OREGON LAW COMMISSION

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REVISED UNIFORM LAW ON NOTARIAL ACTS

Work Group Report

HB 2834

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Submitted to the
Oregon Law Commission on
March 20, 2013

I. Introduction:

The Uniform Law Commission (also known as the National Conference of Commissioners on Uniform State Laws (NCCUSL)) created the Uniform Law on Notarial Acts in 1982 to provide a uniform standard for notaries public across jurisdictions. In 2010 the Uniform Law Commission drafted the Revised Uniform Law on Notarial Acts (RULONA) to update and modernize the original Act and include electronic records and electronic commercial transaction laws. Like the original Act, RULONA provides a minimum standard for the laws regarding notaries public and brings uniformity to the notarization of electronic records as that medium continues to gain popularity.

II. History of the Project:

RULONA is a comprehensive revision of the original Uniform Law on Notarial Acts; the original Uniform Act was enacted in Oregon in 1983. The majority of the original act as Oregon adopted it has not been amended since its original enactment into law.

Oregon Law Commission Work Group member Tom Wrosch, of the Oregon Secretary of State's Corporation Divisions, served as an advisor to the national RULONA drafting committee. The Oregon Secretary of State's office and Uniform Law Commissioner Lane Shetterly both requested that the Commission review RULONA for possible adoption into Oregon law. Until now, the Oregon Legislative Assembly has not considered implementing RULONA into Oregon law.

The Oregon Law Commission staff assembled the RULONA work group in the summer of 2012 by direction of the Program Committee of the Oregon Law Commission and with the Commission's approval. The work group's mission was to evaluate the RULONA and determine how to best reconcile it with Oregon's current law, found in ORS Chapter 194. Members of the work group included: Chairperson Professor Bernie Vail, Lewis & Clark Law School; Dee Berman, Oregon Association of County Clerks; Lisa Ehlers, Oregon Law Commission Legal Assistant and Notary Public; Mike Eliason, Association of Oregon Counties; Amber Hollister, Oregon State Bar; Pat Ihnat, Fidelity National Title; Renee Koleen, Curry County Clerk; Diane Schwartz Sykes, Oregon Department of Justice; Kenneth Sherman, Sherman Sherman Jonnie & Hoyt; and Tom Wrosch, Oregon Secretary of State's Office. Staff for the work group included Ted Reutlinger, Legislative Counsel Office, and Wendy Johnson, Oregon Law Commission.

The work group held meetings on July 11, 2012, August 8, 2012, September 17, 2012, and November 9, 2012. Further discussion occurred via email in November and December. Ted Reutlinger circulated a draft of the bill, LC 243, prior to the July 11, 2012, meeting. The first draft represented an attempt to translate RULONA into traditional Oregon statutory vernacular and formatting. The work group spent the July 11, August 8, and September 17, 2012, meetings reviewing the provisions of LC 243 with discussion of the new RULONA provisions and current Oregon law found at Chapter 194. The work group focused much of its attention on the heart of LC 243—sections 1 through 40. In light of the comments and the

consensus reached on the issues discussed during the July, August and September meetings, Ted Reutlinger drafted a revised version of LC 243 that was circulated to work group members via email on November 26, 2012. After receiving corrections to that draft, Ted Reutlinger circulated a final draft via email on December 21, 2012. In February 2013, LC 243 was introduced in the House Judicial Committee at the request of the Oregon Law Commission as HB 2834.

III. Statement of the Problem:

RULONA is an update of the notary law that addresses the societal, technological, and economic changes that have occurred since the promulgation of the first Uniform Law on Notarial Acts in 1982 and the codification of the Act in Oregon in ORS Chapter 194 (Notaries Public Chapter). Of primary concern is the dramatic increase in the use of electronic records in commercial, governmental, and personal transactions. There have been several uniform acts regarding electronic transactions, which many states have adopted, that place electronic records on par with tangible paper records.[1] These acts all recognize the validity of electronic notarial acts.[2] However, the only mention of electronic documents in Oregon's notarial acts law is found at ORS 194.582, which provides only that electronic signatures may be used whenever an electronic document requires a signature. That is, the Notaries Public Chapter still fails to address electronic documents. Oregon added this electronic signature reference in 2001 when Oregon passed the Uniform Electronic Transactions Act. RULONA would fully update Oregon law to include processes and rules for notarization of electronic documents. Also, as a uniform act, RULONA seeks to unify disparate state treatment of notarial acts on tangible media and electronic media, unify notarial procedure, and generally ensure the integrity and reliability of notarized transactions.

IV. Why Enact Now?

To date, North Dakota and Iowa have adopted RULONA into their state laws. Nevada introduced the bill this year. In order to realize the efficiency afforded by the uniform nature of the act, the ULC urges each state to enact RULONA as soon as possible to ensure consistency across jurisdictions.

RULONA has received widespread endorsement by practitioners and stakeholders. The American Bar Association's Real Property Section and Science and Technology Section endorsed RULONA and the American Bar Association's full House of Delegates endorsed the Act. In addition, the National Notary Association, the American Society of Notaries, and the Property Records Industry Association all endorse RULONA. The Oregon Secretary of

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[1] *See e.g.,* Uniform Electronic Transactions Act (1999) ("UETA"), codified at ORS 84.001-84.070, in 2001. The federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. 96 (2010) ("ESign") and Uniform Real Property Electronic Recording Act (2004) ("URPERA") were not enacted in Oregon but have been enacted in 25 other states.

[2] UETA §11; ESign §101(g); URPERA §3(c).

State's office similarly supports RULONA. Oregon's present statutes are particularly out of date.

V. Section-by-Section Analysis and Explanation of the Bill:

Section 1. Short title: This section provides the name of the act and allows for easier keyword searches once the Act is integrated into the Oregon Revised Statutes.

Section 2. Definitions: The corresponding section in current Oregon law is ORS 194.005(1) – (8) and ORS 194.505. RULONA continues many definitions found in Oregon law that are generally equivalent. However, some nonuniform definitions were carried over from current Oregon law due to unique circumstances in Oregon law, along with a few new nonuniform definitions that were added to reduce confusion.

One example of carrying over current Oregon law into HB 2834 is the definition of Commercial Paper (ORS 194.005(1)). This definition is found in HB 2834 at Section 2(3). The work group determined that it is necessary to maintain consistency for those who use this chapter in combination with negotiable instrument law found in ORS Chapter 73.

One source of new definitions is the work group's effort to clarify which state officials have notarial authority as part of their official position. This effort arose because of several work group members' concern that there is general confusion about which officials in Oregon have authorization to carry out notarizations and/or acknowledgments under color of statutory or other legal authority. The work group identified many positions of public officials in local government that are believed to rely on or have explicitly requested the authority to perform notarial acts and acknowledgments as part of their official duties. The work group also found that Oregon laws do not properly identify all of these eligible groups in a central statutory location. In section 2, the bill defines "clerks of a court of the state", "in a representative capacity", and "judge" to clarify and detail who has authority. See HB 2834 §2(2), (6), (7) and §9(1). To reduce confusion, the work group decided it is best to formally identify and list these officials in statute. Oregon's complex judicial organizational structure (i.e. with county judges, justices of the peace, etc.) makes it particularly necessary to spell out.

The work group reached a consensus to remove the definition of "good moral character" found at ORS 194.005(3) because of the ambiguous and unworkable nature of the standard as used to evaluate the ethical conduct of notaries public. Instead, the HB 2834 provides new language for identifying acts that preclude prospective notary public applicants from receiving or renewing a commission. That provision is found in section 22.

To maintain consistency with current Oregon law, the work group agreed that RULONA's references to "or embossed on" should not be used because all documents must be affixed with the notary public's official stamp. An embossment cannot be substituted for an official stamp. However, a notary may both emboss and stamp a document. See ORS 194.031(1)-(7). The work group found Oregon's policy better than the uniform act in this area because photocopies do not pick up embossing marks.

Section 3. Authority to perform a notarial act: The content of this section is similar to current Oregon law found at ORS 194.012, 194.100, and 194.158(1), which all pertain to the scope of the notary public's position. RULONA adds and Oregon would adopt new language in this provision that codifies a conflict of interest rule. However, it must be noted that this conflict of interest rule was already in practice because the Oregon handbook for notaries public provides that notaries should not notarize documents for which they have a beneficial interest. Unfortunately, the phrase "direct beneficial interest" is not defined in the Act. It must also be noted that transactions are voidable if a notary performs a notarial act with respect to a record to which the notary has a direct beneficial interest. The work group decided against trying to specify exactly what interests are covered under "direct beneficial interest," and intentionally chose to leave the issue for the courts to settle as it will continue to be a fact-specific issue. While ORS 194.100 previously codified a conflicts rule, that rule only applied to banks and financial institutions. With HB 2834, all notaries will be covered.

Section 4. Requirements for certain notarial acts: This section is substantially similar to ORS 194.515(1) to (5). The requirements contained in this section identify what is involved when a notarial officer takes an acknowledgment of a record, takes verification on oath or affirmation, witnesses or attests a signature, or certifies or attests a copy of a record. The bill also directs that matters involving the making or noting of a protest of a negotiable instrument are located at ORS 73.0505.

Section 5. Personal appearance required: Although this section is a new provision, ORS 194.515(3) already implies a "presence" requirement anyway and that has actually been the practice. Section 4(c) formally adopts a presence requirement by mandating that "the individual making the statement or executing the signature" appear before the notarial officer. Appearance by webcam does not meet the presence requirement.

Section 6. Identification of individual: This section brings significant changes to Oregon notary public law. The first change is that while current Oregon law requires current identification to be used, RULONA (and now HB 2834) allows identification that expired not more than three years prior to performance of the notarial act. See Section 6(2)(a). The purpose for this policy is to be less restrictive to sections of the population who frequently do not have up-to-date identification because they no longer drive or have less opportunity to timely renew their identification. The thought process behind this policy in RULONA is that the identification is not truly less capable of being used to identify the individual in the weeks, months, and even a couple years after it expired. More importantly, to restrict notarization in such a way that disallows individuals who have difficulty maintaining current identification creates an additional barrier for these individuals to conduct normal business and only exacerbates their alienation from normal participation in essential civic activities. The elderly, the hospitalized, and undocumented immigrants were noted as three groups that have particular problems with present identification requirements. That is, while many of these individuals may have an expired driver's license that is no longer valid for driving, that same driver's license still serves as an adequate way to identify the individual.

While most commercial notary interests are in favor of the expired identification provision because it will ease business transactions involving individuals who often do not have current identification, other commercial interests (notably, banks) expressed concern that allowing pieces of identification to be valid beyond their expiration date would violate

accepted commercial practices. The work group acknowledged this concern, but the work group also noted that two provisions of the new bill would mediate the risks in the expired identification provision. First, according to section 6(3), notaries are permitted to request that the individual seeking the notarial act provide additional information or identification credentials to confirm the identity of the individual. Second, section 7 allows a notary public to refuse to perform a notarial act if the notary is not satisfied that the individual has the necessary competency and capacity, that the individual's signature is not knowingly and voluntarily made, or because the individual has not provided sufficient identification credentials necessary to confirm the identity of the individual.

The second significant change in this section involves the credible witness identification. The RULONA allows the witness to be unknown to the notary as long as the credible witness can produce valid identification and knows the person seeking the notarial act. See section 2(2)(b). Previously, only credible witnesses personally known to the notary could serve to identify the individual seeking the notarial act. Like the new expansion to allow the use of expired identifications, the policy behind this provision in RULONA is to increase access to notarial acts, especially in communities where notaries are less prevalent and more individuals struggle to maintain current identification.

In light of the variety and variation of physical descriptions currently in use on some pieces of government-issued identification cards and documents, the work group also discussed the need for additional clarification on what would be accepted. The work decided on recommending that the individual's signature and picture be required on the identification. See section 6(2)(a) and (b). Having this standard ensures reliability in verification.

Section 7. Authorization to refuse to perform notarial act: As mentioned in the discussion for section 6, there is no requirement in the act that a notary is compelled to perform a notarial act. Thus, the notary always retains the right to refuse to perform a notarial act if the notary has legitimate concerns about authenticity, identification or capacity of the individual requesting performance. A notary has broad discretion over whom the notary agrees to provide notary services, except for situations involving unlawful discrimination prohibited by law (e.g. civil rights, etc.). This position codifies existing policy previously found in the Oregon Notary Handbook.

Section 8. Signature if individual unable to sign: Work group members summarily confirmed that this is an important new section since it allows a proxy to sign for individuals who are temporarily disabled or permanently disabled. An individual can still use a signature stamp if they have one (see definition of signature that is a "tangible symbol"). A tangible symbol can include a stamp, an X, a signature, etc. Compare ORS 194.578. This new section fixes what has been a simple but real problem (e.g. a person with a broken arm, etc.). Work group members noted that there is a similar provision for wills that allows a proxy.

Section 9. Notarial act in this state: As mentioned in section 2 above, the work group gave serious consideration to clarification of precisely which state officials are authorized to perform notarial acts. Additionally, the work group received requests from government officials who already perform duties similar to notarial acts, some of whom previously had authority to perform notarial acts in the recent past (county clerks had clear authority before

the court reorganization). In part to reduce confusion and to improve access to notarial acts, the work group modified the language of RULONA (section10) and current Oregon law (ORS 194.525) to clarify that county clerks (or the county appointee, for counties that do not have the county clerk position), clerks of the court, and all forms of municipal and county judges—including justices of the peace—have authority to perform a notarial act under HB 2834. This special language is necessary to cover Oregon's unique judicial forms that vary throughout the state.

Similar to the current law found at ORS 194.525(2), section 9 now includes subsection 2, which clarifies that the notarial acts performed under the authority of other states, federally recognized Indian tribes, federal authority, and recognized multinational or international governmental organizations all have the same effect under the law of Oregon as if performed by an Oregon notary public.

Section 10. Notarial act in another state: This section is essentially the same as ORS 194.535, and thus has no difference from current law other than to reduce any redundancy present in ORS 194.535(2). The work group recognized that Oregon adopted the Uniform Acknowledgment Act, which is the foundation for this and similar statutes. In short, Oregon will generally recognize notary acts performed in another state.

Section 11. Notarial act under authority of federally recognized Indian tribe: The content of this section corresponds to current Oregon law found at ORS 194.558. In short, Oregon will generally recognize notary acts performed under authority of federally recognized Indian tribes.

Section 12. Notarial act under federal authority: While this section corresponds to current Oregon law found at ORS 194.545, the work group discussed the possibility of clarifying the section by identifying the individuals that have been granted authority to perform notarial acts under federal authority. For instance, it was suggested that subsection (1)(b) could include a list of individuals in the military that are authorized to perform notarial acts under federal law. The goal behind this would be to allow individuals questioning whether someone holding him or herself out as having notarial powers could be easily confirmed.

Research revealed, however, that the federal authorization underpinning this grant of authority is not conducive to reproduction within this statute, and thus the ultimate goal of making it easier to ascertain the legitimacy of the a notary operating under federal authority would not be helped by attempting to include all of the military officials (or any of the other individuals authorized under federal authority) in HB 2834. That is, the list in federal law is long and complicated and not conducive to listing within Oregon statute.

Section 13. Foreign notarial act: Aside from a change of terms from "foreign nation" to "foreign state," this section remains substantially the same as current Oregon law found at ORS 194.555. A reference to an official seal has been omitted to reflect the change away from embossing in favor of an official stamp only. In short, Oregon will generally recognize notary acts performed under the jurisdiction of a foreign state or an international governmental organization.

Section 14. Certificate of notarial act: Much of the current law on certificates of notarial acts has been retained from ORS 194.565. This section provides that a notarial act must be evidenced by a certificate and the details of the certificate requirements are listed. As mentioned earlier, the work group agreed to remove any reference to "or embossed on" (usually mentioned in tandem with stamping) in RULONA because of the earlier work group decision that embossing alone should remain insufficient under Oregon law due to the photocopying problems inherent with embossing.

Also, the work group agreed that the HB 2834 should retain the current law found at ORS 194.565(1) that allows the notary to correct the date of expiration on the certificate for errors. It states "omission of [date of expiration] information may subsequently be corrected." The work group expanded this provision to allow notaries to subsequently correct any information included or omitted from the certificate (see subsection 14(2)). The work group's rationale for allowing a notary to correct all aspects of the certificate come from the notion that if the notary is otherwise trustworthy enough to maintain his or her commission and make corrections to the date of commission expiration, the notary might as well be able to correct or include any information that was omitted from the certificate. The valid but unlikely concern with forged certificates is valid in either circumstance, and is not intensified by the expansion of the notary's power to correct the certificate. In the end, the work group decided that the undue cost and delay associated with receiving notarized documents with an invalid certificate warrants notaries having the authority to correct invalid certificates.

The work group also agreed that the form certificate should be revised to also "contain the name of the person for whom the notarial act is performed[.]" (See section 14(1)(d)). This seemed like an omission in RULONA.

Section 15. Short form certificates: This section includes only minor changes to existing law that deal with change of phrasing from "seal" to "stamp," (explained above), and dropping the "(and Rank)" from the form with the understanding that title is sufficient. Otherwise, it is essentially the same as current Oregon law under ORS 194.575. Although the work group entertained a suggestion that this section could be referred to as simply "form certificates," the work group decided to keep "short" in the title in cognition that long form certificates are still valid and some people still use them.

Section 16. Official stamp: Much of the substance of the RULONA version of this section essentially already exists in Oregon law by administrative rule. See OAR 160-100-0100. One issue that the work group considered is whether the requirement specified in ORS 194.031(1) for black ink should be maintained in light of an interest expressed by some clerks to have the standard change to blue ink to order to make the stamp more legible. However, the work group determined that other states have reversed course after experimenting with colors other than black after discovering that colors do not photocopy well. HB 2834 would ultimately replace ORS 194.031(1) with section 16(2): "[the stamp must] [b]e a legible imprint capable of being copied together with the record to which it is affixed or attached or with which it is logically associated." The work group further decided that any requirement regarding ink color could be achieved by rulemaking power, as provided in Section 26 of the act, to allow for flexibility and compromises.

Section 17. Stamping device: Current law found at ORS 194.154(1)(a) requires the notary to return the stamping device to the Secretary of State when the notary's commission is resigned or revoked. ORS 194.154(1)(b) directs a notary whose commission expires under normal conditions to destroy the seal (stamp) as soon as it is reasonably practical. HB 2834 reflects a policy change in RULONA that instructs notaries who are resigning their commission to also disable the stamping device by destroying, defacing, damaging, erasing or securing the device against use, instead of notaries returning the stamp to the Secretary of State. The work group decided that it is best not to burden the Secretary of State's office with retrieving and receiving stamps of notaries whose commissions had expired or voluntarily resigned. However, it is important for notaries whose commissions have been revoked to be required to return their stamps because these notaries can no longer be trusted to destroy their stamps.

Section 18. Journal: The work group devoted a significant portion of at least two meetings discussing the rules surrounding recording rules for journaling, exceptions to journaling, and who is to maintain possession of the notary's journal after the notary's commission ends.

Like the rules for destroying or remitting the notary's stamp to the Secretary of State after a notary's commission ends, journals pose a similar problem of what to do with a notary's journal when a commission ends because of death, non-renewal, resignation or revocation. Current Oregon law, found at ORS 194.154(2), requires the notary to "dispose of the notarial journal and records pursuant to rules adopted by the Secretary of State within 30 days after the effective date of the resignation, revocation or expiration, whichever occurs first." Additionally, ORS 194.154(3) allows former notaries who intend to reapply for a commission within 90 days after expiration to delay disposal of the journal until the expiration of that period. The difficulty with the current system, according to work group members with experience at the Secretary of State's office, is that it puts a significant burden on the Secretary of State to store old notary journals, and enforcement is impossible. Work group members, however, also expressed the competing interest for keeping the journals in the possession of the Secretary of State to make the record accessible for verification purposes.

RULONA provides flexibility for journal policy by allowing states the option to select one of two different courses of action. One option directs the notary public to retain the journal and inform the Secretary of State's office of where the journal is stored. Another option would direct the former notary public to transmit the journal to the commissioning agency or an approved repository approved by the commissioning agency.

The work group determined that the benefit of having the Secretary of State receive the journal is greatest when a notary's commission has been revoked because the journal may be important evidence for prosecuting the notary. As a result, the work group drafted HB 2834 to maintain current law that requires a notary whose commission has been revoked to remit the notary's journal to the Secretary of State's office within 30 days. (Section 18(7)).

RULONA's policy for notaries public that die or are adjudged incompetent corresponds to current Oregon law; the deceased notary's personal representative must submit the notary's journal to the Secretary of State. For notaries public that resign or let their commission expire, HB 2834 requires the former notary to "retain the journal for 10 years after the

performance of the last notarial act chronicled in the journal." (Section 18(1)). Additionally, HB 2834 allows notaries to enter into agreements with their employer to keep the notary's journal after their employment ends, as current Oregon law allows. (Section 18(10)).

RULONA also allows flexibility for states to choose whether to limit notaries public to one journal. ORS 194.152(1) permits notaries to maintain "one or more chronological journals of notarial acts." The work group elected to maintain the current language in recognition that maintaining only one journal is impractical given current practices of notaries operating separately in commercial setting as part of the notary's employment and outside of their employment. Still, one journal is preferred and the journaling should be chronological.

Although the work group decided to adopt the new policy in RULONA directing the notary to make entries in the journal contemporaneously with the performance of the notarial act under subsection (3), subsection (4) allows single entries to suffice for certain duplicate notarial acts or situations involving multiple statements or signatures on the same date for the same person.

Also, while RULONA does not make any allowance for exceptions to the journaling of notarial acts, HB 2834 subsection (11) provides nonuniform exceptions to journaling currently codified in ORS 194.152(1) including the following: (a) recording a protest of commercial paper; (b) administering an oath or affirmation; (c) certifying or attesting a copy of a document; (d) taking an affidavit; (e) verifying a billing statement for media advertising; and (f) taking a verification upon oath or affirmation. The Oregon State Bar remains the main proponent for continuing the exceptions to journaling. Law offices conduct a lot of notarizations and requiring journaling is time consuming.

Section 19. Notification regarding performance of notarial act with respect to electronic records: This section reflects an acknowledgment in RULONA that many forms of electronic notarization are found in the market and no one electronic system has become the de facto standard. Because electronic notarization remains an area that continues to experience significant changes on a regular basis, the work group determined the regulation of electronic notarization remains best left to the Secretary of State to control under its rulemaking authority as this section provides.

Section 20. Commission as notary public; qualifications; no immunity or benefit: This section deals with the application and qualifications for becoming a notary. The language laying out the application process intentionally allows flexibility for the Secretary of State's office to shift from receiving paper applications by mail to receiving online applications.

The work group removed the citizenship requirement found in RULONA notary public qualification requirements as it determined *Bernal v. Fainter*, 467 U.S. 216 (1984), to still be good law. The Court's conclusion in that case was the State of Texas violated the Equal Protection Clause by prohibiting noncitizens from applying for a commission as a notary public. This holding has not been overturned, despite evidence that several states seem to maintain prohibitions that are in violation of the Court's holding.

The work group wrestled with a requirement in current Oregon law that requires that the notary public "be a resident of this state . . . or be a resident of an adjacent state and be

regularly employed or carry on a trade or business within this state at the time of appointment." ORS 194.022(1)(b). While some states have opened up their notary public laws to be effective outside of their state (i.e. Virginia's notaries public can lawfully electronically notarize in California), work group members chose not to follow this approach because of worries that it leads to great difficulty in tracking down and enforcing violators of the notary public statutes. Instead, the work group opted to maintain RULONA's language that an applicant must "be a resident of or have a place of employment or practice in this state."

This section also includes nonuniform language meant to clarify the type of crimes or adjudications that would prevent an individual from being able to become a notary. ORS 194.022(e) and (f) currently provide that an applicant for notary commission or renewal must not have had a notary commission revoked within the five year period preceding the date of application. The applicant must also not have been convicted of a felony or "of a lesser offense incompatible with the duties of a notary public during the 10 year period preceding the application." The list of these offenses that are incompatible are provided by rule in 160-100-0510. The new language about "fraud, dishonesty or deceit" is meant to parallel the contents of section 22, which regulates the grounds for denial, revocation, suspension and other acts which are inconsistent with the principles of being a notary public. This section includes a 10-year look-back period prior to the time of application; thus, an individual who has committed a felony earlier than 10 years ago is not automatically barred from being granted a commission. The work group considered the value of having a rule that essentially prevents a person with a felony conviction from ever being a notary, but the work group ultimately decided that this idea is too severe because of the overly harmful employment repercussions that are likely to result from the inability to have the level of responsibilities that come with being a notary public. Collateral consequences to conviction should be thoughtful and constrained.

Additionally, while RULONA continues the tradition in many jurisdictions that requires notaries to procure a surety bond prior to being receiving a commission, the work group agreed that Oregon should continue to not impose bonding requirements. The work group's reasoning is that bonding requirements only tend to shift the regulation of notaries' qualifications to the bonding issuers, and the protection that bonding offers tends to be a trivial amount that does not provide a meaningful remedy to the victims harmed by improper notarial acts.

The work group also decided that four year commission term remains the most appropriate term length because it allows commission renewals to coincide with continuing education needs and the need to maintain accurate contact information for notaries public.

Section 21. Examination of notary public: This bill continues to require applicants for notary commissions to pass an examination administered by the Secretary of State.

Section 22. Grounds to deny, revoke, suspend or condition commission of notary public: This section contains rules for revoking a notary's commission. The analogous section in current law is ORS 194.166. The work group restructured RULONA's language for this section because the arrangement of clauses made for a needlessly compounded list of qualities that apply to a list of sub-clauses. Instead, HB 2834 consolidates the section

without any loss of meaning and reduces the redundancies. Section 20 and 22 work together to address qualifications and grounds for denying, revoking, suspending, and conditioning commissions.

Section 23. Database of notaries public: This section requires the Secretary of State to maintain an electronic notary database; the Secretary of State's office already maintains a voluntary listing of notaries. The new database would permit the public to look up a notary public's commission status.

Section 24. Prohibited acts: This section shares many similarities to current law codified at ORS 194.166. It is updated to remove unnecessary references to no longer applicable rules, and to cross reference definitions from other statutes (for instance, "immigration consultant," as defined in ORS 9.280). This section also maintains enhanced nonuniform posting requirements for advertisements found at ORS 194.162(3), which requires a statement in English about the inability of the notary to give legal advice and the requirement that fees for services are posted according to the terms found at ORS 194.164. In short, having a commission as a notary public does not authorize a person to practice law or act as an immigration consultant. This section restricts advertising to help prevent deception regarding a notary's authority. Subsection (7) is a new important requirement – it provides that a notary public may not withhold original records provided by a person that seeks a notary act.

Section 25. Validity of notarial acts: This section helps maintain the validity of a notarial act even if a notary fails to complete the act correctly. This provision is new with RULONA.

Section 26. Rules: This section pertains to the Secretary of State's rulemaking authority, which is still treated as being very broad, and comes from ORS 194.335. The only significant change is the editing of this section to remove any reference to bonding.

Application Fee, Investigation, Change of Address

Section 27. ORS 194.020 repealed: Section 28 replaces current ORS 194.020 regarding the application fee.

Section 28. Application fee: This section sets out a $40 limit for the non-refundable application fee, which maintains the current limit under Oregon law for applicants seeking a commission as a notary public.

Section 29. ORS 194.024 repealed: This section repeals ORS 194.024 regarding the applicant's consent to a background check and Section 30 is enacted in lieu thereof.

Section 30. Investigation of applicant; consent: This is a new provision authorizing a background check of applicants for a commission as a notary public.

Commercial Paper

Sections 31 – 40: These sections are drawn directly from [194.070, 194.090, 194.100, 194.130, and 194.150]. HB 2834 represents no notable changes from the current law, and

alters RULONA only to use language commonly used in Oregon (e.g. "personal representative" instead of "executor.") In short, these sections continue to provide that a notary public may protest commercial paper procedures, including record keeping requirements for protests are also maintained.

Specific Oregon Provisions/Miscellaneous Changes

Section 44. Action for damages or injunction; attorney fees and costs; employer's liability: This section continues and improves upon current Oregon law found at ORS 194.200 Instead of providing a remedy for only a select number of injuries caused by notaries who perform prohibited acts, section 44 now provides a remedy for eleven violations of section 24. In addition, in subsection (2), the provision now allows the Attorney General to bring a civil action. Present law only allows the Secretary of State to enforce on behalf of injured persons. The remedies made available are also made more consistent, and equitable relief is available.

This revised section also includes a new six-year statute of limitations in (4) which was recommended by the work group based on six years being a common standard for similar causes of action under Oregon law.

Section 45 and 46. Attorney General to investigate or prosecute violation; payment of expenses: This section maintains current law codified at ORS 194.330 and renumbers it. This provision allows the Secretary of State to direct the Attorney General to take charge of an investigation or prosecution.

Section 49. Uniformity of application and construction: This section is essentially an interpretation provision that reminds courts that "consideration must be given to promote uniformity of the law with respect to the subject matter of sections 1 to 50" of this Act. As other states apply the law, uniformity in application is expected.

Section 51. This section would amend ORS 194.980 clarify that the Secretary of State may impose a civil penalty for each violation of any provision of sections 1 to 50 of the Act or any rule adopted by the secretary under the same sections of this Act. Form and style changes are made throughout this section as well.

Sections 54 to 57. These sections make conferring changes to largely reflect cross-reference citation changes necessitated by the new act. Section 56(2) contains bold language that is already in existing law. The Work Group concluded that it is more appropriately located in Section 56, rather than ORS 194.040 of present law. The provision now provides for both the authentication powers the Secretary of State has and does not have. The statement of powers not afforded to the Secretary of State is necessary to clarify common misperceptions in accessible statutory form.

Section 61. Save for the penalties section (194.980, 194.985, and 194.990), all of Chapter 194 is repealed with this bill. Several provisions are essentially retained from present law, but are renumbered to create a new series as provided in this bill.

Specifically, ORS 194.005 and 194.505 are replaced by section 2. ORS 194.010, 194.012, 194.014, 194.020, and 194.022(a)-(c) are replaced by section 20. Other sections subsume the remainder of ORS 194.022. ORS 194.024 is repealed by section 29 and section 30 is in lieu of it. ORS 194.028 is replaced by section 21. The content of ORS 194.031 is primarily replaced by section 16. ORS 194.040 is repealed; subsection 1 is essentially replaced with the maintaining of a database requirement in section 23 and subsection 2 is moved to ORS 177.065 in Section 56. Multiple sections subsume ORS 194.043. ORS 194.047, ORS 194.052 and 194.063 are repealed; these provisions regarding change of address and name as well as renewals and resignations are not replaced as they will be handled by administrative rules. Section 31 repeals ORS 194.070 and it is replaced by section 32. Section 33 repeals ORS 194.090 and it is replaced by section 34. ORS 194.100 is repealed by section 35 and replaced by section 36. ORS 194.130 is repealed by section 37 and it is replaced by section 38. Section 39 repeals ORS 194.150, and it is replaced by section 40. ORS 194.152, 194.154, and ORS 194.156 are subsumed by section 18. ORS 194.158 is subsumed by section 3 (though section 24 now has the title "prohibited acts"). ORS 194.162 is subsumed by section 24. ORS 194.164 is repealed by section 41, and it is replaced by section 42. ORS 194.166 and ORS 194.168 are replaced by section 22. Section 43 repeals ORS 194.200 and section 44 replaces it. Section 45 repeals ORS 194.330, and section 46 replaces it. Section 26 replaces ORS 194.335. Section 4 replaces ORS 194.515. Section 9 replaces ORS 194.525. Section 10 replaces ORS 194.535. Section 12 replaces ORS 194.545. Section 13 replaces ORS 194.555. Section 11 replaces ORS 194.558. Section 14 replaces ORS 194.565. Section 15 replaces ORS 194.575. Section 8 replaces ORS 194.578. ORS 194.582 is subsumed by several sections of the bill. Section 49 replaces ORS 194.585. Section 1 replaces ORS 194.595. Section 47 repeals ORS 194.700 and it is replaced by section 48.

Miscellaneous Transition Provisions

Section 64. Operative date: HB 2834, if passed, would become operative September 1, 2013. The timing of this operative date is meant to efficiently coincide with a change in systems at the Secretary of State's office. Nevertheless, this section also allows the Secretary of State to take any action prior to the operative date to allow the secretary to carry out sections 1 to 50 of the Act.

Section 65. Effective date: This Act will take effect on its passage. The emergency clause provision was requested by the Secretary of State's office as the office is writing the update to finish some of its programming.

VI. Conclusion

The Revised Uniform Law on Notarial Acts would put in place an updated structure and rules to address both the increasing non-uniformity between states and the ever-growing use of technology. The Act makes improvements in the law to provide a system that will better support the integrity of notarial acts. The comprehensive rewrite of Oregon's notary chapter provided for in this bill represents a consensus product among key stakeholders and will aid all Oregonians who need notarial acts performed.

VII. Appendix [Revised Uniform Law on Notarial Acts with comments]

REVISED UNIFORM LAW ON NOTARIAL ACTS

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

ANNUAL CONFERENCE
MEETING IN ITS ONE-HUNDRED-AND-NINETEENTH YEAR
IN CHICAGO, ILLINOIS
JULY 9-16, 2010

WITH PREFATORY NOTE AND COMMENTS

November 15, 2010

ABOUT ULC

The **Uniform Law Commission** (ULC), also known as National Conference of Commissioners on Uniform State Laws (NCCUSL), now in its 119th year, provides states with non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of state statutory law.

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DRAFTING COMMITTEE ON A REVISED UNIFORM LAW ON NOTARIAL ACTS

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REVISED UNIFORM LAW ON NOTARIAL ACTS

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REVISED UNIFORM LAW ON NOTARIAL ACTS

Prefatory Note

This version of the Uniform Law on Notarial Acts ("ULONA") is a comprehensive revision of the Uniform Law on Notarial Acts as approved by the National Conference of Commissioners on Uniform State Laws ("NCCUSL") in 1982. Since that date, countless societal and technological as well as market and economic changes have occurred requiring notarial officers and the notarial acts that they perform to adapt. In addition, there has been a growing non-uniformity among the states in their laws regarding notarial acts. This version of ULONA adapts the notarial process to accommodate those changes, makes the Act more responsive to current transactions and practices, and seeks to promote uniformity among state laws regarding notarial acts.

Perhaps the most pervasive change since the adoption of the original version of ULONA has been the development and growing implementation of electronic records in commercial, governmental, and personal transactions. In 1999, NCCUSL approved the Uniform Electronic Transactions Act ("UETA"), thereby validating electronic records and putting them on a par with traditional records written on tangible media. The federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Ch. 96 (2010) ("ESign") was adopted in 2000, and it also recognized and put electronic records on a par with traditional records on tangible media. In 2004, NCCUSL approved the Uniform Real Property Electronic Recording Act ("URPERA"), thereby permitting county recorders and registrars to accept and register electronic real estate records. Each of those acts also recognized the validity of electronic notarial acts (UETA §11; ESign §101(g); URPERA §3(c)).

This revision of ULONA further recognizes electronic notarial acts and puts them on a par with notarial acts performed on tangible media (Section 2(5)). It does this by unifying the requirements for and treatment of notarial acts, whenever possible, regardless of whether the acts are performed with respect to tangible or electronic media. While continuing the basic treatment of electronic notarial acts provided in UETA, ESign and URPERA, this Act implements structural and operational rules for those notarial acts that were absent in the prior laws. For example, Section 15 sets forth the requirements for certificates of notarial acts whether performed with respect to tangible and electronic records). In addition, Section 20 provides that before notaries public may perform notarial acts with respect to electronic records, they must first notify the commissioning officer or agency.

The Act seeks to provide integrity in the process of performing notarial acts. Regardless of whether the notarial act is completed on a tangible or an electronic record, it requires an individual to appear personally before a notarial officer whenever the officer performs a notarial act regarding a record signed or a statement made by the individual (Section 6), including an acknowledgment, verification, or witnessing of a signature (Section 5(a), (b), and (c)). A notarial officer who certifies a copy of a record must determine that the copy is a full, true, and accurate transcription or reproduction (Section 5(d)).

The Act commands a notarial officer to identify an individual before performing a

notarial act for that individual. The Act provides two methods of performing that identification. Identification may be based on personal knowledge of the individual by the notarial officer (Section 7(a)). If an individual is not personally known to the notarial officer, the individual must provide satisfactory evidence of the individual's identity, which may be through the use of an identification credential or by means of an oath or affirmation of a credible witness (Section 7(b)). A notarial officer may require additional identification of an individual if the officer is not satisfied with the individual's identity (Section 7(c)). Furthermore, if an officer is not satisfied that an individual's signature is knowingly and voluntarily made or has concern as to the competency or capacity of the individual, the officer may refuse to perform the notarial act (Section 8(a)).

The Act strives to provide other assurances that also enhance the integrity of the notarial process. In addition to the familiar assurances when tangible records are used, the Act requires the use of tamper-evident technologies on electronic records (Section 20). It authorizes a commissioning officer or agency to adopt rules to implement this Act (Section 27(a)), including rules to insure that any change or tampering with a record bearing a certificate of the notarial act will be self-evident (Section 27(a)(2)). In order to encourage uniformity and interoperability, it provides that a commissioning officer or agency will consider national standards, the standards and customs of other enacting jurisdictions, and the views of interested persons (Section 27(b)).

Another means of assuring the integrity of the notarial process, strongly urged by commissioning officers and notarial associations, is to require that all notaries public maintain journals chronicling all notarial acts. This position is not without controversy, however, and other voices strongly argue that such requirements are unnecessarily burdensome. This Act includes optional provisions requiring a notary public to maintain a journal of all notarial acts that the notary public performs (Section 19), leaving the ultimate decision to the several states. A journal may be maintained on either a tangible or electronic medium, but not both at the same time. It further specifies the information that must be entered in the journal.

This Act replaces past references to a notarial seal with an official stamp. It defines an official stamp as a physical or electronic image and includes the traditional seal (Section 2(8)). Section 17 states the mandatory contents of the official stamp and requires that it be capable of being copied along with the record with which it is associated. Section 18 deals separately with the stamping device, which is defined as the means of affixing the official stamp to a tangible record or associating the official stamp with an electronic record (Section 2(13)). Section 18 also defines the responsibility of the notary public for controlling the stamping device and assuring that it not be used by others.

As with the prior version of the Act, this revision continues to recognize notarial acts performed by notarial officers in the adopting state (Section 10), another state of the United States (Section 11), or under federal authority (Section 13). It also recognizes notarial acts performed under the authority of a federally recognized Indian tribe (Section 12). The increasing frequency of international transactions requires the recognition of notarial acts performed in foreign states (Section 14). The Act continues to recognize an "apostille" complying with the Convention de La Haye du 5 octobre 1961 ("Hague Convention") as a means of providing conclusive authentication of notarial acts that are performed by a notarial officer of a foreign

state (Section 14(e)). It also recognizes a consular authentication as an alternative means of providing that conclusive authentication of a foreign notarial act (Section 14(f)).

The prior version of this Act did not contain a licensing procedure for notaries public. As a result, the various states adopted their own provisions. Those provisions vary considerably. In order to promote unity, the Act establishes minimum requirements for the commissioning of notaries public (Section 21) as well as grounds to deny, suspend, or revoke those commissions (Section 23). The Act contains an optional section regarding educational and testing requirements for notaries public (Section 22).

The Act seeks to assure that a notarial officer does not act in a deceptive or fraudulent manner. It prohibits a notarial officer from performing a notarial act with regard to a record to which the officer or the officer's spouse is a party or in which either of them has a direct beneficial interest (Section 4(b)). The Act prohibits a notary public from drafting legal records, giving legal advice, or otherwise practicing law. It also prohibits a notary public from acting as a consultant or expert on immigration matters or representing persons in judicial or administrative proceedings in that regard (Section 25(a)). It further prohibits a notary public from engaging in false or deceptive advertising. In that regard, it expressly prohibits a notary public from representing or advertising that the notary may draft legal documents, give legal advice, or otherwise practice law; any representation or advertisement by a notary must contain a disclaimer to that effect in each language used in the advertisement (Section (25(b), (c), and (d)).

During the process of drafting this revision of ULONA, the Drafting Committee received invaluable assistance regarding current and developing notarial practices, regulatory matters, and available technology from numerous observers. The Drafting Committee wishes to express its appreciation to the National Notary Association, the United States Notary Association, the National Association of Secretaries of State, the Property Records Industry Association, the various vendors who demonstrated available technology, and all the other observers who assisted the Committee.

REVISED UNIFORM LAW ON NOTARIAL ACTS

SECTION 1. SHORT TITLE. This [act] may be cited as the Revised Uniform Law on Notarial Acts.

Comment

This Act is a revision of the Uniform Law on Notarial Acts as approved by the National Conference of Commissioners on Uniform State Laws in 1982.

It provides for the recognition of notarial acts performed in this state, in other states, under the authority of a federally recognized Indian tribe, under federal authority, and in foreign jurisdictions. It applies to notarial acts whether performed with respect to tangible or electronic records.

SECTION 2. DEFINITIONS. In this [act]:

(1) "Acknowledgment" means a declaration by an individual before a notarial officer that the individual has signed a record for the purpose stated in the record and, if the record is signed in a representative capacity, that the individual signed the record with proper authority and signed it as the act of the individual or entity identified in the record.

(2) "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(3) "Electronic signature" means an electronic symbol, sound, or process attached to or logically associated with a record and executed or adopted by an individual with the intent to sign the record.

(4) "In a representative capacity" means acting as:

(A) an authorized officer, agent, partner, trustee, or other representative for a person other than an individual;

(B) a public officer, personal representative, guardian, or other representative, in

the capacity stated in a record;

(C) an agent or attorney-in-fact for a principal; or

(D) an authorized representative of another in any other capacity.

(5) "Notarial act" means an act, whether performed with respect to a tangible or electronic record, that a notarial officer may perform under the law of this state. The term includes taking an acknowledgment, administering an oath or affirmation, taking a verification on oath or affirmation, witnessing or attesting a signature, certifying or attesting a copy, and noting a protest of a negotiable instrument.

(6) "Notarial officer" means a notary public or other individual authorized to perform a notarial act.

(7) "Notary public" means an individual commissioned to perform a notarial act by the [commissioning officer or agency].

(8) "Official stamp" means a physical image affixed to or embossed on a tangible record or an electronic image attached to or logically associated with an electronic record.

(9) "Person" means an individual, corporation, business trust, statutory trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(10) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(11) "Sign" means, with present intent to authenticate or adopt a record:

(A) to execute or adopt a tangible symbol; or

(B) to attach to or logically associate with the record an electronic symbol, sound, or process.

(12) "Signature" means a tangible symbol or an electronic signature that evidences the signing of a record.

(13) "Stamping device" means:

(A) a physical device capable of affixing to or embossing on a tangible record an official stamp; or

(B) an electronic device or process capable of attaching to or logically associating with an electronic record an official stamp.

(14) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

(15) "Verification on oath or affirmation" means a declaration, made by an individual on oath or affirmation before a notarial officer, that a statement in a record is true.

Comment

"Acknowledgment." An acknowledgment is a common form of notarial act in which an individual declares before a notarial officer that the individual has executed or signed the record for the purpose or purposes stated in the record. The declaration is made in the presence of the notarial officer. See *Coast to Coast Demolition and Crushing, Inc. v. Real Equity Pursuit, LLC,* 226 P.3d 605, 608 (Nev. 2010).

It is a common practice for the acknowledging individual to sign the record in the presence of the notarial officer. However, actually signing the record in the presence of the notarial officer is not necessary as long as the individual declares, while in the presence of the officer at that time the acknowledgment is made, that the signature already on the record is, in fact, the signature of the individual.

If the record is signed by an individual in a representative capacity, the individual also declares to the notarial officer that the individual has proper authority to execute the record on behalf of the principal (see Section 2(4)).

"Electronic." The adjective "electronic" is used to refer to electrical, digital, magnetic, wireless, optical, electromagnetic, and similar technologies. Electronic technologies are capable of generating, transmitting, or storing information in an intangible format that may subsequently be retrieved and viewed in a perceivable format.

As with the Uniform Electronic Transactions Act, the term "electronic" is descriptive and its reach is not intended to be limited to technologies that are technically or purely electronic in nature (see UETA §2, Comment 4). Rather, it is intended to be a collective term and applies to all "similar" technologies that involve the generation, transmittal, or storage of information in an intangible format.

Electromagnetic technologies that generate, transmit, and store information in intangible formats are electronic in nature. Thus, for example, the typical computer hard drive is a device that stores information electronically. Optical technologies that generate, transmit, or store information in intangible formats are also included within the meaning of the term. Although some aspects of optical technologies may not be truly electronic in nature, they are considered to be electronic because they create or manipulate information in an intangible format. Thus, for example, fiber optic cable is a means of transmitting information electronically.

The listing of specific technologies in this section is not intended to be static or limited to those created or in use at the time of the adoption of this Act. As electronic technologies continue to develop and evolve, even if they involve competencies other than those listed, they are also included in this definition if they perform the function of generating, transmitting, or storing information in an intangible format from which the information may subsequently be retrieved and viewed in a perceivable format.

The term "electronic" in this Act has the same meaning as it has in UETA §2(5), ESign §106(2), and URPERA §2(2).

"Electronic signature." An electronic signature is any electronic symbol, sound, or process that is attached to, or logically associated with, an electronic record by an individual with the intent to sign the record. An electronic signature on an electronic record is one that accomplishes the same purpose as a traditional "wet" or pen and ink signature on a tangible record; it associates an individual with an electronic record for the purpose of signing or executing the record. The technology that may be used for an electronic signature includes all the technologies that are encompassed within the definition of the term "electronic." Whether an individual in fact attaches an electronic signature to an electronic record with the intent to sign it is a question of fact to be determined in each case.

The term is similar to the definition used in UETA §2(8), ESign §106(5), and URPERA §2(4).

"In a representative capacity." The term "in a representative capacity" refers to the role in which an individual signs a record or makes a statement with respect to which a notarial act is performed. Specifically, it indicates that the individual who signs a record or makes the statement is doing so as a representative of another person, a principal, and not on the individual's own behalf. A representative with proper authority binds the principal as if the principal signed the record. The authority to perform an act in a representative capacity may be derived from the position the individual holds (e.g. corporate officer) or from a specific grant of authority to the individual (e.g. attorney in fact). Whether a person is authorized to act in a

representative capacity is a fact to be determined under the agency law of the state.

In this Act, the term is used Section 2(1) and in the short form acknowledgment provided in Section 16(2).

"Notarial act." The term "notarial act" encompasses a notarial act whether authorized in this Act or by other law of this state (see also Section 4(a)). This subsection lists those notarial acts specifically authorized by this Act. The listed notarial acts include taking an acknowledgment, administering an oath or affirmation, taking a verification upon an oath or affirmation, witnessing or attesting a signature, certifying or attesting a copy of a record, and noting a protest of a negotiable instrument.

This Act applies to a notarial act regardless of whether it is performed with respect to a tangible record, such as paper, or with respect to an electronic record. Other Uniform Laws, including UETA, ESign, and URPERA, specifically authorize the creation, transfer, storage, and recording of electronic records just as other law has traditionally authorized records on tangible media. This Act specifically authorizes notarial acts to be performed with respect to electronic records.

"Notarial officer." The term "notarial officer" includes a notary public as well as other individual having the authority to perform notarial acts under other state, tribal, or federal law or the law of a foreign state. Thus, for example, judges, clerks, and deputy clerks are notarial officers (see Sections 10(a)(2), 11(a)(2), 12(a)(2) and 13(a)(1)). Similarly, in some states, attorneys at law, by the fact that they are attorneys at law, are also notarial officers (see Section 10(a)(3)). Also, an individual designated as a notarizing officer by the United States Department of State for performing notarial acts overseas is also a notarial officer for that purpose (see Section 13(a)(3)). Other persons, whether by state law, federal law, tribal law, or the law of a foreign state, may also be notarial officers (see generally Sections 10 through 14.)

Many of the provisions of this Act apply broadly to all notarial officers regardless of the source of their authority. However, some provisions, such as those in Sections 17 through 25, apply only to notaries public.

"Notary public." A "notary public" is an individual who is issued a commission as a notary public by the commissioning officer or agency of a state pursuant to Sections 21 through 23. A notary public does not include those individuals, such as judges and clerks of court, who are authorized to perform notarial acts under other law or as a part of the official duties of an office or position they hold.

"Official stamp." The term "official stamp" refers to an image containing specified information that a notarial officer attaches to or associates with a certificate of notarial act, which is itself on, attached to, or associated with a record. The contents and characteristics of the "official stamp" are set forth in Section 17(a).

On a tangible record, the image is a physical one appropriately located on, or attached to, the certificate of notarial act. It may be applied to the surface of the certificate, as with a rubber

stamp and ink, or it may be applied by compression or embossment, as with a seal. On an electronic record, the image is in an electronic format and attached to, or logically associated with, the electronic certificate of notarial act. Being an electronic image, the image must be viewed through a device such as a computer monitor or printed out in order to be humanly perceivable.

An "official stamp" is to be distinguished from the device by which the image is affixed on, attached to, or associated with a certificate of notarial act; that device is identified as a "stamping device" and is defined in Section 2(13).

"Person." The word "person" is broadly defined to include all persons, whether human individuals or corporate, associational, or governmental entities. When the definition of a "person" is intended to be limited to a human entity, the word "individual" is used in this Act rather than the word "person." The definition of "person" is the standard definition for that term as used in other acts promulgated by the National Conference of Commissioners on Uniform State Laws.

"Record." A "record" consists of information stored on a medium, whether the medium be a tangible one or an electronic one. The traditional tangible medium has been paper on which information is inscribed by writing, typing, printing, or other similar means. The information is humanly perceivable by reading it directly from the paper on which it is inscribed.

An electronic medium is one on which information is stored electronically. The information is humanly perceivable only by means of a device that interprets the electronic information in the record and makes it readable. For example, electronic information may be stored on a hard disk and it may be retrieved and read in a humanly perceivable form on a computer monitor or a paper printout.

Traditionally, especially if the tangible medium is paper, a record has been referred to as a "document." In this Act, the word "record" replaces the word "document" and includes information regardless of whether the medium is tangible or electronic. The definition of the word "record" in this Act is the same as the definition of that word in UETA §2(13) and ESign §106(9). It also is the same as the definition of the word "document" as used in URPERA §2(1).

"Sign" and "Signature." Subsections (11) and (12) of this Act define the related words "sign" and "signature." An individual may "sign" his or her name to a record either on a tangible medium or an electronic medium as long as the individual has the present intent to authenticate or adopt the record so signed. The verb "sign" includes other forms of the verb, such as "signing." Except as provided in Section 9, an individual must personally perform the act of signing a record.

A symbol located on, or associated with, a tangible or electronic record that is the result of the signing process is an individual's "signature." The usual symbol an individual uses as the individual's signature is the individual's given name. If, instead of using the individual's given name, however, an individual uses an alternative symbol as the individual's signature, such as an "X," the individual may affix that symbol to the record as the individual's signature.

Nothing in the definitions of the words "sign" or "signature" or of the word "record" (prior subsection) imposes a security process or standard in the definition of those words. When a means of security is imposed, it is done by a requirement in a separate section (see, for example, Section 20).

"Stamping device." A "stamping device" is the means by which an official stamp is affixed to, embossed on, or associated with, the certificate of notarial act in a record. With a traditional paper medium, for example, the stamping device may be a rubber device that uses ink to impose a stamp on the paper. It may also be a device that compresses or embosses the paper and applies an impression seal.

In an electronic format, the stamping device is an electronic process or technology that associates unique information identifying the notarial officer with the certificate of notarial act that is affixed to, or associated with, an electronic record. The means of identifying the notarial officer may, for example, be a security card, password, encryption device, or other system that allows access to an electronic process that associates the officer's unique information with the certificate of notarial act on an electronic record. The electronic process may be located on, for example, a desktop or laptop computer; a flash drive or other peripheral device used in connection with a computer: a portable electronic device such as a Blackberry or iPhone; or a secure website on the Internet. The means of identifying the notarial officer and the electronic process are collectively the stamping device. The result, although attached to, or associated with, an electronic certificate of notarial act, will be perceivable only by means of a device such as a computer monitor that is capable of presenting it in a perceivable format.

"State." The word "state" includes any state of the United States, the District of Columbia, the United States Virgin Islands, and any territory or insular possession subject to the jurisdiction of the United States. This definition is the standard definition for that word as used in other acts adopted by the National Conference of Commissioners on Uniform State Laws.

"Verification upon oath or affirmation." A "verification upon oath or affirmation" is a common form of notarial act. It is a declaration by an individual before a notarial officer in which the individual states on oath or affirmation that the declaration is true. This declaration is sometimes referred to as an "affidavit" or "jurat." See *Coast to Coast Demolition and Crushing, Inc. v. Real Equity Pursuit, LLC,* 226 P.3d 605, 608 (Nev. 2010).

SECTION 3. APPLICABILITY. This [act] applies to a notarial act performed on or after [the effective date of this [act]].

Comment

This Act is not intended to be retroactive in effect. It applies to notarial acts performed on or after its effective date. The validity and effect of a notarial act performed prior to the effective date of this Act is determined by the law in effect at the time of its performance. (See

also Section 28 regarding application of the Act to a notary public commission in effect on the effective date of the Act.)

SECTION 4. AUTHORITY TO PERFORM NOTARIAL ACT.

(a) A notarial officer may perform a notarial act authorized by this [act] or by law of this state other than this [act].

(b) A notarial officer may not perform a notarial act with respect to a record to which the officer or the officer's spouse [or civil partner] is a party, or in which either of them has a direct beneficial interest. A notarial act performed in violation of this subsection is voidable.

Comment

Subsection (a) is the enabling provision of this Act and grants a notarial officer the authority to perform notarial acts. It authorizes a notarial officer to perform notarial acts that are authorized by this Act as well as those authorized by other law of this State.

When taken in conjunction with the definition of a notarial act in Section 2(5), subsection (a) also authorizes a notarial officer to perform notarial acts regardless of the format of the record. Thus, a notarial officer may perform notarial acts on tangible records as well as electronic records. However, before a notary public may begin to perform notarial acts on electronic records, the notary must notify the commissioning officer or agency that the notary will be performing notarial acts with respect to electronic records (see Section 20(b)).

Subsection (b) prohibits a notarial officer from performing a notarial act in a circumstance in which performance of that act might create a conflict of interest. It provides that a notarial officer may not perform a notarial act with respect to any record in which the officer or the officer's spouse (or civil partner, as defined by state law) is a party. The prohibition is absolute and clear; there is no need to demonstrate a direct beneficial interest even though the interest may be obvious. For example, a notarial officer may not take an acknowledgment of a deed in which the officer or the officer's spouse is a grantor or grantee.

In addition, subsection (b) provides that a notarial officer may not perform a notarial act with respect to any record in which the officer or the officer's spouse (or civil partner) has a direct beneficial interest. This prohibition depends on whether there is a direct beneficial interest derived from the record (see, e.g. *Galloway v. Cinello*, 188 W. Va. 266, 423 S.E.2d 875 (1992)). For example, a deed by a third party (perhaps a grandparent) creating a trust in which a child of the notarial officer is a beneficiary might involve a direct beneficial interest to the notarial officer that is derived from the trust document (record), especially if the trust relieves support obligations of the officer. If it does provide a direct beneficial interest derived from the record, the officer would be prohibited from taking the acknowledgment of the deed of trust. While

further information would be necessary to determine whether there is a direct beneficial interest derived from the record, a notarial officer should avoid performing a notarial act in any situation when doing so would raise the appearance of an impropriety.

This prohibition does not, however, extend to situations in which the beneficial interest is indirect and not the result of the operation of the record or transaction itself. For example, if the interest received is merely the payment of a notarial fee, the benefit is indirect and derived from the performance of notarial duties and not the result of the operation of the record or transaction itself (see, e.g. *Hass v. Neth*, 265 Neb. 321, 657 N.W.2d 11 (2003)). Similarly, a notary public who is hired by an employer to be available to perform notarial acts on multiple transactions does not derive a beneficial interest as a result of the operation of the records or transactions themselves. For example, a notary public may be an employee and the expenses of obtaining and maintaining the commission may be paid by the notary's employer. The obvious purpose of such an arrangement, at least in part, is that the notary public will perform notarial acts in appropriate situations as needed and requested by the employer. The fact that the notary public's salary and expenses are paid by the employer does not prevent the notary public from performing notarial acts when requested by the employer. Even though the notary receives a salary and the notary's salary may even depend on the fact that the notary performs notarial acts for the employer generally, the notary does not have a direct beneficial interest in the transactions or one that is derived from the operation of the records or transactions.

Likewise, if a notarial officer is an attorney, the attorney/notarial officer may perform notarial acts for a client as long as the attorney does not receive a direct beneficial interest as a result of operation of the record or transaction with regard to which the notarial act is performed. The fact that the attorney receives a fee for performing legal services, presently or in the future, is not a direct beneficial interest resulting from the operation of the record or transaction. Thus, receiving a fee for drafting a will or for subsequently representing the estate are fees for legal services and not a direct beneficial interest received as a result of the operation of the will (record) itself.

If a notarial officer should perform a notarial act in violation of subsection (b), the notarial act is not void per se. It may, however, be voidable in an action brought by a party who is adversely affected by the officer's misdeed. See *Galloway v. Cinello*, 188 W. Va. 266, 423 S.E.2d 875 (1992), where the court stated that the document was not void per se but was voidable; in making a determination the court should consider whether an improper benefit was obtained by the notary or any party to the instrument, as well as whether any harm flowed from the transaction. But see *Estate of McKusick*, 629 A.2d 41 (Me. 1993) in which the court questioned the validity of a will because the affidavit of a witness was made before a notary public who was the spouse of the witness.

SECTION 5. REQUIREMENTS FOR CERTAIN NOTARIAL ACTS.

(a) A notarial officer who takes an acknowledgment of a record shall determine, from personal knowledge or satisfactory evidence of the identity of the individual, that the individual

appearing before the officer and making the acknowledgment has the identity claimed and that the signature on the record is the signature of the individual.

(b) A notarial officer who takes a verification of a statement on oath or affirmation shall determine, from personal knowledge or satisfactory evidence of the identity of the individual, that the individual appearing before the officer and making the verification has the identity claimed and that the signature on the statement verified is the signature of the individual.

(c) A notarial officer who witnesses or attests to a signature shall determine, from personal knowledge or satisfactory evidence of the identity of the individual, that the individual appearing before the officer and signing the record has the identity claimed.

(d) A notarial officer who certifies or attests a copy of a record or an item that was copied shall determine that the copy is a full, true, and accurate transcription or reproduction of the record or item.

(e) A notarial officer who makes or notes a protest of a negotiable instrument shall determine the matters set forth in [Section 3-505(b) of the Uniform Commercial Code].

Comment

"Acknowledgment" – Subsection (a) provides that when taking an acknowledgment, a notarial officer certifies that: (1) the individual who is appearing before the officer and acknowledging the record has the identity claimed, and (2) the signature on the record is the signature of the individual appearing before the officer. The notarial officer must identify the individual either through personal knowledge of the individual or from satisfactory evidence of the identity of the individual (see Section 7). The acknowledging individual must also declare, as required in Section 2(1), that the individual in signing the record for the purpose stated in the record.

It is common practice for the individual to sign the record in the presence of the notarial officer. However, actually signing the record in the presence of the officer is not required as long as the individual acknowledges to the officer, when the individual appears before the officer, that the signature already on the record is that of the individual.

"Verification on oath or affirmation" – Subsection (b) provides that when taking a verification on oath or affirmation, a notarial officer certifies that: (1) the individual who is

appearing before the officer and making the verification has the identity claimed, and (2) that the signature on the record is the signature of the individual appearing before the officer. The verifying individual must also declare, as required in Section 2(14), that the statements in the record are true. The notarial officer must identify the individual either through personal knowledge of the individual or from satisfactory evidence of the identity of the individual (see Section 7). A verification may be referred to as an affidavit or a jurat in some jurisdictions.

"Witnessing or attesting a signature" – Subsection (c) provides that when witnessing or attesting a signature, a notarial officer certifies that: (1) the individual who is appearing before the officer and signing the record has the identity claimed, and (2) that the signature on the record is the signature of the individual appearing before the officer. The notarial officer must identify the individual either through personal knowledge of the individual or from satisfactory evidence of the identity of the individual (see Section 7).

Witnessing or attesting a signature differs from taking an acknowledgment in that the record contains no declaration that it is signed for the purposes stated in the record and differs from a verification on oath or affirmation in that the individual is not verifying a statement in the record as being true. It is merely a witnessing of the signature of an identified individual.

"Certifies or attests a copy" – Subsection (d) provides that when certifying or attesting a copy of a record or item, a notarial officer certifies that: (1) the officer has compared the copy with the original record or item, and (2) has determined that the copy is a full, true, and accurate transcription or reproduction of the original record or item. This subsection directs the notarial officer to compare a record or item with a copy of the record or item. Therefore, the record or item must be presented to the notarial officer along with the copy so that the officer is able to make the comparison.

Certifying or attesting of a copy is usually done if it is necessary to produce a copy of a record when the original is in an archive or other collection of records and the archived record cannot be removed. In many cases, however, the custodian of the official archive or collection may also be empowered to issue an officially certified copy. When a copy officially certified by the custodian of the archive is available, it is official evidence of the state of the public archive or collection, and it may be better evidence of the original record than a copy certified by a notarial officer.

"Make or note a protest of a negotiable instrument" – Subsection (e) provides that a notarial officer may make or note a protest of a negotiable instrument under UCC §3-505(b). A protest is an official certificate of dishonor of a negotiable instrument. UCC §3-505(b) confers the authority to make or take a protest on "a United States consul or vice consul, or a notary public or other person authorized to administer oaths by the law of the place where dishonor occurs." In the United States a protest of a negotiable instrument may not be needed as evidence of dishonor (see UCC §3-505(a); see also UCC §3-503). A protest may be necessary, however, on international drafts governed by law of a foreign state (see UCC §3- 505, Official Comment). This subsection is designed to insure that there is no doubt as to the authority or a notary public to make or note a protest of a negotiable instrument when appropriate under the Uniform Commercial Code.

SECTION 6. PERSONAL APPEARANCE REQUIRED. If a notarial act relates to a statement made in or a signature executed on a record, the individual making the statement or executing the signature shall appear personally before the notarial officer.

Comment

This section expressly requires that when an individual is making a statement or executing a record with regard to which a notarial act will be performed by a notarial officer, the individual must appear before the officer to make the statement or execute the record. Thus, an individual who is acknowledging a record or verifying a statement on oath or affirmation before a notarial officer, or an individual whose signature is being witnessed or attested by a notarial officer, must appear before the officer to perform the specified function. See *Vancura v. Katris*, 907 N.E.2d 814, 391 Ill. App. 3d 350 (2009) which involved a notary public who performed notarial acts without the individual signing the instrument personally appearing before the notary.

To provide assurance to persons relying on the system of notarial acts authorized by this Act, notarial officers must take reasonable steps to assure the integrity of the system. It is by personal appearance before the notarial officer that the individual making a statement or executing a record may be properly identified by the notarial officer (see Section 7). It is also by personal appearance before the notarial officer that the officer may be satisfied that (1) the individual is competent and has the capacity to execute the record, and (2) the individual's signature is knowingly and voluntarily made (see Section 8(a)).

Personal appearance does not include an "appearance" by video technology, even if the video is "live" or synchronous. Nor does it include an "appearance" by audio technology, such as a telephone. At the time that this act is being drafted, those methods of "appearance" do not provide sufficient opportunity for the notarial officer to identify the individual fully and properly; nor do they allow the officer sufficient opportunity to evaluate whether the individual has the competency or capacity to execute the record or whether the record is knowingly and voluntarily made.

SECTION 7. IDENTIFICATION OF INDIVIDUAL.

(a) A notarial officer has personal knowledge of the identity of an individual appearing before the officer if the individual is personally known to the officer through dealings sufficient to provide reasonable certainty that the individual has the identity claimed.

(b) A notarial officer has satisfactory evidence of the identity of an individual appearing

before the officer if the officer can identify the individual:

(1) by means of:

(A) a passport, driver's license, or government issued nondriver identification card, which is current or expired not more than [three years] before performance of the notarial act; or

(B) another form of government identification issued to an individual, which is current or expired not more than [three years] before performance of the notarial act, contains the signature or a photograph of the individual, and is satisfactory to the officer; or

(2) by a verification on oath or affirmation of a credible witness personally appearing before the officer and known to the officer or whom the officer can identify on the basis of a passport, driver's license, or government issued nondriver identification card, which is current or expired not more than [three years] before performance of the notarial act.

(c) A notarial officer may require an individual to provide additional information or identification credentials necessary to assure the officer of the identity of the individual.

Comment

Section 5, above, requires a notarial officer to determine, either from personal knowledge or satisfactory evidence, that the individual for whom the officer will perform a notarial act has the identity claimed. Section 7 specifies the means by which the notarial officer is to determine that identity. Subsection 7(a) describes when a notarial officer has personal knowledge of an individual's identity. Subsection 7(b) describes when a notarial officer has satisfactory evidence of an individual's identity.

Subsection (a) states that the notarial officer has personal knowledge of the identity of an individual only if the officer personally knows the individual through prior dealings. The prior dealings may be business dealings or personal dealings. Business dealings might simply be the performance of prior notarial acts for the individual. They may also arise because the notarial officer engaged in prior business transactions with the individual. Personal dealings may exist because the notarial officer is a friend or colleague of the individual. The dealings may also be mixed in nature such as where the notarial officer and individual work in the same office, school, or building. Regardless of whether the prior dealings are business or personal, they must be sufficient to provide the notarial officer with information that is adequate to identify the

individual without the need to view any identification credentials or require any other means of identification.

Subsection (b) describes two methods by which a notarial officer may obtain satisfactory evidence of the identity of the individual even though the officer has no prior dealings with that individual. One method of identification is based on an identification credential issued to the individual (subsection (b)(1)). The other method of identification is based on an oath or affirmation of a credible witness as to the identity of the individual (subsection (b)(2)).

Subsection (b)(1)(A) allows a notarial officer to identify an individual by means of a passport, driver's license, or government issued nondriver identification card. The passport may the issued by the United States or by a foreign state. A United States passport includes the traditional passport book and the more recent passport card as well as any other form of passport the United States may issue. A driver's license may be issued by a state government, the federal government, a government of a foreign state as defined in Section 14(a), or a tribal, pueblo, or similar authority. A government issued nondriver identification card is a card issued by many states to an individual, which may be used as a means of identification instead of a driver's license. It may be issued to an individual who is not qualified to obtain a driver's license or it may be issued in lieu of a driver's license to an individual who is qualified to obtain a driver's license.

Although the notarial officer might usually expect the identification credential to be currently in force, this provision recognizes that even though an expired credential would not be effective for its primary purpose (e.g. as a license permitting the individual to drive an automobile), it may used for a period of up to [three years] after its expiration as a means for identifying an individual. As long as it provides the necessary information for identifying the individual, its identification function is satisfied. This subsection does, however, put a specific outside limit of [three years] beyond the expiration of the credential for its use for identification purposes.

Subsection (b)(1)(B) recognizes that some individuals may not have a passport, driver's license, or even a government issued nondriver identification card that is currently valid or not expired by more than [three years]. This subsection allows the notarial officer to base the officer's identification of the individual on another form of government issued identification as long as that form of identification contains the individual's signature or a photograph of the individual as a means by which the individual can be associated with the credential. This form of credential may include, for example, a military identification. However, this subsection also makes it clear that this alternative form of identification must be satisfactory to the notarial officer. If the officer is not satisfied with the identification that the credential provides, the officer may refuse to accept it as sufficient identification.

Subsection (b)(2) recognizes that an individual may require the performance of a notarial act even though that individual is not known to a notarial officer and does not have one of the identification credentials listed in subsection (b)(1), or at least the individual does not have the identification credential currently available. This provision allows a notarial officer to identify an individual through an oath or affirmation of a credible witness personally appearing before the

officer. The credible witness must either be (1) personally known to the officer, or (2) identified to the officer by means of the witness' passport, driver's license, or government issued nondriver identification as long as the credential has not expired more than [three years] before the performance of the notarial act. If the identity of an individual is verified by a properly identified credible witness, it is established by satisfactory evidence.

The meaning of the term "personally known" in subsection (b)(2) is the same as in subsection (a); the meanings of the terms "passport," "driver's license," and "government issued nondriver identification" in subsection (b)(2) are the same as in subsection (b)(1)(A). Subsection (b)(2) does not allow for the identification of the credible witness by means of an alternative form of identification as is provided in subsection (b)(1)(B) for the identification of the individual for whom the notarial act is performed. Subsection (b)(2) also does not allow the identity of a witness to be based on an oath or affirmation of yet another witness; such a process could lead to a spiraling "witness to the witness."

Subsection (c) recognizes that, even if a specified identification credential is presented, a notarial officer may, in some cases, be uncertain as to the identity of the individual. For example, the identification credential may be defaced or have defects that make legibility difficult, or there may be changes in the physical appearance of the individual that may not be reflected in the image on the identification credential. If the notarial officer is uncertain as to the identity of the individual (whether the individual for whom the notarial act is performed or a credible witness for that individual), the officer may require the individual to provide additional information or identification in order to assure the officer as to the identity of the individual.

Identification of an individual based on an identification credential requires some flexibility. For example, it is not uncommon that an individual's name as used in a record may be a full name, including a full middle name; however, the name of the individual as provided on the identification credential may only use a middle initial or none at all. The inconsistency may be vice versa instead. The notarial officer should recognize these common inconsistencies when performing the identification of an individual. However, if a notarial officer is ultimately uncertain about the identity of the individual, the notarial officer should refuse to perform the notarial act (see Section 8.)

SECTION 8. AUTHORITY TO REFUSE TO PERFORM NOTARIAL ACT.

(a) A notarial officer may refuse to perform a notarial act if the officer is not satisfied that:

(1) the individual executing the record is competent or has the capacity to execute the record; or

(2) the individual's signature is knowingly and voluntarily made.

(b) A notarial officer may refuse to perform a notarial act unless refusal is prohibited by law other than this [act].

Comment

Subsection (a) allows the notarial officer to refuse to perform a requested notarial act in either of two circumstances. First, if the notarial officer is not satisfied as to the competency or capacity of the individual executing the record, the officer may refuse to perform the notarial act. Thus, for example, if the notarial officer is not satisfied that the individual has the mental status needed to execute the record, the officer may refuse to perform the notarial act. Second, if the notarial officer has concern about whether the individual's signature was knowingly and voluntarily made, the officer may refuse to perform the notarial act. Thus, for example, if the notarial officer is concerned that the individual's signature is coerced, the officer may refuse to perform the notarial act.

Satisfaction as to the competency or capacity of the individual making the record or with the fact that the signature is knowingly and voluntarily made are matters within the proper judgment of the notarial officer. No expertise on the part of the notarial officer as to those matters is required to refuse to perform the notarial act.

This subsection does not impose a duty upon the notarial officer to make a determination as to the competency or capacity of the individual nor as to whether the signature of the individual is knowingly and voluntarily made. It does not require the officer to perform a formal evaluation of the individual on those matters. It merely permits the notarial officer to refuse to perform the notarial act if the officer should not be satisfied as to those matters.

Subsection (b) gives the notarial officer the general authority to refuse to perform a notarial act for any other reason as long as the reason for the refusal is itself not a violation of other law of this state or the United States. Thus, for example, a notary public may be an employee whose employer has paid the expenses of obtaining and maintaining the notary public commission. Their understanding may be that the notary public will be available to perform notarial acts as needed by the employer but will not be available to perform them for general members of the public. A notary public under that arrangement may refuse to perform notarial acts for members of the public. In another context, a notary public may refuse to perform a notarial act with respect to an electronic record if the client demands that the notary use a technology for performing the notarial act that the notary has not selected (see Section 20(a)).

The subsection does prohibit, however, the officer from refusing to perform the notarial if the refusal is a violation of other law. For example, the notarial officer may not refuse to perform the notarial act due to discrimination that is prohibited by state or federal law. Indeed, such a refusal to perform the notarial act may also be punishable under the state or federal law.

SECTION 9. SIGNATURE IF INDIVIDUAL UNABLE TO SIGN. If an individual

is physically unable to sign a record, the individual may direct an individual other than the notarial officer to sign the individual's name on the record. The notarial officer shall insert "Signature affixed by (name of other individual) at the direction of (name of individual)" or words of similar import.

Comment

This section recognizes that some individuals may not be personally able to sign a record because of a physical disability. If an individual is physically unable to sign the record, this section allows an alternate process.

This section allows a disabled individual, who is executing a record, to direct an individual other than the notarial officer to sign the executing individual's name to the record. It then requires the notarial officer to insert the quoted language in the record or to insert words of similar import. In effect, the executing individual is appointing another individual to act as the executing individual's agent for the purpose of signing the record.

SECTION 10. NOTARIAL ACT IN THIS STATE.

(a) A notarial act may be performed in this state by:

(1) a notary public of this state; [or]

(2) a judge, clerk, or [deputy clerk] of a court of this state[; or]

[(3) an individual licensed to practice law in this state][; or]

[(4) any other individual authorized to perform the specific act by the law of this state].

(b) The signature and title of an individual performing a notarial act in this state are prima facie evidence that the signature is genuine and that the individual holds the designated title.

(c) The signature and title of a notarial officer described in subsection [(a)(1) or (2)] [(a)(1), (2), or (3)] conclusively establish the authority of the officer to perform the notarial act.

Legislative Note: *Subsection (a)(4) recognizes, collectively and in general terms, the authority of other individuals holding notarial powers authorized under other law of this state. However, instead of the nonspecific collective recognition stated in this subsection, it would be preferable*

to list in this subsection other specific officers or individuals holding notarial powers and, if their powers are limited, the notarial powers granted to them. Such a listing would provide a practical reference for a person seeking to determine whether an individual or holder of an office is authorized to perform notarial acts in this state. This reference would be especially valuable if a notarial act performed in this state is to be recognized in another state under Section 11. Therefore, subsection (a)(4) is bracketed to show that a state may optionally insert a specific list of those officers authorized to perform notarial acts.

Comment

Subsection (a) lists the individuals who are entitled to serve as notarial officers and perform notarial acts in this state. A notary public as well as a judge, clerk, or [deputy clerk] of any court of this state are specifically authorized to perform notarial acts.

This Act provides two optional groups of authorized individuals. Under subsection (a)(3), a state may authorize a duly licensed attorney at law to serve as a notarial officer by virtue of that individual's status as a licensed attorney. The attorney's authority to perform notarial acts does not depend on the issuance of a notary public commission by the commissioning officer or agency. This subsection would not be relevant, however, if an attorney must obtain a commission as a notary public from the commissioning officer or agency in order to perform notarial acts.

Subsection (a)(4) recognizes the authority of other individuals to perform notarial acts if the performance of notarial acts by that individual is otherwise authorized by state law. Usually, the individuals recognized in this subsection are incumbents in a particular office. For example, recorders or registrars of deeds, or commissioners of titles, may be authorized to perform notarial acts under separate legislation. See Legislative Note, above.

Subsections (b) and (c) deal with proof of the authority of a notarial officer to perform a notarial act. Establishing that proof usually involves three steps:

1. Proof that the signature in the certificate of notarial act is that of the individual identified as a notarial officer;

2. Proof that the individual named in the certificate of notarial act holds the designated office as a notarial officer; and

3. Proof that individuals holding the designated office may perform notarial acts.

Subsection (b) creates a prima facie presumption that a signature purported to be that of a notarial officer on the certificate of notarial act is, in fact, that of the named notarial officer. It also creates a prima facie presumption that the individual purporting to be a notarial officer in the certificate of notarial act does, in fact, hold the designated notarial office. These are the first two steps in the proof of a notarial act as listed above. However, being only prima facie evidence, these two elements may be disproved in a legal proceeding upon adequate proof.

Subsection (c) creates a conclusive presumption that notaries public, judges, clerks and [deputy clerks] of this state (and attorneys licensed to practice law in this state, if subsection (a)(3) is adopted) have the authority to perform notarial acts. Since this Act specifically authorizes individuals holding those offices to perform notarial acts, it is not possible to disprove that an individual holding one of those offices has the authority to perform notarial acts. This is the third step in the proof of a notarial act as listed above. However, this per se recognition does not extend beyond a notary public, judge, clerk or [deputy clerk] (or attorneys licensed to practice law in this state, if subsection (a)(3) is adopted) of this state. Authority of other individuals to perform notarial acts must be proven by reference to other law of this state.

SECTION 11. NOTARIAL ACT IN ANOTHER STATE.

(a) A notarial act performed in another state has the same effect under the law of this state as if performed by a notarial officer of this state, if the act performed in that state is performed by:

(1) a notary public of that state;

(2) a judge, clerk, or deputy clerk of a court of that state; or

(3) any other individual authorized by the law of that state to perform the notarial act.

(b) The signature and title of an individual performing a notarial act in another state are prima facie evidence that the signature is genuine and that the individual holds the designated title.

(c) The signature and title of a notarial officer described in subsection (a)(1) or (2) conclusively establish the authority of the officer to perform the notarial act.

Comment

Subsection (a) lists the notarial officers of other states whose notarial acts, when performed in those states, will be recognized in this state. The officers listed in subsections (a)(1) and (2) are identical to the officers listed in Subsections 10(a)(1) and (2), above. It provides parity of recognition for notarial acts performed by those officers. Subsection (a)(3) recognizes notarial acts performed by other notarial officers of other states, when performed in those states, if they are authorized by law of the other state. It is parallel to the recognition of other notarial officers of this state as provided in subsection 10(a)(4) (and subsection 10(a)(3) if

attorneys at law are authorized to perform notarial acts in the other state by reason of their offices and not be reason of being issued commissions as notaries public). It clearly establishes that acknowledgements, verifications, affidavits, and other forms of notarial acts performed in another state by the listed notarial officers of that state meet the requirements of this section and are to be recognized in this state without the further need of a certification or authentication of the notarial officer by an official of the foreign state (see *Aspey v. Memorial Hospital,* 477 Mich. 120, 730 N.W.2d 695 (2007)).

Subsection (b) creates a prima facie presumption that a signature purported to be that of a notarial officer of the other state on the certificate of notarial act is, in fact, the signature of the named notarial officer. It also creates a prima facie presumption that the individual purporting to be a notarial officer of the other state in the certificate of notarial act does, in fact, hold the designated notarial office. These are the first two steps in the proof of the authority of a notarial officer to perform a notarial act as listed in the Comment to Section 10. However, being only prima facie evidence, these two elements may be disproved in a legal proceeding upon adequate proof.

Subsection (c) creates a conclusive presumption that notaries public, judges, clerks and deputy clerks of the other state have the authority to perform notarial acts. Since this Act specifically recognizes the notarial acts of individuals holding those offices, it is not possible to disprove that an individual holding one of those offices has the authority to perform notarial acts. This abolishes the need for a "clerk's certificate," certification, or similar instrument to prove the authority of a notary public, judge, clerk or deputy clerk to perform a notarial act (see *Aspey v. Memorial Hospital,* 477 Mich. 120, 730 N.W.2d 695 (2007). This is the third step in the proof of the authority of a notarial officer to perform a notarial act as listed in the Comment to Section 10. However, this per se recognition does not extend beyond a notary public, judge, clerk or deputy clerk of the other state. Authority of other individuals to perform notarial acts may be proven by reference to law of the other state. In addition, other forms of proof of authority to perform notarial acts, such as a "clerk's certificate" or certification are acceptable.

SECTION 12. NOTARIAL ACT UNDER AUTHORITY OF FEDERALLY RECOGNIZED INDIAN TRIBE.

(a) A notarial act performed under the authority and in the jurisdiction of a federally recognized Indian tribe has the same effect as if performed by a notarial officer of this state, if the act performed in the jurisdiction of the tribe is performed by:

(1) a notary public of the tribe;

(2) a judge, clerk, or deputy clerk of a court of the tribe; or

(3) any other individual authorized by the law of the tribe to perform the notarial

act.

(b) The signature and title of an individual performing a notarial act under the authority of and in the jurisdiction of a federally recognized Indian tribe are prima facie evidence that the signature is genuine and that the individual holds the designated title.

(c) The signature and title of a notarial officer described in subsection (a)(1) or (2) conclusively establish the authority of the officer to perform the notarial act.

Comments

Subsection (a) lists the notarial officers acting under the authority and in the jurisdiction of a federally recognized Indian tribe (see 25 C.F.R. §83.1 et. seq.; see also 25 U.S.C. §9 (2010)) whose notarial acts will be recognized in this state. The officers listed in subsections (a)(1) and (2) are identical to the officers listed in Subsections 10(a)(1) and (2), above. It provides parity of recognition for notarial acts performed by those officers. Subsection (a)(3) recognizes notarial acts performed by other notarial officers acting under the authority and in the jurisdiction of a federally recognized Indian tribe, if they are authorized by the law of the Indian tribe. It is parallel to the recognition of other notarial officers of this state as provided in subsection 10(a)(4) (and subsection 10(a)(3) if attorneys at law are authorized to perform notarial acts under the authority of a federally recognized Indian tribe by reason of their offices and not be reason of being issued commissions as notaries public).

Subsection (b) creates a prima facie presumption that a signature purported to be that of a notarial officer acting under the authority of an Indian tribe on the certificate of notarial act is, in fact, that of the named notarial officer. It also creates a prima facie presumption that the individual purporting to be a notarial officer acting under the authority of a federally recognized Indian tribe in the certificate of notarial act does, in fact, hold the designated notarial office. These are the first two steps in the proof of the authority of a notarial officer to perform a notarial act as listed in the Comment to Section 10. However, being only prima facie evidence, these two elements may be disproved in a legal proceeding upon adequate proof.

Subsection (c) creates a conclusive presumption that notaries public, judges, clerks and deputy clerks acting under the authority of a federally recognized Indian tribe have the authority to perform notarial acts. Since this Act specifically recognizes the notarial acts of individuals holding those offices, it is not possible to disprove that an individual holding one of those offices has the authority to perform notarial acts. This abolishes the need for a "clerk's certificate," certification, or similar instrument to prove the authority of a notary public, judge, clerk or deputy clerk to perform a notarial act. This is the third step in the proof of the authority of a notarial officer to perform a notarial act as listed in the Comment to Section 10. However, this per se recognition does not extend beyond a notary public, judge, clerk or deputy clerk acting under the authority of a federally recognized Indian tribe. Authority of other individuals to perform notarial acts may be proven by reference to law of the federally recognized Indian tribe.

In addition, other forms of proof of authority to perform notarial acts, such as a "clerk's certificate" or certification are acceptable.

SECTION 13. NOTARIAL ACT UNDER FEDERAL AUTHORITY.

(a) A notarial act performed under federal law has the same effect under the law of this state as if performed by a notarial officer of this state, if the act performed under federal law is performed by:

(1) a judge, clerk, or deputy clerk of a court;

(2) an individual in military service or performing duties under the authority of military service who is authorized to perform notarial acts under federal law;

(3) an individual designated a notarizing officer by the United States Department of State for performing notarial acts overseas; or

(4) any other individual authorized by federal law to perform the notarial act.

(b) The signature and title of an individual acting under federal authority and performing a notarial act are prima facie evidence that the signature is genuine and that the individual holds the designated title.

(c) The signature and title of an officer described in subsection (a)(1), (2), or (3) conclusively establish the authority of the officer to perform the notarial act.

Comment

Some notarial acts are performed by notarial officers acting under federal authority or holding office under federal authority. This section recognizes the notarial acts performed by those officers when performed in accordance with federal law. Subsection (a)(1) recognizes the notarial acts performed by judges, clerks, and deputy clerks under federal law. It is the federal law parallel to the notarial officers recognized in subsections 10(a)(2) and 11(a)(2).

Subsection (a)(2) recognizes the authority of certain individuals to perform notarial acts while in the military service or under the authority of a military service. These provisions are currently codified in 10 U.S.C §1044a (2010). At the time of the drafting of this Act, subsection (b) of the federal codification provides the following individuals with the authority to perform

notarial acts for the purposes stated in subsection (a) of the enactment:

> (b) Persons with the powers described in subsection (a) are the following:
>
> (1) All judge advocates, including reserve judge advocates when not in a duty status.
>
> (2) All civilian attorneys serving as legal assistance attorneys.
>
> (3) All adjutants, assistant adjutants, and personnel adjutants, including reserve members when not in a duty status.
>
> (4) All other members of the armed forces, including reserve members when not in a duty status, who are designated by regulations of the armed forces or by statute to have those powers.
>
> (5) For the performance of notarial acts at locations outside the United States, all employees of a military department or the Coast Guard who are designated by regulations of the Secretary concerned or by statute to have those powers for exercise outside the United States.

Subsection (a)(3) recognizes the authority of an individual who is designated as a notarizing officer by the United States Department of State for performing notarial acts overseas. This has been a traditional function performed by a notarizing officer of the Department of State. In many parts of the world a notarial act performed by a notarizing officer of the Department of State may be the best means to perform a notarial act for records that must be recognized in the United States. See subsection 14(f) as to the effect of a consular authentication performed by an individual who is designated as a notarizing officer by the United States Department of State for performing notarial acts overseas .

Subsection (a)(4) provides recognition of the notarial acts performed by other notarial officers authorized under federal law who are not listed in the prior subsections. A variety of other federal officers may be authorized to perform notarial acts, such as wardens of federal prisons (see 18 U.S.C. §4004 (2010)).

Subsection (b) creates a prima facie presumption that the signature purported to be that of a notarial officer under federal law on the certificate of notarial act is, in fact, that of the named notarial officer. It also creates a prima facie presumption that the individual purporting to be a notarial officer in the certificate of notarial act does, in fact, hold the designated notarial office under federal law. These are the first two steps in the proof of the authority of a notarial officer to perform a notarial act as listed in the Comment to Section 10. However, being only prima facie evidence, these two elements may be disproved in a legal proceeding upon adequate proof.

Subsection (c) creates a conclusive presumption that a federal judge, clerk or deputy clerk, an individual in the military service or acting under the authority of a military service, and an individual designated as a notarizing officer by the Department of State has the authority to perform notarial acts. Since this Act specifically recognizes the notarial acts of individuals holding those offices, it is not possible to disprove that an individual holding one of those offices has the authority to perform notarial acts. This is the third step in the proof of the authority of a notarial officer to perform a notarial act as listed in the Comment to Section 10. However, this per se recognition does not extend beyond a federal judge, clerk or deputy clerk, an individual in

the military service or acting under the authority of a military service, or an individual designated as a notarizing officer by the Department of State. Authority of other individuals to perform notarial acts under federal law may be proven by reference to federal law granting the authority.

SECTION 14. FOREIGN NOTARIAL ACT.

(a) In this section, "foreign state" means a government other than the United States, a state, or a federally recognized Indian tribe.

(b) If a notarial act is performed under authority and in the jurisdiction of a foreign state or constituent unit of the foreign state or is performed under the authority of a multinational or international governmental organization, the act has the same effect under the law of this state as if performed by a notarial officer of this state.

(c) If the title of office and indication of authority to perform notarial acts in a foreign state appears in a digest of foreign law or in a list customarily used as a source for that information, the authority of an officer with that title to perform notarial acts is conclusively established.

(d) The signature and official stamp of an individual holding an office described in subsection (c) are prima facie evidence that the signature is genuine and the individual holds the designated title.

(e) An apostille in the form prescribed by the Hague Convention of October 5, 1961, and issued by a foreign state party to the Convention conclusively establishes that the signature of the notarial officer is genuine and that the officer holds the indicated office.

(f) A consular authentication issued by an individual designated by the United States Department of State as a notarizing officer for performing notarial acts overseas and attached to the record with respect to which the notarial act is performed conclusively establishes that the signature of the notarial officer is genuine and that the officer holds the indicated office.

Comment

Subsection (a) clarifies that, for purposes of this section, a "foreign state" means a foreign country and not the United States, a state in the United States federal system, or a federally recognized Indian tribe.

Subsection (b) provides for the recognition of notarial acts performed by notarial officers acting under the authority and in the jurisdiction of a foreign state or its constituent units. It also recognizes the notarial acts performed by notarial officers acting under the authority of a multinational or international governmental organization. An example of a multinational or international governmental organization is the United Nations.

Subsection (c) states that if the title of a notarial office and the authority of a person in that office to perform notarial acts appear in a digest of foreign laws or in a list customarily used as a source for that information, the authority of a notarial officer holding that office to perform the indicated notarial acts is conclusively established. This is the third step in the proof of the authority of a notarial officer to perform a notarial act as listed in the Comment to Section 10.

Subsections (d) states that the signature and official stamp of a notarial officer identified in subsection (c) provides prima facie evidence that (1) the officer's signature is genuine, and (2) the officer holds an office with the designated title. These are the first two steps in the proof of the authority of a notarial officer to perform a notarial act as listed in the Comment to Section 10.

Being only a prima facie evidence that the notarial officer's signature is valid and that the officer holds an office with the designated title, those elements may be disproved in a legal proceeding upon adequate proof. If the validity of a foreign notarial officer's signature or the fact that the officer holds an office with the designated title is challenged, ultimate proof in a judicial proceeding may be expensive and time consuming. Furthermore, the potential of post hoc challenges may be detrimental to the promotion of international commerce. Therefore, the Act recognizes two means by which the validity of the notarial officer's signature and the certainty that the individual holds a notarial office with the designated title can be conclusively established: (1) "apostille," and (2) consular authentication.

Subsection (e) recognizes an "apostille" as one means of conclusively establishing those facts. The United States is a party to an international treaty regarding the authentication of notarial acts performed on public documents. The treaty is known as the Hague Convention ("Convention de La Haye du 5 octobre 1961"). Under this treaty, an "apostille" may be prepared by a competent authority in a foreign state in accordance with the treaty and stamped on or attached to the record. A competent authority is one designated by the foreign state from which the public document emanates. The "apostille" may be in the language of the foreign state in which it is issued, but the words "APOSTILLE (Convention de La Haye, du 5 octobre 1961)" are always in French. The "apostille" should conform as closely as possible to the Model annexed to the Convention.

Subsection (e) carries out the provisions of Hague Convention and gives effect to an

"apostille" complying with the treaty. It states that the "apostille" conclusively establishes that: (1) the signature of the notarial officer on the certificate is genuine, and (2) the officer holds an office with the indicated title. When combined with the conclusive presumption established under subsection (c) as to the authority of a notarial officer with a designated title to perform a notarial act, all three steps in the proof of the authority of a notarial officer to perform a notarial act, as listed in the Comment to Section 10, are met.

The "apostille" has the following form, which is set forth in the annotation to Federal Rules of Civil Procedure Rule 44:

The certificate will be in the form of a square with sides at least 9 centimetres long:

APOSTILLE
(Convention de La Haye du 5 octobre 1961)

1. Country: .....
   This public document
2. has been signed by .....
3. acting in the capacity of .....
4. bears the seal/stamp of .....
   .....

Certified

5. at ..... 6. the .....
7. by .....
8. No .....
9. Seal/stamp: 10. Signature:
   .....

Subsection (f) provides an alternative means by which (1) the fact that the signature of the notarial officer on the certificate is genuine, and (2) the fact that the officer held an office with the designated title may be assured. Under it, an individual designated by the United States Department of State as a notarizing officer for performing notarial acts overseas may provide that assurance by means of a consular authentication. A consular authentication conclusively establishes that (1) the signature of the foreign notarial officer is valid, and (2) the officer holds the indicated office. The consular authentication must be attached to the record with respect to which the notarial act is performed. When combined with the conclusive presumption established under subsection (c) as to the authority of a notarial officer with a designated title to perform a notarial act, all three steps in the proof of the authority of a notarial officer to perform a notarial act, as listed in the Comment to Section 10, are met.

SECTION 15. CERTIFICATE OF NOTARIAL ACT.

(a) A notarial act must be evidenced by a certificate. The certificate must:

(1) be executed contemporaneously with the performance of the notarial act;

(2) be signed and dated by the notarial officer and, if the notarial officer is a notary public, be signed in the same manner as on file with the [commissioning officer or agency];

(3) identify the jurisdiction in which the notarial act is performed;

(4) contain the title of office of the notarial officer; and

(5) if the notarial officer is a notary public, indicate the date of expiration, if any, of the officer's commission.

(b) If a notarial act regarding a tangible record is performed by a notary public, an official stamp must be affixed to or embossed on the certificate. If a notarial act is performed regarding a tangible record by a notarial officer other than a notary public and the certificate contains the information specified in subsection (a)(2), (3), and (4), an official stamp may be affixed to or embossed on the certificate. If a notarial act regarding an electronic record is performed by a notarial officer and the certificate contains the information specified in subsection (a)(2), (3), and (4), an official stamp may be attached to or logically associated with the certificate.

(c) A certificate of a notarial act is sufficient if it meets the requirements of subsections (a) and (b) and:

(1) is in a short form set forth in Section 16;

(2) is in a form otherwise permitted by the law of this state;

(3) is in a form permitted by the law applicable in the jurisdiction in which the notarial act was performed; or

(4) sets forth the actions of the notarial officer and the actions are sufficient to meet the requirements of the notarial act as provided in Sections 5, 6, and 7 or law of this state other than this [act].

(d) By executing a certificate of a notarial act, a notarial officer certifies that the officer has complied with the requirements and made the determinations specified in Sections 4, 5, and 6.

(e) A notarial officer may not affix the officer's signature to, or logically associate it with, a certificate until the notarial act has been performed.

(f) If a notarial act is performed regarding a tangible record, a certificate must be part of, or securely attached to, the record. If a notarial act is performed regarding an electronic record, the certificate must be affixed to, or logically associated with, the electronic record. If the [commissioning officer or agency] has established standards pursuant to Section 27 for attaching, affixing, or logically associating the certificate, the process must conform to the standards.

Comment

Subsection (a) provides that a notarial act must be evidenced by a certificate of notarial act. It sets out the requirements of that certificate:

Subsection (a)(1) – The certificate must be executed contemporaneously with the performance of a notarial act. The performance of a notarial act may take some period of time to accomplish, especially in large transactions with long closings. The fact that the certificate is not executed by the notarial officer immediately after the individual signs and acknowledges a deed would not necessarily demonstrate a lack of contemporaneous execution. However, a certificate that is not executed until some days after an individual signs and acknowledges a deed and the transaction is closed would not be a contemporaneous execution.

Subsection (a)(2) – The certificate must be signed and dated by the notarial officer. If the notarial officer is a notary public, the signature must be signed in the same manner as the signature that is on file with the commissioning officer or agency. For example, if a signature on file with the commissioning officer or agency contains the notary public's middle initial, the signature on the certificate must also contain the initial.

Subsection (a)(3) – The certificate must identify the jurisdiction in which the notarial act is performed. This is normally done by identifying the state and county in which the notarial act is performed (see Section 16, Short Forms). (Some states allow, on a reciprocity basis, notaries public of this state to perform notarial acts in a neighboring state or in counties in a neighboring state. Nothing in this Act changes or limits that reciprocity).

Subsection (a)(4) – The certificate must identify the title of office of the notarial officer.

For example, the office may be notary public or clerk of court. The notarial officer may also be an individual in a military service or performing duties under the authority of a military service, in which case the individual's rank or position should be identified.

Subsection (a)(5) – If the officer is a notary public, the certificate must contain the expiration date of the notary public's commission, if any. In some states, the expiration date will be part of a notary public's official stamp (see Section 17(1)) and the use of the official stamp will satisfy the requirements of this subsection. However, if a notary public's official stamp does not contain the expiration date because it is not required under Section 17(1) or if a notary publicis not required use an official stamp under subsection (b), the expiration date of the notary public's commission must be separately inserted.

Subsection (b) identifies those circumstances in which the certificate of notarial act must contain the official stamp of the notarial officer.

If the notarial act is performed with respect to a tangible medium and is performed by a notary public, subsection (b) requires that the notary public's official stamp be affixed to or embossed on the certificate of notarial act.

If the notarial act is performed with respect to a tangible medium and is performed by a notarial officer other than a notary public, subsection (b) states that an official stamp may be attached to or embossed on the certificate of notarial act. However, although permitted, it is not required by this act. . Whether a notarial officer other than a notary public is required to use an official stamp and what the contents of that stamp may be will depend on other law of this state. That law may not require the use of a stamp or it may require the use of a stamp but may specify other contents. Regardless of whether an official stamp is attached to or embossed on the certificate, the certificate nevertheless must, at a minimum, contain the information specified in subsections (a)(2), (3) and (4).

If the notarial act is performed with respect to an electronic record by a notarial officer, whether a notary public or otherwise, subsection (b) states that the officer's official stamp may be attached to, or associated with, the electronic certificate of notarial act. However, although permitted, this subsection does not require that a notarial officer's official stamp be attached to or logically associated with an electronic certificate. Regardless of whether an official stamp is attached to or logically associated with an electronic certificate, the electronic certificate nevertheless must, at a minimum, contain the information specified in subsections (a)(2), (3) and (4). These are the same provisions found in URPERA §3(c), UETA §11, and ESign §101(g) regarding the performance of notarial acts with respect to electronic records.

Subsection (c) provides that if the certificate of notarial act meets the requirements of subsections (a) and (b), it may be in (1) the appropriate short form set out in Section 16, (2) any other form permitted by the law of this state, (3) any other form permitted by the law of the place where the notarial act is performed if other than this state, or (4) any form that sets forth the actions of the notarial officer if those actions meet the requirements of Sections 5, 6, and 7 or law other than this act, whether state or federal. Thus, acknowledgments and other notarial acts may be in the short forms provided in Section 16 or may be in more prolix and elaborate traditional forms provided they contain the required information.

Subsection (d) emphasizes the obligation of the notarial officer to comply with the requirements of, and to make the determinations required by, Sections 5, 6, and 7. By executing the certificate, the notarial officer certifies that the officer has done so.

Subsection (e) provides that the notarial officer may not sign the certificate until the notarial act has been fully performed (compare N.C. Gen. Stat. §10B-35 (2009)).

Subsection (f) seeks to assure the unified integrity of the record and the related certificate of notarial act. With respect to a notarial act evidenced on a tangible record, this subsection requires that the certificate must be a part of, or securely attached to, the record. If the certificate is not a part of the record itself, the means of attaching the certificate to the record are not specified. However, stapling is a common means.

Affixing an electronic certificate to, or associating it with, an electronic record requires sophisticated technology. There are multiple technologies by which the affixing or associating may be accomplished and those technologies will undoubtedly change over time as technologies improve and change. Accordingly, subsection (f) does not adopt any particular technology or limit the affixing or associating to technologies that are currently available. Rather, it provides that the certificate must be affixed to, or logically associated with, the electronic record in accordance with standards as may be approved by the commissioning officer or agency. The standards are left to the determination of the commissioning officer or agency under Section 27 and will depend on the available technology and the degree of security provided by available technology. In the absence of standards adopted by the commissioning officer or agency, the notary public may proceed with performing notarial acts with respect to electronic records as long as the notary public employs tamper evident technologies as required by Section 20.

SECTION 16. SHORT FORM CERTIFICATES. The following short form certificates of notarial acts are sufficient for the purposes indicated, if completed with the information required by Section 15(a) and (b):

(1) For an acknowledgment in an individual capacity:

State of _____

[County] of _____

This record was acknowledged before me on _____ by _____
Date Name(s) of individual(s)

_____
Signature of notarial officer

Stamp

[_____]
Title of office

[My commission expires: _____]

(2) For an acknowledgment in a representative capacity:

State of _____

[County] of _____

This record was acknowledged before me on _____ by _____
Date Name(s) of individual(s)

as (type of authority, such as officer or trustee) of (name of party on behalf of whom record was executed).

_____
Signature of notarial officer

Stamp

[_____]
Title of office

[My commission expires: _____]

(3) For a verification on oath or affirmation:

State of _____

[County] of _____

Signed and sworn to (or affirmed) before me on _____ by _____
Date Name(s) of individual(s) making statement

_____
Signature of notarial officer

Stamp

[_____]
Title of office

[My commission expires: _____]

(4) For witnessing or attesting a signature:

State of _____

[County] of _____

Signed [or attested] before me on _____ by _____
Date Name(s) of individual(s)

_____
Signature of notarial officer

Stamp

[_____]
Title of office

[My commission expires: _____]

(5) For certifying a copy of a record:

State of _____

[County] of _____

I certify that this is a true and correct copy of a record in the possession

of _____.

Dated _____

_____
Signature of notarial officer

Stamp

[_____]
Title of office

[My commission expires: _____]

Comment

This section provides statutory short form certificates of various notarial acts. These forms are sufficient to document a notarial act in this state. See Section 15(c)(1). Other forms may also qualify as stated in Section 15(c)(2), (3), and (4).

These certificates may be used for notarial acts performed on tangible records as well as those performed with respect to electronic records. They are available for notarial acts performed by notaries public as well as notarial officers who are not notaries public. Under Section 15(b), an official stamp is required on the certificate if the notarial act is performed on a tangible record by a notary public. Under Section 15(b), if the notarial act is performed on a tangible record by a notarial officer other that a notary public or is performed by any notarial officer on an electronic record, an official stamp is optional, but the information or acts specified in Section 15(a)(2), (3) and (4) must be supplied. The short forms provided in this section call for the insertion of that information or the performance of those acts.

The calls in each of the forms for state and county information refer to the state and county where the notarial act is performed.

SECTION 17. OFFICIAL STAMP. The official stamp of a notary public must:

(1) include the notary public's name, jurisdiction, [commission expiration date,] and other information required by the [commissioning officer or agency]; and

(2) be capable of being copied together with the record to which it is affixed or attached or with which it is logically associated.

Legislative Note: *Among the elements of a notary public's official stamp, paragraph (1) includes the expiration date of the notary public's commission. Under the current law of some states, notary public commissions do not have an expiration date. A legislature may wish to continue the practice of issuing notary public commissions without expiration dates (see Section 21(e)). In addition, the current practice in some states is not to require that the expiration date be included as one of the elements of the official stamp, but rather to allow it to be inserted by means of another stamp or by hand. A legislature may wish to continue that practice. Therefore, the provision in paragraph (1) requiring the official stamp to include the expiration date of the commission is optional.*

Comment

This section sets forth two requirements for a notary public's official stamp, whether the stamp is a physical image attached to, or embossed on, a tangible certificate of notarial act or an electronic image attached to, or logically associated with, an electronic certificate of notarial act.

Subsection (1) provides that the official stamp must state the notary public's name. Since Subsection 15(a)(2) requires that a notary public sign the notary's name as it appears on file with the commissioning officer or agency, the name of the notary on the official stamp should also conform with the name on file with the commissioning officer of agency. The official stamp must state the jurisdiction in which the notary public is commissioned. An optional provision states that the official stamp must set forth the date on which the notary public's commission expires. Finally, the official stamp must include any other information that is required by the commissioning officer or agency.

Subsection (2) requires that the official stamp be capable of being copied together with the record to or with which it is attached or logically associated. Thus, for example, an official stamp that is affixed with a rubber stamping device and ink must provide a clear image in an ink that is capable of being copied. An official stamp that is affixed by embossing must do so in such a way that the information in the embossment is capable of being copied. An official stamp that is attached to, or logically associated with, an electronic record must be capable of being copied by the same technology by which the electronic record is copied.

SECTION 18. STAMPING DEVICE.

(a) A notary public is responsible for the security of the notary public's stamping device and may not allow another individual to use the device to perform a notarial act. [On resignation from, or the revocation or expiration of, the notary public's commission, or on the expiration of the date set forth in the stamping device, if any, the notary public shall disable the stamping device by destroying, defacing, damaging, erasing, or securing it against use in a manner that renders it unusable. On the death or adjudication of incompetency of a notary public, the notary public's personal representative or guardian or any other person knowingly in possession of the stamping device shall render it unusable by destroying, defacing, damaging, erasing, or securing it against use in a manner that renders it unusable.]

(b) If a notary public's stamping device is lost or stolen, the notary public or the notary

public's personal representative or guardian shall notify promptly the commissioning officer or agency on discovering that the device is lost or stolen.

Legislative Note: *The second sentence of subsection (a) require a notary public to render the notary's stamping device unusable upon the resignation, revocation, or resignation of the notary's commission. Similarly, the third sentence requires that upon the death or adjudication of incompetency of a notary public, the notary's personal representative or guardian, if knowingly in possession of the stamping device, must render it unusable.*

These two sentences are provided for states that consider that it is important to render a former notary public's stamping device unusable. However, the enactment of these two sentences is not essential for the uniformity of the act. They are bracketed to show that they are optional.

Comment

In order to protect and maintain the integrity of notarial acts, it is important that a notary public's stamping device be kept secure and out of the hands of other individuals who might use it fraudulently or erroneously. Accordingly, subsection (a) provides that a notary public is responsible for maintaining the security of notary's stamping device. Similarly, it provides that a notary public may not allow another individual to use the device.

In order to assure the integrity of the notarial system, the optional (bracketed) sentences of subsection (a) provide that the notary public may not continue to possess the official stamp once the notary is no longer serving as a notary public. The first optional sentence provides that upon the resignation of the notary public's commission, the revocation or expiration of the notary's commission, or the expiration of the date set forth in the stamping device, the notary must disable the device by destroying, defacing, damaging, erasing or securing it in a manner that renders it unusable. Similarly, the second optional sentence provides that upon the death or incompetency of a notary public, if the notary public's personal representative is knowingly in possession of the stamping device, the representative must render the stamping device unusable by destroying, defacing, damaging, erasing or securing it. (Compare N.C. Gen. Stat. §10B-36(a) (2009).)

Subsection (b) recognizes that if the official stamp is lost or stolen, the possibility of fraudulent activity or misuse is also raised. Thus, a notary public is required to notify the commissioning officer or agency as soon as the notary discovers that the stamp is lost or stolen. The commissioning officer or agency may be able to take other steps to provide notification that will further protect the public (compare Ariz. Rev. Stat. §41-323 (2010); N.C. Gen. Stat. §10B-36(c) (2009).)

[SECTION 19. JOURNAL.

(a) A notary public [other than an individual licensed to practice law in this state] shall

maintain a journal in which the notary public chronicles all notarial acts that the notary public performs. The notary public shall retain the journal for 10 years after the performance of the last notarial act chronicled in the journal.

(b) A journal may be created on a tangible medium or in an electronic format. A notary public shall maintain only one journal at a time to chronicle all notarial acts, whether those notarial acts are performed regarding tangible or electronic records. If the journal is maintained on a tangible medium, it must be a permanent, bound register with numbered pages. If the journal is maintained in an electronic format, it must be in a permanent, tamper-evident electronic format complying with the rules of the [commissioning officer or agency].

(c) An entry in a journal must be made contemporaneously with performance of the notarial act and contain the following information:

(1) the date and time of the notarial act;

(2) a description of the record, if any, and type of notarial act;

(3) the full name and address of each individual for whom the notarial act is performed;

(4) if identity of the individual is based on personal knowledge, a statement to that effect;

(5) if identity of the individual is based on satisfactory evidence, a brief description of the method of identification and the identification credential presented, if any, including the date of issuance and expiration of any identification credential; and

(6) the fee, if any, charged by the notary public.

(d) If a notary public's journal is lost or stolen, the notary public promptly shall notify the [commissioning officer or agency] on discovering that the journal is lost or stolen.

(e) On resignation from, or the revocation or suspension of, a notary public's commission, the notary public shall retain the notary public's journal in accordance with subsection (a) and inform the [commissioning officer or agency] where the journal is located.

(f) Instead of retaining a journal as provided in subsections (a) and (e), a current or former notary public may transmit the journal to the [commissioning officer or agency] [the official archivist of this state] or a repository approved by the [commissioning officer or agency].

(g) On the death or adjudication of incompetency of a current or former notary public, the notary public's personal representative or guardian or any other person knowingly in possession of the journal shall transmit it to the [commissioning officer or agency] [the official archivist of this state] or a repository approved by the [commissioning officer or agency].]

Legislative Note: *This section is provided for states that consider it to be good policy for notaries public to maintain journals of the notarial acts that they perform. However, the enactment of this section is not essential for the uniformity of the act. It is bracketed to show that it is optional.*

Subsection (a) contains further optional provision. The optional provision requires attorneys who obtain commissions as notaries public to maintain journals. However, by custom and professional practice, attorneys often retain copies of documents upon which they perform notarial acts for their clients. The retention of those copies generally provides the same assurances for the integrity of the notarial system that this provision is designed to accomplish. This subsection is provided for states that consider it to be good policy for notaries to maintain journals. However, the enactment of this provision is not essential for the uniformity of the act. It is bracketed to show that it is optional.

There are two additional considerations that were not adopted as part of this uniform act but which a state legislature might wish to consider with regard to the journal requirement. Subsection (b) requires that a notary public maintain only one journal at a time. Subsection (c) requires that a notary public make the entries into the journal at the time that a notarial act is performed. This may create a difficulty for a notary public who performs notarial acts with respect to electronic records and also performs notarial acts on tangible records. If a notary maintains an electronic journal (especially if the technology the notary uses automatically performs electronic journaling), the notary will have difficulty journaling a notarial act performed on a tangible record if the notary is away from the computer containing the electronic journal. For example, if a notary's electronic journal were installed on a desktop computer maintained in the notary's office and the notary were asked to perform a notarial act on a tangible record at an individual's bedside in a hospital, the notary might not be able to enter the

notarial act into the electronic journal at the time the notary performs the notarial act. Under this section, as written, a notary would either have to maintain a journal on a tangible record or would have to install the journaling software on a portable computer. As another alternative, an adopting legislature may wish to allow a notary public to maintain a portable journal on a tangible record in addition to the regular electronic journal (see Or. Rev. Stat. §194.152(1) (2010)).

Another alternative that a legislature might wish to consider is adding a provision to subsection (c) requiring an individual for whom a notary public performs a notarial act to sign the journal. This would assure that the entry in the journal is made at the time of the performance of a notarial act and that the individual has reviewed the entry made by the notary public (see Cal. Govt. Code §8206(a)(2)(C) (2010)).

Comment

Creating and maintaining a journal of the notarial acts that a notary public performs provides a number of assurances that will protect the integrity of the notarial system. Among other benefits, it helps to assure, or at least determine whether, a notarial act that is performed in the name of a particular notary public was indeed performed by that notary. As an ordinary business record the journal may provide evidence that the act was performed by the notary or, by the absence of an entry in the journal, it may provide evidence that the act was not performed by the notary. In that regard, it provides protection to both the notary and to the public whom the notary serves (cf. *Vancura v. Kartis,* 907 N.E.2d 814, 391 Ill. App. 3d 350 (2008)).

Subsection (a) requires a notary public to maintain a journal of all the notarial acts that the notary performs. A notary must maintain the journal for at least ten years after the performance of the last notarial act chronicled in that journal. For example, if a particular journal volume chronicles a notary public's notarial acts for the period from January 1, 2005 to December 31, 2009, the entire journal volume must be maintained until December 31, 2019 despite the fact that some entries may be nearly fifteen years old by that date.

The optional exception provided in this subsection for attorneys licensed to practice law in this state applies regardless of whether the attorney is authorized to perform notarial acts by the fact that the attorney is licensed to practice law (see Subsection 10(a)(3)) or the attorney must obtain a commission as a notary public from the commissioning officer or agency.

Subsection (b) allows a notary public to decide whether to use a traditional journal on a tangible medium or an electronic journal. However, the notary may maintain only one active journal at a time. If the notary maintains the journal on a tangible medium (e.g., paper), the journal must be maintained in a permanent, bound register with numbered pages. It may not be in a loose-leaf or similar volume with pages that can be removed or torn out without evidence of their removal. If the notary decides to use an electronic journal, the electronic journal must be maintained in a permanent, tamper evident electronic format as prescribed by the rules of the commissioning officer or agency (see Section 27).

Subsection (c) provides that a notary public must make the entries in the journal

contemporaneously with the performance of the notarial act. The performance of a notarial act may take some period of time to accomplish, especially if is part of a large transaction with numerous notarial acts. Thus, the fact that the entry in the journal not made immediately after an individual signs and acknowledges a document such as a deed does not necessarily demonstrate a lack of contemporaneous entry. Nevertheless, the entry must be made reasonably promptly and by the end of the transaction.

Subsection (c) also lists certain information that must be included in the journal entry for each notarial act performed. These include: (1) the date and time of the notarial act; (2) a brief description of the record, if any, and the type of notarial act performed (e.g., deed with acknowledgment); (3) the full name and address of each individual for whom the notarial act is performed; (4) if identity of the individual was based on personal knowledge (see Section 7(a)), a statement to that effect; (5) if identity of the individual was based on satisfactory evidence (see Section 7(b)), a brief description of the method of identification (i.e. identification credential or credible witness), and, if an identification credential was used, the date the credential was issued and its expiration date; and (6) the fee, if any, charged by the notarial officer (compare Cal. Govt. Code §8206 (2010)).

Because of the importance of journals and their continued maintenance by notaries public, subsection (d) requires a notary public to notify the commissioning officer or agency, upon discovery, if the journal is lost or stolen. Similarly, if pages in a notary's permanent, bound register, as required in subsection (b), are lost or stolen, the notary public must notify the commissioning officer or agency upon discovery. The reporting of this information to the commissioning officer or agency not only protects the members of the public whom the notary has served but also the notary him or herself.

The retention and maintenance of a notary's journals continue to be important after the termination of the notary's commission. Thus, subsection (e) provides that upon the resignation of a notary public from the notary's commission, or the revocation or suspension of the notary's commission, the notary must continue to retain the notary's journals for the ten year period provided in subsection (a) and provide the commissioning officer or agency with information about where the journals are located.

Subsection (f) allows a current or former notary public, instead of retaining journals for the ten year period provided in subsection (a), to elect to transmit them to the [commissioning officer or agency] or [official state archivist] or a repository approved by the commissioning officer or agency.

Subsection (g) directs that upon the death of a notary public, the notary's personal representative, guardian, or any person knowingly in possession of the journals must transmit the journals to the [commissioning officer or agency] or [official state archivist] or a repository approved by the commissioning officer or agency.

SECTION 20. NOTIFICATION REGARDING PERFORMANCE OF NOTARIAL ACT ON ELECTRONIC RECORD; SELECTION OF TECHNOLOGY.

(a) A notary public may select one or more tamper-evident technologies to perform notarial acts with respect to electronic records. A person may not require a notary public to perform a notarial act with respect to an electronic record with a technology that the notary public has not selected.

(b) Before a notary public performs the notary public's initial notarial act with respect to an electronic record, a notary public shall notify the [commissioning officer or agency] that the notary public will be performing notarial acts with respect to electronic records and identify the technology the notary public intends to use. If the [commissioning officer or agency] has established standards for approval of technology pursuant to Section 27, the technology must conform to the standards. If the technology conforms to the standards, the [commissioning officer or agency] shall approve the use of the technology.

Comment

Subsection (a) provides that a notary public may elect to perform notarial acts with respect to electronic records and, for the purpose of performing those notarial acts, may select one or more technologies. This allows a notary to use more than one technology in order to accommodate clients using different technologies to perform their electronic transactions. However, a notary public may determine whether to use a technology requested by a client and may refuse to do so.

Any technology that the notary selects must be a tamper evident technology. A tamper evident technology is one that is designed to allow a person inspecting an electronic record to determine whether there has been any tampering with the integrity of a certificate of notarial act logically associated with a record or with the attachment or association of the notarial act with that electronic record.

Subsection (b) requires that, before performing the notary public's initial notarial act with respect to an electronic record, a notary public must notify the commissioning officer or agency that the notary will be performing notarial acts with respect to electronic records. When a notary provides a notification to the commissioning officer or agency, the notary must also identify the technology or technologies that the notary intends to use to perform the notarial acts.

If, at the time that a notary public provides the notification to the commissioning officer or agency, the commissioning officer or agency has established standards for the approval of technology to be used to perform notarial acts with respect to electronic records, any technology selected by the notary must conform to those standards. If the technology conforms to those standards, the commissioning officer or agency must approve it for use by the notary. In the absence of standards adopted by the commissioning officer or agency, the notary public may proceed with performing notarial acts with respect to electronic records as long as the notary public employs tamper evident technologies as required by this section.

SECTION 21. COMMISSION AS NOTARY PUBLIC; QUALIFICATIONS; NO IMMUNITY OR BENEFIT.

(a) An individual qualified under subsection (b) may apply to the [commissioning officer or agency] for a commission as a notary public. The applicant shall comply with and provide the information required by rules established by the [commissioning officer or agency] and pay any application fee.

(b) An applicant for a commission as a notary public must:

(1) be at least 18 years of age;

(2) be a citizen or permanent legal resident of the United States;

(3) be a resident of or have a place of employment or practice in this state;

(4) be able to read and write [English]; [and]

(5) not be disqualified to receive a commission under Section 23[; and

(6) have passed the examination required under Section 22(a)].

(c) Before issuance of a commission as a notary public, an applicant for the commission shall execute an oath of office and submit it to the [commissioning officer or agency].

(d)[[Not more than [30] days after] [Before] issuance of a commission as a notary public, the [notary public][applicant for a commission] shall submit to the [commissioning officer or agency] an assurance in the form of a surety bond or its functional equivalent in the

amount of $[_____]. The assurance must be issued by a surety or other entity licensed or authorized to do business in this state. The assurance must cover acts performed during the term of the notary public's commission and must be in the form prescribed by the [commissioning officer or agency]. If a notary public violates law with respect to notaries public in this state, the surety or issuing entity is liable under the assurance. The surety or issuing entity shall give [30]-days notice to the [commissioning officer or agency] before canceling the assurance. The surety or issuing entity shall notify the [commissioning officer or agency] not later than [30] days after making a payment to a claimant under the assurance. A notary public may perform notarial acts in this state only during the period that a valid assurance is on file with the [commissioning officer or agency].]

[(e)] On compliance with this section, the [commissioning officer or agency] shall issue a commission as a notary public to an applicant [for a term of [ ] years].

[(f)] A commission to act as a notary public authorizes the notary public to perform notarial acts. The commission does not provide the notary public any immunity or benefit conferred by law of this state on public officials or employees.

Legislative Note: *Subsection (d) requires that a notary public provide a surety bond or its functional equivalent. It is provided for states that consider it to be good policy for a notary public to post an assurance in the form of surety bond or its functional equivalent. However, the enactment of this subsection is not essential for the uniformity of the act. It is bracketed to show that it is optional.*

The qualifications that an individual must meet for the issuance of a commission as a notary public under various state statutes are quite varied. The requirements listed in subsection (b) are common although not uniform among the states. They should be considered to be the minimal requirements for an individual to be entitled to the issuance of a commission as a notary public. Adopting states may add other provisions.

Comment

Subsection (a) provides that an individual qualified under subsection (b) may apply to the commissioning officer or agency to obtain a commission as a notary public. The subsection

applies to an individual seeking an initial or renewal commission. It leaves the form of application, the process for applying, and the timing of the process, as well as other administrative matters to be determined by the commissioning officer or agency pursuant to authority provided in Section 27. It also allows the commissioning officer or agency to establish the fee to be charged for issuance of the commission, if otherwise permitted by law of the state. Although the statutes of some states specify the process and timing for issuance of a commission in varying detail (compare Ariz. Rev. Stat. §41-312 (2010); Cal. Govt. Code §8206 (2010); Del. Code Ann. tit. 29, 4301 (2010)), this Act leaves the determination and implementation of those provisions to rules adopted by the commissioning officer or agency.

Subsection (b) sets out qualifications that an applicant must meet in order to be entitled to the issuance of a commission as a notary public. The qualifications under various existing state statutes are quite varied. The requirements listed in this subsection are common although not uniform among the states (compare Ariz. Rev. Stat. §41-312(E) (2010)). They are the minimal requirements for an individual to be entitled to the issuance of a commission as a notary public.

The requirement in subsection (b)(1) which provides that an applicant must be at least 18 years of age is a minimum age requirement. A state may wish to increase the age if another age better comports with other law of the state. The word "English" in subsection (b)(4) is bracketed because, in some jurisdictions such as Puerto Rico, the legislature may wish to use another language either as a substitute or as an alternative.

Subsection (c) provides that before an applicant will be issued a commission as a notary public the applicant must execute and submit an oath of office to the commissioning officer or agency (compare 5 Me. Rev. Stat. Ann. §82(3-A) (2010)).

Subsection (d)is an optional provision. Depending on the version selected by the legislature, it provides that a notary public must either submit an assurance in the form of a surety bond or its functional equivalent to the commissioning officer or agency not more than 30 days after the notary has been issued a commission, or that an applicant must submit the assurance to the commissioning officer or agency before the issuance of the commission (compare Fla. Stat §117.01(7)(a) (2010); Tex. Govt. Code §406.010(a) (2010)). If the legislature enacts the alternative requiring a notary public to submit the assurance within thirty days after the notary has been issued a commission, the last sentence of this subsection prohibits the notary from performing a notarial act until the assurance is on file with the commissioning officer or agency. An example of an assurance that is the functional equivalent of a surety bond would be an irrevocable letter of credit issued by a bank as long as that letter of credit meets the requirements established by the commissioning officer or agency under Section 27(a)(6).

The monetary amount of the assurance is not specified and is left to the state legislature to determine. It is recognized that an assurance that would cover the full amount of many transactions for which notaries perform notarial acts would be very large and might be prohibitively expensive. Nevertheless, limited but reasonable assurance amounts would cover the amount of some ordinary transactions and would provide some, although limited, recovery in other transactions. Requiring a surety bond or its functional equivalent should also emphasize to a notary that the notary's function is a significant one and that it is not a meager or trivial one.

An assurance must be issued by a surety or other entity that is authorized to do business in this state. It must be in the form prescribed by the commissioning officer or agency under Section 27(a)(6). It must cover acts performed by a notary during the term of the notary's commission. A surety or issuing entity will be liable under an assurance if the notary violates the law of this state with regard to the performance of notarial acts during the term of the assurance. A surety or issuing entity must give the commissioning officer or agency 30 days notice prior to cancelling a bond or other form of assurance and must notify the commissioning officer or agency within 30 days after making a payment to a claimant under a bond or other form of assurance. A notary public may perform notarial acts only while an assurance is on file with the commissioning officer or agency.

Subsection (e) provides that upon compliance with the requirements of subsection (a) through (c), or (a) through (d) if subsection (d) is adopted, the commissioning officer or agency will issue the applicant a commission as a notary public. The term of the commission is to be determined by the state legislature; the legislature may also determine that the commission is to be without term.

Subsection (f) recognizes that a notary public is an individual licensed by the commissioning officer or agency and not a public official or employee of the state. Accordingly, it provides that a notary does not have any of the immunities or benefits conferred by the law of this state on public officials or employees.

[SECTION 22. EXAMINATION OF NOTARY PUBLIC.

(a) An applicant for a commission as a notary public who does not hold a commission in this state must pass an examination administered by the [commissioning officer or agency] or an entity approved by the [commissioning officer or agency]. The examination must be based on the course of study described in subsection (b).

(b) The [commissioning officer or agency] or an entity approved by the [commissioning officer or agency] shall offer regularly a course of study to applicants who do not hold commissions as notaries public in this state. The course must cover the laws, rules, procedures, and ethics relevant to notarial acts.]

Legislative Note: *This section requires an applicant for a commission as a notary public to pass an examination based on a course of study regarding the laws, rules, procedures, and ethics relevant to notarial acts. It is provided for states that consider it a good policy that an applicant for a commission as notary public be required to pass an examination based on such a course of*

study. However, the enactment of this provision is not essential for the uniformity of the act. It is bracketed to show that it is optional.

Comment

An increasingly common requirement for the issuance of a commission as notary public is the applicant's passage of an examination based on a course of study relevant to the law of notarial acts (compare Neb. Rev. Stat. §64-1-1 (2010)). Professional education enhances the effectiveness and integrity of the notarial system. The course of study envisioned in this section is designed to educate a prospective notary public about the laws, rules, procedures, and ethics relevant to notarial acts.

Subsection (a) provides that an applicant for a commission as a notary public who does not currently hold a commission as a notary public must pass an examination administered by the commissioning officer or agency or an entity approved by the commissioning officer or agency. An applicant who does not currently hold a commission as a notary public includes an applicant who never held a commission as a notary public as well as an applicant who previously held a commission as a notary public but whose commission has since expired. The examination is to be based on the course of instruction provided in subsection (b). The subsection leaves administration of the examination to the commissioning officer or agency through rules adopted pursuant to Section 27(a)(7)(A).

Subsection (b) provides that the commissioning officer or agency or an entity approved by the commissioning officer or agency must regularly offer a course of study to applicants (compare Cal. Govt. Code §8201(a)(3) (2010)). To achieve the objective of enhancing the effectiveness and integrity of the notarial system, the course of study is designed to educate a prospective notary public in the laws, rules, procedures, and ethics relevant to notarial acts. The subsection leaves administration of the course to the commissioning officer or agency through rules adopted pursuant to Section 27(a)(7)(B).

SECTION 23. GROUNDS TO DENY, REFUSE TO RENEW, REVOKE, SUSPEND, OR CONDITION COMMISSION OF NOTARY PUBLIC.

(a) The [commissioning officer or agency] may deny, refuse to renew, revoke, suspend, or impose a condition on a commission as notary public for any act or omission that demonstrates the individual lacks the honesty, integrity, competence, or reliability to act as a notary public, including:

(1) failure to comply with this [act];

(2) a fraudulent, dishonest, or deceitful misstatement or omission in the

application for a commission as a notary public submitted to the [commissioning officer or agency];

(3) a conviction of the applicant or notary public of any felony or a crime involving fraud, dishonesty, or deceit;

(4) a finding against, or admission of liability by, the applicant or notary public in any legal proceeding or disciplinary action based on the applicant's or notary public's fraud, dishonesty, or deceit;

(5) failure by the notary public to discharge any duty required of a notary public, whether by this [act], rules of the [commissioning officer or agency], or any federal or state law;

(6) use of false or misleading advertising or representation by the notary public representing that the notary has a duty, right, or privilege that the notary does not have;

(7) violation by the notary public of a rule of the [commissioning officer or agency] regarding a notary public; [or]

(8) denial, refusal to renew, revocation, suspension, or conditioning of a notary public commission in another state[; or]

[(9) failure of the notary public to maintain an assurance as provided in Section 21(d)[; or]

[(10) insert other state specific provisions or reference to other state statutes].

(b) If the [commissioning officer or agency] denies, refuses to renew, revokes, suspends, or imposes conditions on a commission as a notary public, the applicant or notary public is entitled to timely notice and hearing in accordance with [this state's administrative procedure act].

(c) The authority of the [commissioning officer or agency] to deny, refuse to renew,

suspend, revoke, or impose conditions on a commission as a notary public does not prevent a person from seeking and obtaining other criminal or civil remedies provided by law.

Legislative Note: *Subsection (a)(10) is an optional provision and allows the state either to insert other specific grounds for the denial, refusal to renew, revocation, suspension, or imposition of a condition on a commission as a notary public or to insert references to specific statutes elsewhere in the law of this state providing those grounds. It is bracketed to show that it is optional.*

Comment

Subsection (a) lists the grounds upon which the commissioning officer or agency may deny, refuse to renew, revoke, suspend, or impose a condition a commission. The general grounds listed include a lack of honesty, integrity, competency, or reliability on the part of the applicant or current notary public. The grounds are similar to those provided in many states (compare Ariz. Rev. Stat. §41-330(A) (2010); N.C. Gen. Stat. §10B-5(d) (2010)).

Subsections (a)(1) to (6) and (8) enumerate specific grounds upon which the commissioning officer or agency may deny, refuse to renew, suspend, revoke or impose a condition a commission. Subsection (a)(7) allows the commissioning officer or agency to refuse to renew, suspend, revoke, or impose a condition a commission because the notary public has violated rules adopted by the commissioning officer or agency regarding notaries public.

Although the grounds for disciplinary action stated in this subsection provide the commissioning officer or agency with substantial authority to invoke discipline on the applicant or notary public in order to protect the public, paragraph 10 allows legislatures to add other specific grounds.

Because notaries public deal with financial, personal, and confidential matters for their clients, trustworthiness and honesty are essential qualities of a person holding a commission. Many of the disciplinary grounds provided in this subsection deal with breaches of those qualities (compare Cal. Govt. Code §8201.1(a) (2010)). Subsections (a)(2), (3) and (4) specify several situations in which lack of those qualities, i.e. fraud, dishonesty and deceitfulness, may arise and upon which the commissioning officer or agency may deny, refuse to renew, revoke, suspend, or impose a condition on a commission. Subsection (a)(6) allows disciplinary action if dishonesty or deceitfulness is displayed by the use of false or misleading advertising. If optional Section 21(d) is adopted, subsection (a)(8) allows disciplinary action if a notary public refuses to obtain, has been unable to obtain, or has been denied, an assurance in the form of a surety bond or its functional equivalent.

In determining whether to deny, refuse to renew, suspend, revoke, or impose a condition on a notary public's commission based on an applicant's or commission holder's prior felony under subsection (c), the commissioning officer or agency should take into consideration the relevance of the felony to the performance of the notary public's duties as well as the length of time that has transpired since the performance of the felonious act. The commissioning officer or agency has discretion when making the determination and should weigh all the facts and

circumstances before making a decision.

Subsection (b) states that an applicant or notary public whose commission has been denied, revoked, or suspended, or upon whose commission a condition has been imposed, or who has been refused a renewal of a commission is entitled to a timely notice and a hearing. Such a notice and hearing are likely required by the state's administrative procedure act but are restated here for clarity.

Subsection (c) provides that the fact that a commissioning officer or agency has the authority to deny, refuse to renew, suspend, revoke or impose a condition on a commission does not prevent additional relief provided by law. Either the commissioning officer or agency or a person aggrieved by the action of a notary public may seek appropriate relief, whether the relief is civil or criminal.

SECTION 24. DATABASE OF NOTARIES PUBLIC. The [commissioning officer or agency] shall maintain an electronic database of notaries public:

(1) through which a person may verify the authority of a notary public to perform notarial acts; and

(2) which indicates whether a notary public has notified the [commissioning officer or agency] that the notary public will be performing notarial acts on electronic records.

Comment

This section requires the commissioning officer or agency to maintain an electronic database of notaries public. The objectives sought by this provision are twofold. First, it is a disclosure of information and a means by which a member of the public may verify whether an individual who claims to be a notary public in fact has a commission as a notary public. Second, by also requiring that the database indicate whether a notary public has informed the commissioning officer or agency that the notary will be performing notarial acts with respect to electronic records, it provides information to members of the public who are seeking to find a notary public capable of performing notarial acts with respect to electronic records.

SECTION 25. PROHIBITED ACTS.

(a) A commission as a notary public does not authorize an individual to:

(1) assist persons in drafting legal records, give legal advice, or otherwise practice law;

(2) act as an immigration consultant or an expert on immigration matters;

(3) represent a person in a judicial or administrative proceeding relating to immigration to the United States, United States citizenship, or related matters; or

(4) receive compensation for performing any of the activities listed in this subsection.

(b) A notary public may not engage in false or deceptive advertising.

(c) A notary public, other than an attorney licensed to practice law in this state, may not use the term "notario" or "notario publico".

(d) A notary public, other than an attorney licensed to practice law in this state, may not advertise or represent that the notary public may assist persons in drafting legal records, give legal advice, or otherwise practice law. If a notary public who is not an attorney licensed to practice law in this state in any manner advertises or represents that the notary public offers notarial services, whether orally or in a record, including broadcast media, print media, and the Internet, the notary public shall include the following statement, or an alternate statement authorized or required by the [commissioning officer or agency], in the advertisement or representation, prominently and in each language used in the advertisement or representation: "I am not an attorney licensed to practice law in this state. I am not allowed to draft legal records, give advice on legal matters, including immigration, or charge a fee for those activities". If the form of advertisement or representation is not broadcast media, print media, or the Internet and does not permit inclusion of the statement required by this subsection because of size, it must be displayed prominently or provided at the place of performance of the notarial act before the notarial act is performed.

(e) Except as otherwise allowed by law, a notary public may not withhold access to or

possession of an original record provided by a person that seeks performance of a notarial act by the notary public.

Comment

In general, subsection (a) provides that a notary public does not have the authority to render legal services merely by the fact that the individual has a commission as a notary public. It does recognize, however, that a notary public who is also an attorney at law licensed to practice law in this state may, by the fact that he or she is a licensed attorney, provide those legal services.

Subsection (a) lists four specific activities prohibited to notaries public:

(1) A notary public may not assist persons by drafting legal records or giving legal advice; more generally a notary public may not practice law (compare Colo. Rev. Stat §12-55-110.3(3)(b)(I) (2010)).

(2) A notary public may not act as an immigration consultant or an expert on immigration matters (compare Colo. Rev. Stat §12-55-110.3(3)(a) (2010)).

(3) A notary public may not represent a person in any legal or administrative proceedings relating to immigration, United States citizenship or related matters (compare Colo. Rev. Stat §12-55-110.3(3)(b)(III) (2010)).

(4) Since a notary public may not perform the above listed activities, a notary public may not receive or collect compensation for performing or attempting to perform those activities (compare Colo. Rev. Stat §12-55-110.3(3)(b)(II)-(III)) (2010)).

Subsections (a)(2) and (3) specifically reference immigration matters because many immigrants, especially those from civil law countries, are familiar with the civil law office of "notario publico" or "notario." A holder of that civil law office may have the authority to provide immigration advice or assistance in the foreign country. Because of the similarity in the names of the offices, an immigrant from a civil law country may believe that a notary public is authorized to provide the same assistance in this country. Confusion on the part of the client, however, should not be a reason for a notary public to attempt to provide that assistance. Those subsections clearly prohibit a notary public from providing the assistance. See also subsection (c) for further requirements in this regard.

Subsections (b), (c), and (d) attempt to reduce or eliminate misleading or deceptive advertising by notaries public.

Subsection (b) directly and simply prohibits a notary public from engaging in false or misleading advertising. This prohibition includes the false or misleading advertising specifically described in this section as well as other forms of false or misleading advertising prohibited by other law.

Subsection (c) prohibits a notary public, other than one who is also an attorney licensed to practice law in this state, from using the term "notario publico" or "notario" in the notary's advertising, title, or informational material. As described above, many immigrants from civil law countries are familiar with the civil law office of "notario publico" or "notario," a holder of which may have the authority to draft legal records or provide legal advice, including advice on immigration. To prevent notaries public from taking advantage of the similarity of title by using the term "notario publico" or "notario," this subsection prohibits any advertising using either of those titles (compare Colo. Rev. Stat §12-55-110.3(3)(b)(V) (2010)). Since licensed attorneys have, by reason of their attorneys' licenses the authority to draft documents and provide legal advice, this subsection does not apply to licensed attorneys.

Subsection (d) prohibits a notary public, who is not also an attorney licensed to practice law in this state, from advertising that the notary may draft legal records, provide legal advice, or otherwise practice law. In addition to that prohibition, it makes two specific requirements in any advertising or representation that the notary uses:

(1) Any advertising or representation by the notary must include a specific disclaimer as to the notary's authority to practice law, to provide legal services, or to collect a fee for those activities. The disclaimer must be provided regardless of whether the advertising is written or oral, or a combination of the two. Included among the situations in which that disclaimer must be provided are advertising or representations made on broadcast media (e.g. television and radio), print media (e.g. newspapers, newsletters, and magazines), and the Internet (e.g. web pages and banner ads). If the advertising or representation is not made on broadcast media, print media, or the Internet, and if the inclusion of the disclaimer is not possible due to the small size of the advertisement or representation (e.g. business card), the disclaimer must be displayed prominently or provided at the place of performance of the notarial act, including any off-premises locale at which the notary performs a notarial act.

(2) The disclaimer must be provided in each language used in the advertisement or representation. To make sure that any advertising aimed at individuals who are not fluent in English or for whom English is a second language, this subsection requires that the disclaimer must be in each language used in the advertisement or representation.

Subsection (e) prohibits a notary public from retaining an original record presented by a person to a notary. A notary's duties as a notary public are to perform the notarial act and, when completed, return the record to the presenting party or as directed by the presenting party. However, a notary public who is also an attorney licensed to practice law in the state may retain a record for purposes consistent with the performance of legal services. In such a case the attorney is not retaining the record in a notarial capacity.

SECTION 26. VALIDITY OF NOTARIAL ACTS. Except as otherwise provided in subsection 4(b), the failure of a notarial officer to perform a duty or meet a requirement specified

in this [act] does not invalidate a notarial act performed by the notarial officer. The validity of a notarial act under this [act] does not prevent an aggrieved person from seeking to invalidate the record or transaction that is the subject of the notarial act or from seeking other remedies based on law of this state other than this [act] or law of the United States. This section does not validate a purported notarial act performed by an individual who does not have the authority to perform notarial acts.

Comment

This section makes it clear that, except as otherwise provided in subsection 4(b), the failure of a notarial officer to perform the duties or to meet the requirements of this act does not invalidate the notarial act performed by the notarial officer. For example, a notarial act performed by a notary public whose assurance or surety bond may have expired or been cancelled is not invalidated. However, this provision only applies to a person who is a notarial officer. The section does not legitimate a notarial act attempted to be performed by a person who does not have the authority to perform the act. For example, an individual who does not have a valid commission as a notary public cannot perform notarial acts and any attempted notarial act would be invalid.

Despite the fact that a notarial act may be valid, the underlying record or transaction may be invalid and may be set aside in appropriate legal proceedings. For example, the underlying record may be the product of fraud, whether performed by the notarial officer or by a third person. In accordance with other law of this state, an action may be brought to invalidate or set aside the record and obtain restitution and other relief.

SECTION 27. RULES.

(a) The [commissioning officer or agency] may adopt rules to implement this [act]. Rules adopted regarding the performance of notarial acts with respect to electronic records may not require, or accord greater legal status or effect to, the implementation or application of a specific technology or technical specification. The rules may:

(1) prescribe the manner of performing notarial acts regarding tangible and electronic records;

(2) include provisions to ensure that any change to or tampering with a record

bearing a certificate of a notarial act is self-evident;

(3) include provisions to ensure integrity in the creation, transmittal, storage, or authentication of electronic records or signatures;

(4) prescribe the process of granting, renewing, conditioning, denying, suspending, or revoking a notary public commission and assuring the trustworthiness of an individual holding a commission as notary public; [and]

(5) include provisions to prevent fraud or mistake in the performance of notarial acts; [and]

[(6) establish the process for approving and accepting surety bonds and other forms of assurance under Section 21(d)][; and]

[(7) provide for the administration of the examination under Section 22(a) and the course of study under Section 22(b)].

(b) In adopting, amending, or repealing rules about notarial acts with respect to electronic records, the [commissioning officer or agency] shall consider, so far as is consistent with this [act]:

(1) the most recent standards regarding electronic records promulgated by national bodies, such as the National Association of Secretaries of State;

(2) standards, practices, and customs of other jurisdictions that substantially enact this [act]; and

(3) the views of governmental officials and entities and other interested persons.

Comment

Subsection (a) is comprehensive authority for the commissioning officer or agency to adopt rules to implement this Act. Any rules adopted with respect to the performance of notarial acts on electronic records must be technology neutral; they may not require or favor one technology or technical specification over another. This is the same requirement provided in

ESign, 15 U.S.C. Ch. 96, §102(a)(2)(ii) (2010).

Subsection (a)(1) authorizes rules that prescribe the manner of performing notarial acts, whether with respect to tangible or electronic records. The provisions of this Act itself were not intended to specify all the possible requirements or procedures that now or in the future may be appropriate for performing notarial acts. Thus, it allows the commissioning officer or agency to adopt rules to further implement the Act

Subsection (a)(2) authorizes rules that will ensure that any change to, or tampering with, a record bearing a notarial act will be self-evident, i.e. tamper evident. Such a procedure will allow an individual inspecting the record to determine whether there has been any tampering with the integrity of a notarial act performed on, or with respect to, a record or with the attachment or association of a certificate of notarial act with the record. This provision applies both to notarial acts performed on tangible records and notarial acts performed with respect to electronic records. Regarding tangible records, this would allow a rule, for example, that requires a certain method of attaching the certificate to the record so that the removal or addition of a page would be readily discernable. With regard to electronic records, this would allow a rule, for example, that requires the technology or process used provide a means of testing to determine whether there has been any change to the electronic certificate or record. Note, however, that such a requirement must be technology neutral and may not require or favor one particular technology or technical specification. See subsection (a).

Subsection (a)(3) authorizes rules that will ensure integrity in the creation, transmittal, storage, or authentication of electronic records or signatures. This would allow a rule, for example, that requires that a certain level or degree of security be achieved in attaching an electronic certificate of notarial act to, or associating it with, an electronic record, and in its transmission or storage. Once again, the requirement must be technology neutral. See subsection (a).

Subsection (a)(4) authorizes rules for granting and revoking commissions and assuring the trustworthiness of individuals holding a commission. As stated in the Comment to Section 21, that section leaves the form of application, the process for applying, the timing of the process, and other administrative matters to be determined by the commissioning officer or agency. This section authorizes the commissioning officer or agency to adopt a rule, for example, that implements a method by which the prior history of an applicant for a commission could be reviewed with regard to the applicant's trustworthiness.

Subsection (a)(5) authorizes the adoption of rules that will prevent fraud or mistake in the performance of notarial acts. It would authorize the adoption of a rule, for example, that specifies what additional information should be provided in order to guide notaries public under Section 7(c) regarding additional information to identify an individual for whom a notarial act will be performed.

Subsection (a)(6) allows the commissioning officer or agency to adopt rules regarding the approval and acceptance of surety bonds and other forms of assurance if Section 21(d) is adopted by the legislature.

Subsection (a)(7) authorizes the commissioning officer or agency to adopt rules to implement and administer the examination of applicants for notary public commissions if Section 22 is adopted by the legislature. The rules may also administer the provision of a course of study for applicants for a commission as well as the process of selecting and approving of an entity to offer the course.

Subsection (b) directs the commissioning officer or agency, when adopting, amending, or repealing rules regarding notarial acts performed with respect to electronic records, to consider, so far as is consistent with this Act, the most recent standards promulgated by national bodies such as the National Association of Secretaries of State and also to consider the standards, practices, and customs of other jurisdictions that substantially adopt this Act. The purposes of this provision are to bring to the commissioning officer or agency the best practices and information concerning notarial acts performed with respect to electronic records and to encourage uniformity of those provisions among the various states.

SECTION 28. NOTARY PUBLIC COMMISSION IN EFFECT. A commission as a notary public in effect on [the effective date of this [act]] continues until its date of expiration. A notary public who applies to renew acommission as a notary public on or after [the effective date of this [act]] is subject to and shall comply with this [act]. A notary public, in performing notarial acts after [the effective date of this [act]], shall comply with this [act].

Comment

This section states that an individual who has a commission as a notary public that is in effect on the date of the adoption of this Act may retain that notary commission until the scheduled date of expiration, if any. Other than as may apply to the length of an existing commission, however, the provisions of the law previously in effect do not carry over after the adoption of this Act. Thus, after the effective date of this Act, a notary is subject to the provisions of this Act with respect to a refusal to renew the commission or a revocation or suspension of the commission. This Act is also applicable to all notarial acts performed after its effective date regardless of whether the commission predated or postdated the effective date of this Act.

SECTION 29. SAVINGS CLAUSE. This [act] does not affect the validity or effect of a notarial act performed before [the effective date of this [act]].

Comment

This section expressly provides that the enactment of this Act does not affect either the validity or effect of any notarial act performed prior to the effective date of the Act under a law that was repealed by this Act. The validity and effect of that notarial act will continue to be determined under the repealed law.

SECTION 30. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

Comment

This provision seeks to encourage construction that will maintain uniformity among the various states adopting the Act.

SECTION 31. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT. This [act] modifies, limits, and supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

Comment

This section responds to the specific language of the Electronic Signatures in Global and National Commerce Act and is designed to avoid preemption of state law under that federal legislation.

SECTION 32. REPEALS. The following are repealed:

(1) [The Uniform Acknowledgment Act (As Amended)].

(2) [The Uniform Recognition of Acknowledgments Act].

(3) [The Uniform Law on Notarial Acts].

Comment

This section lists laws that this act supervenes.

SECTION 33. EFFECTIVE DATE. This [act] takes effect ....

Comment

This is the standard effective date provision for uniform laws.