international legal obligations requiring in certain situations affecting a foreign national in this country that the foreign national's consulate be contacted. One of these legal obligations comes from the United States being a signatory to the Vienna Convention on Consular Relations (VCCR). Other such obligations arise from numerous bilateral agreements the United States has entered into with individual nations. The VCCR and the bilateral agreements have the status of treaties for purposes of international law and Article VI, clause 2, of the United States Constitution. As such, they are binding on federal, state, and local government officials to the extent they pertain to matters within such officials' competence.

Court-relevant consular notification requirements arise in four types of situations: arrests and detentions of foreign nationals; deaths of foreign nationals; appointments of guardians or trustees for foreign nationals; and accidents involving foreign ships or aircraft.

**Arrests and Detentions of Foreign Nationals**

Article 36 of the VCCR reads, in part, as follows:

With a view to facilitating the exercise of consular functions relating to nationals of the sending State:...

(b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in person, custody or

detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph.

As applied to the United States, this provision requires the “competent authorities” of this country (the State *receiving* a foreign consul) to *offer* to an arrested, incarcerated, or otherwise detained foreign national that the consulate of the foreign national’s country (the State *sending* a foreign consul to our country) be informed of his or her status. However, for over 50 countries there are additional bilateral agreements in place with the United States *mandating* that consulates from any one of those countries be notified if one of their foreign nationals is detained while in this country.

The United States Department of State, through its publication, *Consular Notification and Access* (hereafter, *CNA*), indicates that the term “competent authorities” is “understood to mean those officials, whether federal, state, or local, who are responsible for legal action affecting the foreign national and who are competent, within their legal authorities, to give the notification required.” [*CNA*, p.18] Hence, the “law enforcement officers who actually make the arrest or who assume responsibility for the alien’s detention ordinarily should make the notification” in cases of arrest or detention. [*CNA*, p.18] In these types of cases, however, the State Department does suggest a role for the judiciary:

Because they do not hold foreign national in custody, judicial officials and prosecutors are not responsible for notification. The Department of State nevertheless encourages judicial officials who preside over arraignments or other initial appearances of aliens in court to inquire at that time whether the alien has been provided with consular notification as required by the VCCR and/or any bilateral agreement providing for mandatory notification. [*CNA*, pp.18-19]

The State Department indicates that detention prompting consular notification can include detention in a hospital, “if the foreign national is detained pursuant to governmental authority (law enforcement, judicial, or administrative) and is not free to leave.” [*CNA*, p.19] Hence, it would appear that in cases of the court-ordered involuntary commitment of a mentally ill foreign national to a hospital that the relevant court may be the competent authority for consular notification purposes.

## **Deaths of Foreign Nationals**

Article 37 of the VCCR reads, in part, as follows:

If the relevant information is available to the competent authorities of the receiving State, such authorities shall have the duty:

- (a) in the case of the death of a national of the sending State, to inform without delay the consular post in whose district the death occurred.

The State Department indicates that notification in such cases “should be made by the appropriate state or local authority, be it a coroner or a probate court official.” [*CNA*, p.19] In a similar fashion to the detention situation discussed above, in the case of a decedent estate matter or other matter involving establishment of death, where the decedent is a foreign national, probate courts should inquire during the proceedings as to whether the individual’s consulate has been notified.

## **Appointments of Guardians or Trustees for Foreign Nationals**

Article 37 of the VCCR reads, in part, as follows:

If the relevant information is available to the competent authorities of the receiving State, such authorities shall have the duty:

- (b) to inform the competent consular post without delay of any case where the appointment of a guardian or trustee appears to be in the interests of a minor or other person lacking full capacity who is a national of the sending State. The giving of this information shall, however, be without prejudice to the operation of the laws and regulations of the receiving State concerning such appointments.

Since guardian or trustee appointments are made by courts, the latter should be considered the “competent authorities” for notification under this provision of the VCCR. [See *CNA*, p.19] Probate courts have exclusive jurisdiction to hear matters involving trustee appointment, and so consular notification of the appointment of a trustee to the benefit of a foreign national would always be made by such a court. Most guardians are appointed through probate court proceedings; the family division of circuit court has ancillary jurisdiction to make such appointments. Whichever court makes the appointment of a guardian for a minor foreign national or for a foreign national “lacking full capacity” (supposedly this would include both incapacitated individuals as well as developmentally disabled individuals) should follow the consular notification requirements of the VCCR.

## **Accidents Involving Foreign Ships or Aircraft**

Article 37 of the VCCR reads, in part, as follows:

If the relevant information is available to the competent authorities of the receiving State, such authorities shall have the duty:

- (c) if a vessel, having the nationality of the sending State, is wrecked or runs aground in the territorial sea or internal waters of the receiving State, or if an aircraft registered in the sending State suffers an accident on the territory of the receiving State, to inform without delay the consular post nearest to the scene of the occurrence.

The State Department recognizes that depending upon the state or locality, and upon the nature of the accident, the competent authorities for purposes of consular notification may vary. Courts dealing with matters which involve such accidents (including, for instance, an action before the probate court to establish the death of an individual who is the victim of an accident or disaster) may consider inquiring during the proceedings as to whether the relevant consulate has been notified.

## **Additional Information**

More information and instructions on the requirements under the VCCR and bilateral agreements, and on how to contact foreign embassies and consulates, can be found in the State Department publication referenced above – *Consular Notification and Access*. The document is available on the Department’s website at [http://www.state.gov/www/global/legal\\_affairs/ca\\_notification/ca\\_prelim.html](http://www.state.gov/www/global/legal_affairs/ca_notification/ca_prelim.html). The Michigan Forms Committee will be considering whether to change or develop SCAO forms to help courts in implementing relevant requirements under the VCCR and bilateral agreements.