

THE
MODEL NOTARY ACT

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MODEL NOTARY ACT REVISION COMMITTEE

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FOREWORD

Purpose

Notaries public play a vital role in assuring the integrity of documents essential to commercial and legal transactions. Recognizing the societal importance of this function, the paramount objective of the Model Notary Act of 2002 was to enable notaries to protect the public from fraud. Accordingly, its “Foreword” announced that the 2002 Act would direct notaries to shift from a traditionally passive role to a more proactive one. This Model Notary Act of 2010 emphatically extends that proactivity into the electronic realm. The thorough updating of the original Article III (“Electronic Notary”) in this 2010 Act reflects the developing realities and demands of technology, business, and government in the intervening eight years. The new, expanded Article III empowers notaries to use fraud-deterrent electronic tools of heretofore unmatched potency in ensuring both the integrity and the authenticity of documents vital to the workings of commerce and law.

This enhancement of the electronic provisions of Article III is complemented in the 2010 Act by an expansion and refinement of the paper-based provisions of Articles I and II. As does its predecessor, the Model Notary Act of 2010 provides stringent sanctions for notaries who either negligently or intentionally fail to carry out their responsibilities, whether in the paper or the electronic arena. Likewise, the new Act takes the position that notaries public are professionals who have ethical obligations to the principals and others who request notarizations, the persons who ultimately rely upon the notarized documents, the general public, and to one another.

The Model Notary Act of 2010 is a comprehensive statute designed both to modernize and enhance the societal usefulness of the notary public office. It is a significant updating and expansion of three earlier models promulgated by the National Notary Association: the Model Notary Act of 2002, the Model Notary Act of 1984, and the original Uniform Notary Act of 1973, which was created in a special collaboration with Yale Law School. Over the course of nearly four decades, legislators and notary-regulating officials have borrowed extensively from the 1973, 1984, and 2002 models in reforming notary laws in more than 40 states and U.S. territories. In some of these jurisdictions, only a few sections were adopted into statute; in others, the model was enacted virtually *in toto*.

Drafting Process

The National Notary Association empaneled a drafting committee of distinguished individuals from the business, governmental, legal, and digital technology communities. A wide range of industries and agencies that handle or generate notarized documents was represented.

A series of draft documents was disseminated to the committee for comments. The resulting observations and critiques were then integrated into the final draft by an executive subcommittee. The subcommittee then reviewed the edited document and made appropriate changes to bring it into its final form. Coincident to this effort, detailed “Comment” sections were written to explain the positions taken by the drafters, as well as to clarify related matters.

This latest version of the Model Notary Act draws from many sources. Drafters not only reviewed and analyzed current notary statutes and regulations, but also surveyed reported legal cases and administrative rulings concerning notaries and notarization. The Model Notary Act of 2010 additionally reflects state-of-the-art technological developments related to electronic documents and signatures. The end result is a unique and authoritative statement of exactly how the traditional role of the notary can be adapted seamlessly into the electronic world.

Format

The Model Notary Act comprises three articles. Articles I and II address traditional notary rules and practice. Article III provides rules and procedures for electronic notarization. Articles are divided into chapters. Chapters are divided into sections, the number of which varies depending upon the subject matter covered.

Articles I and II were written as companions and intended to be adopted together. The 2002 Act stated that Articles I and II “may stand alone without Article III, which expands the duties of the traditional paper-based notary into the realm of electronic documents.” However, today it would be imprudent for a legislature to ignore the reality addressed and sanctioned in both the many state-adopted versions of the Uniform Electronic Transactions Act and the federal “E-Sign” law: the notary’s use of electronic signatures. Accordingly, adoption of Articles I, II, and III together, in whole or part, is encouraged.

Article III may be enacted separately, but its electronic provisions are built on the fundamental definitions and procedures of paper-based notarization set forth in Articles I and II. Therefore, in the absence of Articles I and II, Article III would need to be complemented by an existing well-developed statutory code that, *inter alia*, defines notarial acts, sets basic requirements and prohibitions for their performance, and prescribes notarial certificate wording. In addition, Article III would need to be cross-referenced and otherwise integrated with that existing code. The simpler course for a jurisdiction might be to adopt Articles I, II and III as a package, while at the same time repealing the existing notarial statutes.

Although it is suggested that each article be enacted as presented, the drafters recognize that some sections might prove either unnecessary or too controversial for a particular jurisdiction. Adoption of edited versions is welcomed. Also, jurisdictions not inclined to completely revise their notary laws are encouraged to integrate selected sections into existing statutes.

User Guide

The statute is written to allow its adoption as a comprehensive unit. Consequently, there are intersectional references throughout the work. Before such a reference is deleted, care should be taken to ensure that compensating wording is not needed and all references to the deleted material elsewhere in the document are given similar treatment.

Certain material has been put in brackets (“[]”). This serves one of three purposes. In some instances, the brackets indicate that a generic term (*e.g.*, “[commissioning official]”) has been used. The adopting jurisdiction should here insert appropriate specific terminology that is consistent with its statutory scheme (*e.g.*, “secretary of state”). At times, the brackets will indicate that the insertion of a numerical or dollar amount is necessary. If a particular amount is strongly preferred by the drafters, this amount will be placed within brackets (*e.g.*, “[\$25,000]”). Other times, the brackets suggest that a particular matter, while not central to the legislation, was a topic of considerable debate among the drafters. The adopting jurisdiction is then invited to decide whether the bracketed material meets its needs, and determine whether or not to include it.

Finally, parentheses (“()”) on cited documents and certificates indicate options or instructions for document signers or notaries.

Commentary

A detailed commentary is provided to explain the Act’s provisions, some of the thought processes behind them, and their ramifications. These “Comment” sections are not an official part of the proposed legislative text. Principally, the commentary represents the views of the Reporter who drafted it, in conjunction with comments submitted by drafting committee members and discussions with the other members of the executive subcommittee that produced the final draft.

There are numerous citations throughout the commentary. All references to the Model Notary Act are made merely by citing to the section (*e.g.*, Section 2-4). Standard citation form is used to refer to reported cases and state statutes, except that publishers and dates of publication for the latter have been eliminated. The commentary also cites to The Notary Public Code of Professional Responsibility, whose 10 “Guiding Principles” are reprinted in Appendix 1. The Code was promulgated by the National Notary Association in an effort to introduce systematic ethical standards into the notary office. Some sections in the Model Notary Act are outgrowths of the dictates of the Code.

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Article I Implementation and Definitions

Chapter 1 – Implementation

Comment

General: This chapter states the purposes and sets out the applicability of the Model Notary Act (hereinafter “the Act”). Section 1-2 is particularly noteworthy because its goals undergird most of the provisions found throughout the Act, and help justify a number of the positions taken. The balance of the chapter addresses standard legislative matters.

§ 1-1 Short Title.

This [Act] may be cited as the [Model Notary Act of 2010].

§ 1-2 Purposes.

This [Act] shall be construed and applied to advance its underlying purposes, which are:

- (1) to promote, serve, and protect the public interest;
- (2) to simplify, clarify, and modernize the law governing notaries;
- (3) to foster ethical conduct among notaries;
- (4) to enhance cross-border recognition of notarial acts;
- (5) to integrate procedures for traditional and electronic notarial acts;
- and
- (6) to unify state notarial laws.

Comment

Section 1-2 enunciates the overarching purposes of the Act. Although not necessarily listed in order of importance, the first two subparagraphs clearly constitute the driving spirit of the entire Act.

Subparagraph (1) places the public’s interest above all else. The Act adopts the position that notaries are first and foremost public servants. Their powers are to be exercised only in the public’s interest and not for personal gain. Other provisions elsewhere in the Act support and execute this operating precept. (*See, e.g.,* Subparagraph 5-5(a)(1) (no notarization of one’s own signature); Subparagraph 5-5(a)(3) (disqualification when signers are relatives); Section 5-11 (no testimonials); and Subsection 6-2(a) (no surcharges on fees).)

Subparagraph (2) stakes out equally

important territory: bringing notarial laws into the 21st century. Some state notary laws are carry-overs from antiquated statutes (*see, e.g.,* MASS. GEN. LAWS ANN. ch. 222, §§ 1 to 11), some are quite minimalist (*see, e.g.,* VT. STAT. ANN. tit. 24 §§ 441 to 446), and others a patchwork product of numerous unrelated legislative amendments (*see, e.g.,* CAL. GOV’T. CODE §§ 8200 to 8230 & CAL. CIV. CODE §§ 1181 to 1197). The Act offers a comprehensive statute that addresses all contemporary notarial issues, and introduces rules not only for paper-based documents but also for electronic transactions. It then integrates them into one workable piece of legislation. The Act makes the effort both to establish appropriate commissioning guidelines, and to detail proper procedures for performing notarial acts. The focus is

clearly on ensuring that notaries understand their roles. This works toward satisfying the public interest objective set out in Subparagraph (1). The drafters addressed issues principally involving the commissioning of notaries and the performance of notarizations. Consequently, even if the Act is adopted, other legislation may still be needed to respond to related matters, such as ensuring that the statutory forms in other sections of the jurisdiction's law bear notarial certificate wording specified in Sections 9-4, 9-5, and 9-6.

Subparagraph (3) introduces a new concept: notary ethics. Although the Act does not establish any ethical standards, it recognizes that a notary owes special duties both to principals and the public, and consequently may be regarded as a professional. Professions impose ethical standards upon their members, and this should be the case as well for notaries. In 1998, the National Notary Association promulgated THE NOTARY PUBLIC CODE OF PROFESSIONAL RESPONSIBILITY. (Reprinted at 32 J. MARSHALL L. REV. 1123-1193 (1999) and available online at www.NationalNotary.org, clicking on "Best Practices.") It is a comprehensive ethics guide adaptable by state legislatures as a statute or by commissioning officials as an administrative rule. (*See, e.g.*, AMER. SAMOA CODE ANN. § 31.0316, requiring notary commission applicants to take a course

and pass a test that is based upon applicable law and THE NOTARY PUBLIC CODE OF PROFESSIONAL RESPONSIBILITY, which is provided by the Secretary of American Samoa as a study guide; and HAWAII ADMIN. RULES § 5-11-39 (12), listing as grounds for refusal to renew, reinstate, or restore a notary commission the notary's conduct or practice contrary to the CODE.) Absent taking this step, the Act provides rules and procedures that, when properly followed, encourage professionalism and foster ethical conduct.

Subparagraph (4) recognizes the modern reality of cross-border commerce. Principals who migrate from one jurisdiction to another or enterprises that conduct multi-state businesses need to have documents that are recognized wherever presented. A major objective of the Act, as stated in Subparagraph (6), is to unify notarial laws throughout the country. Problems relating to the recognition of out-of-state notarial acts can be eased or eliminated if the Act gains widespread acceptance.

Subparagraph (5) addresses the reality that electronic transactions are becoming more prevalent. One goal of the Act is to ensure that workable notarial procedures are in place to accommodate that fact. To this end, Article III of the Act is devoted to establishing rules for electronic notarizations.

[§ 1-3 Interpretation.

In this [Act], unless the context otherwise requires, words in the singular include the plural, and words in the plural include the singular.]

§ 1-[4] Prospective Effect.

The existing bond, seal, length of commission term, and liability of current notaries commissioned before the [Act's] effective date may not be invalidated, modified, or terminated by this [Act], but those notaries shall comply with this [Act] in performing notarizations and in applying for new commissions.

Comment

Section 1-4 protects valid notary commissions existing when the Act is adopted. The status of notaries holding such commissions continues according to the terms and conditions at the time of commissioning. However, recommissioning for these notaries will have to be done pursuant to the new rules of the Act. (*See* Section 3-5.) Significantly,

although the status of a current commission is not affected, the new operating rules of notarization (*see generally* Chapters 5, 6, 7, 8, and 9) and concomitant obligations (*see generally* Chapter 12) must be followed by all notaries immediately, including those who were commissioned prior to the adoption of the Act.

§ 1-[5] Severability Clause.

If any provision of this [Act] or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this [Act] that can be given effect without the invalid provision or application, and to this end the provisions of this [Act] are severable.

[§ 1-[6] Repeals.

The following acts and parts of acts are hereby repealed:

[_____].]

Comment

Section 1-6 recognizes that not all jurisdictions have a single act containing all of the rules regulating notaries and notarizations. Thus, legislators will have to identify existing statutes or portions thereof that are superseded by the Act and make the appropriate repeals. It is possible that some extant rules affecting notaries are not

inconsistent with the Act, and ought not be repealed. This might include rules prohibiting notary fees for notarial acts related to elections or the securing of veterans' benefits. (*See, e.g.*, CAL. ELEC. CODE § 8080, which prohibits a notary from charging a fee for verifying any nomination document or circulator's affidavit.)

§ 1-[7] Effective Date.

This [Act] shall take effect [_____].

Chapter 2 – Definitions Used in This [Act]

Comment

General: A number of recurring terms are used throughout the Act. Some have a technical meaning specific to notarial use, while others merely require elaborate explanation. Following the example of other statutes, these terms are defined in a separate section to simplify the text in the balance of the Act.

§ 2-1 Acknowledgment.

“Acknowledgment” means a notarial act in which an individual at a single time and place:

- (1) appears in person before the notary and presents a document;
- (2) is personally known to the notary or identified by the notary through satisfactory evidence; and
- (3) indicates to the notary that the signature on the document was voluntarily affixed by the individual for the purposes stated within the document and, if applicable, that the individual had due authority to sign in a particular representative capacity.

Comment

In defining “acknowledgment,” Section 2-1 makes clear that all three elements of the notarial act must occur at the same time and place. Subparagraph (3) explicitly requires that the principal voluntarily sign the document “for the purposes stated” therein. Although current statutes seldom directly address volition (*but see* GA. CODE ANN. § 45-17-8(b)(2) and (3)), it seems to be generally accepted by the courts as a requirement for an acknowledgment. The Act eliminates any doubt about the need for volition in a proper acknowledgment.

A second aspect of Subparagraph (3) raises other issues. The Act converts an acknowledgment from simply a formal statement that the signature on the document was freely made by the principal into one that also declares the intent to validate the document itself. Statutory acknowledgment forms often bear language stating that the acknowledger affixed a signature “for the purposes stated within the document.” (*See, e.g.,* ARK. CODE § 16-47-107, which states that the instrument was signed “for the consideration, uses and purposes therein mentioned and set forth.”) Some drafters criticized this addition, fearing it could unwittingly impose unintended obligations upon the principal. The concern follows from the fact that a principal may read a

document, not truly understand its effect, but nonetheless sign it. It was suggested that an acknowledgment ought not require the principal to speak to the purpose or intent of the document. In response, it was argued that apprehensions over this point can be put to rest by the intended reasonable interpretation of the provision. The definition does not make the acknowledgment in itself an admission that the principal understood the legal significance of the document. Indeed, it does not speak to the contents at all. The provision only means that signing serves to adopt the document as the principal’s act. The legal ramifications of the document are subject to independent review. (*See also* Subparagraph 5-2(3), adopting the rule that a notary must not notarize a document if the principal does not appear to understand the significance of the transaction.)

In acknowledging a document, the principal does not make any statement regarding the truthfulness or accuracy of the contents of the document. (*Compare* Section 2-7 and Comment defining “jurat.”) Moreover, there is no implication that the principal has even read the document. The acknowledgment speaks to the fact that the document was signed voluntarily for the purpose of validating the document.

Additionally, the principal asserts that he or she was authorized to sign the document if it was signed in a representative capacity. (*See* Section 9-4 for a model acknowledgment certificate form.)

§ 2-2 Affirmation.

“Affirmation” means a notarial act, or part thereof, which is legally equivalent to an oath and in which an individual at a single time and place:

- (1) appears in person before the notary;
- (2) is personally known to the notary or identified by the notary through satisfactory evidence; and
- (3) makes a vow of truthfulness or fidelity on penalty of perjury, based on personal honor and without invoking a deity or using any form of the word “swear.”

Comment

Section 2-2 offers a definition of “affirmation” that contains all of the standard components of an oath. An affirmation serves as the functional equivalent of an “oath” (*see* Section 2-11) for principals who prefer not to pledge to a supreme being. As required for most notarial acts, by definition, the principal must personally appear before and satisfactorily prove identity to the notary. In order to solemnify an affirmation, the Act compels the principal to understand that the statement is made under penalty of perjury.

The Act does not prescribe affirmation wording. It assumes that a simple statement including the language “I affirm” and “under penalty of perjury” will suffice. The notary may orally state the affirmation and have the principal positively assent to it, or the principal may speak the entire affirmation aloud. It is preferable for assent to be made by oral response, but any action (*e.g.*, a hand gesture or nod) could constitute assent if clearly made for the purpose of adopting the affirmation, especially in the case of a principal who is

physically incapable of communicating orally. While it is not necessary that the principal raise his or her right hand to make an affirmation, notaries are encouraged to require any ceremonial gesture that they feel will most compellingly appeal to the conscience of the principal. When associated with a notarial certificate, good practice would suggest that the notary read aloud any provided affirmation wording and obtain the principal’s assent. The key point is that a proper affirmation requires a positive and unequivocal response by the principal.

An affirmation may be a notarial act in its own right, but most often it is administered as part of a jurat and the person making the affirmation will be required to sign an affidavit or other document. Note, nonetheless, even in those situations when a signed document is not associated with the affirmation, the notarial act should be memorialized in the notary’s journal, with the entry including the principal’s signature.

§ 2-3 Commission.

“Commission” means both to empower to perform notarial acts and the written evidence of authority to perform those acts.

§ 2-4 Copy Certification.

“Copy certification” means a notarial act in which a notary:

- (1) locates or is presented with a paper or an electronic document that is neither a vital record, a public record, nor a recorded document;

- (2) compares the document with a second paper or electronic document that either is:
 - (i) presented to the notary;
 - (ii) located by the notary; or
 - (iii) copied from the first document by the notary; and
- (3) confirms through a visual or electronic comparison that the second document is an identical, exact, and complete copy of the image or text and, if applicable, metadata of the first document.

Comment

Section 2-4 defines and provides guidance on the notarial act of certifying copies. Subparagraph (1) prohibits a notary from making certified copies of certain documents. Generally, the Act assumes that only the duly appointed public custodians of official records and documents may certify copies of them. Thus, a notary may not certify a copy of a marriage license, birth certificate, or a recorded document such as a deed.

In Subparagraph (1), in a departure from the former Act, the drafters allow a copy of an electronic document to be certified, applying the same proscriptions against certifying a copy of a vital or recorded document. In another departure, the drafters recognize that a notary may be asked to locate the original paper or electronic document – possibly for a verification of fact (*see* Section 2-22) if vital or recorded documents are not involved – in contrast to the typical circumstance wherein the original document is presented to the notary. This expands the utility of copy certification.

Subparagraph (2) provides for three different scenarios, and the pertinent entry in the notary’s journal of notarial acts should be clear on which applies for any particular copy certification. In the first, the notary would be presented with a second paper or electronic document to compare with the original described in Subparagraph (1). In the second scenario, the notary would personally locate this second document, perhaps in an office housing physical records or on the Internet. In the third

scenario, the notary would personally make or supervise the making of a copy of the original document referenced in Subparagraph 1, whether that original were presented to or located by the notary. This copy would then be compared to the original. While the preferred situation from a fraud-deterrent perspective would always be for the notary to control production of the second document, this would limit the utility of copy certification. For instance, the notary might not have access to photocopying or electronic scanning equipment to duplicate an original paper document. Alternatively, the notary might be asked to certify the congruence of two electronic documents, one or both of which may already exist on the Internet. As long as the notary, through a careful visual or a reliable electronic comparison (*see* Subparagraph (3)), confirms that the two documents are identical, the certification will be meaningful.

Subparagraph (3) recognizes that electronic documents contain “hidden” coded information other than text or images. These “metadata,” for instance, dictate the style, size, and spacing of the typeface in which the text appears. They might also include past editings that have been made to the electronic document. It may be very useful for a notary’s client to know whether a certified copy of an electronic document does or does not include the same metadata prescriptions of its original. The copy certification certificate in Section 9-8 allows the notary to provide such information.

§ 2-5 Credible Witness.

“Credible witness” means an honest, reliable, and impartial person who personally knows an individual appearing before a notary and takes an oath or affirmation from the notary to vouch for that individual’s identity.

Comment

Section 2-5 defines the term “credible witness.” Consistent with the public interest goal of deterring fraud and creating reliable documents, the Act takes the step of removing any doubt as to who can qualify to act in this capacity. Particularly noteworthy is the impartiality requirement. This means that the witness neither has an interest in nor is affected by the transaction for which he or she is proving the identity of the principal in a notarization. Although not specifically required by the Act, witness impartiality may be measured by the same standards used to disqualify notaries from acting. (*See*

Section 5-5 and Comment.)

The definition does not address whether a credible witness must be personally known to the notary or whether instead the witness may be identified through reliable identification documents. This matter, however, is resolved by the definition of “satisfactory evidence of identity” (*see* Section 2-20), which dictates that only in instances where two credible witnesses are vouching for the identity of a principal may the notary use identification documents to confirm the identity of a credible witness.

§ 2-6 Journal of Notarial Acts.

“Journal of notarial acts” and “journal” mean a book to create and preserve a chronological record of notarizations that is maintained by the notary public who performed the same notarizations.

Comment

This definition of “journal of notarial acts” differs from the definition in the former Act by its use of the word “book” rather than “device.” The drafters’ intention was to limit the application of the definition to a journal with paper or other tangible pages, and to let the definition of “electronic journal of notarial acts” in Section 15-4 address electronic devices for recording

notarial acts. A notary or an electronic notary may elect to use either kind of journal. (*See* Sections 7-1 and 20-1.)

Another departure from the previous definition is the addition of the phrase “who performed the same notarizations.” This clarifies that no person other than the notary who performed the notarial acts may make entries in the journal that records those acts.

§ 2-7 Jurat.

“Jurat” means a notarial act in which an individual at a single time and place:

- (1) appears in person before the notary and presents a document;
- (2) is personally known to the notary or identified by the notary through satisfactory evidence;
- (3) signs the document in the presence of the notary; and
- (4) takes an oath or affirmation from the notary vouching for the truthfulness or accuracy of the signed document.

Comment

Section 2-7 defines “jurat” as a particular type of notarial act, consistent with the current common usage in the notarial community. In so doing, it broadens the definition of the term commonly found in law dictionaries, *e.g.*, “a certification added to an affidavit or deposition stating when and before what authority the affidavit or deposition was made” (*see* BLACK’S LAW DICTIONARY (7th ed. West 1999)). Mistakenly, some apply the term “jurat” to any notarial certificate form, including that for acknowledgments. It should be pointed out that the type of notarization designated as a “jurat” in this Act, is called a “verification upon oath or affirmation” in the Uniform Law on Notarial Acts (1982) of the National Conference of Commissioners on Uniform State Laws. This term is seldom used by notaries, who prefer the simpler “jurat.”

The definition of “jurat” in Section 2-7 contains the commonly accepted components of this type of notarization. A central feature of the jurat is recognized in Subparagraph (4): the principal must take an oath (or make an affirmation) vouching for the truthfulness or accuracy of the contents of the document. This distinguishes the act from both an acknowledgment (*see* Section 2-1) and a signature witnessing (*see* Section 2-21). In

the former, the principal merely indicates that a signature was voluntarily affixed to a document for the purposes of adopting the document. In the latter, the principal merely signs the document and nothing more is ascribed to the act. No commitment of conscience regarding the truthfulness or accuracy of the contents of the document may be inferred from either an acknowledgment or a signature witnessing, but that is the case with a jurat, which requires an oath or affirmation.

Notwithstanding that it is essential to a jurat, notaries often neglect formally to administer the oath or affirmation. When such omissions are challenged, courts have on occasion inferred that an oath was tacitly taken. The drafters believed that the significance attributed to a jurat as a statement under oath dictates positive action on the part of the notary to administer an oath or affirmation to the principal. Good practice demands that the oath or affirmation language be recited aloud and that the principal affirmatively respond before the notary completes the certificate. (With regard to the administration of oaths and affirmations, *see* Sections 2-11 and 2-2, along with their respective Comments.)

§ 2-8 Notarial Act and Notarization.

“Notarial act” and “notarization” mean any official act of certification, attestation, or administration that a notary public is empowered to perform under this [Act].

Comment

This definition of “notarial act” and “notarization” fleshes out the terser definition that appeared in the former Act, in order to distinguish ancillary acts that a

notary is empowered or required to perform (*e.g.*, reporting a change of address) from the central official function of a notary, which is to certify, attest, or administer.

§ 2-9 Notarial Certificate and Certificate.

“Notarial certificate” and “certificate” mean the part of, or attachment to, a notarized document that, in the performance of the notarization, is completed by the notary, bears the notary’s official signature and seal, and states the date, venue, and facts attested by the notary in the particular notarial act.

Comment

This definition of “notarial certificate” differs from the definition in the former acts, in part, by addition of the phrase “in the performance of the notarization,” in order to clarify that a notarial certificate must be

completed at the time of the notarial act. The definition of “electronic notarial certificate” (*see* Section 15-6) is closely based on this section.

§ 2-10 Notary Public and Notary.

“Notary public” and “notary” mean any person commissioned to perform notarial acts under this [Act].

§ 2-11 Oath.

“Oath” means a notarial act, or part thereof, which is legally equivalent to an affirmation and in which an individual at a single time and place:

- (1) appears in person before the notary;
- (2) is personally known to the notary or identified by the notary through satisfactory evidence; and
- (3) makes a vow of truthfulness or fidelity on penalty of perjury while invoking a deity or using any form of the word “swear.”

Comment

Section 2-11 lists the elements of an “oath.” An oath is the alternative to an affirmation. It serves the same purpose and has the same legal effect. The sole distinction between the two is that an oath-taker pledges to a supreme being or uses the word “swear” in any of its forms to indicate a solemn commitment of conscience. All of the procedural rules relating to affirmation

apply equally to oaths. (*See* Section 2-2 Comment.) When making an oath, the principal need not swear on nor touch a Bible or other revered text. However, notaries have discretion to utilize gestures or ceremonies that they believe will most compellingly appeal to the conscience of the oath-taker.

§ 2-12 Official Misconduct.

“Official misconduct” means:

- (1) a notary’s performance of any act prohibited, or failure to perform any act or duty mandated, by this [Act] or by any other law in connection with a notarial act; or
- (2) a notary’s performance of an official act or duty in a manner that is negligent, contrary to established norms of sound notarial practice, or against the public interest.

Comment

Section 2-12 defines “official misconduct.” In striving to promote the significance of notarial acts in general, the drafters felt it was important to emphasize proper notarial conduct. The Act broadly

defines misconduct to include not only malfeasance (performing prohibited acts) but also nonfeasance (failing to perform required acts). (*See* Subparagraph (1).) Moreover, this type of misconduct is not

limited to duties prescribed by the Act itself, but also extends to obligations imposed by other laws in connection with official acts by the notary. Additionally, misconduct includes misfeasance (negligent performance of acts), as well as actions that violate established standards of sound notarial practice. Recently a court held that the Model Notary Act of 2002 enunciated standards of sound practice and the failure to observe these standards can result in liability to the notary. (*See Vancura v. Katris*, 907 N.E.2d 814 (Ill. App. 2008).)

The drafters added the wording “or duty” to make notaries accountable not only for their official notarial acts, but also for any other

related obligation imposed on them by this Act or any other law. (*See, e.g.*, Chapter 12 for duties of a notary regarding the reporting of changes of status.)

Finally the Act recognizes a type of misconduct constituting a violation of public policy (*i.e.*, “against the public interest”). For example, a notary who gouges a person needing at-home notarial services by overcharging for travel fees may be found in violation of public policy. (*See* Subsection 6-2(b) and Comment.) The commissioning official has discretion under Subparagraph (2) to determine whether a notary’s action constitutes official misconduct.

§ 2-13 Official Seal.

“Official seal” means:

- (1) a device authorized by the [commissioning official] for affixing on a paper notarial certificate an image containing a notary’s name, title, jurisdiction, commission expiration date, and other information related to the notary’s commission; or
- (2) the affixed image itself.

Comment

The definition of “official seal” in Section 2-13 replaces the definition of “seal” that appeared in the former Act as Section 2-18. The replacement enables greater precision and economy of language in Section 8-2 and elsewhere in the Act. The two-part definition makes clear that the term “seal” may denote not only the inking, embossing, or other tangible device used by a notary to create an image containing certain information on a notarized document, but also may denote the image itself.

By contrast, the definition of “electronic

notary seal” (*see* Section 15-8) refers only to certain information (*i.e.*, the notary’s name, title, jurisdiction, and commission expiration date) placed by the notary on an electronic notarial certificate. This definition does not refer to the device or process for creating this information in electronic form. Conceivably, the means registered by the notary for creating “registered electronic notary seals” (*see* Section 15-10) might include the notary’s mere typing of the seal information on the electronic certificate.

§ 2-14 Official Signature.

“Official signature” means a handwritten signature made by a notary that uses the exact name appearing in the notary’s commission and is signed with the intent to perform a notarial act.

Comment

Section 2-14 is new. It provides an important definition that enables greater

precision and economy of language in Section 8-1 and elsewhere in the Act.

§ 2-15 Personal Appearance.

“Personal appearance before the notary” and “appears in person before the notary” mean that the notary is physically close enough to see, hear, communicate with, and receive identification documents from a principal and any required witness.

Comment

Section 2-15 defines “personal appearance before the notary” so as to mandate that the principal be in the physical presence of the notary at the time of notarization. This is necessary in order for the notary to perform the essential task of determining that the principal is exactly who he or she purports to be. Ascertaining identity is an integral part of most notarial acts. (See Sections 2-1, 2-2, 2-7, 2-11, and 2-21.) To properly perform this duty (see Section 2-20 for rules to determine “satisfactory evidence of identity”) – and to make a necessary commonsense judgment that the principal appears to be acting without coercion and with adequate awareness – the notary must be able to question and closely observe the principal. A telephone call or an e-mail message to the notary will not serve this purpose.

In requiring each principal to appear in person before the notary, the drafters recognized that the Act bars electronic signatures from being notarized when the

signer is at a location remote from the notary. One jurisdiction formerly recognized teleconferencing notarizations, with the signer at location A and the notary at location B (see former UTAH ADMIN. CODE R154-10-502), though this rule was repealed because its rigorous technical requirements were deemed impractical in the marketplace. The drafters believe that until teleconferencing equipment is refined to ensure ready and reliable determination of identity, mandating face-to-face personal appearance before a notary in the same room will remain necessary. The drafters are committed to re-evaluating this position as technological advances make reliable remote identification more feasible.

This definition was amended from that appearing in the former Act to clarify that the personal appearance rule also applies to “any required witness” needed to identify the principal. This would include credible witnesses (see Section 2-5) and witnesses to a signing by mark (see Section 5-3).

§ 2-16 Personal Knowledge of Identity.

“Personal knowledge of identity” and “personally knows” mean familiarity with an individual resulting from interactions with that individual over a period of time sufficient to dispel any reasonable uncertainty that the individual has the identity claimed.

Comment

Section 2-16 provides guidance on the critical concept of personal knowledge of identity. Although most notarizations will be based upon identification through evidentiary means (see Section 2-20), sometimes identity will be determined based on a notary’s personal familiarity with another individual. Personal knowledge is a necessary element of the chain of proof when a sole credible witness is used. (See Subparagraph 2-20(2).) The Act provides a

rule of reason for determining personal knowledge. (See *Anderson v. Aronsohn*, 63 CAL. APP. 737 (1923), which deals with the nature of personal knowledge of identity, stating that “the degree of acquaintance which would authorize a notary to certify that he had personal knowledge involves something more than mere casual meetings, and must be based upon a chain of circumstances surrounding the person tending to show that he is the party he

purports to be.”)

The definition does not quantify the number of interactions nor the period of time of acquaintance sufficient to convince a notary that an individual has a claimed identity. This is left to the notary’s best judgment. However, the drafters firmly believed that any reasonable doubt on the part of the notary about whether a signer is “personally known” must result in reliance instead on acceptable identification documents or on at least one qualified credible witness.

A unique California law (*see* CAL. CIV. CODE § 1185) prohibits notaries from relying on personal knowledge to identify principals or credible witnesses in the performance of notarial acts. These provisions

were recently enacted at the behest of the California law enforcement community, which has perceived an overly liberal interpretation of “personal knowledge” as the basis for too many identifications by notaries. The result, prosecutors complained, was a lack of recorded evidence in notary journals (*e.g.*, identification document serial numbers) that might be useful in investigating criminal acts of forgery. The drafters of this Act decided not to take away from notaries the valuable option of using personal knowledge as the basis for an identification. Instead, they encourage notaries to supplement any journal notation that a signer was “personally known” with information from an identification document of the signer that might later be useful to law enforcement.

§ 2-17 Principal.

“Principal” means:

- (1) a person whose signature is notarized; or
- (2) a person, other than a credible witness, taking an oath or affirmation from the notary.

Comment

Section 2-17 defines a term used throughout the Act – principal. The drafters determined that it made sense to identify the person using the services of a notary as a principal. It makes for easier reading of the statute and ends ambiguities with respect to

witnesses or other parties who may have dealings with a notary, but are not seeking the performance of a notarial act for themselves (*e.g.*, a person asking a notary to serve a bedridden elderly parent).

§ 2-18 Regular Place of Work or Business.

“Regular place of work or business” means a stationary office or workspace where one spends all or some of one’s working or business hours.

Comment

Section 2-18 establishes an important situs for purposes of the Act. A non-resident may qualify for a notary commission if he or she has a regular place of work or business in the jurisdiction. (*See* Subparagraph 3-1(b)(2).) The Act uses the word “regular” to ensure that a notary applicant has more than a passing relationship to the jurisdiction. The drafters

intended “regular” to be reasonably construed. Clearly, having an office that is visited on a weekly basis qualifies, but visiting the office once every year would not. One significant limiting factor is that the workplace must be stationary, *i.e.*, one may not claim a vehicle used for business in the state as a place of business.

§ 2-19 Requester of Fact.

“Requester of fact” means a person who asks the notary public to perform:

- (1) a copy certification; or
- (2) a verification of fact.

Comment

Section 2-19 introduces the new term “requester of fact” to designate a person who asks a notary to perform either a copy certification (*see* Section 2-4) or a verification of fact (*see* Section 2-22). In contrast to a “principal” (*see* Section 2-17), a requester of fact does not have a signature notarized nor personal identity confirmed by the notary. Indeed, the drafters determined that the personal identity of the individual requesting a copy certification or a verification of fact is not essential to the proper performance of these two notarizations. In performing either, the notary need not verify the requester’s identity, volition, or awareness, as is necessary with a notarial act involving authentication of a principal’s signature. Instead, the notary’s focus is confirming or

extracting a fact from public records, or confirming that two separate documents are congruent.

Thus, the drafters opened the door to the possibility that a copy certification or a verification of fact might be sought by the requester of fact from a remote location, perhaps over the Internet. This would enhance the public utility of the notary office and at times be of particular value in international child adoptions. The notary would still be required to record in the journal of notarial acts, at the least, the proffered name and address of each requester of fact (*see* Subparagraph 7-2(a)(5)), but not the requester’s signature, evidence of identity, or thumbprint (*see* Subparagraphs 7-2(a)(4), (6), and (7)).

§ 2-20 Satisfactory Evidence of Identity.

“Satisfactory evidence of identity” means identification of an individual based on:

- (1) at least 1 current document issued by a federal, state, or tribal government in a language understood by the notary and bearing the photographic image of the individual’s face and signature and a physical description of the individual, or a properly stamped passport without a physical description; or
- (2) the oath or affirmation of 1 credible witness disinterested in the document or transaction who is personally known to the notary and who personally knows the individual, or of 2 credible witnesses disinterested in the document or transaction who each personally knows the individual and shows to the notary documentary identification as described in Subparagraph (1) of this Section.

Comment

Section 2-20 manifests the tenet that positive proof of identity is integral to every proper notarization of a signature. A detailed definition of “satisfactory evidence of identity” was deemed essential to this Act. Many statutes refer to satisfactory evidence, but not all go on to define it precisely.

The section allows a principal to prove identity in one of two ways. The first involves self-proof through the use of reliable identification documents. The second employs credible witnesses.

Subparagraph 2-20(1) describes the attributes of documents found in most self-proving provisions. (*See, e.g.*, CAL. CIV.

CODE § 1185(b)(4). *But see* GA. CODE ANN. § 45-17-8(e); and IOWA CODE ANN. § 9E.9(6)(c), which allow the notary some discretion in determining what constitutes acceptable proof.) To eliminate any doubt, the Act specifically states that identification issued by a tribal government is acceptable. The Act also makes any valid current passport acceptable identification. This will ensure that visitors from foreign lands have the requisite proof of identity to access notarial services while they are in the United States. Of course, passports are excellent proofs of identity for United States citizens, as well. The Act requires the principal to produce only one identifying document. (*Accord*, FLA. STAT. ANN. § 117.05(5)(b)(2).) Nothing prohibits a notary from asking for additional proof of identity if any item presented by the principal raises questions as to its authenticity or is otherwise suspect. Indeed, notaries are obligated to satisfy themselves that the evidence presented positively proves the principal's identity.

Subparagraph (2) provides a second avenue for proving identity. It is designed for those principals who for one reason or another do not have identification documents. Primary beneficiaries of this rule are the elderly, especially those in nursing homes, who may no longer have valid driver's licenses or other current forms of government identification.

§ 2-21 Signature Witnessing.

"Signature witnessing" means a notarial act in which an individual at a single time and place:

- (1) appears in person before the notary and presents a document;
- (2) is personally known to the notary or identified by the notary through satisfactory evidence; and
- (3) signs the document in the presence of the notary

Comment

Section 2-21 defines "signature witnessing," a notarial act recognized in a number of jurisdictions. (*See, e.g.*, 5 ILCS 312 / 6-102(c); and states that have adopted the Uniform Law on Notarial Acts.) Technically, the act is neither an acknowledgment (*see* Section 2-1) nor a jurat (*see* Section 2-7). The drafters contemplate that the simple witnessing will be used in lieu of a jurat when an oath or affirmation is not needed, and as a substitute for

Following the lead of California (*see* CAL. CIV. CODE § 1185(b)(1)(A)) and Florida (*see* FLA. STAT. ANN. § 117.05(5)(b)(1)), the Act allows credible witnesses of two types to prove the identity of the principal. (For a definition of "credible witness," *see* Section 2-5 and Comment.) Any credible witness must personally know the principal. (*See* Section 2-16 for a definition of "personal knowledge.") To prevent fraud and add to the integrity of the notarization, only persons disinterested in the document or related transaction may serve as credible witnesses. This is consistent with the requirement that credible witnesses be impartial. (*See* Section 2-5.)

Only one witness is needed if that witness is personally known to the notary. Otherwise two witnesses are required. The Act takes the view that the notary's personal knowledge of the identity of one credible witness is preferred to reliance on two witnesses, who must prove their own identities under the rules of Subparagraph (1). Note that a credible witness may not have his or her identity proven by another credible witness. The credible witness must either be known to the notary or this person must self-prove identity through acceptable identification documents.

Because proper identification lies at the heart of reliable notarizations, the drafters contemplated that the rules of this section will be narrowly construed and strictly enforced.

an acknowledgment when a positive declaration that the principal accepts the terms of the document is not required. A signature witnessing has the same integrity as other notarial acts, and by definition must meet the same personal appearance and identification requirements in order to be valid. As with the jurat, affixation of the signature in this type of notarial act must be observed by the notary.

§ 2-22 Verification of Fact.

“Verification of fact” means a notarial act in which a notary reviews public or vital records, or other legally accessible data, to ascertain or confirm any of the following facts:

- (1) date of birth, death, marriage, or divorce;
- (2) name of parent, marital partner, offspring, or sibling;
- (3) any matter authorized for verification by a notary by other law or rule of this [State].

Comment

Section 2-22 defines a notarial power that some may regard as being beyond the notary’s traditional ministerial role. Locating, reading, and interpreting legal records is generally regarded as being in the bailiwick of attorneys. Yet, the extraction of certain basic information from public, vital, or other records – *e.g.*, date of birth or death, date of marriage or divorce – is not a function requiring legal training. Such information, as certified by a notary, is often requested by foreign agencies in the context of adoption of a foreign child. Thus, in part to lessen the bureaucratic hardships imposed on couples attempting to adopt foreign children, this section gives lawmakers the option of allowing notaries to perform a verification of fact function. The statutory list of verifiable facts may be tailored to a particular jurisdiction.

The verification of fact certificate in Section 9-9 gives notaries the option of visiting a pertinent office that houses public, vital, or other records to ascertain the

needed facts, or of accepting a record from an individual named in the certificate. Clearly, the former option is preferred, but notaries are given discretion in the latter case to assess the trustworthiness of any presented record. The notary is well-advised to positively identify the presenter, and to inspect the proffered document for evidence of tampering or counterfeiting, much like a notary inspects identification cards presented by principals.

In the former Act, this section was bracketed to indicate that the verification of fact was a notarization departing from the notary’s traditional duties. After careful consideration, the drafters decided to remove the brackets in their effort to enhance the public utility of the notary office and in their belief that the new duties were not beyond the ken of notaries. This section also differs from that in the former Act in expanding the categories of verifiable facts beyond public and vital records to “other legally accessible data.”

Article II
Notary Public

Chapter 3 – Commissioning of Notary Public

Comment

General: The Act codifies a comprehensive set of commissioning rules. Each adopting jurisdiction is thereby assured that only well-trained and knowledgeable notaries are serving the public. To meet this goal, the Act requires both the education and testing of applicants. (See Subparagraph 3-1(b)(5).) In an effort to protect the public from unscrupulous notaries, the Act also provides specific guidance to the commissioning authority regarding the types of behavior that justify denying an applicant a notary commission. (See Subsection 3-1(c).) As financial protection for the public against the notary's misconduct, the Act mandates that every notary be bonded. (See Section 3-3.)

§ 3-1 Qualifications.

- (a) Except as provided in Subsection (c), the [commissioning official] shall issue a notary commission to any qualified person who submits an application in accordance with this Article.
- (b) A person qualified for a notary commission shall:
 - (1) be at least 18 years of age;
 - (2) reside or have a regular place of work or business in this [State], as defined in Section 2-18;
 - (3) reside legally in the United States;
 - (4) read and write English;
 - (5) pass a course of instruction requiring a written examination under Section 4-3; and
 - (6) submit fingerprints to allow a criminal background check.
- (c) The [commissioning official] may deny an application based on:
 - (1) submission of an official application containing material misstatement or omission of fact;
 - (2) the applicant's conviction or plea of admission or nolo contendere for a felony or any crime involving dishonesty or moral turpitude, but in no case may a commission be issued to the applicant within 5 years after such conviction or plea;
 - (3) a finding or admission of liability against the applicant in a civil lawsuit based on the applicant's deceit;
 - (4) revocation, suspension, restriction, or denial of a notarial commission or professional license by this or any other state or nation, but in no case may a commission be issued to the applicant within 5 years after such disciplinary action; or

- (5) an official finding that the applicant had engaged in official misconduct as defined in Section 2-12, whether or not disciplinary action resulted.
- (d) Denial of an application may be appealed by filing in proper form with the [administrative body hearing appeal] within [time limit] after denial, except that an applicant may not appeal when the [commissioning official] within 5 years prior to the application has:
 - (1) denied or revoked for disciplinary reasons any previous application, commission, or license of the applicant; or
 - (2) made a finding under Section 13-3(d) that grounds for revocation of the applicant's commission existed.

Comment

Section 3-1 addresses the personal qualifications needed for commissioning as a notary. Subsection (a) provides that, unless a statutory basis for denial exists, every otherwise qualifying applicant must be granted a commission. There is no limit imposed on the number of notaries that may hold a commission in the jurisdiction at any one time. Nor is the number to be linked to the jurisdiction's perceived need for notaries. (*See contra* HAW. REV. STAT. ANN. § 456-1(a).) The public is better served when there is an ample number of notaries available. The Act seeks to foster convenient access for all to notarial services, but it also promotes quality by imposing meaningful commissioning standards.

Subsection (b) spells out the personal requirements for commissioning. As is common throughout the country, Subparagraph (b)(1) sets the minimum qualifying age at 18 years. (*See, e.g.*, ARK. CODE ANN. § 21-14-101(b)(1)(C); and N.M. STAT. ANN. § 14-12A-3(B).)

In addressing the residency requirement, Subparagraph (b)(2) adopts an increasingly common policy. The Act subscribes to the view that having a regular place of business (as defined in Section 2-18) within the jurisdiction creates a sufficient nexus for a non-resident to warrant notary commissioning. This position takes into account the "equal protection" argument available to persons doing business in a state, but who are denied notary status because they are not residents. (*See Cook v Miller*, 914 F. Supp. 177 (W.D.Mich.1996), where the Court rejected the "equal protection" argument, but reconsidered its position for an out-of-state attorney licensed in Michigan

seeking a notary commission to compete effectively with other lawyers. The legislative response supporting this position can be found at MICH. COMP. LAWS ANN. § 55.271(1)(e).) Although this problem can be handled through cross-border recognition of notary commissions (*see, e.g.*, MONT. CODE ANN. § 1-5-605), the drafters believed the better response is to allow non-residents to become commissioned provided that they establish a sufficient nexus in the commissioning state. This will always give persons seeking legal redress against the notary a basis for jurisdiction and a place to serve court summonses or other official papers on the notary. Additionally, it will guarantee that there is an in-state location where the notary journal will be kept and be available for inspection. (For rules regarding access to notary journals, *see* Subsections 7-3(a) through (d).)

Subparagraph (b)(3) incorporates the current state of the law into the statute. Although some state statutes still nominally require the applicant to be a citizen of the United States (*see, e.g.*, KAN. STAT. ANN. § 53-101), in *Bernal v. Fainter* (467 U.S. 216, 228 (1984)) the Supreme Court ruled that imposing a citizenship requirement for a notary was unconstitutional. Consequently, any legal resident may qualify for a notary commission, and the Act so holds.

Subparagraph (b)(5) imposes both an education and testing requirement on all notary applicants, including commission renewals. (*See* Section 3-5.) Some states mandate notary testing (*see* UTAH CODE ANN. § 46-1-3(5)) and a growing number additionally require a course of instruction for notary commission

applicants (*see* N.C. GEN. STAT. § 10B-8(a)). Many states merely dictate that notary commission applicants attest to having read the local notary laws or have a familiarity with them. (*See, e.g.*, R.I. GEN. LAWS § 42-30-5(b).) The Act takes the bold step of requiring notaries not only to understand relevant notary laws and practices, but also to satisfactorily demonstrate a command of that knowledge. The drafters believe this requirement serves the public interest by ensuring that all notaries are qualified to perform their duties. Additionally, the requirement helps to professionalize the office, a subsidiary goal of the Act. Finally, passing a written test helps prove that the applicant can satisfy Subparagraph (b)(4) – the ability to read and write English.

In regard to Subparagraph (b)(5), the drafters recognize that there is a financial cost associated with an education and testing requirement. The Act is silent as to when and by whom the cost is to be borne. This omission was intentional. The drafters believed it best to allow each state to determine the most appropriate method of funding the cost. Some states may have administrative budgets sufficiently ample to meet the added expense. Some will pass the cost along to notary commission applicants either by rolling it into a higher general application fee or by imposing a separate course or testing charge. Other states may allow private enterprise to play a role, letting notaries pay a non-governmental educational organization or institution for the requisite instruction and testing.

Arguably, passing the education and testing costs on to applicants heightens the entry barrier for the notary profession, which can translate into fewer independent notaries whose expenses are not underwritten by an employer. This, in turn, could mean there will be a smaller number of notaries available to serve the public, especially in economically disadvantaged areas. The drafters considered this possibility, but believed the benefits to the public outweighed any of the risks. Higher commissioning fees and strict testing requirements should limit applications only to highly motivated individuals who will take their duties seriously. Elevating standards in an effort to provide better trained and more devoted notaries can only redound to the public good. Should education

and test costs restrict otherwise qualified and interested individuals from entering the field and serving areas in need, a commissioning authority is not precluded from instituting a “test fee waiver” program if it is deemed necessary or appropriate.

Subparagraph (b)(6) introduces a fingerprinting requirement as an added protection against dishonest persons becoming notaries. Fingerprints will allow commissioning officials to do computer-assisted background checks to determine whether the applicant has a criminal record. They also provide the opportunity to discover if aliases have been used, and, if so, whether criminal acts were committed under them. The federal Integrated Automated Fingerprint Identification System (IAFIS), linked to law enforcement data banks around the nation, simplifies the process of checking an applicant’s prints. Additionally, requiring applicants to provide fingerprints should help ensure truthful responses to questions relating to prior criminal activity on the application. (*See* Subparagraph 4-2(7).) The fingerprint requirement should deter many unqualified applicants from trying to obtain a commission through deceitful means. Currently, one state requires fingerprints of notary applicants. (*See* CAL. GOV’T. CODE § 8201.1.)

Subsection (c) details specific grounds for denying a commission. Denials are within the discretion of the commissioning official. Although there was unanimous support for authorizing such discretion, some drafters felt the Act did not go far enough, and should have made certain past behavior automatic grounds for rejecting an application. In any event, because notaries hold positions of public trust, any matters within the purview of the subsection raised in the application are to be carefully scrutinized. In exercising discretion, the commissioning official should tip the balance in favor of the public’s interest and not the applicant’s desire to become a notary. The better approach is that, absent a clear showing of no risk to the public, the application should be denied. Although the Act contemplates that reviews will be made on a case-by-case basis, the appropriate body ought to consider maintaining accurate records to ensure that the rules are applied evenhandedly over the course of time.

Subparagraph (c)(1) provides a reasonable, minimum standard for denial. A person who is dishonest on an application cannot be trusted to faithfully execute notarial duties. The commissioning official will assess “materiality” of the misstatement or omission. The section allows the applicant to explain the error, and if it is excusable, to be granted a commission.

Subparagraph (c)(2) limits the commissioning official’s discretion when the applicant has been held accountable for a felony or any crime involving dishonesty or moral turpitude. Examples could include crimes involving fraud, forgery, theft, securities law violations, and perjury. (The list is merely illustrative and not meant to be inclusive. It is contemplated that the commissioning authority will determine the appropriate crimes for these purposes.) The subsection mandates a five-year commissioning moratorium after a conviction, plea of admission, or *nolo contendere* plea. After that period has elapsed, it is expected that the commissioning official will scrutinize the circumstances to determine whether such an applicant is then fit or suited to be a notary.

The provision was purposefully written in broad terms. This allows the commissioning official the opportunity to determine those crimes which should provide a basis for applying the five-year rule. Also, it permits greater discretion after the five-year period has passed to determine which types of acts so challenge the applicant’s integrity that commissioning would constitute too great a risk to the public. For the latter reason, some drafters believed that applicants with a history of fraud, forgery, or similar crimes of deceit ought never to be commissioned. Others felt that rather than provide a potentially incomplete list of acts warranting denial of a notary commission, it was best to let the commissioning authority exercise judgment on which acts warranted commission denial, taking into account what best suits the needs of the jurisdiction’s citizenry.

Subparagraph (c)(3) reinforces the concept that honesty and reliability are cornerstones of the notarial office. Consequently, an applicant who has engaged in deceitful activity, even if not of a

criminal nature, ought to be closely scrutinized. Absent a satisfactory belief that such actions will not be repeated, the application should be denied.

Subparagraph (c)(4) places sanctioned notarial and other professional license improprieties on the same footing as crimes involving dishonesty or moral turpitude. (See Subparagraph (c)(2).) Some drafters argued that revocation of a notary commission ought to serve as a permanent bar from future commissioning. The Act adopts the view that prior bad actors can be rehabilitated, but recognizes that certain acts require longer periods to prove rehabilitation. Hence, the five-year moratorium for professional misdeeds. After the moratorium expires, the commissioning official retains the discretion to deny the application if satisfactory evidence of rehabilitation has not been produced. Also, the commissioning official always has the discretion to examine the facts leading to the prior disciplinary action, and determine which acts are less likely to be repeated.

Subparagraph (c)(5) provides the commissioning official with general discretionary authority to reject applications of any notary found to have engaged in official misconduct as defined in Section 2-12 of the Act even if no disciplinary action had resulted. In essence, it serves as a back-up to the other rules.

Subsection (d) permits the applicant to appeal a commission denial. The provision also requires the jurisdiction to establish an appeal board and an appropriate filing deadline. Presumably, the appellate body would establish its own procedures. The Act prohibits an appeal for any applicant who has had a notary commission denied or revoked by the commissioning authority within five years of the application; this time period is congruent with Subparagraph (c)(4)’s five-year ban on commission issuance after a disciplinary action. The Act contemplates that denials or revocations of non-notarial professional licenses are to be treated similarly, *e.g.*, a real estate broker’s license. Also, the applicant may not bring an appeal if a ground for revocation of a notary commission existed in a previous case, even though no official disciplinary action was taken on it. (See Subsection 13-3(d).)

§ 3-2 Jurisdiction and Term.

A person commissioned as a notary may perform notarial acts in any part of this [State] for a term of [4] years, unless the commission is earlier revoked under Section 13-3 or resigned under Section 12-3.

Comment

Section 3-2 addresses the scope of the commission. The Act adopts the modern view that a notary is authorized to act throughout the entire jurisdiction. (*See, e.g.*, IND. CODE ANN. § 33-42-2-1.) Although the Act allows each jurisdiction to set the length of the notary commission term, a four-year term of office is recommended. Currently, some states set two or three-year periods (*see* DEL. CODE ANN. tit. 29 § 4307 (two years); and IOWA CODE ANN. § 9E.4 (three years)). The drafters felt this was too short, especially in light of the Act's rigorous education and testing components (*see* Subparagraph 3-1 (b)(5)). On the other hand, a five or six-year term, or longer, was considered too lengthy in that it does not provide

sufficient contact between the notary and the commissioning official. (*But see* S.C. CODE ANN. § 26-1-10; and ARK. CODE ANN. § 21-14-101 (setting 10-year terms of office).) A few states offer lifetime appointments (*see e.g.*, WIS. STAT. ANN. §137.01(2)(a), providing a lifetime appointment for attorneys in good standing). The drafters did not believe that the public's interest would be served by commission terms of such length that the commissioning official could not regularly reassess the qualifications of the notary nor apprise the notary of pertinent statutory changes or other developments affecting notarial duties.

§ 3-3 Bond.

- (a) A notary commission shall not [become effective / be issued] until an oath of office and [25,000] dollar bond have been filed with the [designated office]. The bond shall be executed by a licensed surety, for a term of [4] years commencing on the commission's effective date and terminating on its expiration date, with payment of bond funds to any person conditioned upon the notary's misconduct as defined in Section 2-12.
- (b) The surety for a notary bond shall report all claims against the bond to the [commissioning official].
- (c) If a notary bond has been exhausted by claims paid out by the surety, the [commissioning official] shall suspend the notary's commission until:
 - (1) a new bond is obtained by the notary; and
 - (2) the notary's fitness to serve the remainder of the commission term is determined by the [commissioning official].

Comment

Section 3-3 addresses notary bonding requirements. Most jurisdictions now require notaries to obtain a surety bond covering their official acts (*see, e.g.*, CAL.

GOV'T. CODE § 8212; and 57 PA. STAT. ANN. § 154), but these are often for quite modest amounts (*see, e.g.*, HAW. REV. STAT. ANN. § 456-5 (\$1,000)); and WYO. STAT. ANN. §

32-1-104(a) (\$500)). The Act favors a higher bond of \$25,000, as opposed to the common \$10,000 to \$5,000 range (*see, e.g.*, ALA. CODE § 36-20-3; KAN. STAT. ANN. § 53-102; and MISS. CODE ANN. § 25-33-1). It is important to note that the bond's function is to protect the public. The injured party can seek financial recovery against the bond, but is not limited to it. Excess damages may also be recovered against the notary. Even if the bond covers the damages, the notary is responsible to the surety company for any payments made on the bond.

The Act does not address notary errors and omissions insurance. This is a different issue. The drafters did not believe imposing an insurance requirement on notaries was warranted, as has occasionally been proposed. Other professions do not have it.

It is hoped that the more stringent commissioning requirements, especially the education and testing components, will reduce if not eliminate notarial errors and concomitant claims.

Subsection (b) imposes a reporting requirement on the surety. This will help the commissioning official monitor notarial misconduct. It will also provide a record for future application reviews.

Subsection (c) puts teeth into the bond requirement. To protect the public, the notary commission is automatically suspended if the bond expires or is exhausted. Notably, once expired, the notary must not only obtain a new bond, but also undergo a fitness review. By its silence, the Act implicitly empowers the commissioning official to promulgate standards and procedures for this review.

§ 3-4 Commissioning Documents.

Upon issuing a notary commission, the [commissioning official] shall provide to the notary:

- (1) a commission document stating the commission serial number and starting and ending dates; and
- (2) a Certificate of Authorization to Purchase a Notary Seal stating the commission serial number.

Comment

Section 3-4 provides the means by which the notary can satisfy other sections of the Act. The Certificate of Authorization

to Purchase a Notary Seal is needed to acquire a seal under Subsection 8-4(b).

§ 3-5 Recommissioning.

A current or former notary applying for a new notary commission shall submit a new completed application and comply anew with all of the provisions of Chapters 3 and 4.

Comment

Section 3-5 establishes an important rule that has far-reaching implications for protection of the public. The Act requires every notary commission applicant, specifically including those who are seeking "renewal" of a current commission, to comply anew with all of the provision of Chapters 3 and 4. Most importantly, this includes the education and testing

requirements.

Although it is at odds with what some have termed a "rubber-stamp" renewal process in many jurisdictions (*see, e.g.*, MD. CODE ANN., STATE GOV'T § 18-103(d); and N.D. CENT. CODE § 44-06-02), the drafters believed that the Act presents the better approach. By requiring that all components of the commissioning process be met anew,

the Act ensures that every notary keeps abreast of changes and developments in notarial laws and procedures. It also compels individuals to re-examine their interest in remaining a notary, and filters out

those who are not willing to go to the trouble of demonstrating proficiency. This serves the public's interest by ensuring that only those committed to the notary office are allowed to continue in it.

Chapter 4 – Application for Notary Public Commission

Comment

General: This chapter converts the commissioning requirements set out in Chapter 3 into an application form. The format provided is complete in itself, but there is allowance for modifications and additions. The Act is silent on a number of points that were considered to be best left to the discretion of the commissioning official.

§ 4-1 Application Materials.

Every application for a notary commission shall be made in a paper or electronic format established by the [commissioning official] and include:

- (1) a statement of the applicant's personal qualifications, as described in Section 4-2;
- (2) a certificate evidencing successful completion of a course of instruction, as described in Section 4-3;
- (3) a notarized declaration of the applicant, as described in Section 4-4;
- (4) a full set of fingerprints of the applicant;
- (5) such other information as the [commissioning official] may deem appropriate; and
- (6) an application fee, as specified in Section 4-5.

Comment

Section 4-1 establishes the components of an official application form. A notary commission may be granted only to applicants filing this official form. The section requires the commissioning official to provide the format for this application. It is implicit that the form will both be printed and made available by the commissioning official. Subparagraphs (1) - (5) set forth the elements of the application form as provided in the balance of the chapter. To the extent that any jurisdiction does not adopt a specific application requirement set out in the chapter, then the corresponding subparagraph of Section 4-1 should be deleted. For example, for those states that do not opt to impose an education requirement as prescribed in Section 4-3, Subparagraph (2) will be deleted and the balance of the subparagraphs re-numbered.

§ 4-2 Statement of Personal Qualifications.

The application for a notary commission shall state or include, at least:

- (1) the applicant's date of birth;
- (2) the applicant's residence address and telephone number;
- (3) the applicant's business address and telephone number, the business mailing address, if different, and the name of the applicant's employer, if any;
- (4) a declaration that the applicant is a citizen of the United States or proof of the applicant's legal residency in the country;
- (5) a declaration that the applicant can read and write English;
- (6) all issuances, denials, revocations, suspensions, restrictions, and resignations of a notarial commission, professional license, or public office involving the applicant in this or any other jurisdiction;

- (7) all criminal convictions of the applicant, including any pleas of admission or nolo contendere, in this or any other state or nation; [and]
- (8) all claims pending or disposed against a notary bond held by the applicant, and all civil findings or admissions of fault or liability regarding the applicant's activities as a notary, in this or any other state or nation [; and
- (9) if the notary elects to keep an electronic journal, the password or access instructions required by Section 7-6].

Comment

Section 4-2 incorporates into the application form the qualification requirements set out in Section 3-1. Subparagraph (3) is particularly important for non-resident notaries, whose non-residency status is not a bar to commissioning if Subparagraph 3-1(b)(2) is satisfied. The business address requirement not only provides necessary information for the commissioning official, but also for parties seeking to serve legal papers (*e.g.*, a summons or subpoena) on the non-resident notary or to access the non-resident notary's journal (*see* Section 7-3). Subparagraph (4) anticipates that the non-citizen applicant will attach a photocopy of the official

paperwork that authorizes the applicant's legal residence in the country. Subparagraphs (6), (7), and (8) manifest the requirements of Subparagraphs 3-1(c)(2) through (5) and make clear that potential disqualifying acts are not limited only to those performed in the commissioning jurisdiction.

Subparagraph (9) requires those who elect to use an electronic journal in lieu of a bound paper record to include journal-access information in their respective commission applications. By doing so, the applicant immediately complies with the journal-access requirements imposed by Section 7-6.

§ 4-3 Course and Examination.

- (a) Every applicant for a notary commission shall take, within the 3 months preceding application, a course of instruction of at least 4 hours approved by the [commissioning official], and pass a written examination of this course.
- (b) The content of the course and the basis for the written examination shall be notarial laws, procedures, and ethics.

Comment

Section 4-3 describes the education and testing requirement mandated by Subparagraph 3-1(b)(5). The applicant must both complete the course and pass the exam within three months before submission of the application. Notably, the Act does not waive the requirement for even highly experienced or credentialed applicants. This is contrary to practice in some jurisdictions. (*See, e.g.*, N.C. GEN. STAT. § 10B-8(a) and (b).)

Both the course and test must be approved by the commissioning official. Nothing in the Act mandates that the commissioning official compose or teach the course, or develop or administer the test. These matters may be handled by an approved educational body. The degree of control over these matters is left to the discretion of the commissioning official. Some states may opt to have the course and test developed, administered, and graded by

an approved independent provider. Others may want to administer both the course and test, or just develop and grade the test.

The educational program must be at least four hours in duration. The Act does not preclude requiring longer courses, and some jurisdictions may opt for that. Subsection (b) states that the course content shall include notarial laws, procedures, and ethics. Although the Act provides the rules for notary laws, it does not provide specific ethical standards for notaries. Nonetheless, the Act views notaries public as professionals, albeit with narrow powers, and as such implicitly suggests that they have ethical obligations to principals and the public.

THE NOTARY PUBLIC CODE OF PROFESSIONAL RESPONSIBILITY, promulgated by the National Notary Association ([see www.NationalNotary.org](http://www.NationalNotary.org)), provides a comprehensive set of basic ethical standards. Commissioning authorities are encouraged to have education providers integrate the CODE into their courses.

As for the test itself, the Act requires only that it be written. (Currently at least one jurisdiction administers an oral notarial exam.

See 17 D.C. MUN. REG § 2402.3. Other jurisdictions in which courts are the commissioning authority may base qualification on an oral interview with a judge. *See, e.g.*, ALA. CODE § 36-20-1; GA. CODE ANN. § 45-17-1.1 and 2.1; and VT. STAT. ANN. tit. 24 § 441.) Written exams with only multiple-choice or “true-false” answers satisfy the provision. Online or other technologically generated exams are permitted. (*See, e.g.*, <http://notaries.dos.state.fl.us/> regarding Florida’s online notary education and examination program.)

To facilitate implementing the examination requirement, the Act does not specify when the test is to be administered. The drafters intended that the test would be taken immediately after the course is completed when the material would be freshest in the mind of the student. Some jurisdictions, however, may want to allow the applicants time to reflect on the material. The Act does not mandate a formal classroom setting. Thus, aside from online teaching and testing, home study and mail-in tests are possible options, provided that the material and tests are from an approved education provider.

§ 4-4 Notarized Declaration.

Every applicant for a notary commission shall sign the following declaration in the presence of a notary of this [State]:

Declaration of Applicant

I, _____ (name of applicant), solemnly swear or affirm under penalty of perjury that the personal information in this application is true, complete, and correct; that I understand the official duties and responsibilities of a Notary Public in this [State], as explained in the course of instruction I have taken; and that I will perform, to the best of my ability, all notarial acts in accordance with the law.

(signature of applicant)
(notarial certificate for a jurat as specified in Section 9-5)

Comment

Section 4-4 requires all applicants to swear or affirm on three points. The first is that the application is fully and accurately completed. This means not only that all statements are true, but also that there are not any pertinent omissions. The applicant then states that he or she understands the obligations

of the notary office as taught in the mandatory four-hour course. Finally, the applicant takes what amounts to an “oath of office.” Such a declaration is standard fare and required in all jurisdictions. (*See, e.g.*, COLO. REV. STAT. ANN. § 12-55-105; IDAHO CODE § 51-105(1)(d); 5 ILCS 312 / 2-104; and VA. CODE ANN. § 47.1-

9.) The oath impresses upon applicants that notaries public perform an important function in society, a role that must be faithfully fulfilled.

§ 4-5 Application Fee.

Every applicant for a notary commission shall pay to this [State] a non-refundable application fee of [dollars].

Comment

Section 4-5 establishes the application fee. This will vary from jurisdiction to jurisdiction depending upon how the general operational costs of the office of the commissioning official are funded, how the specific expenses of processing applications are covered, and whether or not the cost of testing is to be borne by this fee or through a separate charge.

Jurisdictions that rely on third-party education providers for both the course and test may prefer to segregate the training/testing fee from the fee for application processing. Market forces should keep the educational costs reasonable and permit applicants to use factors

other than cost (*e.g.*, convenience) in satisfying their requirements.

Although the Act is silent on point, nothing prevents the commissioning official from waiving the fee in hardship situations. An overarching goal of the Act is to ensure that the public is properly served. The drafters recognize that providing notarial service in some economically depressed areas may be problematic. Thus, to encourage otherwise qualified members of those communities to meet notarial needs, fee waivers may be appropriate. (*See* Subparagraph 3-1(b)(5) Comment for similar issues with respect to testing fees.)

§ 4-6 Confidentiality.

Information required by Section 4-2(7) shall be used by the [commissioning official] and designated [State] employees only for the purpose of performing official duties under this [Act] and shall not be disclosed to any person other than:

- (1) a government agent acting in an official capacity and duly authorized to obtain such information;
- (2) a person authorized by court order; or
- (3) the applicant or the applicant's duly authorized agent.

Comment

Section 4-6 mandates that the commissioning official keep all information regarding an applicant's criminal history confidential. Such information, however, may be used for all legitimate, official purposes by the office of the commissioning official. It must also be shared with other governmental officials operating within their authority, and is subject to lawful subpoena. The Act eliminates the need for the commissioning official to seek specific authority to release the information to the applicant's authorized agent. This should eliminate unnecessary paperwork and delay

when legitimate requests for information are made.

The drafters considered whether all or more of the information in the application should be kept confidential. For example, some could not understand why the notary's home address and telephone number should be available to the public when a business address and number are listed. In certain situations, a state legislature could exempt certain notaries (*e.g.*, law enforcement personnel) from the requirement to disclose a residence address and telephone number. The drafters decided that all matters related

to prior professional licenses, public offices, and tort actions be available to the public. Notaries, as public servants, should be able to withstand the scrutiny of those who will use their services. Principals will depend on notaries to honestly and properly execute certificates and perform other notarial acts. These services will relate to important transactions for the principals and for innocent third parties relying on the

notarized documents. Consequently, principals concerned about such matters ought to be able to screen a notary's qualifications to determine whether or not the notary satisfies the principal's expectations, and to find the notary for later legal action and redress in the event of misconduct. Realistically, the drafters expect that few requests would ever be made for such information.

Chapter 5 – Powers and Limitations of Notary Public

Comment

General: This chapter establishes the parameters for official notarial acts. It not only identifies authorized acts and related functions (*see* Sections 5-1, 5-3, and 5-4), but also specifically proscribes certain activities (*see* Section 5-2 and Sections 5-5

through 5-14). In some respects this chapter is the centerpiece of the Act. It introduces new procedural concepts, imposes rigorous execution standards, and provides sage guidance for notarial practice.

§ 5-1 Powers of Notary.

A notary is empowered to perform the following notarial acts:

- (1) acknowledgments;
- (2) oaths and affirmation;
- (3) jurats;
- (4) signature witnessings;
- (5) copy certifications;
- (6) verifications of fact; and
- (7) any other acts so authorized by the law of this [State].

Comment

Section 5-1 identifies the permissible notarial acts. Subparagraphs (1), (2), and (3) list standard notarial acts recognized in all jurisdictions. (For the applicable description and general execution requirements of “acknowledgment,” *see* Section 2-1 and Comment; of “oath” and “affirmation,” *see* Sections 2-11 and 2-2 and Comments, respectively; and of “jurat,” *see* Section 2-7 and Comment.) Subparagraphs (4) and (5) authorize two acts – “signature witnessing” and “copy certification” – not expressly recognized by statute in all jurisdictions. (*See* Section 2-21 and Comment for a definition and execution requirements of a “signature witnessing”; and Section 2-4 and Comment for a definition and execution requirements of a “copy certification.”)

In the former Act, Subparagraph (6) was bracketed to indicate that a “verification of fact” is not a traditional duty for the American notary. In this revised section, the brackets have been removed by the drafters in their effort to expand the public utility of the notary office and in their belief that the duty of “verification of fact” is not beyond the ken of the notary. (*See* Section 2-22 and Comment.)

The former subparagraph authorizing a

notary to perform electronic notarial acts has been removed and placed in its own section – Section 17-1. The drafters determined that performing electronic notarizations is so different from paper-based acts in certain regards that they merit separate consideration. Thus, only those notaries public who decide to enable themselves to perform electronic notarial acts pursuant to the rules provided in Article III are authorized to do so.

Subparagraph (7) expands a notary’s authority to include acts permitted in the jurisdiction by other laws. This is not an uncommon practice. (*See, e.g.*, ALA. CODE § 36-20-5; and R.I. GEN. LAWS § 42-30-7.)

The drafters realize that there are other notarial acts currently recognized in some jurisdictions but not listed in Section 5-1. These acts include protesting commercial paper (*see, e.g.*, CAL. GOV’T. CODE § 8205(a)(1)) and solemnizing marriages (*see* FLA. STAT. ANN. § 117.045). In the case of protesting commercial paper, the drafters believed it better to mention this act and its requirements within a jurisdiction’s Uniform Commercial Code, where it would be known to notaries with the requisite specialized knowledge, rather than in the

general notary laws. Each jurisdiction is free to add as many notarial powers as it determines best meets the needs of its citizenry.

Conversely, a jurisdiction could delete an enumerated power. The drafters believe “acknowledgments,” “oaths and affirma-

tions,” “jurats,” “copy certifications,” and “signature witnessings” are essential notarial acts that must be included in any comprehensive notary statute. Any of the other listed powers could be eliminated without substantially impacting the efficacy of the statute.

§ 5-2 Requirements for Notarial Acts.

A notary shall perform a notarial act only if the principal:

- (1) is in the presence of the notary at the time of notarization;
- (2) is personally known to the notary or identified by the notary through satisfactory evidence;
- (3) appears to understand the nature of the transaction requiring a notarial act;
- (4) appears to be acting of his or her own free will;
- (5) signs using letters or characters of a language that is understood by the notary; and
- (6) communicates directly with the notary in a language both understand.

Comment

Section 5-2 is derived from Subsection 5-1(b) in the former Act. It has been removed to its own section to emphasize its importance. The former subsection was rephrased to make clear that the requirements within it are positive obligations imposed upon the notary.

Section 5-2 prohibits a notary from performing a notarial act if any of the listed prerequisites are missing. These prescriptions guarantee the integrity and reliability of the transaction. Subparagraphs (1) and (2) specify requirements – the principal’s physical presence and properly proved identity – that appear in the definition of all signature notarizations permitted by the Act. (*See, e.g.*, Sections 2-1, 2-7, and 2-21.) Although some jurisdictions do not specifically address these requirements, the drafters considered these two elements essential to all proper notarizations involving a principal, and deemed it worthwhile to iterate them.

Subparagraphs (3) and (4) address more controversial issues. The former follows the lead of two jurisdictions (*see* FLA. STAT. ANN. § 117.107(5); and GA. CODE ANN. § 45-17-8(b)(3)) requiring the notary to assess whether or not the principal

is aware of the significance of the transaction involving the notarial act. The provision does not require the notary to inquire into the principal’s knowledge or understanding of the document to be notarized. Nor does it mandate that the notary actively inquire into or investigate the transaction. Instead, it demands that the notary form a judgment from the circumstances as to whether or not the principal is generally aware of what is transpiring. Thus, if a principal presented a document entitled “power of attorney” and then asked the notary to notarize “this contract to purchase a burial plot,” the notary might have a basis to determine that the principal was not aware of the transaction to which the notarization related. Usually, this provision will become critical only when the notary believes the principal suffers from mental infirmity. It also can come into play, however, for principals who are operating under the heavy influence of alcohol or drugs. It is expected that the notary will make a commonsense judgment about the principal’s level of awareness, mainly through conversing with and observing the individual.

The obligation imposed upon the

notary in Subparagraph (4) is similar to that set forth in Subparagraph (3) relating to the principal's awareness. In Subparagraph (4), the issue is volition. The subparagraph reinforces the view that a signing is the voluntary and intended act of the principal. If the principal is being unduly influenced by another or is acting under duress, the notary should not perform the notarization. As is the case with "awareness," notaries should pay close attention to principals who appear to have mental infirmities, as they are more susceptible to manipulation and exploitation by a third party. (For a more detailed discussion of volition, *see* Section 2-1 Comment.)

The final two subparagraphs, (5) and (6), are new. Subparagraph (5) recognizes that notaries may be asked to notarize a signature written in a foreign language or in characters they cannot understand. As a result, a notary may not be able to make a

meaningful comparison of a signature affixed on a document with another signature or a printed name appearing on an identification document.

Subparagraph (6) takes a similar tack with respect to the notary's ability to communicate with the principal. If, for example, the notary cannot understand the spoken words of the principal, a meaningful judgment about this individual's awareness or volition cannot be made. (*See* the above discussions regarding Subparagraphs (3) and (4).) Moreover, a notary must not rely on an interpreter to communicate with the principal. Doing so would establish a dangerous policy. For any variety of reasons, an intermediary may not be capable or motivated to accurately represent the words of the principal or the notary. This subparagraph eliminates the risk of notarizing a document for someone the notary cannot understand.

§ 5-3 Signature by Mark.

A notary may certify the affixation of a signature by mark by a principal on a document presented for notarization if:

- (1) the mark is affixed in the presence of the notary and 2 witnesses disinterested in the document;
- (2) both witnesses sign their own names beside the mark;
- (3) the notary writes below the mark: "Mark affixed by (name of signer by mark) in the presence of (names and addresses of 2 witnesses) and the undersigned notary pursuant to Section 5-3 of [Act]"; and
- (4) the notary notarizes the signature by mark through an acknowledgment, jurat, or signature witnessing.

Comment

Section 5-3 was Subsection 5-1(c) in the former Act, but was made into its own separate section to accord it more prominence. The section provides a simple procedure for certifying a principal's mark as his or her legal signature. The mark must

be made in the presence of the notary and two disinterested witnesses. The witnesses must sign their names beside the mark. The notary must memorialize the ceremony in writing, and then execute the requested notarization.

§ 5-4 Signing for Principal Unable to Sign.

A notary may sign the name of a principal physically unable to sign or make a mark on a document presented for notarization if:

- (1) the principal directs the notary to do so in the presence of 2 witnesses disinterested in the document;

- (2) the notary signs the principal's name in the presence of the principal and the witnesses;
- (3) both witnesses sign their own names beside the signature;
- (4) the notary writes below the signature: "Signature affixed by the notary at the direction and in the presence of (name of principal unable to sign or make a mark) and also in the presence of (names and addresses of 2 witnesses) pursuant to Section 5-4 of [Act]"; and
- (5) the notary notarizes the signature through an acknowledgment, jurat, or signature witnessing.

Comment

Section 5-4 was Subsection 5-1(d) in the former Act, but was made into its own separate section to accord it more prominence. The section provides a procedure to allow the notary to sign the name of a principal who is physically unable to do so. The same safeguards found in Section 5-3 for a mark made by a principal are present for a proxy signature made by the notary. There is one added protection:

the notary may only affix the signature if specifically directed to do so by the principal. Moreover, this request must be made in the presence of the two disinterested witnesses. Once the proxy signature is affixed by the notary, the memorializing procedure is essentially congruent with the one spelled out in Section 5-3. The appropriate notarization may then be performed.

§ 5-5 Disqualifications.

- (a) A notary is disqualified from performing a notarial act if the notary:
 - (1) is a party to or named in the document that is to be notarized;
 - (2) will receive as a direct or indirect result any commission, fee, advantage, right, title, interest, cash, property, or other consideration exceeding in value the fees specified in Section 6-2 of this [Act];
 - (3) is a spouse, domestic partner, ancestor, descendant, or sibling of the principal, including in-law, step, and half relatives; or
 - (4) is an attorney who has prepared, explained, or recommended to the principal the document that is to be notarized.
- (b) Notwithstanding Subsection (a)(2), a notary may collect a non-notarial fee for services as a signing agent if payment of that fee is not contingent upon the signing, initialing, or notarization of any document.

Comment

Section 5-5 describes situations in which a notary has a disqualifying interest and, therefore, must not proceed with a related

notarization. Subparagraph (a)(1) states the basic rule that a notary may not notarize a document in which he or she is either a

principal or otherwise named. This rule goes beyond the basic prohibition against notarizing one's own signature. It also prohibits the notary from acting if mentioned in the document. Being named in the document impugns the notary's disinterest in the transaction and casts in doubt whether he or she impartially can meet the obligations imposed by law.

Subparagraph (a)(2) addresses the "interest in the transaction" issue more squarely. It specifically prohibits a notary from performing an official act related to a transaction from which the notary could benefit. This rule is common to most jurisdictions. (*See, e.g.*, 57 PA. STAT. ANN. § 165(e).) However, being an employee who performs a notarization for an employer does not create an interest governed by this subparagraph, unless the employee receives a benefit directly related to the completion of the act. Issues with respect to employee-notaries are specifically addressed in Sections 6-4 (fees), 7-4(b) (journal), 8-2(c)(4) (seal), and 13-1(c) and (d) (liability). Additionally, in recognizing that employees may notarize documents for their employers, it is contemplated that notarization in similar business relationships is permissible. A jurisdiction could specifically authorize corporate officers and directors to notarize documents for their business organizations. (*See, e.g.*, ARK. CODE ANN. § 21-14-109.) The drafters did not feel this needed to be stated separately, concluding that it was implicitly permitted by language that did not specifically prohibit it. (*But see* Subparagraph (a)(4) which disqualifies attorneys from notarizing documents for clients.)

Subparagraph (a)(3) offers an expanded view of disqualifying relationships for a notary. Most jurisdictions that address the matter confine such disqualification to close family members, but the drafters felt that broader coverage best fostered the integrity of the notarial act. Particularly noteworthy is the position that for these purposes a domestic partner must be treated identically to a spouse. Also, the Act includes "in-laws," "half," and "step" relatives as family members who ought to have their documents notarized by completely independent and disinterested notaries.

Subparagraph (a)(4) raises a controversial issue. Attorneys often notarize their clients' documents. The drafters believed, however, that attorneys clearly have an interest in

documents they draft or offer advice on for clients that should disqualify them from notarizing those documents. A separate non-notarial fee probably is being earned for providing legal services in these cases.

Whereas it could be argued that an attorney's notarization of a client's document would run afoul of Subparagraph (a)(2), the drafters thought it best to state the disqualification separately. Another consideration was whether the attorney's role as advocate for a client is compatible with the notary's role as disinterested witness, especially if the notarized document becomes evidence in litigation and the attorney is asked to testify as the supposed impartial notary in a case in which he or she is representing the client.

Notably, nothing in Subparagraph (a)(4) would prevent a paralegal, legal secretary, or other notary associated with the attorney from notarizing the document. Even so, an attorney's employment of a notary does not relieve the notary from fulfilling all of the obligations imposed by the Act with respect to proper execution of a notarial act.

Subsection (b) addresses "notary signing agents," who perform a courier and clerical function in bringing loan documents to a borrower and, before notarizing these documents, ensure that they are signed in the proper places. The operation of notary signing agents has been challenged in a few states because their total fees exceed the maximums allowed by statute for notarial acts. (*See, e.g.*, NOTARY PUBLIC GUIDEBOOK FOR NORTH CAROLINA (10th Ed., July 2006), which states: "Whether a notary may charge for mileage traveled in order to notarize an instrument is unclear, but a literal reading of GS 138-2 indicates that he or she may not.") The subsection allows signing agents to charge fees for their non-notarial functions, in addition to notarial fees, as long as payment of the non-notarial fees does not depend on performance of a notarial act – for example, when a borrower signs a packet of loan documents. In other words, the notary signing agent who travels to deliver loan documents to a borrower must be paid for the assignment by the contractor even when the borrower decides not to sign, or when a discovered impropriety or discrepancy prevents the notary from completing the notarial act. This removes the signing agent's incentive to exert pressure on the borrower.

§ 5-6 Refusal to Notarize.

- (a) A notary shall not refuse to perform a notarial act based on a person's race, advanced age, gender, sexual orientation, religion, national origin, disability, or status as a non-client or non-customer of the notary's employer.
- (b) A notary shall perform any notarial act described in Section 5-1 of this Chapter for any person requesting such an act who tenders the appropriate fee specified in Section 6-2(a), unless:
 - (1) the notary knows or has a reasonable belief that the notarial act or the associated transaction is unlawful;
 - (2) the act is prohibited under Section 5-2 or 5-5;
 - (3) the number or timing of the requested notarial act or acts practicably precludes completion at the time of the request, in which case the notary shall arrange for later completion of the requested act or acts without unreasonable delay; or
 - (4) in the case of a request to perform an electronic notarial act, the notary is not registered to notarize electronically in accordance with Chapter 16.
- (c) A notary may but is not required to perform a notarial act outside of the notary's regular workplace or business hours.

Comment

Section 5-6 establishes important rules that help regulate a notary's conduct. The section gives guidance on the central issues of whether and when a notary may refuse to perform an official act. Most statutes are silent on these matters, yet this silence can prove to be troublesome for notaries in the field.

Subsection 5-6(a) reinforces the principle that the notary occupies a public office and therefore must treat all members of the public equally. The provision makes clear that a notary may not discriminate against any principal, and, absent some reasons justified by another section, must perform any requested notarization. The drafters' goal was to be as broad as possible in identifying protected classes. Listing specific groups was not intended to suggest that other persons are not entitled to the same protection, but merely to identify groups that often encounter discrimination. For example, people of advanced age were specifically identified because they are often the victims of discrimination on the presumption that they are not competent to

handle their own affairs.

Subsection 5-6(a) also prohibits a notary from distinguishing between clients or customers and those who do not avail themselves of the notary's other professional or business services. The drafters were concerned that some employers might view an employee-notary as being available exclusively for the benefit of the employer. The language in this section is designed to emphasize two important points. First, there are no "notaries private," that is, officials commissioned for the sole purpose of handling a single employer's notarization needs. (*Contra* CA. GOV'T CODE § 8202.8.) Second, notaries are commissioned to serve all members of the public, including people who do not avail themselves of the notary's other business services. (*Accord* CONN. GEN. STAT. § 3-94(f).)

Subsection 5-6(b) begins by specifically requiring a notary to perform all authorized notarizations that are requested by anyone offering the statutory fee. The subsection then carves out four important

exceptions to the rule. Subparagraph (b)(1) directs the notary to refrain from acting if he or she “knows or has a reasonable belief” that the notarization is associated with an unlawful act. The drafters did not contemplate that the notary would conduct an investigation of the underlying transaction. There is no duty for the notary to search beyond the readily apparent facts. Nonetheless, as a responsible public officer, the notary must always refuse to proceed with a notarial act when the illegality of the transaction is self-evident. The goal is to thwart illegal acts from being consummated – an entirely appropriate aim for any public official.

Subparagraph (b)(2) reinforces the position that notarizations should never be performed in certain circumstances in which exploitation of the principal or the parties relying on the notarization is possible or likely. The specific instances are set forth in Sections 5-2 and 5-5.

Subparagraph (b)(3) introduces a commonsense rule for notarial practice. The drafters recognize that at times there may be a tension between the notary’s serving as a public officer and having other professional obligations. In reality, being a notary public is not full-time employment for most commission holders. A notary may not reasonably be expected to be at the instantaneous beck and call of the public. The notary may well have to attend to other duties. Consequently, there needs to be some flexibility in responding to the public’s requests. This subparagraph makes clear that the notary is not constantly “on call” to perform notarizations, but may arrange to

make reasonable accommodations to satisfy the public’s need. When the number of documents presented makes notarizing all of them at one time unfeasible, the Act allows the notary to satisfy the request in a way that does not unreasonably interfere with the notary’s other obligations.

Subparagraph (b)(3) is worded to address multiple notarizations, or any request made for notarial services during regular business hours when the notary is engaged in another task and it would be unreasonably disruptive for the notary to “drop everything” and immediately attend to the notarial services. In this situation, the notary would be encouraged to find a convenient juncture to attend to the notarization(s) within a reasonable time, or to arrange a mutually convenient alternate time to perform this function. A principal requesting a lawful notarial act should never be turned away without accommodation.

Subparagraph (b)(4) recognizes that notaries who have not taken the steps to educate, equip, and register themselves as electronic notaries (*see generally* Chapter 16) are not permitted to perform an electronic notarization.

Subsection (c) further reinforces the view that, notwithstanding status as a public servant, being a notary is not a round-the-clock job. Notaries may limit their availability to both a regular workplace and regular business hours. Whereas a notary has discretion to provide notarial services at any time or place within the jurisdiction, there is no obligation to do so outside of the notary’s normal business hours or business place.

§ 5-7 Improper Influence.

- (a) Unless Section 5-6(b)(1) applies, a notary shall not influence a person either to enter into or avoid a transaction involving a notarial act by the notary.
- (b) A notary commission shall not authorize the notary to investigate, ascertain, or attest to the lawfulness, propriety, accuracy, or truthfulness of a document or transaction involving a notarial act.

Comment

Section 5-7 provides a rule to performing official duties. Subsection (a) emphasize the notary’s impartial role in mandates that the notary play a neutral role

and not attempt to influence any party from participating in or eschewing a transaction requiring a notarial act. The provision is written in broad terms and applies to a notary's dealings with all persons, including those who are not principals. Thus, for example, a notary is forbidden to influence a third party to act as a credible witness under Section 2-5 to prove a principal's identity. Notwithstanding the general rule, Subsection (a) does not apply to situations where the notary has reason to believe the underlying transaction is unlawful. (*See* Subsection 5-6(b)(1).)

Subsection (b) underscores the notary's limited role. The notary's duties are confined to the requirements established by the Act.

A notary by virtue of holding a commission is neither authorized nor obligated to conduct an investigation into any aspect of a transaction. Indeed, the notarization promises no more than what the language in the certificate states. A notary never vouches for the legality, truthfulness, or accuracy of a document. The notary only verifies the principal's identity and participation in the notarial act. Nonetheless, a notary may "wear two hats" and by virtue of a professional credential, certification, or training (*e.g.*, a real estate or insurance license) may be authorized and obligated to vouch for a document's legality, truthfulness, and accuracy.

§ 5-8 Improper Certificate.

- (a) A notary shall not execute a notarial certificate containing information known or believed by the notary to be false.
- (b) A notary shall not affix an official signature or seal on a notarial certificate that is incomplete.
- (c) A notary shall not affix an official signature or seal on a notarial certificate other than at the time of notarization and in the presence of the principal.
- (d) A notary shall not provide or send a signed or sealed notarial certificate to another person with the understanding that it will be completed or attached to a document outside of the notary's presence.

Comment

Appearing as Section 5-5 ("False Certificate") in the 2002 Act, Section 5-8 addresses improper handling of the notarial certificate, which is the essential manifestation of most notarial acts. (Simple oaths and affirmations as oral declarations may not require completion of a certificate.)

Subsection (a) prohibits execution of a certificate that the notary knows or believes contains incorrect information. "Known" information would be based on the notary's firsthand observation or experience, while "believed" information would be derived from other sources that the notary considers reliable. It is possible that notaries could be pressured by employers, clients, friends, and relatives to falsify a notarial certificate by inserting an incorrect date, or stating that an absent person was present, or a stranger was personally known. In these instances,

notaries must keep in mind that the information in a notarial certificate may carry great weight in resolving disputes involving legal rights and interests. Much may depend on the truthfulness and accuracy of the statements in a notarial certificate.

Subsection (b) prohibits a notary from executing an incomplete certificate. The official signature and seal must not be affixed until all other portions of the certificate have been completed. If a notary signs and seals an incomplete certificate, an opportunity may be provided for an unscrupulous person to insert false information on the form.

Subsection (c), which did not appear in the 2002 Act, prohibits the not uncommon notarial practice of pre-signing and pre-sealing stacks of certificates to save time.

This is both an improper and a dangerous practice that could result in theft and subsequent fraudulent use of certificates without the notary's knowledge.

Subsection (d) reinforces the proposition stated in Subsection (c) that a proper notarization must be completed entirely at one time and place in the principal's presence. This subsection mandates that the notary not execute a certificate without also attaching it to the document to which it relates. The Act makes clear that an unattached certificate, whether complete or incomplete, may not be forwarded for

attachment to the related document by a person other than the notary. The reason for this rule is quite simple. It would be too easy for an unscrupulous person to attach the signed and sealed certificate to a document for which it was not intended. Whereas it is true that, after a document with an attached certificate leaves the notary's possession, there is no way to prevent the certificate from being detached and then reattached to a different document (though there may be physical evidence of reattachment), Subsection (d) at least assures that the notary will not have abetted the illegal act.

§ 5-9 Improper Documents.

- (a) A notary shall not notarize a signature:
 - (1) on a blank or incomplete document; or
 - (2) on a document without notarial certificate wording.
- (b) A notary shall neither certify nor authenticate a photograph.

Comment

Section 5-9 identifies documents that may not properly be notarized due to significant omissions. Subparagraph (a)(1) bans notarizing a blank or incomplete document. A blank document is one that has no text. An incomplete document is one that has unfilled blanks in its text. Nothing in this section authorizes the notary to read the document itself. A principal's privacy rights are important. The notary should do no more than scan the pages for incomplete sections and to glean information about the document for entry in the journal. (For more information on this point, *see* THE NOTARY PUBLIC CODE OF PROFESSIONAL RESPONSIBILITY, Guiding Principal IX, Standards IX-A-1 and IX-A-2, and Commentary.)

Subparagraph (a)(2) extends the rule to prohibit a notary from notarizing a document that lacks notarial certificate wording, though subsequent authorized prescription of a proper certificate for the

notary to use may remedy the situation.

Subsection (b) specifies that a notary may not notarize a photograph. Although statutes do not specifically address this issue, it is important because of frequent requests that photographs be notarized, particularly for certain medical license applications. Making and certifying a subjective judgment about the accuracy, completeness, authenticity, or other attribute of a photograph, even if the notary had a hand in its production, is not an apt function of a notary. At best, a notary may notarize another person's signed statement of certain facts relating to the picture. Moreover, nothing precludes this statement and the notary's accompanying certificate from being executed on or across the photograph itself. But that notarization does not authenticate the photograph; it only verifies that a principal proved his or her identity, took an oath in the case of a jurat, and signed the statement.

§ 5-10 Intent to Deceive.

A notary shall not perform any official action with the intent to deceive or defraud.

Comment

Section 5-10 enunciates a basic rule that pervades the entire Act: a notary shall not engage in deceptive practices in the performance of official duties. This concept is self-evident, but is so essential to establishing integrity and reliability that the drafters believed it was well worth repeating through separate attention. Aside from being

a positive obligation, it is also an ethical imperative. (*See* THE NOTARY PUBLIC CODE OF PROFESSIONAL RESPONSIBILITY, Guiding Principle IV, Standards IV-E-1 and IV-E-2, and Commentary.) A notary who violates this duty should incur both disciplinary and criminal sanctions. (*See generally* Sections 13-3 through 13-7.)

§ 5-11 Testimonials.

A notary shall not use the official notary title or seal to endorse, promote, denounce, or oppose any product, service, contest, candidate, or other offering.

Comment

Section 5-11 fosters maintenance of a neutral, independent, and respected notary office. To this end, the Act prohibits use of the office or any of its incidents for any commercial or political purpose. A similar rule has been promulgated in a number of jurisdictions. (*See, e.g.*, UTAH CODE ANN. § 46-1-10; and OR. REV. STAT. § 194.158(2).) The drafters adopted the rule because of a concern that uninformed members of the public could

misunderstand the significance of a notary seal. It was feared that some might believe it carried with it a governmental imprimatur of approval. Of course, this is not the case. Indeed, a notary who uses his or her seal for such purposes with the intent to deceive someone into believing the seal imparted an official government endorsement would be in violation of Section 5-10, and subject to severe sanctions.

§ 5-12 Unauthorized Practice of Law.

- (a) A non-attorney notary shall not assist another person in drafting, completing, selecting, or understanding a document or transaction requiring a notarial act.
- (b) If notarial certificate wording is not provided or indicated for a document, a non-attorney notary shall not determine the type of notarial act or certificate to be used.

Comment

Section 5-12 has been reformulated from the former Section 5-9. The drafters determined that the section as it appeared in the former Act included provisions that, although related, deserved separate treatment. As a result the former Section 5-9 was parsed to create a series of sections that delivered their proscriptions and exceptions thereto in a succinct, direct manner. (*See* Sections 5-12, 5-13, and 5-14.)

Section 5-12 adopts the language of the former Subsections 5-9(a) and (b), but has

reversed their order. The drafters determined that Subsection (a), as it appears here, provides the overarching proscription, and therefore should be placed first in the section.

This section draws a sharp line between notarial practice and legal advice. A significant underlying goal of the section is to protect the public, especially those who believe that notaries may lawfully perform some of the functions of attorneys. To this end, guideposts are provided to help ensure

that the notary does not cross the line separating notarization from legal advice. Notaries who are not duly qualified attorneys are strictly forbidden from offering legal opinions to others. Those who do are engaged in the unauthorized practice of law. (*See* IDAHO CODE § 51-112(d); and TEX. GOV'T CODE ANN. § 406.016(d).) Aside from constituting official misconduct for notary purposes, it may also be actionable as a criminal offense.

Subsection (a) further clarifies the purely ministerial role played by a notary. It expands the proscription relating to notarial certificates to documents. A notary commission does not authorize the notary to provide any transaction-related assistance. Thus, the notary may neither complete an unfinished document nor draft a document for another person. Of course, this does not apply to completing the notarial certificate that is part of the document, including striking inapplicable language.

The notary should not recommend a document type to a principal, even if specifically asked. Notaries who have access to pre-printed legal forms must refrain from suggesting a form to another person even if the notary is confident about which form is needed. In addition, the notary must never interpret or explain either the purpose or contents of a document to another person. These acts constitute legal advice, and may only be performed by licensed attorneys, or by non-attorneys duly qualified, trained, licensed, or experienced within a particular professional field. (*See* Section 5-13.)

Subsection (a) underscores the fact that a notary is empowered solely to perform a requested notarization. It is inappropriate for a non-attorney notary even to suggest that a document needs to be notarized. The section is not limited in its application to principals (*i.e.*, individuals for whom a notarization is performed), but applies to all persons, whether or not they ask to have a document notarized. Finally, notaries who are also

attorneys are not covered by the subsection because an attorney is authorized to perform all of the otherwise proscribed activities in that capacity.

Subsection (b) establishes the rule that the notary's determination of the type of notarization needed or the type of certificate to be executed on a document is prohibited. An exception, of course, is made for notaries who are also attorneys. Some notaries may believe it is appropriate for them to assist principals in executing the notarization, and that recommending the act and certificate is consistent with this role. The drafters strongly disagree. Some documents may need an acknowledgment, others a jurat, and others only a signature witnessing. An improperly selected certificate could render the document ineffective. For example, a document with an acknowledgment or signature witnessing certificate would not be accepted as an affidavit, which speaks to the truth of the contents of the document. Neither of these types of notarization involves an oath or affirmation, an essential element of an affidavit. Such a mistake could prove costly if the transaction was voided because the truth of the document's contents was essential to its completion. A notary ought not to be involved in these matters; they belong in the attorney's realm. The drafters firmly believed that the notary public serves a ministerial role, one that does not entail giving advice or offering opinions. (*Accord* THE NOTARY PUBLIC CODE OF PROFESSIONAL RESPONSIBILITY, Guiding Principle VI.)

Nothing in this section prohibits a notary from putting or writing certificate wording on a document if the principal asks for a specific type of notarial act. Thus, if a notary is asked to take an acknowledgment of a principal's signature, but there is no certificate on the document, the notary may add the required wording for an acknowledgment certificate to the signature page. Prescribed certificate wording for different notarizations is provided in Chapter 9.

§ 5-13 Permissible Advice.

Section 5-12 does not preclude a notary who is duly qualified, trained, licensed, or experienced in a particular industry or professional field from selecting, drafting, completing, or advising on a document or certificate related to a matter within that industry or field.

Comment

Section 5-13 is the former Subsection 5-9(c) in the previous Act. The section recognizes that many notaries have other professional qualifications. So to speak, they may wear more than one hat. The Act provides that being a notary does not derogate from any authority or discretion the

notary may derive from other professional licenses or certifications. A real estate agent, for example, may in that capacity give advice and assistance in executing a contract for the purchase of property. The Act permits this and similar activities of other professionals.

§ 5-14 Misrepresentation and Improper Advertising.

- (a) A notary shall not claim to have powers, qualifications, rights, or privileges that the office of notary does not provide, including the power to counsel on immigration issues.
- (b) A non-attorney notary who advertises notarial services in a language other than English shall include in the advertisement, notice, letterhead, or sign the following, prominently displayed in the same language:
 - (1) the statement: “I am not an attorney and have no authority to give advice on immigration or other legal matters”; and
 - (2) the fees for notarial acts specified in Section 6-2(a).
- (c) A notary may not use the term “notario publico” or any equivalent non-English term in any business card, advertisement, notice, or sign.

Comment

Section 5-14 is a restatement of Subsections 5-9(d), (e), and (f) in the former Act. Subsection (a) forbids the notary from misrepresenting notarial authority. Immigration and other legal matters are of particular concern because in civil law jurisdictions the attorney-like *notario publico* may be authorized to deal with these issues. To prevent public confusion and thwart unscrupulous notaries from attracting business for unauthorized acts, the Act mandates that notaries not misrepresent the powers associated with the notary office. Nothing in the subsection prohibits an attorney-notary from claiming powers afforded by a license to practice law.

Subsection (b) is designed to supplement the rule against misrepresentation of authority spelled out in Subsection (a). The drafters recognize that there is a significant Spanish-speaking population in this country familiar with the powers of the *notario publico*. As an added precaution to avoid confusion and misunderstanding about the extent of the

American notary’s notarial powers, the Act requires any notary who advertises notarial services in a foreign language to stipulate clearly in the ad that the notary is not a lawyer and may not provide legal advice or counsel. Specific reference is made to immigration matters because it is often the subject of greatest interest to foreign-born residents who are less than fluent in English. To further deter exploitation of unknowledgeable aliens, the Act mandates that a notary who advertises in a foreign language state the statutory fees for notarial acts in the same language.

Subsection (c) takes the final step in attempting to clearly distinguish the United States notary from the *notario publico* of civil law Latin nations. The Act forbids a notary from using the term “*notario publico*” in any commercial communication to members of the public. Also prohibited is the use of equivalent non-English terms designating other attorney-like civil law notarial officers, including *notaire* (French) and

notaio (Italian). Although the subsection speaks specifically to written material, the drafters intended the prohibition to extend to all types of solicitations, whether they be oral or electronic.

§ 5-15 Notarial Officers Other Than Notaries.

- (a) Notarial officers, other than notaries public, who are given the power to perform notarial acts by other laws of this [State] shall comply with the following sections of this [Act], in the same manner as notaries public, in performing their authorized notarial acts:
 - (1) regarding prohibitions and restrictions, Sections 5-2 through 5-14;
 - (2) regarding maintenance of a journal of notarial acts, Sections 7-1 through 7-2; and
 - (3) regarding execution of notarial certificates, Sections 9-1 through 9-9.
- (b) Notarial officers, other than notaries public, shall follow all pertinent laws of this [State], except those set down in this [Act] apart from this section, and the rules duly issued by their authorized employers in regard to:
 - (1) use or non-use of a seal of office;
 - (2) performance of electronic notarial acts;
 - (3) disposition of a seal of office and a journal of notarial acts after termination of status as a notarial officer; and
 - (4) all other matters, including discipline, related to their status as a notarial officer.

Comment

Section 5-15 did not appear in the Model Notary Act of 2002, but is included here to address the notarial responsibilities of officers who have been given the power to notarize by laws other than this Act. In most cases, such laws do not address basic notarial prohibitions and restrictions, maintenance of a journal of notarial acts, nor execution of notarial certificates, even though a notary's failure to attend to these matters can undermine the utility of a notarization. Subsection (a) identifies three parts of this Act that the drafters believed should not

be ignored by *ex officio* notaries and others whose notarial authority derives from occupying an office or performing a function governed by statute or administrative rule.

Through Subsection (b), the drafters preferred to allow all other matters attendant to the duties of *ex officio* notaries – including, for example, seal use, performance of electronic notarial acts, disposition of seals and journals, and discipline for misconduct – to be addressed by dictates other than set down in this Act.

Chapter 6 – Fees of Notary Public

Comment

General: This chapter addresses a variety of issues concerning the setting and charging of notarial fees. The Act adopts the long recognized position that notaries are entitled to receive a fee for performing a notarization. The Act acknowledges that a notary may waive all or part of the fee, but must not use discriminatory bases in making that decision. As a convenience to consumers and to better serve the needs of

the homebound, the Act introduces a “travel fee” concept. This permits notaries to recover their costs incident to bringing notarial services to those unable to leave a bed or residence and to those home refinancers and other borrowers who expect such conveniences in a competitive marketplace. Finally, the chapter also provides guidance on how the fees of employee-notaries are to be handled.

§ 6-1 Imposition and Waiver of Fees.

- (a) For performing a notarial act, a notary may charge the maximum fee specified in Section 6-2, charge less than the maximum fee, or waive the fee.
- (b) A notary shall not discriminatorily condition the fee for a notarial act on the attributes of the principal or requester of fact as set forth in Subsection 5-6(a), though a notary may waive or reduce fees for humanitarian or charitable reasons.

Comment

Section 6-1 states the basic rule that notaries themselves are to decide whether or not fees are charged. The drafters acknowledged that many notaries do not charge for their services, especially those who are employees. (*See* Section 6-4 for special rules applicable to an employee-notary.) There are, however, some limitations on notaries’ discretion in regard to fees. First, Subsection (a) makes clear that in no event may a notary charge more than the maximum allowable fee. (*See* Subsection 6-2(a) for the fee structure.) Second, Subsection (b) prohibits a notary from charging a fee predicated on an improper discriminatory basis. This anti-discrimination provision is new to notary statutes. The subsection specifically incorporates the Subsection 5-6(a) criteria for determining prejudicial acts, and applies

to fees the same ban on unacceptable discrimination applicable to refusals to perform a notarial act.

Conceptually, as a public servant, the notary is precluded from engaging in any discriminatory practices. The Act reinforces the point. Subsection (b) carves out an exception for the notary who is motivated by philanthropic or charitable intentions. Thus, a notary who waives fees as a humanitarian act does not engage in discriminatory practice if he or she charges the maximum fee to others. Moreover, a notary may be selective in identifying those worthy charitable causes for which he or she chooses to waive the fee. The only limitation is that the notary may not use the characteristics specified in Subsection 5-6(a) as the basis for distinguishing those worthy causes.

§ 6-2 Fees for Notarial Acts.

- (a) The maximum fees that may be charged by a notary for notarial acts are:
 - (1) for an acknowledgment, [dollars] per signature;

- (2) for an oath or affirmation without a signature, [dollars] per person;
 - (3) for a jurat, [dollars] per signature;
 - (4) for a signature witnessing, [dollars] per signature;
 - (5) for a certified copy, [dollars] per page certified with a minimum total charge of [dollars];
 - (6) for a verification of fact, [dollars] per certificate; and
 - (7) for an electronic notarization, as specified in Section 21-2.
- (b) A notary may charge a travel fee when traveling to perform a notarial act if:
- (1) the notary and the person requesting the notarial act agree upon the travel fee in advance of the travel; and
 - (2) the notary explains to the person requesting the notarial act that the travel fee is both separate from the notarial fee prescribed in Subsection (a) and neither specified nor mandated by law.

Comment

Section 6-2 establishes the fee schedule. Subsection (a) identifies all of the different notarial acts, and provides a separate fee for each one. The drafters did not include fee amounts. It was determined that these decisions were best left to the respective jurisdictions. However, the drafters did express a preference for a fee of at least \$10 for any notarial act, because this amount, authorized by law for most notarizations in a growing number of states (*see, e.g.*, CAL. GOV'T CODE § 8211; FLA. STAT. ANN. § 117.05(2)(a); and S.D. CODIFIED LAWS § 18-1-9), was deemed to fairly compensate notaries for their time, effort, and potential liability. Enumeration of the various notarial acts was not intended to indicate that each should carry a different fee amount. More than one type of notarial act may command the same fee. (For example, the fee for an acknowledgment and a jurat may be the same.) The list provides the opportunity to set different fee amounts for the authorized notarial acts. Some jurisdictions stipulate a single fee for any and all notarial acts (*see, e.g.*, 5 ILCS 312 / 3-104(a); and IND. CODE ANN, § 33-42-8-1), while others prescribe a fee for each different type of notarial act (*see, e.g.*, HAW. REV. STAT. § 456-17; and N.M.. STAT. ANN. § 14-12A-16(D)). By its specific reference, Subparagraph (7) applies only if

the jurisdiction adopts Article III of the Act relating to electronic notarizations. If that article is not adopted, the subparagraph may be deleted. Should Article III be adopted without Section 21-2, then the fee schedule in this section shall also apply to electronic notarizations.

Subsection 6-2(b) addresses charging a travel fee incident to the performance of a notarial act. A few jurisdictions currently permit a notary to charge for these costs (*see, e.g.*, ARIZ. REV. STAT. ANN. § 41-316(B); N.M. STAT. ANN. § 14-12A-16(E); and UTAH CODE ANN. § 46-1-12(2)), and one jurisdiction, Nevada, sets a per-hour fee that varies according to the time of day the travel is performed (*see* NEV. REV. STAT § 240.100(3) and (4)). However, most state laws are silent on this point. There are many homebound disabled or elderly persons, as well as individuals in remote areas, who need notarial services. Given the relatively small fees that can be charged for notarial services, a notary may not reasonably be expected to personally bear the cost of traveling to accommodate these people. In response, the Act permits the notary to be reimbursed for necessary costs incurred to provide these special services. The Act does not impose rigid guidelines, but there is an expectation that the travel fee will be reasonable. Gouging or otherwise taking

advantage of a person needing at-home services may violate public policy and constitute official misconduct. (*See* Section 2-12 and Comment.)

At a minimum, the travel fee covers costs such as public transportation fares, or, if a private vehicle is used, gas, parking, and tolls. The drafters contemplated that the travel fee could include additional expenses, as well. For example, if the situation necessitates that the notary spend a night away from home, reasonable accommodation and meal costs could be recoverable as part of the travel fee. Indeed, one state currently allows and sets per diem charges for notaries traveling to perform services within that geographically expansive state. (*See* ARIZ. REV. STAT. ANN. § 41-316(B).) Additionally, although the term “travel fee” is used, the section was written so as not to preclude a jurisdiction from allowing a notary to include a charge for time spent traveling. Each jurisdiction must balance the potential cost of a “time charge” against the benefit of special-needs principals having a notary come to them. Also, although perhaps not to be encouraged, nothing in the section would

preclude a principal from paying a notary solely for the convenience of having the notary come to a home or office.

Subparagraphs (b)(1) and (b)(2) put two extremely important limits on the use of travel fees. First, and foremost, the notary and the principal or authorized principal’s representative must agree upon the travel fee in advance. The drafters contemplated that this agreement will a) be made at the time the principal or representative asks the notary to travel and before the notary commits to the travel, and b) specify the actual dollar amount or an exact method for computing the amount of the fee. Second, the principal or representative must be informed that the travel fee is a) in addition to any notary fees to be charged for notarial acts, and b) not required by law but only payable by mutual agreement.

In regard to the new notarial act of verification of fact (*see* Subparagraph (a)(6)), it is anticipated that the notary’s fee will be set at a level sufficient to cover the costs of obtaining any needed document copies from an office housing public or vital records. The costs of traveling to the office would be addressed by Subsection 6-2(b).

§ 6-3 Payment Prior to Act.

- (a) A notary may require payment of any fees specified in Section 6-2 prior to performance of a notarial act.
- (b) Any fees paid to a notary prior to performance of a notarial act are non-refundable if:
 - (1) the act was completed; or
 - (2) in the case of travel fees paid in compliance with Subsection 6-2(b), the act was not completed after the notary traveled to meet the principal because it was prohibited under Section 5-2, or because the notary knew or had a reasonable belief that the notarial act or the associated transaction was unlawful.

Comment

Section 6-3 addresses the problem notaries encounter when they expend considerable time and effort in traveling to perform a notarization, but are denied payment for travel when the notarial act could not be completed for due cause (*see* Section 5-2 and Subparagraphs 5-6(b)(1) and (2) or when the principal was

dissatisfied with a properly performed act. Subsection (a) gives notaries discretion to require pre-payment of fees prior to performance of any notarial act. Some notaries may elect to invoke this provision only for acts necessitating travel, particularly verifications of fact (*see* Subparagraph 5-1(6)), wherein it is possible

that the person requesting the verification may disagree with the notary's discovered facts and refuse to pay.

Subsection (b) stipulates that any fees paid to the notary prior to notarization are not returnable if a) the notarial act was

completed, or b) the act was not completed for due cause when the notary had traveled to the site of the aborted notarization, in which case only the fee for the notarial act itself need be refunded. The travel fee would be retained by the notary.

§ 6-4 Fees of Employee Notary.

- (a) An employer may prohibit an employee who is a notary from charging for notarial acts performed on the employer's time, but shall not condition imposition of a fee on attributes of the principal as described in Section 5-6(a).
- (b) A private employer shall not require an employee who is a notary to surrender or share fees charged for any notarial acts.
- (c) A governmental employer who has absorbed an employee's costs in becoming or operating as a notary shall require any fees for notarial acts performed on the employer's time either to be waived or surrendered to the employer to support public programs.

Comment

Section 6-4 addresses issues relating to the employee-notary who performs notarial services primarily for the employer or for customers of the employer. Employee-notaries perform most, if not all, of their notarial duties at the employer's place of business, and they typically store their seals and journals at that site. (Subsections 7-4(a) and (b) require a notary to safeguard the journal when not in use. Subsection 8-2(c) imposes the same requirement for the official seal.) Oftentimes, an employer will pay for the cost of obtaining the employee-notary's commission.

Subsection (a) recognizes that, since an employee is being paid during business hours, it is not unreasonable to allow the employer to dictate that notarial services in the employer's place of business be provided without a fee. However, the subsection provides that notary fees should not be discriminatorily imposed by an employer based on a given principal's status as a non-customer of the employer, or for any other prejudicial reason enumerated in Subsection 5-6(a). Note, the subsection is geared to the employment relationship and would apply to off-site notarizations performed in the scope of employment, as well. However, an employee-notary prohibited from charging

during business hours could charge fees for notarizations performed off-site during non-business hours, or for other notarizations not in the scope of employment. Nothing in this section should be used to imply that an employer may have an employee commissioned solely for the employer's business needs.

Subsection (b) reinforces the view that notarial fees may only be earned by and paid to the notary. The Act tries to balance the notary's independence as a public officer with the employer's right of control over an employee within the scope of employment. Whereas Subsection (a) tips the scale toward employer control over employees, Subsection (b) places greater weight on notarial independence. An employer may not collect the notary's fees, if for no other reason than that the employer is not a duly commissioned notary. The rule that only a commissioned notary may charge for notarial services cannot be questioned. (For penalties that may be imposed on an unauthorized person acting as a notary, *see generally* Chapter 14.) The effect of this proscription is to prevent the employer from offsetting the employee's salary cost by notary fees collected from third parties. Notwithstanding the above, nothing would

prevent a notary from voluntarily giving the fee to, or sharing it with, an employer.

Subsection (c) provides a limited exception to Subsection (b). It permits certain government employers to take the employee notary's fees and use them for the benefit of the public, or to offer free notarial services as a public convenience. This applies in cases where the employing governmental agency

absorbs the cost for maintaining the employee-notary's commission. The Act intentionally uses the non-specific term "public programs" to allow discretion to the governmental unit availing itself of this opportunity. Presumably, using the fees to help defray the costs of commissioning the employee-notary could fall within the definition of "public program."

§ 6-5 Notice of Fees.

Notaries who charge for their notarial services shall conspicuously display in their places of business, or present to each principal outside their places of business, an English-language schedule of fees for notarial acts, as specified in Section 6-2(a). No part of any notarial fee schedule shall be printed in smaller than 10-point type.

Comment

Section 6-5 provides a simple rule that notaries who charge for their services must prominently display a fee schedule. Notaries who travel to perform notarizations must carry a schedule with them and show it to any principal who inquires about fees. Fee-posting provisions may be found in some existing statutes, though these laws do not require carrying and displaying such a schedule when traveling to perform a notarization. (*See, e.g.*, NEV. REV. STAT. ANN. § 240.110; and OR. REV. STAT. § 194.164(3).) The drafters believed that the rule to post or display fees should help eliminate misunderstandings regarding charges for different services, as well as

minimize opportunities for unscrupulous notaries to overcharge unsuspecting principals. The notice must be printed in English, but the drafters are equally concerned that non-English-speaking people, especially those from countries with *notarios publicos*, are not overcharged. Although not required, good practice suggests that notaries who usually deal with people not fluent in English also post or present a fee schedule printed in the language used by those persons. Any foreign-language advertisement for notarial services requires inclusion of a fee schedule in the particular foreign-language (*see* Subparagraph 5-14(b)(2)).

Chapter 7 – Journal of Notarial Acts

Comment

General: Notwithstanding their widely acknowledged critical value to the notarial act, notary journals have still proven to be a somewhat controversial subject. First, there is the threshold issue of whether or not a notary needs to maintain a journal. Many states require a notary journal (*see* ARIZ. REV. STAT. ANN. § 41-319; CAL. GOV'T CODE § 8206(a)(1); and 57 PA. STAT. ANN. § 161), but some do not. State law may mention notary journals without imposing a requirement to maintain one. (*See* UTAH CODE ANN. §§ 46-1-13 and 46-1-14.) No jurisdiction outlaws the practice. Second, if a journal is maintained, what entries are appropriate? Finally, who should have access to a journal? Most states do not address this issue, even though their notaries may be required or allowed to maintain a

journal of notarial acts.

The drafters have adopted the view that journals are essential to good notarial practice and decidedly in the public interest. Entry requirements serve to help ensure that the notary records critical information about each notarial act. Such data can be extremely useful in answering any future questions that may arise concerning the document or its signer.

The Act nonetheless recognizes that there is a tension between principals' privacy rights and the right of the public to access information. Consequently, the drafters determined that while notary journals should not be considered public records *per se*, their public utility should be recognized and limited access granted in certain situations.

§ 7-1 Maintaining Journal of Notarial Acts.

- (a) A notary shall keep, maintain, protect, and provide for lawful inspection a chronological journal of notarial acts that is either:
 - (1) a permanently bound book with numbered pages; or
 - (2) an electronic journal of notarial acts as described in Section 20-2 of this [Act].
- (b) A notary shall keep a record of electronic and non-electronic notarial acts in the same journal.
- (c) A notary shall maintain only 1 active journal at the same time, except that a backup of each active and inactive electronic journal shall be retained by the notary in accordance with Section 20-2(3) as long as each respective original journal is retained.

Comment

Section 7-1 mandates that every notary maintain and safeguard an official journal of all notarizations performed. The section also provides the specific authority for access rules (*i.e.*, "provide for lawful inspection") that are spelled out in Section 7-3.

The notary is required to record notarial acts in chronological order. The Act permits the notary to choose a journal that is either in a bound paper or an electronic form, but Subsection (c) makes clear that only one active journal may be maintained.

Thus, a notary may not have one book at home for recording notarial acts for friends and neighbors and another at the office for notarial acts completed at work, nor one to record paper-based notarizations and another to record electronic acts. To preserve the chronological integrity of the notary's record, there can be but one active journal. To facilitate adherence to the rule, good practice suggests that the notarial journal and seal be kept together at all times, thereby eliminating the opportunity to use

the seal without having immediate access to the journal for recording the respective act. However, with the anticipated eventual advent of online electronic journals that may be accessed through any Internet connection, notaries will be given a new flexibility to enter notarial acts in the same journal from any location.

Due to the occasional malfunctioning of electronic systems, Subsection (c) mandates that a backup journal be retained for the active and for each inactive electronic journal. This will preserve a record of the notary's official acts in the event the original is lost or compromised. Ideally, such a backup electronic record would be maintained "off site" to prevent flood, fire, or other disaster from claiming both original and backup records.

Although the Act was intended to be a comprehensive unit of three articles, some jurisdictions may elect not to adopt the

provisions regarding electronic notarization in Article III. At the same time, however, notaries in such jurisdictions may be allowed to maintain electronic journals for their paper-based notarial acts. This is an increasingly common practice, whether sanctioned by statute (*see, e.g.*, TEX. GOV'T CODE § 406.014(e)) or permitted without express statutory authority. Subparagraph (a)(2) addresses this possibility. In jurisdictions not adopting Section 15-4 ("Electronic Journal of Notarial Acts") and Chapter 20 ("Record of Electronic Notarial Acts") from Article III but nonetheless permitting notaries to use an electronic journal, language defining and setting rules for such a journal should be added to Chapter 7. In those instances, the drafters recommend and encourage that the language from Section 15-4 and Chapter 20 be integrated into the chapter.

§ 7-2 Journal Entries.

- (a) For every notarial act, the notary shall record in the journal at the time of notarization at least the following:
- (1) the date and time of day of the notarial act;
 - (2) the type of notarial act;
 - (3) the type, title, or a description of the document or proceeding;
 - (4) the signature, printed name, and address of each principal;
 - (5) the printed name and address of each requester of fact;
 - (6) the evidence of identity of each principal in the form of either: a statement that the person is "personally known" to the notary; a notation of the type of identification document, its issuing agency, its serial or identification number, and its date of issuance or expiration; or the handwritten signature and the name and address of each credible witness swearing or affirming to the principal's identity, and for credible witnesses who are not personally known to the notary, a description of the identification documents relied on by the notary;
 - [(7)] the thumbprint of each principal and witness, or, in the case of an electronic journal, the thumbprint or other recognized biometric identifier, in accordance with Section 20-2(4) of this [Act];
 - [(8)] the fee, if any, charged for the notarial act;
 - [(9)] the address where the notarization was performed, if not the notary's business address;

- [(10)] the sequential number of any adhesive label bearing a notary seal image on the notarized document, in accordance with Section 8-2(d) of this [Act]; and
 - [(11)] in the case of an electronic notarization, the name of any authority issuing or registering the means used to create the electronic signature that was notarized; the source of this authority's license, if any; and the expiration date of the electronic process.
- (b) A notary shall not record a Social Security or credit card number in the journal.
 - (c) A notary shall record in the journal the circumstances for not performing or completing any requested notarial act.
 - (d) A notary shall record in the journal the circumstances of any request to inspect or copy an entry in the journal, including the requester's name, address, handwritten signature, [thumbprint or other recognized biometric identifier,] and evidence of identity. The reasons for refusal to allow inspection or copying of a journal entry shall also be recorded.
 - (e) As required in Section 9-3(4), a notary shall append to the pertinent entry in the journal a notation of the nature and date of the notary's correction of a completed notarial certificate corresponding to the entry.

Comment

Subsection 7-2(a) both mandates that every notarization requires an entry in the notary's journal of notarial acts and specifies the proper components of such an entry. Most of the separate items enumerated in Subparagraphs (a)(1) through (a)(11) are currently required or allowed by jurisdictions legislating the use of notary journals. (*See generally* ARIZ. REV. STAT. ANN. § 41-319; CAL. GOV'T CODE § 8206(a)(2); and 57 PA. STAT. ANN. § 161.) There are, however, some innovations.

A new Subparagraph (a)(5) has been added to accommodate journal entries for verification of fact notarizations (*see* Section 2-19 and Comment), for which only the name and address of the requester of fact – and not the person's signature, thumbprint, and identifying information – need be recorded. Because the verification of certain other facts is the matter at issue (*e.g.*, whether two separate documents are congruent), there is no need for this identity-related information to be recorded in the journal. Indeed, it is not even necessary for

the requester to be in the notary's physical presence. The drafters contemplated that verifications of fact might be requested by mail or electronic communication. If the requester of fact is present, the notary would not be prohibited from asking the person to sign the journal as evidence that the verification of fact certificate was delivered.

Subparagraph (a)(6) compels the notary to record how the identity of the principal was established, including a description of any identification documents or credible witnesses that were relied on. By requiring this entry, the Act reinforces both the essential role of the notary in authenticating signed documents – identity verification – and the proper methods of obtaining such verification. Additionally, the entry serves to memorialize proper performance of the act.

Offered as an option (*i.e.*, bracketed) because it may be regarded as too intrusive or controversial by some lawmakers, Subparagraph (a)(7) requires capture of all principals' and witnesses' thumbprints, or,

in the case of electronic records, other accepted biometric identifiers. This requirement sparked robust discussion among the drafters, a number of whom believed it demands too much of both the principal and notary. Proponents of the rule countered that modern technology has made fingerprinting clean, easy, and inexpensive. They argued that many impostors will thereby be deterred from forgery because they will not want to leave a thumbprint behind in the notary's journal as proof of their attempted crime. Also, it was asserted, prosecutors will be aided by the journal evidence in bringing forgers to justice.

For electronic journals, any other recognized biometric identifier (*e.g.*, a retinal scan) may be captured in lieu of a thumbprint if the notary's journal technology so allows. No doubt, future technical advancements will make it easier for notaries who maintain an electronic journal to use biometric identifiers other than fingerprints, which a host of electronic products can now capture and store.

Subparagraph (a)(9) directs the notary to enter the location at which the notarization was performed, if not at the notary's normal business address. The purpose is to help protect the notary if the act is questioned in the future. Should the notary be called as a witness, this information can serve to refresh the notary's recollection regarding the transaction.

Subparagraph (a)(10) reflects that the Act recognizes official notary seals in forms other than the traditional metal embosser or inked stamp, as long as the seal satisfies the requirements of Chapter 8.

Subparagraph (a)(11) provides additional requirements for electronic notarial acts. It directs the principal to provide information about the origin and authenticity of any notarized electronic signature. If, for example, the signature were made using public key technology, the "authority issuing or registering the means used to create the electronic signature" would be the pertinent certification authority.

Subsection 7-2(a) mandates that the journal entry be made at the time of notarization. The Act does not specify whether the recording must be made before or after the notarial act is otherwise completed. Although completing the journal entry at the end might seem a logical choice, there is merit in completing the entry before the rest of the

notarization is performed. The latter option prevents time-pressed principals from leaving with the notarized document before the journal entry is completed. Additionally, it allows the notary to refuse to act for those who will not provide a thumbprint or any other required entry component. Finally, the journal entries detail the essential elements of a proper notarization; by making the journal entry first, the notary reinforces the procedure that should be followed for each notarial act.

Subsection (b) responds to privacy concerns by precluding a notary from entering either a Social Security number or a credit card number in a journal. (*See, e.g.*, TEX. ADMIN. CODE § 87.60, prohibiting notaries from recording identification document serial numbers in their journals.) Sophisticated criminals can exploit this information for illegal purposes. The drafters believe that this proscription is a prudent and necessary step toward protecting principals from identity theft and the concomitant hardships it can cause.

Subsection (c) is designed to provide a notary some protection against future claims regarding non-performance. The provision not only addresses instances in which a request for a notarial act was refused for due cause, but also those in which an act was begun and then discontinued due to discovery of an impropriety or other valid reason. The justification for non-performance or discontinuation should be explained.

Subsection (d) requires a notary to record in the journal the circumstances of any request to inspect or copy an entry in the journal, including the requester's name, address, signature, and evidence of identity. The reasons for refusal to allow inspection or copying of a journal entry must also be recorded. The notary is specifically cautioned to confine the entry to specific facts (*e.g.*, inability to provide proof of identity), and not record purely subjective judgments. Again, the thumbprint requirement is bracketed to indicate a choice for lawmakers.

Subsection (e) is new and corresponds to the new Subparagraph 9-3(4), which requires a notation to be made in the journal in the event that a notarized document is returned to the notary for correction of an error in its notarial certificate.

§ 7-3 Inspection and Copying of Journal.

- (a) In the notary's presence, any person may inspect and request a copy of an entry or entries in the notary's official journal during regular business hours, but only if:
- (1) the person's identity is personally known to the notary or proven through satisfactory evidence;
 - (2) the person affixes a signature [and thumbprint or other recognized biometric identifier] in the journal in a separate, dated entry;
 - (3) the person specifies the month, year, type of document, and name of the principal or requester of fact for the notarial act or acts sought;
 - (4) the person is shown or given a requested copy of only the entry or entries specified; and
 - (5) the other entries on the same journal page are covered to prevent disclosure.
- (b) If the notary has a reasonable and explainable belief that a person bears a criminal or harmful intent in requesting information from the notary's journal, the notary may deny access to any entry or entries.
- (c) The journal may be examined and copied without restriction by a law enforcement officer in the course of an official investigation, subpoenaed by court order, or surrendered at the direction of the [commissioning official].
- (d) Upon complying with a request for copies under Subsection (a), the notary shall charge not more than [dollars] per copy; and if a certified copy is requested, the fee is as specified in Section 6-2.

Comment

Section 7-3 addresses a controversial issue concerning the notary journal – whether or not it is a public record – and prescribes procedures for proper handling of the journal. Although a number of jurisdictions require notaries to maintain journals, not all consider the journal to be an accessible public record. The Act rejects the view that the journal is a true public record. Instead, it takes the position that the journal is quasi-public in nature. The Act controls and limits access to the journal by a) having it remain in the complete control of the notary, and b) restricting its inspection by the general public.

Subsection (a) establishes the principle that access to the journal is a privilege, not an absolute right. Thus, a person seeking to inspect the journal must be willing to give up some privacy in order to gain access. Specifically, the

person must prove identity and both sign and impress a thumbprint in the journal, though, again, some jurisdictions may forego the thumbprint requirement. Additionally, the inspection must be made in the presence of the notary. In an effort to preserve the privacy rights of principals and eliminate “fishing expeditions,” Subparagraph (a)(4) further promotes principals’ privacy protection by limiting the inspection to only the specified entries. The Act requires the notary to exercise due care when making copies to ensure that other journal entries, or parts thereof, are neither revealed nor included as part of the copied material.

Except for an electronic journal (*see* Subsection 7-1(c)), a notary is not authorized to make a copy of the journal or any separate entry therein for personal use or as a “backup”

record in the event the original journal is lost, destroyed, or stolen. Although having a copy of the journal might seem to be a sensible precaution, it invites other risks. A copy of a journal may not be adequately protected from unauthorized inspection. It is also possible that the notary by inadvertence or convenience might make an official entry in the copy, a violation of the dictate that the notary maintain only one journal.

In seeking to balance the public's rights against unwarranted invasions of privacy, the Act adopts the position that all specific inspection requests must be granted, unless the notary believes either a criminal or harmful purpose will be served by allowing the inspection. (*See* Subsection (b).) The notary must have a "reasonable and explainable belief" that the person requesting the inspection bears a wrongful motive. The drafters recognized that this standard is neither easily defined nor applied. Additionally, there was concern over how the notary would make such a determination. The drafters' intent was to allow a notary to deny or limit access in those situations where the notary has prior knowledge or is able to formulate a compelling

opinion regarding the request. As to the former, the notary may have been informed by a principal that he or she is being stalked or is the target of identity theft. Regarding the latter, when asked by the notary why the journal information is needed, the person might not be able to give a plausible response. In these situations the notary is alerted to potential misuse of the information and should proceed with caution. To protect the personal safety and the private interests of persons named in the journal, Subsection (b) gives the notary discretion to deny access to the journal to any person the notary reasonably believes has a criminal or harmful intent. Notaries should be protected from becoming accessories to criminal or other wrongful acts. The subsection affords them this opportunity.

Subsection (c) makes it clear that, notwithstanding the protections provided by Subsection (b), notary journals are always subject to lawful inspection by appropriate authorities.

Subsection (d) authorizes the notary to provide a copy of a journal entry for any permitted inspection and to charge a statutory fee for the service.

§ 7-4 Security of Journal.

- (a) A notary shall safeguard the journal and all other notarial records and surrender or destroy them only by rule of law, by court order, or at the direction of the [commissioning official].
- (b) When not in use, the journal shall be kept in a secure area under the exclusive control of the notary, and shall not be used by any other notary, nor surrendered to an employer upon termination of employment.
- (c) Within 10 days after the journal is discovered to be stolen, lost, destroyed, damaged, or otherwise rendered unusable or unreadable, the notary, after informing the appropriate law enforcement agency in the case of theft or vandalism, shall notify the [commissioning official] by any means providing a tangible receipt, including certified mail and electronic transmission, and also provide a copy or identification number of any pertinent police report.

Comment

Section 7-4 lays down rules for safeguarding the notary journal as a valuable and sensitive record of official acts. Subsection (a) instructs the notary to protect

not only the journal, but also any correlative notarial documents. This might include the notary's commission or copies of communications from the commissioning

official. The notary's journal and records may only be surrendered pursuant to statute, court order, or a directive of the commissioning official. Note, although law enforcement officials are permitted to access journals, they are not entitled to take physical custody of the journal absent a court order.

Subsection (b) requires the notary to safeguard the journal at all times. The drafters recognize that journals often contain sensitive, confidential information that merits protection. The requirement that the journal be kept in a secure area lends itself to reasonable interpretation. The objective is to shield the information in the journal from unauthorized use. Clearly, keeping the journal locked in a desk under the notary's exclusive control meets the test. But other less secure measures might also be acceptable. Notaries who keep their journals at home must implement similar security measures.

This subsection reinforces the rule that the journal is the notary's property. No other notary has a greater right than any member of the general public to inspect the journal, nor may another notary use it. Consequently, a notary who performs a notarial act but does not have the journal available may not record that act in the journal of another notary. Also, in some instances a person may become a notary at the behest of an

employer who may presume that the notary's services will be exclusively for the employer's benefit. The Act, however, does not recognize a "notary private" and considers every notary to owe obligations to the general public, notwithstanding the fact that an employer may have absorbed the notary's commissioning costs. Consistent with this view, the Act declares that the notary's journal belongs exclusively to the notary and not the employer. The employer has inspection and copying rights similar to those of other members of the public. Nothing prohibits the employer from exercising these rights to create a separate photocopied log of employer-related notarizations. (*See, e.g.*, CAL. GOV'T CODE § 8206(d).) Consistent with this position, the journal goes with the notary when the employment relationship terminates.

Subsection (c) requires the notary to inform the commissioning official if, for any reason, the notary cannot continue to use the journal to record notarizations. Imposing this reporting requirement reinforces the view that the journal has official significance and must be handled with due care.

In the 2002 Act, Section 7-4 appeared as Subsections 7-4 (e), (f), and (g), but the drafters believed the topic of journal inspection and copying merited its own full section in this 2010 version.

§ 7-5 Disposal of Journal.

- (a) Upon resignation, revocation, or expiration of a notary commission, or death of the notary, the journal and notarial records shall be delivered to the [office designated by the commissioning official] in accordance with Sections 12-4(a) or 12-5(3) by any means providing a tangible receipt, including certified mail and electronic transmission, allowing that an electronic journal may be delivered on disk, printed on paper, or transmitted electronically, in accordance with the requirements of the same office.
- (b) In the case of an electronic journal and its backup copy whose disks or other physical storage media are not required to be surrendered, no further entries shall be made in the journal and its backup, both of which shall be safeguarded until both shall be erased or expunged after [5] years from the date of the last entry by the notary or the notary's personal representative.

Comment

Section 7-5 provides guidance on what to do with the journal and notarial records after the office is vacated or the commission terminated. This provision is consistent with the view that the journal contains sensitive, confidential information that must ultimately be turned over to an appropriate official for safekeeping. The journal should not be kept by another notary, or by the former notary's successors in interest. To do so would compromise the privacy rights of principals and others whose actions are recorded in the journal.

The drafters added new language in Subsection (b) to provide direction on how

to dispose of electronic journals and backups after the notary vacates office or the commission terminates and the notary has complied with the journal disposition rules of Subsection (a). As with the paper journal, the objective is to safeguard the electronic journal entries from compromise or improper disclosure, while preserving them for a reasonable and justifiable period of time to allow proper public access.

In the Model Notary Act of 2002, Section 7-5 appeared as Subsection 7-4(h), but the drafters believed the topic of journal disposal merited expansion into its own section.

§ 7-6 Electronic Journal.

If a notary elects to keep an electronic journal pursuant to Section 7-1(a), the notary shall:

- (1) provide to the [commissioning official] the access instructions that allow journal entries to be viewed, printed out, and copied; and
- (2) notify the [commissioning official] of any subsequent change to the access instructions.

Comment

Section 7-6 contains provisions that ensure official access to the electronic journal of notarial acts in the event the notary is no longer alive or available to provide such access. Entries in the electronic journal may be made only by the custodial notary after a two-factor access process is satisfied. (*See* Subparagraph 20-2(1) and Comment.) However, any person subsequently using the same access process may view, print out, or copy journal entries, but will not be able to alter any entry or its sequence. (*See* Subparagraph 20-2(2) and Comment.) Section 7-6 requires the notary to provide the access instructions to the commissioning official. (*See* Subparagraphs 4-2(9) and 16-4(3).)

As the official record of notarial acts, an electronic journal must be forwarded to an office designated by the commissioning official after the notary's death. (*See* Subparagraph 12-5(3).) In the event of death, this section anticipates that the notary's personal representative or other successor in interest will present proper proof of authority to the commissioning official to obtain access to the electronic journal for the sole purpose of forwarding it as required by law. In the event of the notary's disappearance or permanent incapacity, any other individual legally designated to attend to or settle the notary's affairs may also perform this function.

Chapter 8 – Signature and Seal of Notary

Comment

General: Notarizations involving a paper document typically require the notary to affix both an official signature and an official seal on the document itself. These two affixations together symbolize to the world that all of the statutory requirements for a proper notarization were satisfied. Because the signature and seal are the prime manifestations of the notarial act, guiding regulations for their proper use and protection are warranted. This is particularly

true for the seal, which, if improperly appropriated, could lead to unchecked fraud. In many respects the seal is similar to the notary journal – both are incidents of the office and items for which the notary is the official custodian. (For notary journal rules paralleling those for the official seal, *see* Subsections 7-4(a) through (c).) This chapter addresses basic “signature and seal” issues with an eye toward minimizing opportunities for fraud.

§ 8-1 Official Signature.

In notarizing a paper document, a notary public shall affix an official signature on the notarial certificate at the time the notarial act is performed.

Comment

Section 8-1 has been substantially revised from its appearance in the former Act and reduced to a short, succinct direction. The change was allowed by the introduction in this Act of a definition of “official signature.” (*See* Section 2-14.)

Section 8-1 states the simple rule that a notary must place an official signature on the notarial certificate portion of any paper document that is being notarized. Section 2-14 dictates that this signature must be “handwritten.” No other means of creating the notary’s signature is authorized. Thus, the notary may not run a principal’s document through a word processor and have a computer-generated signature validate the

document’s notarial certificate. The official signature that authenticates the notarial act must be handwritten by the notary.

In addition, Section 2-14, which defines “official signature,” specifies that the notary’s official signature must exactly match the spelling of the notary’s name as it appears on the commission. Signatures that are shortened versions of the commission name are not valid.

Section 8-1 mandates that the notary’s official signature be affixed only at the time of the notarization. The drafters believed that the practice of presigning multiple copies of standard notary certificates to save time is very dangerous, offering many opportunities for fraudulent abuse of the signed blank forms.

§ 8-2 Official Seal.

- (a) In notarizing a paper document, a notary public shall affix an official seal on the notarial certificate at the time the notarial act is performed.
- (b) The official seal of a notary public shall not be used for any purpose other than performing lawful notarizations.
- (c) The official seal shall:
 - (1) be the exclusive property of the notary;
 - (2) not be affixed by any other person;
 - (3) be kept secure and accessible only to the notary; and
 - (4) not be surrendered to an employer upon termination of employment.

- (d) An official seal affixed by an adhesive label shall bear a preprinted sequential number which shall be recorded in the journal of notarial acts for its respective notarization.
- (e) Within 10 days after the official seal of a notary is discovered to be stolen, lost, damaged, or otherwise rendered incapable of affixing a legible image, the notary, after informing the appropriate law enforcement agency in the case of theft or vandalism, shall notify the [commissioning official] by any means providing a tangible receipt, including certified mail and electronic transmission, and also provide a copy or number of any pertinent police report. Upon receipt of such notice, the [commissioning official] shall issue to the notary a new Certificate of Authorization to Purchase a Notary Seal, which shall be presented to a seal vendor in accordance with Section 8-4.
- (f) As soon as reasonably practicable after resignation, revocation, or expiration of a notary commission, or death of the notary, the seal shall be destroyed or defaced so that it may not be misused.

Comment

Section 8-2 provides detailed rules for the use, handling, and safekeeping of the notary seal. The drafters deemed them entirely appropriate for this most important of all the notary's tools of office. The seal is the internationally recognized symbol of the notary's authority and *prima facie* evidence of the facts attested in a notarial act.

Section 8-2 has been slightly revised and reorganized from its appearance in the former Act. In particular, Subsection (a) was changed to parallel Section 8-1 in order to indicate that the notary's seal and signature must be used in tandem to authenticate a notarial act.

Subsection (a) mandates that a seal impression be affixed by the notary for every notarization of a paper document. In contrast to the limitations on affixation of the notary's signature, however, the subsection does not preclude a seal image from being affixed by an electronic device or by an adhesive label, as long as the notary controls access to the sealing mechanism (*see* Subparagraph (c)(3)) and, in the case of an adhesive label, the labels bear preprinted sequential numbers, which must be noted in the journal for each notarial act (*see* Subsection (d)). Most often, however, the seal image will be affixed with an inked stamp.

Subsection (a) also mandates that the seal be affixed only at the time of notarization. This is the counterpart to Section 8-1, requiring notary signatures to be similarly affixed. Together, these two provisions work to reduce fraud, mistakes, and omissions because the notary will complete the entire notarization at one time, and that will be in the principal's presence. (*See* Subparagraph 5-2(1).) Otherwise, the notary might more readily forget to complete any open-ended act, leading to possible hardships for the principal. There would also be questions about where such an act should be entered in the sequential journal.

Subsection (b) dictates that an official notary seal may not be used for any purpose other than performance of lawful notarial acts. This subsection is supplemented by Section 5-11, which prohibits use of the "official notary title or seal to endorse, promote, denounce, or oppose any product, service, contest, candidate, or other offering." Subsection (b) offers a broader proscription, applying to use of the seal to lend authority or weight to any documentation, even that not amounting to a formal testimonial. For example, a seal's use by a notary on personal correspondence would be prohibited by this provision. The subsection is mirrored by Subsection 19-5(b), which applies to electronic notary seals.

Subsection (c) underscores that the seal belongs solely to the notary. It may not be used by anyone else, even if the other person is a notary. It is exclusively for the use of the notary to whom it was issued. Likewise, the seal of a notary whose commissioning fees and other notary-related costs were paid by an employer remains the property of the notary, not the employer. Consequently, if and when the employment relationship ends, the seal stays with the notary. This mirrors the rule with respect to notary journals. (*See* Subsection 7-4(b) and Comment.)

Subparagraph (c)(3) advances the view that the seal is an incident of the notary office and must be properly safeguarded. This provides the analog to Section 7-4, which contains the rules for proper care of the notary journal. As with the journal, a rule of reason is to be applied to determine what security measures satisfy the spirit of the requirement. Again, good practice suggests that the seal and journal be kept together. Thus, steps to protect one may serve the same purpose for the other.

Subsection (d) reflects the position that an official notary seal may be in a form other than the traditional embosser or inked stamp. (For a corresponding provision regarding a notation

in the notary's journal about the adhesive label seal, *see* Subparagraph 7-2(10).)

Subsection (e) imposes a basic notification rule in the event the seal becomes missing or in any way unusable for its intended purpose. It also imposes a duty on the notary to report any theft or vandalism of the seal to the appropriate law enforcement agency. This requirement underscores the importance of safeguarding the seal, which, in the hands of dishonest people, can enable production of forged documents and breed attendant problems. The subsection requires the commissioning official, upon receipt of a proper notice, to authorize the notary to obtain a new seal, as provided in Section 8-4.

Subsection (f) mandates that the seal be rendered unusable upon the notary's death or the resignation, revocation, or expiration of the commission. A new seal must then be issued for any subsequent new commission. This is consistent with the rule stated in Section 3-5 that the notary commission is not renewable automatically. Since every seal must contain the expiration date of the commission (*see* Subparagraph 8-3(a)(3)), every new commission requires a new seal.

§ 8-3 Image of Official Seal.

- (a) Near the notary's official signature on each paper notarial certificate, the notary shall affix a sharp, legible, permanent, and photographically reproducible image of the official seal that shall include the following elements:
 - (1) the notary's name exactly as stated on the commission;
 - (2) the identification number of the notary's commission;
 - (3) the words "Notary Public" and "[State] of [name of jurisdiction]" and "My commission expires (commission expiration date)";
 - (4) the notary's business address; and
 - (5) a border in a [rectangular/circular] shape no larger than [dimensions], surrounding the required words.
- (b) Illegible information within a seal impression may be typed or printed legibly by the notary adjacent to but not within the impression, or another impression may be legibly affixed nearby.
- (c) An embossed seal impression that is not photographically reproducible may be used in addition to but not in place of the official seal described in Subsection (a).
- (d) A seal as described in Subsection (a) shall not be affixed over printed or written matter.

Comment

Subsection 8-3(a) serves two purposes. First, its general language prescribes where the seal is to be affixed and how it shall appear. Second, the subparagraphs provide detailed specifications for an official seal. As to the former, the seal must be affixed near but not over the notary's signature. Since documents differ, the drafters realized that it would be impossible to identify one physical location for the seal that would serve all purposes. The document or certificate may indicate exactly where the seal should be placed, but both can be silent on this point, leaving the matter up to the notary. (*See, e.g.*, certificate forms in Sections 9-4 through 9-9.) The Apostille is an example of a form that specifically designates where its signature and seal are to be affixed. (*See* Section 10-3.) Regardless of where affixed, the seal must be clearly readable and capable of being copied photographically. Accordingly, an inked rather than an embossing seal increasingly is the standard in modern jurisdictions, because an inked seal image is readily reproduced on microfilm or electronic media by county recorders.

Subparagraphs (a)(1) through (5) detail the components of the seal itself. The name on the seal must be exactly the same as that appearing on the commission. (*See* Subparagraph (a)(1).) Subparagraph (a)(2) requires that the notary's commission identification number be included. (*See* Section 3-4.) Although some jurisdictions require such numbers (*see, e.g.*, CAL. GOV'T CODE § 8207; and FLA. STAT. ANN. § 117.05(3)(a)), others do not (*see* IND. CODE ANN. § 33-42-2-4). The Social Security number should never be used as a substitute for an identification number because of its potential for co-option and misuse. The "business

address" feature mandated by Subparagraph (a)(4) is required in one jurisdiction. (*See* W. VA. CODE ANN. § 29C-4-102(d).) The drafters felt it important to allow the public both to question the notary about a notarization and access the notary's journal in certain instances. By having the notary's address on the document, interested parties are given reasonable direction on where to find the notary and journal. Subparagraph (a)(5) gives each jurisdiction the opportunity to fashion the shape and design of the seal, and should result in uniform, easily recognizable seals.

Subsection (b) provides guidance for the notary when the seal does not create the legible image required by Section (a). Notaries are authorized to remedy unreadable portions of the seal by typing or printing the needed wording legibly, adjacent to the seal image. To avoid charges that the seal image was tampered with, notaries must not write over any portion of the seal nor make any marks within the area circumscribed by the seal border.

Subsection (c) addresses the use of non-photographically reproducible embossing seals. Although they may not be used as the official seal and have no official status, they may be affixed to a document for both practical and ceremonial purposes. Adroitly affixed embossing seals can discourage fraudulent attachment of document pages and notary certificates, and facilitate acceptance of documents in foreign jurisdictions where embossments may be expected. Subsection (d) indicates that the notary's mandatory, photographically reproducible seal must not be placed over handwriting, printing or other images, lest wording within the seal image be obscured.

§ 8-4 Obtaining and Providing Official Seal.

- (a) In order to sell or manufacture notary seals, a vendor or manufacturer shall apply for a permit from the [commissioning official], who shall charge a fee of [dollars] for issuance of this permit and maintain a controlled-access telephone number or Internet site to allow vendors and manufacturers to confirm the business mailing address and current standing of any notary in the [State].

- (b) A vendor or manufacturer shall not provide a notary seal to a purchaser claiming to be a notary, unless the purchaser presents a Certificate of Authorization to Purchase a Notary Seal from the [commissioning official] and a photocopy of the respective notary commission, and unless:
 - (1) in the case of a purchaser appearing in person, the vendor or manufacturer identifies this individual as the person named in the commission and the Certificate of Authorization, through either personal knowledge or satisfactory evidence of identity; or
 - (2) in the case of a purchaser ordering a seal by mail or delivery service, the vendor or manufacturer confirms the business mailing address and current standing through the controlled-access telephone number or Internet site.
- (c) A vendor or manufacturer shall mail or ship a notary seal only to a mailing address confirmed through the controlled-access telephone number or Internet site.
- (d) For each Certificate of Authorization to Purchase a Notary Seal, a vendor or manufacturer shall make or sell one and only one seal, plus, if requested by the person presenting the Certificate, one and only one embossing seal.
- (e) After manufacturing or providing a notary seal or seals, the vendor shall affix an image of all seals on the Certificate of Authorization to Purchase a Notary Seal and send the completed Certificate to the [commissioning official], retaining a copy of the Certificate and the Commission for [period of time].
- (f) A notary obtaining a seal or seals as a result of a name or business address change shall present a copy of the Confirmation of Notary's Name or Address Change from the [commissioning official] in accordance with Sections 12-1 and 12-2.
- (g) A vendor or manufacturer who fails to comply with this section shall be guilty of a [class of offense], punishable upon conviction by a fine not exceeding [dollars]. For multiple violations, a vendor's permission to sell or manufacture notary seals shall be withdrawn by the [commissioning official]. Such conviction shall not preclude the civil liability of the vendor to parties injured by the vendor's failure to comply with this section.

Comment

Section 8-4 establishes the procedure for producing and issuing notary seals. Most jurisdictions have little or no regulation regarding the production of seals. This can make it relatively simple for unscrupulous individuals to obtain a seal fraudulently. The drafters believed that imposing some

measure of control over the issuance of seals was warranted. This is consistent with the position taken by some other jurisdictions. (See CAL. GOV'T CODE §§ 8207 to 8207.4; and OR. REV. STAT. § 194.031.)

Subsection (a) requires all seal vendors and manufacturers to be state-approved. The

commissioning official must issue a permit to all seal vendors and manufacturers. To facilitate security with mail or Internet orders, the commissioning official must make available to vendors and manufacturers a controlled-access telephone number or Internet site. This allows any purchaser's good standing as a notary and the address to which the seal will be sent to be verified.

Subsection (b) prohibits a vendor or manufacturer from providing any type of notary seal unless a copy of the notary's commission and an original official purchase authorization certificate (*see* Section 3-4) is supplied by the notary. Additionally, before issuing the seal the vendor or manufacturer must verify that the person is the individual entitled to the seal. The notary must establish identity through satisfactory evidence, or, if the seal is mailed or shipped, the commissioning official's controlled-access roster of addresses must be used to guarantee that delivery is made only to an authorized person.

Subsection (c) reinforces the protection of Subsection (b) by expressly requiring that seals be mailed only to an address listed on the roster maintained by the commissioning official, as mandated by Subsection (a).

Subsection (d) provides that only one official seal may be issued upon presentation of a Certificate of Authorization to Purchase a Notary Seal. Notaries may not order duplicates to hold

in the event the original seal is lost or destroyed. However, one embossing seal may be issued in addition to the official seal allowed for each Certificate of Authorization. (Regarding use of an embossing seal, *see* Subsection 8-3(c) and Comment.)

Subsection (e) provides a procedure for giving a sample of the notary's official seal to the commissioning official, allowing this official to survey issued seals for compliance with the law. The sample may also be useful as evidence in any investigations of the notary's conduct.

Subsection (f) gives a procedure for obtaining a new seal in the event of a name or address change by the notary. The commissioning official also must put in place procedures for replacing a lost, stolen, or damaged seal. (*See* Subsection 8-2(e).)

Subsection (g) imposes criminal, administrative, and possible civil sanctions upon a manufacturer or vendor who violates any terms of the section. The drafters believed this was necessary to ensure that the rules would be properly followed. Imposing penalties is consistent with the view that reasonable efforts should be made to prevent fraud. Since an official seal can easily be used by anyone to generate false notarizations, taking appropriate steps to prevent that from happening is both prudent and justified.

Chapter 9 – Certificates for Notarial Acts

Comment

General: In the former Act, this chapter merely provided model certificates for use by notaries in performing the permitted notarial acts. In this Act, however, the drafters decided to address the common practical issues regarding both the completion and handling of notarial certificates. Three particular matters are

addressed: identifying the essential components of a proper notarial certificate (*see* Section 9-1); properly attaching notarial certificates to notarized documents (*see* Section 9-2); and properly correcting an error in a notarial certificate (*see* Section 9-3).

§ 9-1 Notarial Certificate.

- (a) For every notarial act involving a document, a notary public of this [State] shall properly complete a notarial certificate that contains or states:
 - (1) the official signature of the notary, in accordance with Section 8-1;
 - (2) an impression of the official seal of the notary, in accordance with Section 8-2;
 - (3) the venue of the notarial act, including the name of this [State] and of the pertinent [county] [parish] [district];
 - (4) the date of the notarial act; and
 - (5) the facts and particulars attested by the notary in performing the respective notarial act, as defined in Chapter 2.
- (b) A notarial certificate shall be sufficient for a particular notarial act only if it meets the requirements of Subsection 9-1(a) and is in a form that:
 - (1) is set forth for that act in this Chapter;
 - (2) is otherwise prescribed for that act by the law of this [State];
 - (3) is prescribed for that act by a law, regulation, or custom of another jurisdiction, provided it does not require actions by the notary that are unauthorized by this [State]; or
 - (4) describes the actions of the notary in such a manner as to meet the requirements of the particular notarial act, as defined in Chapter 2.
- (c) A notarial certificate shall be worded and completed using only letters, characters, and a language that are read, written, and understood by the notary public.

Comment

Section 9-1 is new and therefore has no counterpart in the former Act. Its focus is the notarial certificate, which provides proof of the

performance of a notarization. Given its central importance, the drafters determined that the essential elements for a notarial certificate

ought to be delineated beyond the basic definition in Section 2-9. Doing so allows a proper certificate to be recognized by the notary in the event a jurisdiction does not promulgate by statute or rule the certificate forms for permitted notarial acts. Should a document presented for notarization not contain a notarial certificate, or contain a questionable form, this section informs the notary of the minimum elements necessary for a proper certificate. The section does not authorize a notary to select or recommend a specific type of notarial certificate. That would violate the dictate of Subsection 5-12(b) proscribing the unauthorized practice of law. The section, however, does instruct the notary on how to prepare a notarial certificate that is requested or provided by the principal.

Subparagraphs (a)(1) and (2) require that every notarial certificate contain both the official signature and the official seal of the notary, as defined in Sections 2-14 and 2-13, respectively. The references to Sections 8-1 and 8-2 serve to reinforce the requirement that the certificate for notarization of a signed document be completed only in the presence of the principal at the time of the notarization. Notarial certificates for copy certifications and verifications of fact need not be executed in the presence of the requester of fact. (*See* Section 2-19 and Comment.)

Subparagraph (a)(3) requires every notarial certificate to identify the venue where

the notarization was performed. The venue named on the certificate should be the site of the notarial act and not necessarily where the notary is commissioned. Subparagraph (a)(4) mandates that every notarial certificate bear the date of notarization. Subparagraph (a)(5) requires that the certificate state the elements of the particular notarial act performed (*e.g.*, “...personally appeared before me and acknowledged...”). These elements are defined in Chapter 2 for each notarial act authorized in Section 5-1.

Subsection (b) states that a notarial certificate suffices if it is provided or authorized by statute or official rule. Subparagraph (b)(4) specifically recognizes the validity of a notarial certificate whose wording aptly characterizes a notarization but is not prescribed by law. Again, the subsection does not authorize the notary to draft or select the type of certificate to be used. That may constitute the unauthorized practice of law for any notary who is not licensed as an attorney (*see* Section 5-12) or duly qualified, trained, or licensed in a particular professional field (*see* Section 5-13).

Subsection (c) complies with the rules provided in Subparagraphs 5-2(5) and (6). The notary must be able to understand the notarial certificate on a document presented for notarization. If the notary cannot comprehend what the certificate says, the notary is prohibited from performing the notarial act.

§ 9-2 Attaching Notarial Certificate.

A paper notarial certificate that is attached to a document during the notarization of the signature of a principal shall:

- (1) be attached by stapling or other method that leaves evidence of any subsequent detachment;
- (2) be attached, signed, and sealed only by the notary and only at the time of notarization and in the presence of the principal;
- (3) be attached immediately following the signature page if the certificate is the same size as that page, or to the front of the signature page if the certificate is smaller; and
- (4) contain all of the elements described in Section 9-1 on the same sheet of paper.

Comment

Section 9-2 is also new and therefore has no counterpart in the former Act. The section sets forth the rules for attaching a so-

called “loose” notarial certificate to a paper document. The reference to “the notarization of the signature of a principal” indicates that

the rules prescribed in Section 9-2 need not apply to requests for notarial acts (*i.e.*, copy certifications and verifications of fact) by a requester of fact. (*See* Section 2-19 and Comment.) The notarial certificate for a copy certification and a verification of fact need not be attached in the presence of a requester of fact; and they typically will be attached as a cover sheet to the front of the certified copy or to copies of document(s) confirming a fact – although a verification of fact certificate may stand on its own. (*See* Section 9-9 and Comment).

In regard to notarization of the signature of a principal (*see* Section 2-17), Subparagraph (1) provides that any method of attaching a paper notarial certificate must

leave evidence on the notarized document in the event that the certificate is detached (*e.g.*, staple holes). Subparagraph (2) requires that the certificate attachment be made at the time of the notarization and in the principal's presence. This confirms to the principal that the notarial act is complete, and it lessens the possibility that the certificate will be attached to an unintended document. Subparagraph (3) identifies the proper location within the document for certificate attachment. Subparagraph (4) provides the important rule that the certificate components be contained entirely on one page. This lessens the risk of fraudulent substitution of portions of the certificate after its execution.

§ 9-3 Correcting Notarial Certificate.

A notary public may correct an error or omission made by that notary in a notarial certificate if:

- (1) the original certificate and document are returned to the notary;
- (2) the notary verifies the error by reference to the pertinent journal entry, the document itself, or to other determinative written evidence;
- (3) the notary legibly corrects the certificate and initials and dates the correction in ink, or replaces the original certificate with a correct certificate; and
- (4) the notary appends to the pertinent journal entry a notation regarding the nature and date of the correction.

Comment

Section 9-3 also is new and therefore does not have a counterpart in the former Act. The section addresses how to correct a mistake in a notarial certificate. Subparagraph (1) makes clear that only the notary who completed the erroneous certificate may correct it. The notary may not authorize another person by telephone or e-mail to make a correction, nor may the notary mail or forward a corrected certificate. In order to make the correction, the notary must receive the original document and notarial certificate.

Subparagraph (2) mandates that any correction be corroborated by reviewing information either appearing on the document or entered in the notary's journal, or by reviewing other documentation (*e.g.*, an identification card proving that a principal's name was misspelled on the notarial

certificate).

Correctible errors and omissions include missing seals, signatures, and dates; misspellings of names; and incorrect insertions related to the gender or number of principals. Any request to change the nature of the notarial act (*e.g.*, substituting a jurat for an acknowledgment) can be accomplished only by executing a new notarial act. If the principal's representative status was incorrectly stated on the certificate (*e.g.*, attorney in fact rather than partner), it may be necessary for the principal to return to confirm this status. If, for example, the notary has to replace a statutory attorney in fact certificate with one for a signing by a partner – as addressed in Subparagraph (3) – a new notarization and new certificate date would then be needed if there is not any evidence, such as a journal

notation, that the signer had declared the correct representative status at the time of the original notarization.

minor, Subparagraph (4) directs the notary to make note of the revision in the journal of notarial acts. (See Section 7-2(e).)

Whatever the corrective change, major or

§ 9-4 General Acknowledgment Certificate.

A notary shall use a certificate in substantially the following form in notarizing the signature or mark of any person acknowledging on his or her own behalf or as a partner, corporate officer, attorney in fact, or in any other representative capacity:

[State] of _____

[County] of _____

On this _____ day of _____, 20____, before me, the undersigned notary, personally appeared _____ (name of document signer),

(personally known to me)

(proved to me through identification documents, which were _____,)

(proved to me on the oath or affirmation of _____, who is personally known to me and stated to me that (he)(she) personally knows the document signer and is unaffected by the document,)

(proved to me on the oath or affirmation of _____ and _____, whose identities have been proven to me through identification documents and who have stated to me that they personally know the document signer and are unaffected by the document,)

to be the person whose name is signed on the preceding or attached document, and acknowledged to me that (he)(she) signed it voluntarily for its stated purpose(.

(as partner for _____, a partnership.)

(as _____ for _____, a corporation.)

(as attorney in fact for _____, the principal.)

(as _____ for _____, (a)(the) _____.)

(official signature and seal of notary)

Comment

Section 9-4 provides a general, “all-purpose” acknowledgment form adaptable to principals with different signing capacities. To comply with Section 2-20, the model form has language compelling credible witnesses to state specifically that they do not have any interest in the transaction related to the

document being notarized. The form also includes language relating to the principal’s volition in response to the rule for the notarial act of acknowledgment set out in Subparagraph 2-1(3). Both of these provisions are innovations not found in most notary acknowledgment certificates.

§ 9-5 Jurat Certificate.

A notary shall use a jurat certificate in substantially the following form in notarizing a signature or mark on an affidavit or other sworn or affirmed written declaration:

[State] of _____

[County] of _____

On this _____ day of _____, 20____, before me, the undersigned notary, personally appeared _____ (name of document signer),

(personally known to me)

(proved to me through identification documents, which were _____,)

(proved to me on the oath or affirmation of _____, who is personally known to me and stated to me that (he)(she) personally knows the document signer and is unaffected by the document,)

(proved to me on the oath or affirmation of _____ and _____, whose identities have been proven to me through identification documents and who have stated to me that they personally know the document signer and are unaffected by the document,)

to be the person who signed the preceding or attached document in my presence and who swore or affirmed to me that the contents of the document are truthful and accurate to the best of (his)(her) knowledge and belief.

(official signature and seal of notary)

Comment

Section 9-5 provides a model form for a standard jurat certificate. As with the acknowledgment form (*see* Section 9-4), how the signer was identified must be specified. In many states, identification of the signer is not an express statutory

requirement for a jurat, as it is with an acknowledgment. Attention should be paid to the form's language regarding the oath or affirmation, which the notary must not neglect to administer to the principal. (*See* Subparagraph 2-7(4) and Comment.).

§ 9-6 Signature Witnessing Certificate.

A notary shall use a certificate in substantially the following form in notarizing a signature or mark to confirm that it was affixed in the notary's presence without administration of an oath or affirmation:

[State] of _____

[County] of _____

On this _____ day of _____, 20____, before me, the undersigned notary, personally appeared _____ (name of document signer),

(personally known to me)

(proved to me through identification documents, which were

_____,)
 (proved to me on the oath or affirmation of _____, who is
 personally known to me and stated to me that (he)(she)
 personally knows the document signer and is unaffected
 by the document,)

 (proved to me on the oath or affirmation of _____ and
 _____, whose identities have been proven to me
 through identification documents and who have stated to me
 that they personally know the document signer and are
 unaffected by the document,)

 to be the person who signed the preceding or attached document in my
 presence.

 (official signature and seal of notary)

Comment

Section 9-6 provides a certificate for a signature witnessing. As defined in Section 2-21, this notarial act only requires the principal to appear, prove identity, and sign. Although silent on point, the certificate does not eliminate the need for the conscientious notary to take the standard precautions for ensuring the principal's awareness and willingness to sign. (*See* Subparagraphs 5-2(3) and (4).)

§ 9-7 Certificates for Signer by Mark and Person Unable to Sign.

On paper documents, certificates in Sections 9-4, 9-5, and 9-6 may be used for signers by mark or persons physically unable to sign or make a mark if:

- (1) for a signer by mark, the notary and 2 witnesses disinterested in the document observe the affixation of the mark, both witnesses sign their own names beside the mark, and the notary writes below the mark: "Mark affixed by (name of signer by mark) in the presence of (names and addresses of 2 witnesses) and the undersigned notary pursuant to Section 5-3 of [Act]"; or
- (2) for a person physically unable to sign or make a mark, the person directs the notary to sign on his or her behalf in the presence of 2 witnesses disinterested in the document, both witnesses sign their own names beside the signature, and the notary writes below the signature: "Signature affixed by the notary at the direction and in the presence of (name of principal unable to sign or make a mark) and also in the presence of (names and addresses of 2 witnesses) pursuant to Section 5-4 of [Act]".

Comment

Section 9-7 provides formats and procedures allowing use of the previous three certificates (*see* Sections 9-4, 9-5, and 9-6) when the principal's signature is made by mark or by the notary as a substitute signer (*see* Sections 5-3 and 5-4). In either case, it is possible that a credible witness who was used to identify the principal (*see* Subparagraph

2-20(2)) may additionally serve to witness the principal’s signature by the notary. signing by mark or the proxy signing of the

§ 9-8 Certified Copy Certificate.

A notary shall use a certificate in substantially the following form in notarizing a certified copy:

[State] of _____

[County] of _____

On this _____ day of _____, 20____, I certify that the

(attached or following paper document)

(affixed, attached, or logically associated electronic document)

has been (visually) (electronically) confirmed by me to be a true,

exact, and complete copy of the image (or text) (and metadata) of

_____ (description of original document),

(presented/e-mailed to me by _____,)

(found by me (online) at _____,)

(held in my custody as a notarial record,)

and that, to the best of my knowledge, the copied document is neither a vital record, a public record, nor a publicly recordable document, certified copies of which may be available from an official source other than a notary public.

(official signature and seal of notary)

Comment

Section 9-8 provides the form for a copy certification. It has been significantly revised from the former Act to allow for copy certification of electronic as well as paper documents. (See the corresponding new definition of “copy certification” in Section 2-4.) As more fully explained in the Comment for Section 2-4, the form accommodates a copy certification request by a person not in the physical presence of the notary; enables a notary to search and find online an electronic

document that is to be copy-certified; and allows the notary to indicate whether hidden “metadata” are included in the copy. As did the former certificate for a certified copy of a paper document, the form accommodates certification of the notary’s own records. The certificate makes clear that the notary is prohibited from certifying copies of certain records and that in making the copy the notary believes he or she is complying with that proscription.

§ 9-9 Verification of Fact Certificate.

A notary shall use a certificate in substantially the following form in verifying a fact or facts :

[State] of _____

[County] of _____

On this _____ day of _____, 20____, I certify that I have reviewed the following record(s) or data,

(a) _____,

(b) _____,

- (c) _____,
- (d) _____,

at the following office, Internet or electronic system locations, respectively,

- (a) _____,
- (b) _____,
- (c) _____,
- (d) _____,

or upon the record(s) being presented to me by _____,

and hereby verify the following respective fact(s) as stated in these records:

- (a) _____,
- (b) _____,
- (c) _____,
- (d) _____.

 (official signature and seal of notary)

Comment

Section 9-9 provides a certificate for the notary to complete in performing a verification of fact. (*See* Section 2-22 and Comment.) This type of notarial act can be used to confirm data on vital records such as birth certificates and marriage licenses, thereby certifying information often needed for the adoption of a foreign child.

While, in the interest of fraud deterrence, it is preferable that such records be reviewed by the notary in the offices of the records' duly designated public custodians (*e.g.*, bureau of vital statistics or

office of the county clerk), the form also allows the notary to review records presented by a private individual. It is left to the discretion of the relying third party as to whether such records are trustworthy.

Unlike other certificates in this chapter, this certificate need not be attached to another document. The certificate constitutes a complete notarial act in and of itself. It does not require the notarization of a signature and it need not be completed in the presence of the requester of fact. (*See* Section 2-19 and Comment.)

Chapter 10 – Evidence of Authenticity of Notarial Act

Comment

General: This chapter presents authentications might not be needed. Even authentication forms that may be required by other jurisdictions of the United States or by foreign nations before recognizing notarial acts performed by a notary outside those jurisdictions. A principal goal of the Act is to establish uniform rules throughout the states of this nation. If achieved, state-to-state if that overarching goal is realized, there would still be the need to authenticate notarial acts to enable their recognition by foreign nations. This chapter addresses that need, as well as offering the standard form for the internationally recognized Apostille.

§ 10-1 Forms of Evidence.

On a notarized document sent to another state or nation, evidence of the authenticity of the official seal and signature of a notary of this [State], if required, shall be in the form of:

- (1) a certificate of authority from the [commissioning official] and/ or [designated local official], authenticated as necessary by additional certificates from United States and/or foreign government agencies; or
- (2) in the case of a notarized document to be used in a nation that has signed and ratified the Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents of October 5, 1961, an Apostille from the [federally designated official] in the form prescribed by the Convention and described in Section 10-3, with no additional authenticating certificates required.

Comment

Section 10-1 sets the rule that there are only two types of acceptable evidence of authentication. One is a Certificate of Authority provided in Section 10-2. The other is the Apostille found in Section 10-3.

§ 10-2 Certificate of Authority.

A certificate of authority evidencing the authenticity of the official seal and signature of a notary of this [State] shall be substantially in the following form:

Certificate of Authority for a Notarial Act

I, _____ (name, title, jurisdiction of authenticating official), certify that _____ (name of notary), the person named in the seal and signature on the attached document, was a Notary Public for the [State] of _____ [name of jurisdiction] and authorized to act as such at the time of the document's notarization.

To verify this Certificate of Authority for a Notarial Act, I have affixed below my signature and seal of office this ____ day of _____, 20__.

(Signature and seal of commissioning official)

Comment

Section 10-2 presents a Certificate of Authority evidencing the authenticity of a notary’s signature and seal. Although this exact form need not be used, it provides all of the necessary information that must be included in such a certificate. Note, the certificate must be

executed by the commissioning official or a designated local official, such as a county clerk, who has evidence of the notary’s authority on file. In the case of official acts performed by electronic notaries, an adaptation of the form is provided in Section 22-2.

§ 10-3 Apostille.

An Apostille prescribed by the Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents of October 5, 1961, shall be in the form of a square with sides at least 9 centimeters long and contain exactly the following wording:

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: _____

Comment

Section 10-3 sets out the Apostille form as prescribed in an annex to the Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents. This Convention was concluded on October 5, 1961, by the Hague Conference on Private International Law, and entered into force on January 24, 1965. The rules regarding the format of the Apostille, which may be used to authenticate the acts of a variety of state or territorial officials, must

be observed exactly. An Apostille evidencing a notary’s authority is to be completed by the office of a federally designated state or territorial official, normally the official who commissioned the notary. On line 3, the capacity “Notary Public” would be indicated, and on line 4 the name of the notary would be placed. The venue of the authentication, typically the state capital, would be written on line 5, and the date of the authentication on line 6.

§ 10-4 Fees.

The [commissioning/federally designated official] may charge:

- (1) for issuing a certificate of authority, [dollars]; and
- (2) for issuing an Apostille, [dollars].

Comment

Section 10-4 authorizes the authenticating official to charge a fee to cover the administrative costs of issuing a Certificate of Authority or an Apostille. The jurisdiction may wish to include in the fee schedule changes for special services such as “while-you-wait” or “overnight-return” authentications.

Chapter 11 – Recognition of Notarial Acts

Comment

General: This chapter has been added to the Act to remedy a deficiency of its predecessor. The drafters determined that a model act ought to have rules regulating the recognition of notarial acts from other jurisdictions. The rules provided here are congruent with the positions taken on point in the UNIFORM LAW ON NOTARIAL ACTS (14 U.L.A. 202 (2005)).

§ 11-1 Notarial Acts by Officers of This [State].

- (a) A notarial act may be performed within this [State] by the following persons:
- (1) a notary public of this [State];
 - (2) a judge, clerk, or deputy clerk of any court of this [State];
 - [or]
 - (3) [designation[s] of other officer[s]; or
 - (4)] any other officer authorized to perform a specific notarial act by the law of this [State].
- (b) The official signature, seal, and title of a person authorized by Subsection (a) to perform a notarial act are prima facie evidence that the signature and seal are genuine and that the person holds the indicated title.

Comment

Section 11-1 provides general guidance on notarial acts performed within the jurisdiction. Subsection (a) identifies all of the officials authorized to perform notarial acts. Subsection (b) provides that the collective appearance on a notarial certificate of the signature, seal, and title of the person authorized to perform notarial acts self-proves the genuineness of those items and that the person actually holds the title indicated.

§ 11-2 Notarial Acts by Officers of Other United States Jurisdictions.

- (a) A notarial act has the same effect under the law of this [State] as if performed by a notarial officer of this [State] if performed in another state, commonwealth, territory, district, or possession of the United States by any of the following persons:
- (1) a notary public of that jurisdiction;
 - (2) a judge, clerk, or deputy clerk of a court of that jurisdiction; or
 - (3) any other person authorized by the law of that jurisdiction to perform notarial acts.
- (b) The official signature, title, and, if required by law, seal of a person whose authority to perform notarial acts is recognized by Subsection (a) are prima facie evidence that the signature and seal are genuine and that the person holds the indicated title, and,

except in the case of Subparagraph (a)(3), conclusively establishes the authority of a holder of that title to perform a notarial act.

Comment

Section 11-2 provides that notarial acts performed in other American states, districts, territories, and possessions are to be given the same effect as if they were performed by a duly authorized officer within the home jurisdiction, provided that the notarial act was executed by a person so authorized to do so in that other jurisdiction. As does Subsection 11-1(b), Subsection 11-2(b) allows a notarizing official's certificate to be self-proving if it bears the official's signature, title, and, if local law requires its use, the seal of office; however, unless the official is a notary or a judge, clerk, or deputy clerk of a court, further evidence may be needed to prove that a person holding the cited title has notarial powers.

While it might be argued that the "full

faith and credit" clause of the United States Constitution renders this section redundant, notarial acts performed lawfully in one U.S. jurisdiction unfortunately may be rejected improperly in other U.S. jurisdictions, due to cosmetic inconsistencies or policy disagreements between governments. This section reinforces the obligation to honor lawfully performed notarial acts originating in other jurisdictions of the United States. (*See, e.g., Apsey v. Memorial Hospital*, 730 N.W. 2d 695 (Mich. 2007), in which the Supreme Court of Michigan ruled that an affidavit in a medical malpractice suit executed before a Pennsylvania notary must be accepted in a Michigan court without certification by the clerk within the notary's county.)

§ 11-3 Notarial Acts by Federal Officers of United States.

- (a) A notarial act has the same effect under the law of this [State] as if performed by a notarial officer of this [State] if performed anywhere by any of the following persons under authority granted by the law of the United States:
- (1) a judge, clerk, or deputy clerk of a court;
 - (2) a commissioned United States military officer on active duty;
 - (3) a foreign service or consular officer of the United States; or
 - (4) any other person authorized by federal law to perform notarial acts.
- (b) The official signature, title, and, if required by law, seal of a person whose authority to perform notarial acts is recognized by Subsection (a) are prima facie evidence that the signature and seal are genuine, that the person holds the indicated title, and, except in the case of Subsection (a)(4), conclusively establishes the authority of a holder of that title to perform a notarial act.

Comment

Section 11-3 provides that notarial acts performed anywhere in the world by U.S. federal officers pursuant to lawful authority

granted to them must be given full recognition and treated as if they were performed within the home jurisdiction by a

duly authorized officer of the jurisdiction. Subsection (a) identifies federal officials who possess notarial powers. As do Subsections 11-1(b) and 11-2(b), Subsection 11-3(b) allows a notarizing official's certificate to be self-proving if it bears the official's signature, title, and, if federal law

requires its use, the seal of office. If, however, the official is not a judge, clerk, or deputy clerk of a court, a commissioned U.S. military officer on active duty, or a U.S. foreign service or consular officer, further evidence may be needed to prove that a person holding the cited title has notarial powers.

§ 11-4 Notarial Acts by Foreign Officers.

- (a) A notarial act has the same effect under the law of this [State] as if performed by a notarial officer of this [State] if performed within the jurisdiction and under authority of a foreign nation or its constituent units or a multi-national or international organization by any of the following persons:
 - (1) a notary public or other notarial officer;
 - (2) a judge, clerk, or deputy clerk of a court of record; or
 - (3) any other person authorized by the law of that jurisdiction to perform notarial acts.
- (b) The official seal or stamp of a person whose authority to perform notarial acts is recognized by Subsection (a) are prima facie evidence that the signature is genuine, that the person holds the indicated title, and, except in the case of Subsection (a)(3), conclusively establishes the authority of a holder of that title to perform a notarial act.
- (c) The authority of an officer to perform notarial acts is conclusively established if the title of the office and indication of authority to perform notarial acts appears either in a digest of foreign law or a list customarily used as a source for that information.
- (d) An Apostille in the form prescribed by Section 10-3 conclusively establishes that the signature and seal of the notarial officer referenced in the Apostille are genuine and that the person holds the indicated office.
- (e) A certificate of a foreign service or consular officer of the United States stationed in the nation under whose jurisdiction the notarial act was performed, or a certificate of a foreign service or consular officer of that nation stationed in the United States, conclusively establishes any matter relating to the authenticity or validity of the notarial act referenced in the certificate.

Comment

Section 11-4 puts notarial acts performed by duly authorized officials of foreign nations on the same legal footing as those performed by notaries in the home jurisdiction. Subsection (a) designates the

types of foreign official whose notarial acts will be recognized. Subsection (b) allows a notarizing foreign official's certificate to be self-proving if it bears the official's seal or stamp. Again, if the official is not a notary

or a judge, clerk, or deputy clerk of a court of record, further evidence may be needed to prove that a person with the cited title has notarial powers. Subsection (c) states that the authority to perform notarial acts of a foreign official is proven if the title and authority of such an officer is listed in a commonly accepted source. Subsection (d) mandates that an Apostille (*see* Section 10-3) authenticating a foreign notarial certificate must be accepted as genuine. Subsection (e) asserts that any matter

related to the authenticity or validity of a foreign notarial certificate may be settled by the certificate of a U.S. foreign service or consular officer stationed in the respective nation, or by the certificate of a foreign service or consular official of that nation stationed in the United States. All of the subsections work together to ensure that notarial acts properly performed in foreign nations will be duly recognized in the jurisdiction adopting the section.

Chapter 12 – Changes of Status of Notary Public

Comment

General: This chapter addresses the administrative steps to be taken when a notary changes his or her name, address, or commission status. Easy-to-follow rules are established to ensure that proper notice is received by the commissioning official.

Importantly, the Act does not merely impose a notification requirement, but goes on to mandate that the notifying party (the notary or the notary's representative) actually verify receipt of the notice. Any notice required by this chapter may be sent electronically.

§ 12-1 Change of Address.

- (a) Within 10 days after the change of a notary's residence, business, or mailing address, the notary shall send to the [commissioning official] by any means providing a tangible receipt, including certified mail and electronic transmission, a signed notice of the change, giving both old and new addresses.
- (b) If the business address is changed, the notary shall not notarize until:
 - (1) the notice described in Subsection (a) has been delivered or transmitted;
 - (2) a Confirmation of Notary's Name or Address Change has been received from the [commissioning official];
 - (3) a new seal bearing the new business address has been obtained; and
 - (4) the surety for the notary's bond has been informed in writing.

Comment

Section 12-1 imposes a notification requirement for any address change by the notary. The notification must be made within 10 calendar days after the change. Some address changes may impact commission status and necessitate resignation of the office. (*See* Subsection

12-3(b).) All notices must include both the old and new address. Since the notary's business address appears in the official seal, any change in business address requires that a new seal be obtained. (*See* Subparagraph (b)(3).) Further notarizations are prohibited until this is done.

§ 12-2 Change of Name.

- (a) Within 10 days after the change of a notary's name by court order or marriage, the notary shall send to the [commissioning official] by any means providing a tangible receipt, including certified mail and electronic transmission, a signed notice of the change, giving both former and new names, with a copy of any official authorization for such change.
- (b) A notary with a new name shall continue to use the former name in performing notarial acts until the following steps have been completed, at which point the notary shall use the new name:

- (1) the notice described in Subsection (a) has been delivered or transmitted;
- (2) a Confirmation of Notary's Name or Address Change has been received from the [commissioning official];
- (3) a new seal bearing the new name exactly as in the Confirmation has been obtained; and
- (4) the surety for the notary's bond has been informed in writing.

Comment

Section 12-2 provides guidance when a notary changes his or her name. The Act only contemplates official name changes, *i.e.*, pursuant to court order or through marriage. Using a different name familiarly will not affect one's official name for notary public purposes. The notification process for a name change generally mirrors the procedure for an address change, including requirements to notify the commissioning authority within 10 calendar days and to obtain a new seal reflecting the change. (*See* Section 12-1) However, a notary

may continue notarizing using a former name until a seal bearing the new name is obtained. (*See* Subsection (b).) In contrast, a notary having moved to a new business address may not notarize until a seal bearing that new address has been obtained. The drafters felt that knowing where to find a notary who has moved is more critical than keeping track of the current name of a notary at a known location in the event a questionable notarization has been performed.

§ 12-3 Resignation.

- (a) A notary who resigns his or her commission shall send to the [commissioning official] by any means providing a tangible receipt, including certified mail and electronic transmission, a signed notice indicating the effective date of resignation.
- (b) Notaries who cease to reside in or to maintain a regular place of work or business in this [State], or who become permanently unable to perform their notarial duties, shall resign their commissions.

Comment

Section 12-3 requires that proper notification be given to the commissioning official when a notary resigns a commission. Additionally, Subsection (b) establishes the rule that a notary who, because of a change of address, no longer has a qualifying nexus in the jurisdiction, must resign the notary commission. The rule applies equally to

notaries residing outside of the commissioning jurisdiction who fail to maintain a regular place of business within the jurisdiction. The subsection also mandates that any notary who can no longer perform the duties of office resign. The Act thereby forces notaries to self-evaluate their status, another step toward professionalizing the office.

§ 12-4 Disposition of Seal and Journal.

- (a) Except as provided in Subsection (b), when a notary commission expires or is resigned or revoked, the notary shall:

- (1) as soon as reasonably practicable, destroy or deface all notary seals so that they may not be misused; and
 - (2) within 30 days after the effective date of resignation, revocation, or expiration, dispose of the journal and notarial records in accordance with Section 7-5 of this [Act].
- (b) A former notary who intends to apply for a new commission and whose previous commission or application was not revoked or denied by this [State], need not dispose of the journal and notarial records within 30 days after commission expiration, but must do so within 3 months after expiration unless recommissioned within that period.

Comment

Section 12-4 deals with the proper disposition of the incidents of office when a notary commission terminates for any reason. To prevent its unauthorized use, the notary must destroy or deface the official seal and any unofficial embossers. (See Subparagraph (a)(1).) How this is best accomplished is left to the judgment of the notary.

Subparagraph (a)(2) requires the former notary, within 30 calendar days after termination of the commission, to deliver the notary journal

and any notarial records to the office designated by the commissioning official in Section 7-5. Subsection (b) carves out an exception to the 30-day-delivery rule. It allows a notary who intends to renew an expired commission up to three months to complete the process. If, however, within that time the commission has not been renewed, the journal and accompanying records must then be forwarded to the commissioning official.

§ 12-5 Death of Notary.

If a notary dies during the term of commission or before fulfilling the obligations stipulated in Section 12-4, the notary's personal representative shall:

- (1) notify the [commissioning official] of the death in writing;
- (2) as soon as reasonably practicable, destroy or deface all notary seals so that they may not be misused; and
- (3) within 30 days after death, dispose of the journal and notarial records in accordance with Section 7-5 of this [Act].

Comment

Section 12-5 addresses disposal of a deceased notary's official seal and journal, and notification of the commissioning authority regarding the death. Destruction or defacement of the seal and proper delivery of the journal, to be performed by the notary pursuant to Section 12-4 after termination of a commission, are instead to be performed by the decedent's personal representative. Although in many cases this may be a surviving spouse, any proper successor in interest is authorized to perform this task. In regard to the disposition of an electronic

journal upon the death of the notary, the notary's personal representative may first have to contact the commissioning official in order to learn journal access instructions (see Sections 7-6; 4-2(9); and 16-4(3)) for the purpose of meeting the obligations imposed by this section.

In the event of the disappearance or permanent incapacity of the notary, any individual legally designated to attend to or settle the notary's affairs may perform the acts required in this section. (See Section 7-6 Comment.)

Chapter 13 – Liability, Sanctions, and Remedies for Improper Acts

Comment

General: This chapter provides rules for handling situations in which notaries have acted improperly incident to the performance of their official duties. The drafters believed notaries should be fully accountable for their official actions, and to this end imposed personal liability on them for any of their actions that result in damages to others. Additionally, since the Act mandates bonding (*see* Section 3-3), the drafters included rules to

maximize an injured party's access to the bond. The Act also applies traditional liability rules to broaden the available resources from which damages caused by employee-notaries may be recovered. The balance of the chapter enumerates criminal and disciplinary sanctions that may be imposed on notaries who breach their obligations or violate rules of law in the performance of their official duties.

§ 13-1 Liability of Notary, Surety, and Employer.

- (a) A notary is liable to any person for all damages proximately caused that person by the notary's negligence, intentional violation of law, or official misconduct in relation to a notarization.
- (b) A surety for a notary's bond is liable to any person for damages proximately caused that person by the notary's negligence, intentional violation of law, or official misconduct in relation to a notarization during the bond term, but this liability may not exceed the dollar amount of the bond or of any remaining bond funds that have not been disbursed to other claimants. Regardless of the number of claimants against the bond or the number of notarial acts cited in the claims, a surety's aggregate liability shall not exceed the dollar amount of the bond.
- (c) An employer of a notary is liable to any person for all damages proximately caused that person by the notary's negligence, intentional violation of law, or official misconduct in performing a notarization during the course of employment, if the employer directed, expected, encouraged, approved, or tolerated the notary's negligence, violation of law, or official misconduct either in the particular transaction or, impliedly, by the employer's previous action in at least one similar transaction involving any notary employed by the employer.
- (d) An employer of a notary is liable to the notary for all damages recovered from the notary as a result of any violation of law by the notary that was coerced by threat of the employer, if the threat, such as of demotion or dismissal, was made in reference to the particular notarization or, impliedly, by the employer's previous action in at least one similar transaction involving any notary employed by the employer. In addition, the employer is liable to the notary for damages caused the notary by demotion,

dismissal, or other action resulting from the notary's refusal to engage in a violation of law or official misconduct.

- (e) Notwithstanding any other provision in this Act, for the purposes of this section "negligence" shall not include any good-faith determination made by the notary pursuant to the obligations imposed by Subparagraph 5-2 (3) or (4).

Comment

Subsection 13-1(a) establishes the basic rule that a notary is liable for damages directly resulting from the improper performance of a notarial act. The notary may be held responsible for either a negligent or an intentional act. Intentional acts that can create liability include acts that are either unlawful or constitute official misconduct. (See Section 2-12.) Consistent with the modern trend (*see, e.g.*, IND. CODE ANN. § 33-42-4-2), the Act specifically rejects the antiquated view that a notary as a public official is entitled to sovereign immunity (*see May v. Jones*, 14 S.E. 552 (Ga. 1891)).

Subsection (b) obligates the surety for the notary's bond for damage recoveries permitted by Subsection (a). Recovery, however, is limited to the unused balance of the bond. A surety is not responsible for more than the dollar value of the bond. Multiple claims are to be prioritized pursuant to local law.

Subsection (c) limits the *respondent superior* doctrine for employee-notaries to a few, select situations. Although the doctrine may be applied in employee-notary situations without limitation (*see, e.g.*, FLA. STAT. ANN. § 117.05(6)), the Act employs a more stringent application that requires additional action by the employer before imposing any liability for an employee-notary's notarization. The drafters decided that the tension between the notary as an independent public servant and an employee warranted the approach adopted. To reinforce the independence of the office, the drafters wanted to iterate the fact that a notary is first and foremost a public servant, whose duty to the public overrides obligations to an employer. An employer cannot control a notary's performance of official duties. Consequently, it would be unfair always to hold the employer

accountable for the employee-notary's behavior. Thus, the Act only imposes liability on the employer where the employer's own actions caused, facilitated, or permitted the improper behavior. (*Accord* VA. CODE ANN. § 47.1-27, which requires an employer to have actual knowledge of an improper practice, or reasonably be obliged to know, before liability is imposed.)

In order for an employer to be liable for a recovery permitted by Subsection (a), the employee must not only perform the notarization within the scope of employment, but the employer must also actively or impliedly "consent" to the notary's specific improper notarial act. Active "consent" includes directing, approving, or tolerating the notary's behavior. For these purposes, "tolerating" is the functional equivalent of tacit approval. It connotes an awareness of the behavior without taking any steps to correct or prevent it from recurring. Additionally, encouraging or expecting an employee-notary to perform improper notarial acts will constitute active "consent." The facts of each particular case will have to be reviewed to ascertain when the employer encouraged the notary to perform an improper notarization. The same is true for those cases in which the injured party will try to demonstrate how the employer "expected" the behavior.

As to implied "consent," the Act simply provides that any past action or inaction by the employer concerning a particular improper notarization will carry forward to a later improper notarization. The theory is that the employee may reasonably rely on the employer's past action (or inaction, as the case may be) as a guide to a present act. If an objection was not raised earlier, there is no reason to believe it would be raised now. Thus, under the implied

“consent” rule, an employer may be liable for a notarization despite being totally unaware it was performed by the employee-notary. The employer’s failure to properly address a prior improper notarization can provide the basis for liability resulting from a future improper notarization.

The implied “consent” rule can be applied to an improper notarization by any of an employer’s notaries. It is not limited to only the future improper notarizations of the notary who performed a prior improper notarization. The theory justifying the broad application of the rule is that employees are charged with knowledge of company policies and normally are aware of the acts of similar coworkers. It would be inappropriate to allow an employer to escape responsibility because a different employee-notary relying on past company practice performed the improper act. The Act effectively imposes an affirmative obligation on employers to promulgate and implement adequate internal controls to ensure that employee-notaries perform notarizations properly.

Subsection (d) serves to protect the notary financially from damages resulting from an improper notarization coerced by the employer. Generally, Subsection (a) makes the notary liable for damages resulting from all improper notarizations. The Act takes the position that if, under Subsection (c), the employer is found responsible for a specific improper notarial act, then the notary should be indemnified by the employer for any costs imposed upon the notary for following the employer’s dictates. In adopting this position, the drafters recognize that a notary can be put in an untenable position: either perform the improper act or possibly suffer an employment penalty, including loss of job. Ideally, one would like to think the notary would demonstrate independence and refuse to perform the improper notarization. But reality suggests that usually this will not be the case, especially when the employee notary is young and inexperienced. Thus, although the notary remains primarily liable for his or her improper acts, the financial costs for those which are coerced by an employer should ultimately be borne by the employer who causes them. Nothing in this section exculpates the notary from responsibility for the improper act, and

appropriate sanctions may be imposed by the commissioning official for it. (*See* Sections 13-3 and 13-4.)

This subsection also imposes financial obligations on an employer who penalizes a notary for failing to obey a request to perform an illegal notarization. The employer will be held responsible for recompensing the notary for any monetary loss incurred by any employment action taken by the employer that effectively constitutes retaliation for the refusal to follow the illegal request. The drafters believed that this rule was necessary to give teeth to the general proscription against coercing employees into performing illegal notarizations. Without it, an employer could too easily sidestep the ban.

Subsection (e) serves to insulate notaries who properly refuse to execute notarizations. The protection is specifically confined to those situations wherein the notary believes the principal lacks either the capacity to understand the underlying consequences of, or the independent volition to proceed with, the notarization. These are the mandates from Subparagraphs 5-2(3) and (4), respectively. The drafters strongly believe that notaries should refrain from acting in these situations, but feared they might be hesitant to do so. Whether a layperson could make the informed judgment required by the Act was a concern. The “good faith determination” defense was added to encourage notaries to adhere to the rule.

Notaries are not expected to make informed evaluations based upon either lengthy discussions with principals or reviews of medical documents. The Act simply calls for a commonsense assessment drawn from the circumstances attendant to the notarization request.

Under these conditions, a notary who refuses to perform the notarization based on a good-faith determination that the principal failed to satisfy either the “capacity” or “volition” test is exculpated from any liability that might result from such refusal. Notaries are required to record refusals to notarize in their journals. (*See* Subsection 7-2(c).) The drafters, however, caution the notary to use care when making this entry. A simple recitation of the circumstances that led to the determination is sufficient.

§ 13-2 Proximate Cause.

Recovery of damages against a notary, surety, or employer does not require that the notary's negligence, violation of law, or official misconduct be either the sole or principal proximate cause of the damages.

Comment

Section 13-2 provides a special definition of "proximate cause" for purposes of the Act. It expands the traditional notion of "proximate cause" as applied in tort cases. Generally, "proximate cause" is the "primary," "dominant," or "moving" cause for an event. (*See* BLACK'S LAW DICTIONARY 234 (8th ed. West 2004).) The Act creates liability so long as the notary's wrongful official act contributes to the

damages; it need not be the sole cause of the injury. (*Accord* 5 ILCS 312/7-103; and MO. REV. STAT. § 486.365.) For this purpose, "wrongful" refers to conduct identified in Subsection 13-1(a). Additionally, the provision imputes the same "contributing cause" rule to both the notary's surety and the employer who may be liable for the improper notarization pursuant to Subsection 13-1(c).

§ 13-3 Revocation.

- (a) The [commissioning official] may revoke a notary commission for any ground on which an application for a commission may be denied under Section 3-1(c).
- (b) The [commissioning official] shall revoke the commission of any notary who fails:
 - (1) to maintain a residence or a regular place of work or business in this [State]; and
 - (2) to maintain status as a legal resident of the United States.
- (c) Prior to revocation of a notary commission, the [commissioning official] shall inform the notary of the basis for the revocation and that the revocation takes effect on a particular date unless a proper appeal is filed with the [administrative body hearing appeal] before that date.
- (d) Resignation or expiration of a notary commission does not terminate or preclude an investigation into the notary's conduct by the [commissioning official], who may pursue the investigation to a conclusion, whereupon it shall be made a matter of public record whether or not the finding would have been grounds for revocation.

Comment

Section 13-3 both authorizes the commissioning official to revoke a notary commission, and prescribes procedural rules to effectuate the decision. Subsection (a) provides that a notary commission may be revoked for any of the reasons that may be used to deny a notary application. These are set out in Subsection 3-1(c). The drafters believed that an

act sufficiently serious in nature to deny an application ought to provide the basis for a revocation if committed or discovered after the commission was granted. Thus, an act that could have provided the basis for an application denial, if properly disclosed upon the application, cannot become the basis for a subsequent commission revocation. If the

act were not disclosed on the application, that may be a ground for revocation whenever discovered. To hold otherwise would encourage applicants to hide relevant information from the commissioning authority.

Subsection 13-3(b) implements the requirements of Subparagraph 3-1(b)(2) regarding having a sufficient nexus in the state to warrant receiving a notary commission. Section 2-18 defines “regular place of work or business” for this purpose. If the nexus is severed after the commission is granted, the commission must be revoked. (*Accord* NEB. REV. STAT. § 64-112.) The Act, by its silence, allows the commissioning jurisdiction to determine both local and United States residency.

Subsection (c) requires the commissioning official to give the notary

proper notice of the revocation. The notice must inform the notary of a) the basis for revocation, b) the date when the revocation is to take place, and c) the notary’s specific appeal rights. The Act holds that the notary may continue to perform notarizations until the effective revocation date on the notice. The commission, however, may be suspended during the pendency of any appeal.

Subsection (d) reinforces the view that a notary should be held accountable for any improper official act. Thus, resigning a commission or merely letting it expire will not end or preclude any investigatory process and possible subsequent disciplinary action. Moreover, the subsection provides that when the appropriate authority proceeds against a former notary, the action becomes a matter of public record.

§ 13-4 Other Remedial Actions for Misconduct.

- (a) The [commissioning official] may deliver a written Official Warning to Cease Misconduct to any notary whose actions are judged to be official misconduct.
- (b) The [commissioning official] may seek a court injunction to prevent a person from violating any provision of this [Act].

Comment

Section 13-4 permits the commissioning official to reprimand a notary for matters not warranting greater discipline. The Act establishes an Official Warning sanction. This disciplinary action allows the official to notify the notary that he or she is engaging in official misconduct and must cease such activity. Should the warning not prove effective, or the activities be sufficiently egregious, the commissioning official may seek injunctive

relief from the courts. The subsection gives the commissioning official broad discretion to seek injunctive relief to prevent any provision of the Act from being violated. The drafters intended this authority to extend to non-notaries as well. Thus, the commissioning official could seek to enjoin any person from violating the provisions of the Act. (For examples of non-notary infractions, *see* Chapter 14.)

§ 13-5 Publication of Sanctions and Remedial Actions.

The [commissioning official] shall regularly publish a list of persons whose notary commissions have been revoked by the [commissioning official] or whose actions as a notary were the subject of a court injunction or Official Warning to Cease Misconduct.

Comment

Section 13-5 requires a list of the names of notaries who have had their commissions revoked and of notaries who have received an

Official Warning to Cease Misconduct to be published. The drafters thought that such a regular public posting would have a fraud-

deterrent utility in alerting the public about notaries who have been sanctioned. Also, it would impose a stigma that conscientious notaries would strive to avoid.

§ 13-6 Criminal Sanctions.

- (a) In performing a notarial act, a notary is guilty of a [class of offense], punishable upon conviction by a fine not exceeding [dollars] or imprisonment for not more than [term of imprisonment], or both, for knowingly:
- (1) failing to require the presence of a principal at the time of the notarial act;
 - (2) failing to identify a principal through personal knowledge or satisfactory evidence; or
 - (3) executing a false notarial certificate under Subsection 5-8(a).
- (b) A notary who knowingly performs or fails to perform any other act prohibited or mandated respectively by this [Act] may be guilty of a [class of offense], punishable upon conviction by a fine not exceeding [dollars] or imprisonment for not more than [term of imprisonment], or both.

Comment

Section 13-6 sets out specific criminal penalties for notaries who violate critical provisions of the Act. Since criminal acts are involved, the Act requires that the notary knowingly violate the law. Mere negligence does not merit criminal sanction, and is addressed in Section 13-1. Nonetheless, repeated, knowing acts of negligence may result in suspension or revocation of the commission. If damage claims exceed the available bond, under Subsection 3-3(c) the commission will be suspended. When this happens, Subparagraph 3-3(c)(2) further requires the notary to prove fitness to serve out the remainder of the commission term. The request to continue may be denied. Further, the suspension could then serve as the basis for revoking the commission. (*See* Subsection 13-3(a) applying Subparagraph 3-1(c)(3).)

Subsection (a) targets three specific notarial functions – requiring a principal’s physical presence, properly identifying the principal, and executing a true notarial certificate – for special treatment. These acts

are the core features of notarizations that lend integrity and reliability to the notarial act, and therefore are given individual attention to reinforce their importance.

The drafters did not recommend specific criminal sanctions, preferring instead to have each jurisdiction determine whether violating these duties should constitute a felony, misdemeanor, or mere infraction. Appropriate fines and terms of incarceration would be determined by the status assigned to these offenses.

Subsection (b) makes any other knowing violation of the Act subject to criminal sanction. Again, the drafters deferred to the local jurisdictions to determine what penalties would best meet their needs. Examples of potential criminal violations could include charging a fee in excess of the statutory amount, creating a false journal record of a notarial act, or allowing another person to use the notary’s official seal.

§ 13-7 Additional Remedies and Sanctions Not Precluded.

The remedies and sanctions of this chapter do not preclude other remedies and sanctions provided by law.

Comment

Section 13-7 makes clear that the criminal sanctions described in Section 13-6 are not exclusive. Certain Act violations may also trigger sanctions provided by the jurisdiction's penal code. For example, a non-attorney notary who dispenses legal advice might be in violation of the jurisdiction's unauthorized practice of law statute. Also, the criminal sanction will not serve as a substitute to block any civil remedies that may be available to injured parties.

Chapter 14 – Violations by Non-Notary

Comment

General: This chapter provides disciplinary sanctions to impose on non-notaries who wrongfully simulate or interfere with official notarial acts.

§ 14-1 Impersonation.

Any person not a notary who knowingly acts as or otherwise impersonates a notary is guilty of a [class of offense], punishable upon conviction by a fine not exceeding [dollars] or imprisonment for not more than [term of imprisonment], or both.

Comment

Section 14-1 addresses acting as a notary without authorization, and makes clear that such action is illegal and subject to criminal penalties. This position is common to many jurisdictions. (*See, e.g.*, COL. REV. STAT. § 12-55-117; VA. CODE ANN. § 47.1-29; and W. VA. CODE ANN. § 29C-6-203.)

§ 14-2 Wrongful Possession.

Any person who knowingly obtains, conceals, defaces, or destroys the seal, journal, or official records of a notary is guilty of a [class of offense], punishable upon conviction by a fine not exceeding [dollars] or imprisonment for not more than [term of imprisonment], or both.

Comment

To protect against fraudulent notarizations and destruction of useful records, Section 14-2 makes the knowingly wrongful possession or corruption of the official notarial materials (seal, journal, and records) a criminal act. (*Accord, see* MO. REV. STAT. § 486.380; NEV. REV. STAT. ANN. 240.143; and W. VA. CODE ANN § 29C-6-204.)

§ 14-3 Improper Influence.

Any person who knowingly solicits, coerces, or in any way influences a notary to commit official misconduct is guilty of a [class of offense], punishable upon conviction by a fine not exceeding [dollars] or imprisonment for not more than [term of imprisonment], or both.

Comment

To preserve the integrity of the notarial act, Section 14-3 makes influencing or assisting a notary to commit an improper act a violation.

§ 14-4 Additional Sanctions Not Precluded.

The sanctions of this chapter do not preclude other sanctions and remedies provided by law.

Comment

Section 14-4 states that the penalties of Sections 14-1 through 14-3 are not necessarily exclusive, and allows imposition or pursuit of other sanctions as deemed appropriate. (*Accord* CAL. GOV'T CODE § 8207.4(b); and IDAHO CODE § 51-119(5).)

Article III Electronic Notary

Comment

This article establishes the role of the electronic notary public. It constitutes a considerable advancement and refinement of the initial specifications for the role proposed in Article III of the 2002 Act. The changes reflect pertinent developments and demands of technology, business, and government over the intervening eight years.

Like its 2002 predecessor, Article III in the Model Notary Act of 2010 acknowledges the significance of two legislative standards. The first is the widely enacted Uniform Electronic Transactions Act (“UETA”), adopted by the National Conference of Commissioners on Uniform State Laws on July 29, 1999. UETA recognizes the legal effect of electronic signatures, including those used by notaries. The second is the federal Electronic Signatures in Global and National Commerce Act (“E-Sign”) (15 U.S.C.A. §§ 7001 *et seq.*), which is largely congruent with UETA and authorizes every state-commissioned notary in the nation to use electronic signatures in performing official acts. Significantly, however, neither UETA nor E-Sign actually defines an electronic notarization, nor provides pertinent procedures, certificates, or qualifications for the officer performing such acts. This Act accomplishes those tasks.

Also like its 2002 predecessor, Article III in the 2010 Act is based on two cornerstone rules. The first is that the fundamental principles and processes of traditional notarization must apply regardless of the technology used to create a signature. No principle is more critical to notarization than that the signer must appear in person before a duly commissioned notary public to affix or acknowledge the signature and be screened for identity, volition, and basic awareness by the notary at the time of the notarial act. While technology may be improved, the basic nature of the human beings who use it, unfortunately, may not. Any process – paper-based or electronic – that is called notarization of a signature must involve the

personal physical appearance of a principal before a duly empowered notary. Contrary to popular understanding, electronic notarization does not mean “remote” notarization, with the notary in front of a computer at location A and the principal before another computer at location B. In the Act, the definitions of the common notarizations apply, both to paper and electronic documents (*see* Sections 2-1, 2-2, 2-7, 2-11, and 2-21, respectively, for definitions of acknowledgment, affirmation, jurat, oath, and signature witnessing), and all embody the fundamental principle that the signer must appear in person before the notary at the time of notarization.

The second cornerstone rule of the article is technology neutrality. This Act neither embraces nor rejects any particular electronic signature technology. At the same time, it does not prevent or discourage a jurisdiction’s prescription or proscription of a particular technology for electronic signatures or notary journals. Rather, the Act posits performance standards for electronic notarization which any qualifying technology must meet. (*See, e.g.*, the performance standards for an electronic journal of notarial acts in Section 20-2.) The drafters preferred to let the forces of the marketplace winnow out less efficient technologies, and drive people toward those that combine maximum security with ease of operation.

The drafters considered it to be administratively problematic, if not in violation of E-Sign, to require special commissioning of electronic notaries. Instead, the Act merely requires interested paper-based notaries formally to register their intent to notarize electronically with the commissioning official, while submitting evidence of their electronic capabilities. (*See* Chapter 16, “Registration as Electronic Notary.”) E-Sign authorizes every state-commissioned notary to act as an electronic notary – but only if the desire is there. Just as most notaries today elect to eschew any authority granted by statute to

take depositions for lack of facility in shorthand reporting, so too, no doubt, many notaries will pass up the opportunity to notarize electronically for lack of facility in computers. A “regular notary” (*i.e.*, one authorized to execute traditional paper-based notarizations) is not obligated to become an electronic notary.

Developments and demands of industry and government have shaped the major changes to Article III that distinguish the 2010 Act from its 2002 predecessor. The new Act, for example, reflects a clear and growing consensus that electronic notarizations must both be “capable of independent verification” (*see* Section 15-1) and render any notarized electronic document as tamper-evident (*see* Section 15-12). According to the American Bar Association volume, FOUNDATIONS OF DIGITAL EVIDENCE (2008): “Concerning electronically notarized documents, an international and national e-document authenticity standard has emerged that reflects the evidentiary need for electronic documents to have the capability of

authenticity testing. This standard requires that any relying party be able to verify the origin and integrity of the notarized electronic document. Establishing the authenticity of a notarized document thus requires the capability, in perpetuity, of independently authenticating the notary, and verifying whether the content of the electronic document is complete and unaltered.”

Another marketplace demand reflected in the new Act is permission for the notary to register with the commissioning official more than one means for creating electronic signatures and electronic seals. Notaries may need to employ multiple technologies to accommodate the different electronic systems of their various clients. For example, one client might require the notary to use a portable plug-in token to notarize an electronic document, while another might require the notary to sign and seal electronically using an online server. Such electronic versatility benefits both the notary and the business world.

Chapter 15 – Definitions Used in This Article

Comment

General: Chapter 15 provides definitions of terms integral to the process of electronic notarization. Four are closely based on definitions in UETA (*i.e.*, “electronic,” “electronic document,” “electronic signature,” and “security procedure”). These UETA-inspired terms tie the Model Notary Act to fundamental understandings of electronic transactions that now permeate state and federal law, through enactments of both UETA and E-Sign.

One of the definitions is for a term (“capable of independent verification”) often encountered without further explanation in state laws governing electronic signatures. Two others (“electronic notarial certificate” and “electronic notary seal”) reflect definitions

developed in guidelines for electronic notarization promulgated by the National Association of Secretaries of State. (*See* “National E-Notarization Standards,” hereinafter “NASS Standards,” adopted July 12, 2006.) Three of the terms (“electronic journal of notarial acts,” “electronic notarial act and electronic notarization” and “electronic notary public and electronic notary”) were defined in the 2002 Act but have been redefined by the drafters in this 2010 version. The remaining two original definitions are of unique terms (“registered electronic notary seal” and “registered electronic signature”) that are key to the highly secure system for electronic notarization set forth in this Act.

§ 15-1 Capable of Independent Verification.

“Capable of independent verification” means that any interested person may confirm the validity of an electronic notarial act and an electronic notary public’s identity and authority through a publicly accessible system.

Comment

Section 15-1 specifies what “capable of independent verification” means. This term or the term “capable of verification” is often found undefined in statutes to denote an attribute of a reliable electronic signature. (*See, e.g.*, CAL. GOV. CODE § 16.5; FLA. STAT. § 117.021(2); N. MEX. ADMIN. CODE § 12.9.2.11(C); and CODE OF VA. § 47.1-16(D).) It is used in this Act to denote a desired and

required attribute of an electronic signature used by a notary in performing an electronic notarial act. (*See* Section 19-2(2).)

An example of a system providing such verification may be accessed on the Internet at www.dos.state.pa.us/dos/site/default.asp, clicking on “Notaries” and “Electronic Notarization.”

§ 15-2 Electronic.

“Electronic” means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

Comment

Section 15-2 defines “electronic” consistent with the Uniform Electronic Transactions Act. (*See* UETA § 2(5).) The drafters employed terms that are compatible with UETA because that act has either been adopted by a number of jurisdictions (*see,*

e.g., KAN. STAT. ANN. §§ 16-1601 to 16-1620; NEB. REV. STAT. §§ 86-612 to 86-643; UTAH CODE ANN. §§ 46-4-101 to 46-4-503; and ME. REV. STAT. ANN. tit. 10 chapt. 1051 §§ 9401 to 9419) or served as the starting point for other legislation enacted throughout

the country (*see, e.g.*, ARIZ. REV. STAT. ANN. §§ 44-7001 *et seq.*; MD. CODE ANN. (Commercial Law) §§ 21-101 *et seq.*; and OHIO REV. CODE ANN. §§ 1306.01 to 1306.23).

The term “electronic” is to be liberally

construed to embrace not only computer-generated signatures and documents, but also those created by other technologies that may currently be in use or developed in the future.

§ 15-3 Electronic Document.

“Electronic document” means information that is created, generated, sent, communicated, received, or stored by electronic means.

Comment

The definition remains unchanged from the prior version of the Act.

Section 15-3 defines “document” in a way that makes it the functional equivalent of the term “record” in UETA. (*See* UETA § 2(13).) The drafters preferred “document” to “record” because it strengthens the connection

of electronic notarizations to paper-based official acts. The Act also seeks to eliminate any confusion about the term “record,” which could be misunderstood to denote that the document has an official status or is considered an archive.

§ 15-4 Electronic Journal of Notarial Acts.

“Electronic journal of notarial acts” and “electronic journal” mean a chronological electronic record of notarizations that is maintained by the notary public who performed the same notarizations.

Comment

Section 15-4 has been changed from its 2002 version. The drafters decided to enumerate the specifications for an electronic notarial journal in a separate chapter (*see* Chapter 20), instead of

following the approach in the former Act of including them in the definition itself.

For the purposes of this section, “record” is used in its ordinary, everyday meaning, and not as it is defined in UETA.

§ 15-5 Electronic Notarial Act and Electronic Notarization.

“Electronic notarial act” and “electronic notarization” mean an official act involving an electronic document that is performed in compliance with this Article by an electronic notary public as a security procedure [as defined in the Uniform Electronic Transactions Act].

Comment

Section 15-5 declares that every electronic notarization is itself a “security procedure,” whose definition in Section 15-12 is closely based on the definition of the same term in UETA (*see* UETA § 2(14)). The UETA definition spells out that a security procedure is “employed for the purpose of verifying that an electronic signature, record, or performance is that of a specific person or

for detecting changes or errors in the information in an electronic record.” One of the clear standards that has arisen in the new field of electronic notarization is that an electronic notarial act must qualify as a “security procedure” with the important capabilities of establishing who signed and notarized an electronic document and rendering a notarized electronic document as

tamper-evident. According to George L. Paul *et al.*, FOUNDATIONS OF DIGITAL EVIDENCE, p. 212 (ABA, 2008): “Concerning electronically notarized documents, an international and national e-document authenticity standard has emerged that reflects the evidentiary need for electronic documents to have the capability of authenticity testing. This standard requires that any relying party be able to verify the origin and integrity of the notarized electronic document. Establishing the authenticity of a notarized document thus requires the capability, in perpetuity, of independently authenticating the notary, and verifying whether the content of the electronic document is complete and unaltered.” (See also NASS Standards 5-9; ABA SUBCOMMITTEE ON ETRUST: ENOTARY WORKGROUP WHITEPAPER ON ENOTARIZATION AT 3.3 (ABA, 2006), stating, “(T)he document being proffered must contain or be

accompanied by evidence that it has not changed since it was first generated in its final form”; and Daniel J. Greenwood, ELECTRONIC NOTARIZATION: WHY IT’S NEEDED, HOW IT WORKS, AND HOW IT CAN BE IMPLEMENTED TO ENABLE GREATER TRANSACTIONAL SECURITY 10 (Nat’l Notary Ass’n, 2006).)

In this Act, at the core of each electronic notarization is the assurance that the notarized electronic document truly was signed by a particular real person and that the document will prominently display evidence of any subsequent alteration. In that way, all electronic notarizations are themselves security procedures.

The use of brackets in the definition allows jurisdictions that have not adopted rules inspired by the UETA definition to define “security procedure” in a manner more suitable to their own governing laws.

§ 15-6 Electronic Notarial Certificate.

“Electronic notarial certificate” means the part of, or attachment to, a notarized electronic document that, in the performance of an electronic notarization, is completed by the electronic notary public, bears the notary’s registered electronic signature and seal, and states the date, venue, and facts attested to or certified by the notary in the particular electronic notarization.

Comment

Section 15-6 recognizes that every notarization, whether paper-based or electronic, requires a notarial certificate. The certificate may be either an integral or attached part of the paper or electronic document. This new section defines the electronic notarial certificate to parallel its paper counterpart. (See Section 2-9.)

The definition of “electronic notarial

certificate” reflects the definition of the same term adopted by the National Association of Secretaries of State in 2006. (See NASS Standards, “Definitions” at 7.)

An “electronic notarial certificate” is not to be confused with a “public key certificate,” which is a component of a technology widely used to create electronic signatures.

§ 15-7 Electronic Notary Public and Electronic Notary.

“Electronic notary public” and “electronic notary” mean a notary public who has registered with the [commissioning official] the capability to perform electronic notarial acts.

Comment

Section 15-7 defines “electronic notary public.” The Act recognizes that any commissioned notary should have the opportunity to operate as an electronic notary, but ought not be compelled to do so if there is no interest.

Most authorities interpret E-Sign as giving electronic notarization powers to all current state-commissioned notaries. (E-Sign specifically states that it may be preempted by state law when certain requirements are met, but absent meeting those requirements, E-

Sign controls (*see* § 7002.) Thus, the registration process itself does not empower registrants to notarize electronically. Instead, it enables the [commissioning official] to learn the specific electronic capabilities of a notary so that

the notary's future electronic acts can be verified and authenticated by the [commissioning official] for such uses as become necessary.

§ 15-8 Electronic Notary Seal.

“Electronic notary seal” and “electronic seal” mean information within a notarized electronic document that includes the electronic notary's name, title, jurisdiction, and commission expiration date.

Comment

Section 15-8 defines “electronic notary seal” to be information both identifying an electronic notary and delineating in basic terms the notary's authority to act electronically.

E-Sign and UETA do not eliminate the need for the notary's addition to each electronically notarized document of authenticating information that is traditionally found in an official seal. This section defines that important information as an “electronic notary seal” in order to strengthen the connection between electronic and traditional

paper-based notarial acts.

Unlike the definition of the “official seal” that is to be affixed on paper documents (*see* Section 2-13), this definition does not denote a device for imparting an image, nor the image itself. Inclusion of a digital image, however, would neither be required nor prohibited in an electronic seal, if the technology allowed it. (The required informational components of an electronic notary seal are prescribed in Subparagraph 18-2(3).)

§ 15-9 Electronic Signature.

“Electronic signature” means an electronic sound, symbol, or process attached to or logically associated with an electronic document and executed or adopted by a person with the intent to sign the document.

Comment

Section 15-9 essentially borrows the definition of “electronic signature” from UETA, substituting the term “document” for “record.” (*See* Section 15-3; and UETA § 2(8).) The definition describes the different possible forms of an electronic signature, and is intended to be as inclusive as possible. No doubt, technologies not yet developed will create new ways to produce electronic signatures that would satisfy the definition.

It is important to note that this section only defines what an electronic signature is. It does not purport to authorize the use of a signature in a notarization. Only a registered electronic signature (as defined in Section 15-11) may be used by an electronic notary to perform an electronic notarization. Production of an electronic signature by a means not registered under Section 16-4 would render the attempted electronic notarization invalid.

§ 15-10 Registered Electronic Notary Seal.

“Registered electronic notary seal” means an electronic notary seal produced by a notary in the performance of an electronic notarial act by a means that was registered with the [commissioning official].

Comment

Section 15-10 introduces a new term to apply to electronic notarizations. Defining “registered electronic notary seal” enables more economy of language throughout the Article whenever reference is made to a notary completing an electronic notarization. (“Electronic notary seal” is defined in Section 15-8.) A “registered electronic notary seal” is an official seal of office for electronic notarial acts and an analog to a “registered electronic signature.” (See Section 15-11.)

Only an electronic seal whose means of production has been registered with the commissioning official (see Section 16-4) may be used in an electronic notarization (see Section 19-1). The Act does not dictate how the seal must be produced. Instead, it specifies the required components of an electronic notary seal (see Subparagraph 18-2(3)), and gives the notary discretion to select the means of production. One such means of producing an electronic seal might

be the simple process of typing in the required information comprising the seal – though such a process by itself would not result in a secure electronically notarized document. (For a discussion of the relative security of the different means for producing electronic notary seals and signatures, see generally Daniel J. Greenwood, ELECTRONIC NOTARIZATION: WHY IT’S NEEDED, HOW IT WORKS, AND HOW IT CAN BE IMPLEMENTED TO ENABLE GREATER TRANSACTIONAL SECURITY (Nat’l Notary Ass’n 2006).) By contrast, an electronic notary seal used in conjunction with an electronic notary signature with the attributes set forth in 19-2, including the attribute of rendering an electronically notarized document as tamper-evident (see Subparagraph 19-2(3)) will produce a secure electronically notarized document.

Notably, more than one means for producing electronic notary seals may be registered by a notary. (See Section 16-5.)

§ 15-11 Registered Electronic Signature.

“Registered electronic signature” means an electronic signature produced by a notary in the performance of an electronic notarial act by a means that was registered with the [commissioning official].

Comment

Section 15-11 introduces a new term, “registered electronic signature,” and distinguishes it from other electronic signatures that a notary may use for non-notarial purposes. (“Electronic signature” is defined in Section 15-9.) Only a “registered electronic signature” may be used by a notary in performing electronic notarizations. It is an official notary signature for electronic notarial acts and an analog to a “registered electronic notary seal.” (See Section 15-10.)

Generally, in the paper world a person has only one signature and it is produced by the person’s own hand. Thus, that same signature – with subtle variations in its image due to the fact that it is hand-drawn – is used for official notarial acts as well as for all other non-notarial signings.

The same is not true in the electronic world, where an individual may use completely different personal electronic signatures produced by different processes. This Article dictates that despite the number of different ways a notary may make an electronic signature, only a signature whose specific means of production has been registered with the commissioning official (see Section 16-4) may be used in performing electronic notarizations (see Section 19-1).

Notably, more than one means for producing electronic signatures may be registered by a notary. (See Section 16-5.) Thus, an electronic notary may have and use multiple registered electronic signatures.

§ 15-12 Security Procedure.

“Security procedure” means a procedure employed for the purpose of verifying that an electronic signature, document, or performance is that of a

specific person or for detecting changes or errors in the information in an electronic document. The term includes a procedure that requires the use of algorithms or other codes, identifying words or numbers, encryption, or callback, or other acknowledgment procedures.

Comment

Section 15-12 adopts the definition of “security procedure” provided in UETA (*see* UETA § 2(14)), with one change. To maintain consistency throughout the Act regarding adoption of language from UETA, “document” (*see* Section 15-3) has again been substituted for “record” (*see* UETA § 2(13)).

One of the prime innovations of this Act is applying the function of a security procedure as defined in UETA to electronic

notarization. (*See* Section 15-5 and Comment.) There is congruence in the two processes. Indeed, the Comment for UETA § 2(14) states: “A security procedure may be applied to verify an electronic signature, verify the identity of the sender, or assure the informational integrity of an electronic record.” This description demonstrates the overarching policy of the Act to have paper-based and electronic notarizations be as similar as possible.

Chapter 16 – Registration as Electronic Notary

Comment

General: Chapter 16 delineates the process for registering as an electronic notary. The drafters firmly believed that requiring a notary to obtain an additional commission in order to operate electronically would impose an impediment in violation of E-Sign's already existing permission, not to mention an administrative hardship on the commissioning body. The drafters, however, also believed it to be in the public interest and a reasonable accommodation to have some governmental oversight over electronic notaries. Such oversight would at the very least enable the commissioning body to authenticate a notary's electronic acts and to investigate an electronic notary's conduct in disciplinary matters.

Thus, this Act requires interested notaries to register with the commissioning official their capability of notarizing electronically before performing such acts. (See Section 16-1.) A notary who is not interested in performing electronic notarizations is not required to register as an electronic notary.

It was viewed as a reasonable public

protection to require registrants first to prove their electronic competence by passing a course of instruction on electronic notarization. (See Section 16-2.) The registration would be valid as long as the notary's underlying commission remains in effect (see Section 16-3) or is not terminated for cause (see Section 24-2).

The electronic registration form requires the notary to inform the commissioning official about the specific means the notary will use to produce electronic signatures and notary seals in performing electronic notarial acts. (See Section 16-4.) Section 16-5 permits more than one means to be registered for each of these purposes or, alternatively, more than one "single element" combining the required features of both electronic signature and seal.

Sections 16-6, 16-7, and 16-8, respectively, address the administrative matters of material misstatement or omission of fact in the registration form, fees for registering, and confidentiality of information disclosed by registrants.

§ 16-1 Registration with [Commissioning Official].

- (a) A notary public shall register the capability to perform electronic notarial acts with the [commissioning official] before notarizing electronically.
- (b) Upon recommissioning, a notary public shall again register with the [commissioning official] before notarizing electronically.
- (c) A person may apply or reapply for a notary commission and register or reregister to perform electronic notarial acts at the same time.

Comment

Section 16-1 requires the electronic notary to register with the commissioning official. In contrast to the former Act, this section has been reworded, lengthened, and transposed with the section titled "Course of Instruction and Examination," now designated as Section 16-2.

Registration serves a number of

purposes. First, it demonstrates the electronic notary's proficiency in electronic communications and use of an electronic signature. Second, it provides the commissioning official with notice of the notary's intent to perform electronic notarizations. Third, it provides information (e.g., decrypting instructions) that may assist

the commissioning official in any subsequent investigation of the electronic notary's conduct. Fourth, it allows the official to verify and authenticate the acts of the electronic notary.

Under Subsection (b), upon "renewing" a notary commission, an interested notary must in essence also renew the registration as an electronic notary. However, unlike the commission renewal process (*see* Section 3-5),

reregistration as an electronic notary does not require renewed satisfaction of the education and testing requirements (*see* Section 16-2(a)).

Subsection (c) is new. It clarifies that a person may seek to be registered to perform electronic notarial acts at the same time the person submits an application for a commission – even an initial notary commission.

§ 16-2 Course of Instruction and Examination.

- (a) Before initially registering the capability to perform electronic notarial acts, an electronic notary public shall complete a course of instruction of [4] hours approved by the [commissioning official], in addition to the course required for commissioning as a notary, and pass an examination based on the course.
- (b) The content of the course shall be notarial laws, procedures, and ethics pertaining to electronic notarization.

Comment

Section 16-2 mandates that all notaries applying for registration to perform electronic acts (*see* Section 16-1) first satisfactorily complete an education and testing requirement. This is in addition to and not a substitute for the general education and testing requirement for basic notary commissioning. (*See* Section 4-3.) The Act adopts the position that, in order to protect the public, any notary who wants to perform electronic notarizations must prove the capability to do so. This section sets forth the mechanism for providing that protection.

The recommended education requirement has been raised to four hours, one hour more than was required in the former Act. The drafters believe that as the electronic world changes and becomes more complex, it makes sense for notaries to have additional "basic training" in order to start off abreast of the very

latest developments affecting electronic notarization. The purpose is to ensure that the electronic notary is at a minimum proficient in performing certain electronic tasks. It is anticipated that the course and exam may be taken interactively online or in a more traditional classroom setting. Administrative matters may be handled in the same manner as are the basic notary education requirements. (*See* Section 4-3 and Comment.) Nothing in the Act precludes the electronic notary from taking additional courses to maintain or improve skills. Indeed, continuing education that keeps the electronic notary apprised of technological advances is encouraged. (*See* THE NOTARY PUBLIC CODE OF PROFESSIONAL RESPONSIBILITY, Principle X and Standard X-A-4.)

§ 16-3 Term of Registration of Electronic Notary.

The term of registration of an electronic notary public begins on the registration starting date set by the [commissioning official] and continues as long as the notary's commission remains in effect or until registration is terminated under Subsection 24-2(a).

Comment

Section 16-3 is new and fills a void in the former Act, *viz.*, the starting and ending

dates of the registration term. It provides that the commissioning official shall set the

term. This section also provides that the term of the electronic registration runs concurrently with that of the notary's commission. When the commission expires or otherwise terminates, so does the electronic registration.

§ 16-4 Electronic Registration Form.

To register the capability to perform electronic notarial acts, a notary public shall electronically sign and submit to the [commissioning official] an electronic form prescribed by the [commission official] which includes:

- (1) proof of successful completion of the course and examination required by Section 16-2;
- (2) the following information:
 - (i) a description of each separate means that will be used to produce electronic signatures [and electronic notary seals];
 - (ii) any keys, codes, software, decrypting instructions, or graphics that will allow the electronic signatures [and seals] produced by the means described in Subparagraph (i) to be verified;
 - (iii) the names of any licensed authorities issuing the means for producing the electronic signatures [and seals], the source of each license, and the starting and expiration dates of each pertinent certificate, software, or process;
 - (iv) an explanation of any revocation, annulment, or other premature termination of any certificate, software, or process ever issued or registered to the applicant to produce an electronic signature or seal;[and]
 - [(v) a declaration that the notary public will use the means issued or authorized for issuance by the [commissioning official] for producing an electronic notary seal; and]
- (3) if the notary will use an electronic journal of notarial acts as described in Chapter 20, the access instructions that will allow the journal to be viewed, printed out, and copied.

Comment

Section 16-4 provides the form for registering as an electronic notary. The form has been substantially revised from the version appearing in the former Act. The separate components of the form are drawn from requirements established in other sections of the Act that speak principally to the notary's ability to perform electronic notarizations in a secure and tamper-evident manner. The form itself must be signed and submitted electronically. Notwithstanding the fact that a notary may register more than one electronic signature (*see* Section 16-5), this section permits any electronic signature adopted by the notary, or required by the commissioning official, to be used to sign

the registration form.

Subparagraph (2) requires the notary to submit to the commissioning official a description of the separate means that will be used to produce electronic signatures in future electronic notarial acts. This is done by providing both a verbal account of each means and certain items cited in Subparagraphs (2)(i) through (2)(iv), such as keys or codes, that will enable the resulting electronic signatures to be verified. These submissions also will allow the commissioning official to authenticate the notary's electronic signature.

The brackets in Subparagraph (2) accommodate two options for registering the

means for producing the electronic notary seal. The first option is to register these means in the same manner as registering the means for producing the notary's electronic signature. The second is to give the commissioning official the duty either to issue the means for producing the notary's seal, or to authorize a trusted entity to issue

such means.

Subparagraph (3) provides the mechanism for the electronic notary to comply with Subparagraph 20-4(1), which directs the notary to provide on the registration form access instructions for the notary's electronic journal.

§ 16-5 Registration of Multiple Means.

Under Section 16-4, a notary public may register at the same or different times 1 or more respective means for producing electronic signatures and electronic notary seals, or single elements combining the required features of both, consistent with the requirements cited elsewhere in this [Act].

Comment

Section 16-5 permits a notary to register multiple means for producing both electronic signatures and electronic notary seals. Notaries accustomed to the practices of the paper world might be uneasy that an electronic notary may use different methods for producing an official seal or signature on different electronic documents. However, it should be no more a matter of concern than the fact that a non-electronic notary might employ different pens to produce the same official signature on different paper documents, or might use both an inking and an embossing seal during a single notarization. The important thing is that, first, the differently produced signatures all refer to the notary as named on the commission (*see* Sections 19-1 and 19-2); second, that the differently produced seals all contain the same information about the notary's commission and jurisdiction (*see* Subparagraph 18-2(3)); and, third, that their

means of production are registered (*see* Section 16-4).

In today's electronic world, it is understandable why a business-savvy notary might want to register different means for producing an electronic signature or seal. Different clients or business situations, for example, might dictate use of different technologies by the notary. (For a fuller discussion of this point, *see* the introductory Comment to this Article.)

This section permits the combining of the electronic signature and the electronic notary seal into a single unit, which would be registered as such with the commissioning official under Section 16-4. The option to use such a combination has been specifically endorsed by the National Association of Secretaries of State. (*See* NASS Standards, Sections 3-4 and Comment.)

§ 16-6 Material Misstatement or Omission of Fact.

The [commissioning official] shall deny registration to any applicant submitting an electronic registration form that contains a material misstatement or omission of fact.

Comment

Section 16-6 is new. It reinforces the view that notaries hold a special position of trust. Material evidence indicating that a notary is not trustworthy will require the commissioning official to deny a

registration request. This provision is consistent with the rule with respect to the application to become or be recommissioned as a notary. (*See* Subsection 3-1(c).)

§ 16-7 Fee for Registration.

The fee payable to the [commissioning official] for registering or reregistering as an electronic notary public is [dollars].

Comment

Section 16-7 sets a registration fee that is distinct from the commissioning fee. The Act anticipates that the fee will be established at an amount to cover the commissioning official's administrative and related costs in overseeing electronic notarizations.

§ 16-8 Confidentiality.

Information in the registration form of an electronic notary public shall be used by the [commissioning official] and designated [State] employees only for the purpose of performing official duties, and shall not be disclosed to any person other than to:

- (1) a government agent acting in an official capacity and duly authorized to obtain such information;
- (2) a person authorized by court order; or
- (3) the registrant or the registrant's duly authorized agent.

Comment

Section 16-8 serves as the counterpart to Section 4-6 regarding confidentiality of application information submitted for a notary commission. In this context, however, some of the information is even more sensitive because, if compromised, it could allow access to otherwise secure electronic documents and records. Moreover, these documents and records might belong to unsuspecting members of the public who had an expectation of privacy when they presented the instruments for notarization. Consequently, this section reinforces the need for strict confidentiality on decrypting instructions, codes, and related items. As with other confidential material, only duly authorized persons are entitled to obtain access to it. Additionally, the section seeks to preserve the security of the notary's keys or other means for producing electronic signatures. Doing so helps protect a notary's privacy.

Chapter 17 – Electronic Notarial Acts

Comment

General: Chapter 17 identifies those traditional paper-based notarial acts that may be performed electronically, and makes clear that certain fundamental requirements for non-electronic notarial acts also apply in the electronic realm. While copy certification was not included as an authorized electronic notarization in the former Act, the drafters decided its inclusion now was essential. (*See* Subparagraph 17-1(4).) The pervasiveness of electronic documents, particularly in the arena of the Internet, gives increasing utility, if not necessity, to a process for electronic certification of such documents.

Section 17-2 specifies six basic requirements for electronic notarial acts, which are taken virtually verbatim from the mandates for non-electronic acts in Article II. Given primacy among these six is the need for the document signer to be in the physical presence of the notary for any notarization

of an electronic signature. A new requirement that is particular to electronic notarial acts directs the notary to take reasonable steps to establish that a particular electronic signature is being used by the very person authorized to do so.

Section 17-3 provides a procedure allowing a person who is physically unable to make an electronic signature to direct an electronic notary to produce that signature on a particular document presented for notarization. Two other persons must be physically present to witness the process.

Section 17-4, complementing the six specific requirements of Section 17-2, requires notaries who perform electronic notarizations to adhere to all other applicable rules in this Act that govern the proper performance of non-electronic notarizations.

§ 17-1 Authorized Electronic Notarial Acts.

The following notarial acts may be performed electronically:

- (1) acknowledgment;
- (2) jurat;
- (3) signature witnessing;
- (4) copy certification; and
- (5) verification of fact.

Comment

Section 17-1 identifies the five types of notarization that can be performed electronically.

Copy certification has been added to the list of authorized electronic acts. (*See* the corresponding new definition of “copy certification” in Section 2-4.) The drafters recognized that the pervasive presence of electronic and Internet documents upon which people rely in everyday personal and professional life has created situations where verifying the exact language or appearance of such documents is often necessary or useful. Since the content of electronic documents and Internet sites is readily changeable, electronic copy

certifications will allow interested parties to possess an exact image, or an exact statement of language, used in a particular document or site on a particular date and at a particular time, as confirmed by a notary.

Oaths and affirmations are not mentioned because, being purely oral acts that require a face-to-face meeting of oath-taker and notary, they are not performed differently in an electronic context than in a paper environment. An electronic notary must still administer an oath or affirmation in person when executing an electronic jurat (*see* Section 2-7) or swearing in a credible witness (*see* Section 2-5) for an electronic acknowledgment, jurat, or signature

witnessing.

Nothing in this or any other section of this Article derogates from the electronic

notary's authority to perform any of the notarial acts authorized by Section 5-1 in a non-electronic setting.

§ 17-2 Requirements for Electronic Notarial Acts.

An electronic notary public shall perform an electronic notarization only if the principal:

- (1) is in the presence of the notary at the time of notarization;
- (2) is personally known to the notary or identified by the notary through satisfactory evidence;
- (3) appears to understand the nature of the transaction;
- (4) appears to be acting of his or her own free will;
- (5) communicates directly with the notary in a language both understand; and
- (6) reasonably establishes the electronic signature as his or her own.

Comment

Section 17-2 restates the basic requirements common to all notarizations, whether paper-based or electronic. The drafters thought it imperative to highlight the fact that electronic notarizations carry the same fundamental responsibilities as their non-electronic counterparts. Consequently, basic requirements for all notarizations, as set out in Section 5-2, mandating the principal's presence, proof of identity, awareness, and exercise of free will, also must be observed for electronic notarial acts. Subparagraph (1) clarifies that electronic notarization does not mean "remote" notarization. Not only must the principal be physically present before the notary, but the notary also must meet the same identity, volition, and awareness standards imposed for paper-based notarizations.

It should be pointed out, however, that the definition of "principal" (*see* Section 2-17) applies to "a person whose signature is notarized; or...a person, other than a credible witness, taking an oath or affirmation from the notary." Thus, the determinations about identity, awareness, and volition required of the notary by Subparagraphs (2), (3), and (4) do not apply to "requesters of fact" – *i.e.*, persons asking the notary to perform either a copy certification or a verification of fact (*see* Section 2-19). Significantly, the drafters came to the conclusion that the personal

appearance before the notary of a requester of fact is irrelevant in a notarial act in which the personal identity of the signer is not a central issue. In this Internet age, notaries must be allowed to certify needed electronic copies and to provide information available in local public records without imposing the inconvenience or hardship of requiring a client to present the request in person. Notaries serving such remote clients, of course, would be encouraged to use their best judgment and due caution by not engaging clients who are anonymous. Nothing in this section prevents a notary from asking for proof of identity from a requester of fact who does appear in person before the notary, but it is not required.

Two new requirements have been added to the section. First, the new Subparagraph (5) is drawn from the paper-based Subparagraph 5-2(6), which addresses increasingly common communication problems involving foreign-language documents and non-English-speaking signers. Second, the new Subparagraph (6) applies only to electronic transactions – added by the drafters as a fraud-deterrent measure. When paper-based notarizations are performed, normally the notary can easily read and recognize a handwritten signature as belonging to a person who has just been identified. Such ease of recognition may not be the case with electronic signatures, which can be

produced at the mere touch of a computer key. To minimize the fraudulent use of another person's electronic signature, the Act now requires the notary to take affirmative action to ascertain that an electronic signature belongs to the individual using it. Some states already mandate such proactivity by the electronic notary – *see, e.g.*, CODE OF VA. § 47.1-14(D), which directs the notary performing electronic acts to ensure that any registered devised used to create electronic signatures is current. Subparagraph (6) leaves to the

notary's judgment the matter of what evidence reasonably identifies an individual as the rightful owner of an electronic signature made or acknowledged in the notary's presence.

The drafters chose not to incorporate the restriction of Section 5-2(5) (prohibiting the notary from notarizing a document written in a language the notary does not understand) because it would prevent many notarizations in the electronic world, where signatures may be processes or employ symbols not understood by the notary.

§ 17-3 Notary May Sign for Principal Unable to Sign Electronically.

An electronic notary public may electronically sign the name of a principal physically unable to make an electronic signature on an electronic document presented for notarization if:

- (1) the principal directs the electronic notary to do so in the presence of 2 witnesses disinterested in the document;
- (2) the electronic notary electronically signs the principal's name in the presence of the principal and the 2 witnesses;
- (3) both witnesses sign their own names in the electronic notary's journal;
- (4) the electronic notary writes on the electronic notarial certificate: "Signature made by the electronic notary at the direction and in the presence of (name of principal unable to sign electronically) and in the presence of (names and addresses of 2 witnesses) pursuant to Section 17-3 of [Act]"; and
- (5) the electronic notary notarizes the signature through an acknowledgment, jurat, or signature witnessing.

Comment

Section 17-3 provides the procedure for an electronic notary to sign electronically the name of a principal who is unable to do so. This section mirrors Section 5-4 ("Signing for Principal Unable to Sign") but places the procedure in an electronic context. The same safeguards against fraud are in place (*i.e.*, two disinterested witnesses) to protect both the principal and any third party who might rely on the electronic document.

Since some electronic signatures may be executed by the mere depression of a computer key, it is possible that the electronic procedure outlined in this section may not be used as often as its paper-based counterpart. Certainly, some individuals who are physically unable to sign or make a mark by pen might be able to

negotiate the displacement of a button on a keyboard. It is noteworthy that there is no section in this chapter corresponding to the paper-based Section 5-3 ("Signature by Mark"), because a would-be electronic signer would either be able to perform the physical action required to produce an electronic signature (*e.g.*, depress a key or type in a name) or not. At present there is not any electronic equivalent to a signature by mark.

Subparagraph (3) requires both witnesses to sign the notary's journal. Any electronic journal used for this purpose must be capable of capturing the witnesses' holographic or electronic signatures.

§ 17-4 All Notarial Rules Apply.

In performing electronic notarial acts, an electronic notary shall adhere to all applicable rules governing notarial acts provided in this [Act].

Comment

Section 17-4 makes clear that regardless of whether the document being notarized is electronic or non-electronic, the notary has to follow the fundamental rules that both prescribe and proscribe certain acts. Thus, for example, when notarizing an electronic document, the notary may not influence a person to act or refrain from

acting (*see* Subsection 5-7(a)), execute a false certificate (*see* Subsection 5-8(a)), notarize a blank or incomplete document (*see* Section 5-9(a)), use the notary seal or title in testimonials (*see* Section 5-11), or engage in the unauthorized practice of law (*see* Section 5-12).

Chapter 18 – Electronic Notarial Certificate

Comment

General: Chapter 18 is the electronic counterpart of Chapter 9, which describes the components, form, and use of non-electronic notarial certificates. Section 18-1 states that the notary must properly complete an electronic notarial certificate (*see* definition in Section 15-6) for every electronic notarization performed. Section 18-2 states that

a proper electronic certificate is comprised of a registered electronic signature, a registered electronic notary seal, and attestation wording appropriate to the notarial act. Section 18-3 dictates that the form of this attestation wording must be the same as that described for non-electronic documents in Chapter 9 of the Act.

§ 18-1 Completion of Electronic Notarial Certificate.

In performing an electronic notarial act, the notary shall properly complete an electronic notarial certificate.

Comment

Section 18-1 requires that all notarized electronic documents bear an electronic notarial certificate. (*See* Section 15-6 for a definition of “electronic notarial certificate.”) Notarial certificates likewise are required for notarization of all non-electronic documents. (*See* Subsection 9-1(a).) A typical notarial certificate contains a venue, date of notarization, statement of the facts being attested (in the form of wording for an acknowledgment, jurat, or any other notarial act), testimonium clause (*i.e.*, “Witness my hand and official

seal...”), and the notary’s signature and seal.

Whether electronic or non-electronic, the notarial certificate may be either an integral part of the document or an attachment to it. In this Article, the notary’s electronic signature is the means for securing an electronic certificate to its intended document, and for enabling a certificate attachment to manifest subsequent tampering. (*See* Subparagraph 19-2(3).) The notary’s electronic signature also provides evidence of alteration of the underlying document itself.

§ 18-2 Components of Electronic Notarial Certificate.

A proper electronic notarial certificate shall contain:

- (1) completed wording appropriate to the particular electronic notarial act, as prescribed in Section 18-3;
- (2) a registered electronic signature; and
- (3) a registered electronic notary seal, which shall include:
 - (i) the name of the electronic notary fully and exactly as it is spelled on the notary’s commissioning document;
 - (ii) the jurisdiction that commissioned and registered the electronic notary;
 - (iii) the title “Electronic Notary Public”;
 - (iv) the commission or registration number of the electronic notary; and
 - (v) the commission expiration date of the electronic notary.

Comment

Section 18-2 sets forth the individual elements required for a proper electronic notarial certificate. They reflect the requirements for a non-electronic notarial certificate. (*See* Section 9-1.)

Only an electronic signature and an electronic notary seal whose means of production have been registered by the notary under the terms of Section 16-4 may be used with an electronic notarial certificate. The

notary has the option of satisfying the requirements of Subparagraphs (2) and (3) by use of a single element that combines all the mandated features of a registered electronic signature and registered electronic notary seal. (*See* Section 16-5.)

Nothing in the section precludes the registered electronic notary seal from including a graphic image of a traditional seal.

§ 18-3 Form of Electronic Notarial Certificate.

- (a) The wording of an electronic notarial certificate shall be in a form that:
- (1) is set forth in Chapter 9 of this [Act];
 - (2) is otherwise prescribed by the law of this [State];
 - (3) is prescribed by a law, regulation, or custom of another jurisdiction, provided it does not require actions by the electronic notary that are unauthorized by this [State]; or
 - (4) describes the actions of the electronic notary in such a manner as to meet the requirements of the particular notarial act, as defined in Chapter 2 of this [Act].
- (b) A notarial certificate shall be worded and completed using only letters, characters, and a language that are read, written, and understood by the electronic notary.

Comment

Section 18-3 prescribes the allowed forms for an electronic notarial certificate, and corresponds to its non-electronic counterpart. (*See* Subsection 9-1(b) and (c).) The essential congruity of the form and content of the electronic and non-electronic certificates reinforces a fundamental principle of this Act: the only true difference between electronic and non-electronic

notarizations is the medium used.

Subsection (b) is consistent with Subsection (c) of Section 9-1, iterating that the notary must understand what the certificate states. Otherwise, the notary would not be able to execute the certificate with the knowledge that it is what it purports to be, *i.e.*, an acknowledgment, jurat, or other notarial act.

Chapter 19 – Registered Electronic Signature and Seal

Comment

General: Chapter 19 sets forth rules for the secure use of registered electronic signatures and notary seals, starting with the fundamental requirement in Section 19-1 that any such signatures and seals be “attached to or logically associated with” (*see* UETA § 2(8)) a notarial certificate in such a way that both are attributed to the notary. The Act remains neutral about the type of technology or process to be used to achieve this end.

The security attributes of registered electronic signatures are detailed in Section 19-2. Registered electronic notary seals are not required to have all of the same security attributes. This difference speaks to the primacy of the notary’s electronic signature in this Act, and to the drafters’ economy in avoiding redundancy and needless cost. Even so, there is no prohibition in the Act against a registered electronic notary seal having all four of the same security attributes as a registered signature; indeed, if the signature and seal are combined into the same “single element” (*see* Section 16-5),

they necessarily would share these attributes.

The fourth security attribute of Section 19-2 (*i.e.*, keeping the means for producing a registered electronic seal “under the electronic notary’s sole control”) was considered so critical by the drafters that it was extended to registered electronic notary seals by Section 19-3. Further, Section 19-4 makes clear that even an employer who has paid for a notary’s commissioning and electronic registration does not have a right to control or retain any means solely designed to produce an employee notary’s electronic signatures and seals.

Section 19-5 provides that a registered electronic signature of a notary may be used for lawful purposes other than performing notarizations, as long as it does not label the user as a notary public. The same, however, does not hold true for registered electronic notary seals, which are restricted to official use only. This is consistent with the rules for use of traditional paper-based notary signatures and seals.

§ 19-1 Electronic Signature and Seal Attributed to Notary.

In notarizing an electronic document, the notary shall attach to, or logically associate with, the electronic notarial certificate a registered electronic signature and a registered electronic notary seal, or a registered single element in conformance with Section 16-5, in such a manner that the signature and the seal, or the single element, are attributed to the notary as named on the commission.

Comment

Section 19-1 applies the signature and seal requirements for non-electronic notarizations to their electronic counterparts. (*See* Sections 8-1 and 8-2.) The language “attach to, or logically associate with,” adopted from UETA (*see* UETA § 2(8)), is a technology-neutral way to express how the signature and seal become part of the electronic notarial certificate.

The section recognizes that an electronic signature and seal may be combined into a single element. The Act permits the use of

such a single element, provided that it meets all requirements pertaining to both a registered electronic signature and a registered electronic notary seal. (*See* Section 16-5.) These requirements are designed to deter fraud and help assure the security of the notarized document.

If a notary has registered more than one means for producing, respectively, electronic signatures and notary seals, any one of the resulting registered signatures may be used with any one of the resulting registered seals in

notarizing an electronic document. Likewise, if the notary has registered more than one means of producing a combined signature and seal in a single element, then any one of the produced single elements may be used in notarizing electronically.

§ 19-2 Attributes of Registered Electronic Signature.

A registered electronic signature shall be:

- (1) unique to the electronic notary public;
- (2) capable of independent verification;
- (3) attached to or logically associated with an electronic notarial certificate in such a manner that any subsequent alteration of the certificate or underlying electronic document prominently displays evidence of the alteration; and
- (4) attached or logically associated by a means under the electronic notary's sole control.

Comment

Section 19-2 enumerates four attributes of electronic signatures commonly found in statutes. (*See, e.g.*, CAL. GOV. CODE § 16.5; FLA. STAT. § 117.021(2); N. MEX. ADMIN. CODE § 12.9.2.11(C); CODE OF VA. § 47.1-16(D).)

Subparagraph (1) establishes that each notary must have his or her own distinctive means for performing electronic notarizations. Just as a notary could not simulate another notary's holographic signature to perform a notarization, an electronic notary may not use another's electronic signature. This rule drives the registration form requirements of Section 16-4.

Subparagraph (2) requires that the electronic signature be verifiable by independent means. (*See* definition of "capable of independent verification" in Section 15-1.) This permits third parties relying on electronically notarized documents to determine whether an electronic signature has been duly registered to a particular notary and is valid. The commissioning official could serve as the archivist of the means registered by notaries for producing electronic signatures, or that function could be performed by another trusted entity capable of maintaining a publicly accessible registration list. Although the Act is silent on point, it is conceivable that third parties seeking signature verifications might have to pay a fee to obtain the desired information.

Subparagraph (3) provides an extremely important attribute of the registered electronic

signature, *viz.*, that it render any change to the notarial certificate or document conspicuously evident. Electronic documents can be altered quite easily without any apparent trace. In order for third parties to rely on the authenticity of a notarized electronic document, there needs to be some assurance that the document reads exactly as it did when notarized. This third attribute of a registered electronic signature provides that assurance. Such resistance to tampering is promoted by the Uniform Real Property Electronic Recording Act (URPERA), which directs state panels adopting standards for electronic recording to consider "standards requiring adequate information security protection to ensure that electronic documents are accurate, authentic, adequately preserved, and resistant to tampering." (*See, e.g.*, CODE OF S. CAR. § 30-6-50(b)(5).)

Subparagraph (4) makes clear that the means for affixing a registered electronic signature must be under the exclusive control of the notary. This is consistent with the rules dictating that non-electronic notarial seals and journals be under the notary's sole control. (*See* Subsections 7-4(b) and 8-2(c).) An electronic signature may be applied with the touch of a computer key. Without proper safeguards, it can be easy for persons familiar with a notary's routine to co-opt the notary's registered electronic signature for fraudulent purposes. Mandating that the means for electronically signing be within the notary's exclusive control will deter fraud.

It should be understood that in the paper-based world, a person would need to take significant steps to forge or steal both a notary's signature and a notary's seal in order to perform a fraudulent notarial act. In the electronic world, however, the signature and seal can be combined and together employed with one strike of a computer key. (See Section 19-1.) Thus, a notary's failure to maintain exclusive control over the means of producing electronic signatures and seals offers easy opportunities for illegal acts. In one respect, the mandate of

Subparagraph (4) may be met quite simply by designating a password known only to the notary to enable access to the means for producing a registered electronic signature. However, the conscientious electronic notary will be aware that passwords may be uncovered or subverted by technically sophisticated criminals, and therefore will be proactive in taking whatever measures are appropriate to prevent unauthorized use of a registered electronic signature.

§ 19-3 Security of Registered Electronic Notary Seal.

At all times the means for producing registered electronic notary seals, or registered single elements as described in Section 16-5, shall be kept under the sole control of the electronic notary.

Comment

Section 19-3 is essentially a continuation of Subparagraph 19-2(4). It extends the same mandate (*i.e.*, exclusive control by the notary) from the means of producing an electronic signature to that for producing an electronic notary seal or a single element combining the required features of the signature and seal. (See

Section 16-5.) Through use of the words "At all times," Subsection (a) heightens the notary's accountability for the security of these items. "At all times," of course, does not mean a constant physical presence by the notary, but it does mean employment of reliable systems to safeguard access when the notary is not present.

§ 19-4 Employer Shall Not Use or Control Means.

An employer of an electronic notary shall not use or control the means for producing registered electronic signatures and notary seals, or registered single elements combining the required features of both, nor upon termination of a notary's employment, retain any software, coding, disk, certificate, card, token, or program that is intended exclusively to produce a registered electronic signature, notary seal, or combined single element, whether or not the employer financially supported the employee's activities as a notary.

Comment

Section 19-4 is consistent with rules governing use and control of a notary seal for non-electronic notarizations. (See Subsection 8-2(c).) The overarching principle here is that, regardless of who financed the notary's commissioning, the commission itself solely belongs to and is controlled by the notary, as are all the appurtenances of office – including the means for producing the notary's electronic

signatures and seals. This does not mean that a notary leaving a company's employment is entitled to take every piece of "software, coding, disk, certificate, card, token, or program" used in producing a registered electronic signature or notary seal. Only those items "intended exclusively" to produce a registered signature or seal, or a combined single element, would be retained by the notary.

§ 19-5 Non-Notarial Use.

- (a) A registered electronic signature may be used by the electronic notary for lawful purposes other than performing electronic notarizations, provided that neither the title “notary” nor any other indication of status as a notarial officer is part of the signature.
- (b) Neither a registered electronic notary seal nor a combined single element containing the seal shall be used by the electronic notary for any purpose other than performing lawful electronic notarizations.

Comment

Section 19-5 applies certain principles of paper-based notary signatures and seals to their electronic counterparts.

Subsection (a) specifically allows the notary to use a registered electronic signature for non-notarial transactions, personal or professional, provided the signature does not contain any designations, such as the title “notary,” indicating it belongs to an official with notarial powers. Otherwise, there could be confusion about whether a particular electronic document was or was not notarized. This corresponds to a notary’s use of handwritten personal signatures on different paper documents in official and unofficial capacities, respectively.

In the future, the same electronic credential registered by a notary to produce electronic signatures for notarizations (*see* Section 16-4) might be used as well for the

non-notarial purpose of systems access. For example, future notaries might be hired by organizations to perform electronic notarial acts but first will need to obtain access to a secure computer system using their electronic credentials in order to perform those official acts.

Subsection (b) lays down the simple and obvious rule that precludes a notary from using a registered electronic notary seal for any purpose other than performing an electronic notarization. This mirrors the rule with respect to improper use of an inking seal on paper documents. (*See* Subsection 8-2(b).) Because a single registered element combining the electronic signature and seal does indeed contain the seal (*see* Section 16-5), the same prohibition applies to the single element.

Chapter 20 – Record of Electronic Notarial Acts

Comment

General: In the former Act, no separate chapter existed to address record-keeping for electronic notarizations. Instead, the matter was largely dealt with in an expansive definition that the current drafters believed did not do full justice to the topic. Chapter 20 takes on this task.

Section 20-1 restates basic rules for maintaining a journal of notarial acts already set forth in Section 7-1 for paper-based notaries. Rather than insist that electronic notaries keep an electronic record of their official acts, the Act gives such notaries the option to maintain a traditional paper journal. Similarly, otherwise solely paper-based notaries may opt to keep electronic records. This flexibility was seen by the drafters as helpful at a time when many notaries are still transitioning to electronic processes.

Section 20-2 enumerates the required attributes of an electronic journal that, in the former Act, had been incorporated into the definition of “electronic journal of notarial acts.” The attributes include a two-factor

access procedure for the notary making entries or any person seeking to view or copy an entry (Subsection 1); a capability to prevent alteration of the content or sequence of a saved entry (Subsection 2); a backup system to compensate for loss of the original record (Subsection 3); and the capability of capturing, storing, and printing out the image of a handwritten signature, as well as data related to one other type of biometric identifier (Subsections 4 and 5). The “Comment” to Section 20-2 points out that an electronic notarial record is superior to a paper one in matters such as guarding the confidential data of signers.

Section 20-3 imposes on notaries who keep electronic journals the responsibility of obeying all applicable rules for traditional non-electronic journals.

Section 20-4 requires inclusion of electronic journal access instructions on the electronic notary registration form (*see* Subsection 16-4(3)), and notification of the commissioning official of any subsequent changes.

§ 20-1 Maintaining Journal of Electronic Notarial Acts.

- (a) An electronic notary public shall keep, maintain, protect, and provide for lawful inspection a chronological journal of notarial acts that is either:
 - (1) a permanently bound book with numbered pages; or
 - (2) an electronic journal of notarial acts as described in Section 20-2.
- (b) An electronic notary shall keep a record of electronic and non-electronic notarial acts in the same journal.
- (c) An electronic notary shall maintain only 1 active journal at the same time, except that a backup of each active and inactive electronic journal shall be retained by the notary in accordance with Subparagraph 20-2(3) as long as each respective original journal is retained.

Comment

Section 20-1 mandates that a notary who performs electronic notarial acts must maintain a journal. This is consistent with the rule established in Section 7-1 for non-

electronic notarial acts. The section does not require that electronic acts be recorded in an electronic journal. Subsection (a) permits notaries to record electronic transactions in a

bound paper journal. Although a jurisdiction always may opt to require an electronic notary to maintain an electronic journal (*see, e.g.,* 29 DEL. CODE § 4314(a); CODE OF VA. § 47.1-14(C)), the drafters decided that notaries should be given flexibility to perform this record-keeping function in the way that best suits them, especially in this era of continuing transition to electronic processes.

Conforming further with Section 7-1, Subsections (b) and (c) restate two important rules. First, a notary shall

maintain only one active, official journal at a time and record all notarial acts (both electronic and non-electronic) in it. This averts possible later confusion about the completeness of any one journal. Second, if an electronic journal is used to record notarial acts, the notary must maintain a backup copy to accommodate the not inconceivable event of irreversible computer system failure or damage. (*See* Subparagraph 20-2(3).) Ideally, the backup journal would be retained in a separate, off-site system.

§ 20-2 Attributes of Electronic Journal.

An electronic journal of notarial acts shall:

- (1) allow journal entries to be made, viewed, printed out, and copied only after access is obtained by a procedure that uses two factors of authentication;
- (2) not allow a journal entry to be deleted or altered in content or sequence by the notary or any other person after a record of the notarization is entered and stored;
- (3) have a backup system in place to provide a duplicate record of notarial acts as a precaution in the event of loss of the original record;
- (4) be capable of capturing and storing the image of a handwritten signature and the data related to 1 other type of recognized biometric identifier; and
- (5) be capable of printing out and providing electronic copies of any entry, including images of handwritten signatures and the data related to the 1 other selected type of recognized biometric identifier.

Comment

Section 20-2 enumerates the minimum attributes of an electronic journal. While in the former Act the attributes of the journal appeared in the definitions chapter (*see* the current much shorter definition of “electronic journal of notarial acts” in Section 15-4), the drafters decided that the more appropriate venue for these detailed specifications was this chapter.

Subparagraph (1) provides security to the journal by requiring a two-factor access process. There are three categories from which such authenticating factors may be drawn. These are based on 1) who you are (*e.g.,* a user name or thumbprint), 2) what

you have (*e.g.,* a token or smart card), and 3) what you know (*e.g.,* a password or knowledge-based question such as, “What is your mother’s maiden name?”). Subparagraph (1) requires that access to the electronic journal be protected by at least two of these factors. Such protection is consistent with the rules in Section 7-4 for safeguarding a bound paper journal. It was the consensus of the drafters that while notary journals are not purely public records *per se* and should not be accessible at whim, their public utility should be recognized and limited access granted in certain situations.

Subparagraph (2) mandates that the

electronic journal be tamper-resistant. It is critical that the system not allow changes by the notary or anyone else after a journal entry is electronically saved. Without such protection, the integrity of the electronic journal is compromised. In a paper journal, erasures or deletions are conspicuous and call attention to possible fraud, but electronic records often can be changed without detection. Thus, any reliable electronic journal must be tamper-resistant.

Subparagraph (4) dictates that the electronic journal be able to capture a handwritten signature and one other type of recognized biometric identifier, such as a thumbprint. Nothing would prohibit the additional capability of capturing a photographic facial image of a principal. Indeed, a signature, thumbprint, and photograph would be convincing evidence that a particular individual

appeared in person before the notary, and comprise a potent deterrent to forgers.

Subparagraph (5) requires that the electronic journal be capable of printing out any or all entries, including any or all associated images and supplemental information (*e.g.*, signature dynamics data). This increases the public utility of the electronic journal and puts it on equal footing with its paper counterpart. (*See* Section 7-3.) Yet, in many respects the electronic journal is far superior to a paper one in the benefits it can provide to the public. For instance, the electronic journal much more easily enables the notary to protect the confidentiality of other entries from the unauthorized scrutiny of a principal, a witness, or a copy seeker who has been given proper access to view a particular entry.

§ 20-3 Rules for Electronic Journal.

In maintaining an electronic journal of notarial acts, a notary public shall comply with the applicable prescriptions and prohibitions regarding the contents, copying, security, surrender, and disposition of a journal as set forth in Chapters 7 and 12 of this [Act].

Comment

Section 20-3 simply imposes on the notary who maintains an electronic journal the same obligations in maintaining and disposing of this journal as exist for paper journals. (*See, generally*, Sections 7-2

through 7-5; and 12-4 through 12-5.) Notably, this rule applies as well to non-electronic notaries who opt to record their paper-based official acts in an electronic journal.

§ 20-4 [Commissioning Official's] Access to Electronic Journal.

If an electronic notary public elects to keep an electronic journal of notarial acts pursuant to Subsection 20-1(a), the notary shall:

- (1) provide to the [commissioning official] on the registration form described in Section 16-4 the access instructions that allow journal entries to be viewed, printed out, and copied; and
- (2) notify the [commissioning official] of any subsequent change to the access instructions.

Comment

Section 20-4 requires that the commissioning official be given the means to access electronic journals kept by electronic notaries. Initially, this is done through the registration process. (*See*

Subparagraph 16-4(3).) Subparagraph (2) directs the notary to inform the commissioning official of any later change in the procedure for gaining access to the journal. In the absence of the notary, such

access instructions enable the official to glean information from any active or inactive journal should it ever be needed in authenticating an electronic or non-electronic act, or in investigating the activities of the notary.

This section is similar to Section 7-6. The drafters believed that this same directive

is needed in both the article guiding electronic notaries and that guiding non-electronic notaries, because notaries in either group may opt to maintain an electronic journal. Non-electronic notaries, of course, do not use the electronic notary registration process to inform the commissioning official of their journal access procedure.

Chapter 21 – Fees of Electronic Notary

Comment

General: This chapter adapts the fee rules for paper-based notarial acts (*see* Chapter 6) to electronic notarizations. The drafters anticipated that jurisdictions will permit higher fees for electronic notarizations than for their paper-based counterparts because of the costs necessary to establish oneself and operate as an electronic notary. There also will be ongoing upgrade, maintenance, and security expenses. Electronic notary fees must bear a reasonable relationship to operating costs, yet be set at a level that does not make electronic notarial acts prohibitively expensive and thus discourage the use of electronic documents.

§ 21-1 Imposition and Waiver of Fees.

- (a) For performing an electronic notarial act, an electronic notary public may charge the maximum fee specified in Section 21-2, charge less than the maximum fee, or waive the fee.
- (b) An electronic notary shall not discriminatorily condition the fee for an electronic notarial act on the attributes of the principal or requester of fact as set forth in Subsection 5-6(a) of this [Act], though an electronic notary may waive or reduce fees for humanitarian or charitable reasons.

Comment

Section 21-1 essentially adopts the general rules regarding fees for paper-based notarizations (*see* Section 6-1) and applies them to electronic notarizations. As with non-electronic acts, an electronic notary must neither charge a fee higher than permitted by statute, nor improperly discriminate in the setting of fees. (For a discussion of prohibited discriminatory fee practices, *see, generally*, Section 6-1 “Comment.”)

§ 21-2 Maximum Fees.

- (a) The maximum fees that may be charged by an electronic notary public for performing an electronic notarial act are:
 - (1) for an acknowledgment, [dollars] per signature;
 - (2) for a jurat, [dollars] per signature;
 - (3) for a signature witnessing, [dollars] per signature;
 - (4) for a copy certification, [dollars] per [500 characters] certified but in no event shall the fee be less than [dollars]; and
 - (5) for a verification of fact, [dollars] per certificate.
- (b) An electronic notary may charge a travel fee when traveling to perform an electronic notarial act if:
 - (1) the notary and the person requesting the electronic notarial act agree upon the travel fee in advance of the travel; and
 - (2) the notary explains to the person requesting the notarial act that the travel fee is both separate from the notarial fee prescribed in Subsection (a) and neither specified nor mandated by law.

Comment

Section 21-2 sets the fee schedule for electronic notarizations, closely following the format of Section 6-2, which sets fees for non-electronic acts. It is anticipated that these fees will be higher than those for paper-based notarizations. The exact fees should be determined by lawmakers who take into account the expenses associated with maintaining the capability to perform electronic notarizations. They must not be so high as to discourage citizens from availing themselves of electronic services. Since federal legislation (E-Sign) has paved the way for the widespread use of electronic documents and signatures, efforts should be made to foster that initiative. A reasonable, affordable fee structure will speed the absorption of electronic notarization into the stream of commerce.

In Subsection (a), the drafters were particularly challenged by the issue of how to charge properly for copy-certifying an electronic document, because charging per page, as is the rule with copy-certifying a paper original (*see* Subsection 6-2(a)), does not correspondingly accommodate lengthy “scroll down” electronic pages. Charging by character or word count seemed fairer, although this method is less

useful when graphic images are involved. Some drafters proposed that “file size” be the determining factor in establishing the fee, but there often will not be direct proportionality between the size of an electronic file and the complexity of the copy-certification task. After considerable discussion, the drafters decided that it would be fairest in most cases for the electronic notary to charge based on the number of characters in the original electronic document, but with a “floor” or minimum fee in every case.

Subsection (b) restates the travel fee rules and restrictions for paper-based notarial acts (*see* Section 6-2(b)), and applies them to electronic notarizations. The provision reinforces the position that “remote notarizations” are not permitted. Principals must be in the physical presence of the notary for every notarization of a signature. There are not any exceptions made for electronic notarizations. Thus, if an electronic notary has a laptop computer or other portable means of notarizing a principal’s electronic document, the notary may agree with the principal on an appropriate travel fee. (For further rules and discussion of travel fees, *see* Section 6-2(b) “Comment.”)

§ 21-3 Payment Prior to Electronic Act.

- (a) An electronic notary public may require payment of any fees specified in Section 21-2 prior to performance of an electronic notarial act.
- (b) Any fees paid to an electronic notary prior to performance of an electronic notarial act are non-refundable if:
 - (1) the act was completed; or
 - (2) in the case of travel fees paid in compliance with Subsection 21-2(b), the act was not completed after the notary traveled to meet the principal because it was prohibited under Section 17-2, or because the notary knew or had a reasonable belief that the notarial act or the associated transaction was unlawful.

Comment

Section 21-3 adapts for electronic notaries the rules giving paper-based notaries discretion to require payment of fees prior to the performance of a notarial act. (*See* Section 6-3.) Under these rules, if a notarial act is not

completed because of an action of the principal for whom the notarization is performed (*see* Section 17-2), then the notary may still retain the travel fee.

§ 21-4 Fees of Employee Electronic Notary.

The rules relating to fees for an employee notary public that are prescribed in Section 6-4 of this [Act] also apply to an electronic notary public in the performance of an electronic notarial act.

Comment

For electronic notaries who are non-electronic notarial acts. (*See* Section 6-4 employees, Section 21-4 adopts the same and Comment.) rules applicable to employees who perform

§ 21-5 Notice of Fees.

An electronic notary public who charges for performing electronic notarial acts shall conspicuously display in all of the notary's places of business and Internet sites, or present to each principal or requester of fact when outside such places of business, an English-language schedule of maximum fees for electronic notarial acts, as specified in Subsection 21-2(a). No part of any such notarial fee schedule shall appear or be printed in smaller than 10-point type.

Comment

Section 21-5 adopts for electronic notaries who charge fees a disclosure requirement similar to that for paper-based notaries. (*See* Section 6-5 and Comment.) In the case of a notary traveling to perform an electronic notarization, the Act would allow a fee schedule to be "presented" through an on-screen laptop display in lieu of a schedule printed on paper.

Chapter 22 – Evidence of Authenticity of Electronic Notarial Act

Comment

General: Chapter 22 provides for the authentication of electronically notarized documents so that they may be honored in foreign jurisdictions. Section 22-1 dictates that an electronic authenticating certificate be attached to or logically associated with the notarized document in a way that imparts the same level of tamper-evident security as did use of a registered electronic signature by the notary. Section 22-2 prescribes a form for the electronic certificate of authority, and Section 22-3 a maximum fee that may be charged by the commissioning official for issuance of the certificate.

§ 22-1 Form of Evidence of Authority of Electronic Notarial Act.

- (a) On a notarized electronic document transmitted to another state or nation, electronic evidence of the authenticity of the registered electronic signature and seal of an electronic notary public of this [State], if required, shall be in the form of an electronic certificate of authority signed by the [commissioning official] in conformance with any current and pertinent international treaties, agreements, and conventions subscribed by the government of the United States.
- (b) The electronic certificate of authority described in Subsection (a) shall be attached to or logically associated with the electronically notarized document in such a manner that any subsequent alteration of the notarized document, or removal or alteration of the electronic certificate of authority, produces evidence of the change.

Comment

Section 22-1 describes the electronic version of a certificate of authority, for use in authenticating a notarized electronic document. (See the rules for a non-electronic certificate of authority in Section 10-1.)

Subsection (b) provides the same security protection for electronic certificates of authority as is given to notarized electronic documents themselves. Specifically, the section requires that the means for attaching or logically associating the certificate to the notarized document

must produce evidence of any future tampering with either the certificate or document – thus, conforming with the NASS Standards. (See NASS Standards, *Requirements for Issuance of Electronic Apostilles and Certificates of Authentication*, 13 through 15 (2006) (www.nass.org). The drafters believed that a certificate from the commissioning authority that speaks to the authenticity of an electronic notary's act should maintain at the very least the same level of security as the underlying notarized document.

§ 22-2 Certificate of Authority for Electronic Notarial Act.

An electronic certificate of authority evidencing the authenticity of the registered electronic signature and seal of an electronic notary public of this [State] shall be in substantially the following form:

Certificate of Authority for Electronic Notarial Act

I, _____ (name and title of commissioning official), certify that _____ (name of electronic notary public), the person named as Electronic Notary Public in the attached, associated, or accompanying electronic document, was registered as an Electronic Notary Public for the [State] of [name of jurisdiction] and authorized to act as such at the time the document was electronically notarized. I also certify that the document bears no evidence of illegal or fraudulent alteration.

To verify this Certificate of Authority for an Electronic Notarial Act, I have included herewith my electronic seal and signature this ____ day of _____, 20____.

(Electronic seal and signature of [commissioning official])

Comment

Section 22-2 prescribes a certificate for issuance by the commissioning official that in a straightforward manner provides the necessary assurances to third parties relying upon a particular notarized electronic document and confirms an electronic notary's authority to notarize that document.

Implicit in this confirmation is the assurance that the document has the security features required by the Act. The certificate largely reflects the requirements of the authenticating certificate for non-electronic acts set forth in Section 10-2.

§ 22-3 Fee for Electronic Certificate of Authority.

For issuing an electronic certificate of authority for an electronic notarial act, including an electronic form of the Apostille set forth in Section 10-3 of this [Act], the [commissioning official] may charge a maximum of [dollars].

Comment

Section 22-3 authorizes the commissioning official to charge a fee for issuing a certificate of authority, including an electronic Apostille, for a notarized electronic document. This is consistent with

the practice for non-electronic certificates of authority and Apostilles. (*See* Section 10-4.) The specific dollar amount is not set, but instead left to the discretion of the lawmakers of each jurisdiction.

Chapter 23 – Changes of Status of Electronic Notary

Comment

General: This chapter provides guidance for electronic notaries in reporting to the commissioning official pertinent changes in status. The provisions correspond to similar rules imposed on paper-based notaries (*see* Chapter 12), but the distinctive nature of the

electronic notary's duties requires that some additional status changes be reported. However, nothing in this chapter relieves the notary from any obligations imposed by Chapter 12.

§ 23-1 Change of E-Mail Address.

Within [5] business days after the change of an electronic notary public's e-mail address, the notary shall electronically transmit to the [commissioning official] a notice of the change secured by a registered electronic signature of the notary.

Comment

Section 23-1 imposes an obligation specific to the electronic notary to report any change of e-mail address. The reporting must be made electronically. This form of notification underscores the fact that the primary medium of communication between electronic notaries and the commissioning

official is electronic. Whereas paper-based notaries are given 10 calendar days to report changes of physical address (*see* Subsection 12-1(a)), the drafters believed an e-mail address change can be reported more expeditiously without hardship to the notary.

§ 23-2 Change of Registration Data.

Any change or addition to the data on the electronic registration form described in Section 16-4, including any change to an electronic journal's access instructions, shall be reported within 10 days to the [commissioning official].

Comment

Section 23-2 mirrors the reporting requirements imposed on paper-based notaries. Because the commissioning official has discretion to ask for registration information from the notary in addition to that specified by Section 16-4, the drafters opted not to enumerate the information that might be changed, but instead just to address this data by reference to the registration form. Conceivably, such additional data

might include the notary's name, telephone number, and business name. The drafters selected a reporting deadline of 10 calendar days to be congruent with the 10-day deadline for changes of name and address by paper-based notaries (*see* Sections 12-1 and 12-2) to enable the reporting obligations for both electronic and non-electronic status to be fulfilled by a single electronic communication.

§ 23-3 Change of Means of Production.

- (a) Upon becoming aware that the status, functionality, or validity of the means for producing a registered electronic signature, notary

seal, or single element combining the signature and seal, has changed, expired, terminated, or become compromised, the notary shall:

- (1) immediately notify the [commissioning official];
 - (2) cease producing seals or signatures in electronic notarizations using that means;
 - (3) perform electronic notarizations only with a currently registered means or another means that has been registered within 30 days; and
 - (4) dispose of any software, coding, disk, certificate, card, token, or program that has been rendered defunct, in the manner described in Subsection 23-5(a).
- (b) Pursuant to Subsection (a), the [commissioning official] shall immediately suspend the electronic status of a notary who has no other currently registered means for producing electronic signatures or notary seals, and if such means is not registered within 30 days, electronic status shall be terminated.

Comment

Section 23-3 recognizes the fact that a notary's registered electronic seal and signature are produced by specific electronic processes that are subject to change. For example, the electronic credential used by the notary to create electronic signatures may expire. Alternatively, heat or water may have damaged or destroyed the functionality of a pertinent disk or token; or theft or loss may have prevented any further use of the disk or token. Another eventuality that would qualify as a reportable change of status is the notary's voluntary discarding or destroying of the means for producing an electronic seal or signature. If the commissioning official determines that the notary's negligence or other misconduct compromised the means for producing an electronic signature or seal, the official has authority to terminate registration as an electronic notary. (See Subparagraph 24-2(a)(3).)

Subparagraph (1) requires the electronic notary to notify the commissioning official of the change of status. This must be done even if the notary has registered other means for producing seals or signatures for electronic acts. For authentication and investigative purposes, the commissioning official must immediately be made aware of any changes of status in the capability to perform electronic acts.

Subparagraph (2) directs the notary to stop using any expired, invalid, or otherwise defunct

means for producing an electronic seal or signature in notarial acts.

Subparagraph (3) dictates that the notary may continue to perform electronic notarizations only with a currently registered means for producing seals and/or signatures or with a means that will be registered within 30 calendar days. The drafters believed that electronic notaries should be given a "grace period" to update their expired electronic tools rather than have to suffer immediate termination of electronic notary status. Of course, if the notary possessed a still valid and registered second means for producing electronic seals and/or signatures, such termination would not be necessary.

Subparagraph (4) directs the notary to dispose of (*i.e.*, "permanently erase or expunge") any defunct software, coding, disk, certificate, card, token, or program formerly used exclusively to produce electronic notary seals and signatures in notarial acts. The disposal must be accomplished as stipulated in Subsection 23-5(a).

Subsection (b) grants the electronic notary without another registered signature or seal a 30-day grace period to replace the defunct means for producing an electronic signature and/or notary seal and to register a new means. If this is not done within 30 calendar days, the notary's electronic status is terminated.

§ 23-4 Termination of Electronic Notary Registration.

- (a) Any revocation, resignation, expiration, or other termination of the commission of a notary public immediately terminates any existing registration as an electronic notary.
- (b) A notary's decision to terminate registration as an electronic notary shall not automatically terminate the underlying commission of the notary.
- (c) A notary who terminates registration as an electronic notary shall notify the [commissioning official] in writing and dispose of any pertinent software, coding, disk, certificate, card, token, or program as described in Section 23-5(a).

Comment

Section 23-4 addresses matters related to termination of registration as an electronic notary. Subsection (a) states a basic rule: termination of the notary's commission, for any reason, concomitantly terminates the electronic notary registration. While the notary thereby would be prohibited from producing further electronic notary seals, there would be no such ban against future personal use of electronic signatures whose means of production was formerly registered, provided such signatures do not indicate status as a notary. (*See* Subsection 19-5(a).)

Subsection (b) makes clear that a notary may voluntarily terminate electronic notary registration without jeopardizing an otherwise

valid notary commission. However, resignation of electronic notary status does not preclude an official investigation into an electronic notary's conduct. (*See* Subsection 24-2(c).) Official misconduct as an electronic notary is cause for the revocation of the underlying commission. (*See* Section 2-12 and Subsections 3-1(c) and 13-3(a).) The first two subsections make the point that while electronic registration is available only to duly commissioned notaries, not all such notaries may need or want to be registered.

Subsection (c) instructs the electronic notary on the steps to be taken for voluntary termination of registration.

§ 23-5 Disposition of Software and Hardware.

- (a) Except as provided in Subsection (b), when the commission of an electronic notary public expires or is resigned or revoked, when registration as an electronic notary terminates, or when an electronic notary dies, the notary or the notary's duly authorized representative within [30] business days shall permanently erase or expunge the software, coding, disk, certificate, card, token, or program that is intended exclusively to produce registered electronic notary seals, registered single elements combining the required features of an electronic signature and notary seal, or registered electronic signatures that indicate status as a notary.
- (b) A former electronic notary public whose previous commission expired need not comply with Subsection (a) if this person, within 3 months after expiration, is recommissioned and reregistered as an electronic notary using the same registered means for producing electronic notary seals and signatures.

Comment

Section 23-5 mandates that the software and other electronic devices used exclusively to create the notary's electronic seal and signature be properly disposed of to prevent their misuse by unauthorized parties. This corresponds to the rule for the proper disposal of the tools of office for the paper-based notary, *i.e.*, seal and journal. (*See* Sections 12-4 and 12-5.)

Under Subsection (a), an electronic item need not be permanently erased or expunged if it were not used "exclusively" to produce a registered electronic notary seal or a registered single element combining the required features of an electronic signature and notary seal. Neither would the

registered means for producing a notary's electronic signature have to be disposed of if the signatures produced did not indicate status as a notary. (*See* Subsection 19-5(a).) Such signatures could continue to be used on electronic documents in the notary's personal and other non-notarial affairs.

Subsection (b) allows a notary "renewing" a commission in accordance with Chapters 3 and 4 to avert the disposal procedure set forth in Subsection (a) if the notary intends to be recommissioned and reregistered within three months after the original commission expires. These two processes may be accomplished at the same time. (*See* Subsection 16-1(c).)

Chapter 24 – Liability, Sanctions, and Remedies for Improper Acts

Comment

General: Chapter 24 makes clear that the basic responsibilities and penalties belonging to the new functions of the electronic notary public are the same as those imposed by the traditional duties of the notarial office. (*See* Section 24-1.) Section 24-2 prescribes rules for

the commissioning official to observe in terminating the registration of an electronic notary. These include the rule that voluntary resignation of status as an electronic notary not terminate an investigation into a notary's misconduct in the electronic arena.

§ 24-1 Penalties and Remedies for Improper Electronic Acts.

The liability, sanctions, and remedies for the improper performance of electronic notarial acts by an electronic notary public are the same as described and provided in Chapter 13 of this [Act] for the improper performance of non-electronic notarial acts.

Comment

Section 24-1 reinforces the position that electronic notaries are first and foremost duly commissioned notaries with traditional powers and responsibilities. As such, they hold positions of trust and confidence. Therefore, in the performance of electronic notarizations the public has the right to expect the same high

level of integrity, honesty, impartiality, and trustworthiness that is demanded of notaries performing traditional paper-based notarizations. In recognition of that fact, the Act applies all of the liabilities, sanctions, and remedies set out in Chapter 13 for paper-based notarizations to electronic notarizations.

§ 24-2 Causes for Termination of Registration.

- (a) The [commissioning official] shall terminate an electronic notary public's registration for any of the following reasons:
 - (1) submission of an electronic registration form containing material misstatement or omission of fact;
 - (2) failure to maintain the capability to perform electronic notarial acts, except as allowed in Subparagraph 23-3(a)(3);
or
 - (3) the electronic notary's performance of official misconduct.
- (b) Prior to terminating an electronic notary's registration, the [commissioning official] shall inform the notary of the basis for the termination and that the termination shall take place on a particular date unless a proper appeal is filed with the [administrative body hearing the appeal] before that date.
- (c) Neither resignation nor expiration of a notary commission or of an electronic notary registration precludes or terminates an investigation by the [commissioning official] into the electronic notary's conduct. The investigation may be pursued to a conclusion, whereupon it shall be made a matter of public record whether or not the finding would have been grounds for termination of the commission or registration of the electronic notary.

Comment

Section 24-2 provides the bases and procedures for terminating registration as an electronic notary.

Subparagraph (a)(1) mirrors the commonsense rules applied to notary commission applications. (*See* Subsections 3-1(c); and 13-3(a).) There cannot be any reason to allow a notary who intentionally deceives the commissioning official to be given authority to perform notarial acts, either paper-based or electronic. Subparagraph (a)(2) mandates that registration terminate if the notary loses the technological capability to perform electronic acts. (This might result for any number of reasons, as outlined in the “Comment” to Section 23-3.) However, the subparagraph provides an exception if there is merely an interruption in the notary’s capability to perform electronic notarizations. For example, if the electronic credential used by the notary to create electronic signatures expires, and the notary quickly (within 30 days, *see* Subparagraph 23-3(a)(3)) takes action to replace this credential and to register the new means of producing electronic signatures, then status as an electronic notary need not terminate. Subparagraph (a)(3) requires the commissioning official to terminate the registration of an

electronic notary for official misconduct. (*See* definition of “official misconduct” in Section 2-12.) Such misconduct might include the notary’s negligence in allowing the means for producing electronic notary seals and signatures to be compromised. (*See* Section 23-3 and “Comment.”)

Subsection (b) provides the notice and appeal procedures to be used in a registration termination action. These ensure that the electronic notary is given a fair chance to respond to any allegations giving rise to termination. The procedures are similar to those used in cases of notary commission revocation. (*See* Subsection 13-3(c).)

Subsection (c) specifically applies to endorse the rule enunciated in Subsection 13-3(d) regarding the need to continue to a conclusion any investigation into alleged misconduct of the electronic notary, even if the notary’s registration or commission is resigned or expired prior to completion of the termination proceeding. Mere resignation or expiration of notarial powers is not a satisfactory response to egregious misconduct. It is important that any investigation go forward to ensure that misdeeds are exposed and appropriate measures taken and made public.

Chapter 25 – Violations by Person Not an Electronic Notary

Comment

General: This chapter addresses actions by third parties designed to bring about improper electronic notarizations. It also provides guidance with respect to criminal sanctions that may be imposed upon persons who improperly access, possess, or use the tools of office of an electronic notary.

§ 25-1 Impersonation and Improper Influence.

The criminal sanctions for impersonating an electronic notary public and for soliciting, coercing, or improperly influencing an electronic notary to commit official misconduct in performing notarial acts are the same sanctions described in Chapter 14 of this [Act] in regard to performing non-electronic notarial acts.

Comment

Section 25-1 establishes rules that parallel those set out in Sections 14-1 and 14-3 with respect to performing non-electronic notarial acts without authority and influencing the execution of improper non-electronic notarial acts. The section recognizes that an unscrupulous individual impersonating a notary could a) use an electronic signature and seal whose means of production have not been duly registered with the commissioning official to perform unauthorized electronic notarizations, or b) misappropriate and use a notary's registered means for producing an electronic signature and seal to do so. The section also imposes sanctions upon any person attempting to influence a notary to perform an improper electronic notarization.

§ 25-2 Wrongful Destruction or Possession of Software or Hardware.

Any person who knowingly obtains, conceals, damages, or destroys the coding, disk, certificate, card, token, program, software, or hardware that is intended exclusively to enable an electronic notary public to produce a registered electronic signature, notary seal, or single element combining the required features of an electronic signature and notary seal, is guilty of a [class of offense], punishable upon conviction by a fine not exceeding [dollars] or imprisonment for not more than [term of imprisonment], or both.

Comment

Section 25-2 is analogous to Section 14-2, which relates to the wrongful possession or destruction of the seal or journal of a paper-based notary. This section imposes the same criminal liability for any person who engages in similar acts with respect to the tools needed to perform an electronic notarial act. The section does not specifically mention electronic journals because there is no distinction between a paper and an electronic journal for the purposes of Section 14-2. Thus, the electronic journal is protected under that section. In this Act, electronic and bound paper journals are interchangeable.

§ 25-3 Additional Sanctions Not Precluded.

The sanctions of this chapter do not preclude other sanctions and remedies provided by law.

Chapter 26 – Administration

Comment

General: Section 26-1 enables the commissioning official to administer the rules governing electronic notarization in the manner this official deems appropriate. The drafters anticipate that different officials will craft different methods to administer the Act most efficiently in their respective jurisdictions.

§ 26-1 Policies and Procedures.

The [commissioning official] may promulgate and enforce any policies and procedures necessary for the administration of this Article.

APPENDICES

APPENDIX 1**THE NOTARY PUBLIC CODE
OF PROFESSIONAL RESPONSIBILITY*****GUIDING PRINCIPLES****I**

The Notary shall, as a government officer and public servant, serve all of the public in an honest, fair and unbiased manner.

II

The Notary shall act as an impartial witness and not profit or gain from any document or transaction requiring a notarial act, apart from the fee allowed by statute.

III

The Notary shall require the presence of each signer and oath-taker in order to carefully screen each for identity and willingness, and to observe that each appears aware of the significance of the transaction requiring a notarial act.

IV

The Notary shall not execute a false or incomplete certificate, nor be involved with any document or transaction that is false, deceptive or fraudulent.

V

The Notary shall give precedence to the rules of law over the dictates or expectations of any person or entity.

VI

The Notary shall act as a ministerial officer and not provide unauthorized advice or services.

VII

The Notary shall affix a seal on every notarized document and not allow this universally recognized symbol of office to be used by another or in an endorsement or promotion.

VIII

The Notary shall record every notarial act in a bound journal or other secure recording device and safeguard it as an important public record.

IX

The Notary shall respect the privacy of each signer and not divulge or use personal or proprietary information disclosed during execution of a notarial act for other than an official purpose.

X

The Notary shall seek instruction on notarization, and keep current on the laws, practices and requirements of the notarial office.

**In addition to its 10 "Guiding Principles," the Code includes 85 "Standards of Professional and Ethical Practice." Each Standard presents an "Illustration" for which a proper course of action is explained through either an "Ethical Imperative" or a "Professional Choice." Published in 1998 by the National Notary Association, the Code was drafted by an NNA-recruited national panel of attorneys, state and county officials, executives from the business sector, and notaries public.*

APPENDIX 2

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 NINETY-FIRST YEAR
IN MONTEREY, CALIFORNIA
JULY 30 – AUGUST 6, 1982

WITH PREFATORY NOTE AND COMMENTS

Approved by the American Bar Association
New Orleans, Louisiana, February 9, 1983

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UNIFORM LAW ON NOTARIAL ACTS

Commissioners' Prefatory Note

This Uniform Act is designed to define the content and form of common notarial acts and to provide for the recognition of such acts performed in other jurisdictions. It thus replaces two Uniform Laws, the Uniform Acknowledgment Act (As Amended), and the later Uniform Recognition of Acknowledgments Act. The original Acknowledgment Act served to define the content and form of acknowledgments. The Recognition Act later provided for more specific rules for recognition of acknowledgments and “other

notarial acts” from outside of the state, although its title was more narrowly stated.

This statute is thus a consolidation, extension, and modernization of the two previous acts. It consolidates the provisions of the two acts relating to acknowledgments of instruments. It extends the coverage of the earlier act to include other notarial acts, such as taking of verifications and attestation of documents.

In addition, the act seeks to simplify and clarify proof of the authority of notarial officers.

Uniform Law on Notarial Acts

Section

1. Definitions.
2. Notarial Acts.
3. Notarial Acts in This State.
4. Notarial Acts in Other Jurisdictions of the United States.
5. Notarial Acts Under Federal Authority.
6. Foreign Notarial Acts.
7. Certificate of Notarial Acts.
8. Short Forms.
9. Notarial Acts Affected by This Act.
10. Uniformity of Application and Construction.
11. Short Title.
12. Repeals.
13. Time of Taking Effect.

§ 1. Definitions

As used in this [Act]:

- (1) “Notarial act” means any act that a notary public of this State is authorized to perform, and includes taking an acknowledgment, administering an oath or affirmation, taking a verification upon oath or affirmation, witnessing or attesting a signature, certifying or attesting a copy, and noting a protest of a negotiable instrument.
- (2) “Acknowledgment” means a declaration by a person that the person has executed an instrument for the purposes stated therein and, if the instrument is executed in a representative capacity, that the person signed the instrument with proper authority and executed

it as the act of the person or entity represented and identified therein.

- (3) “Verification upon oath or affirmation” means a declaration that a statement is true made by a person upon oath or affirmation.
- (4) “In a representative capacity” means:
 - (i) for and on behalf of a corporation, partnership, trust, or other entity, as an authorized officer, agent, partner, trustee, or other representative;
 - (ii) as a public officer, personal representative, guardian, or other representative, in the capacity recited in the instrument;
 - (iii) as an attorney in fact for a principal; or
 - (iv) in any other capacity as an authorized representative of another.
- (5) “Notarial officer” means a notary public or other officer authorized to perform notarial acts.

Commissioners’ Comment

This Uniform Law defines common notarial acts and provides for the recognition of notarial acts performed in other states and in foreign jurisdictions. It does not prescribe the qualifications of notaries public or other officers empowered to perform notarial functions, nor does it establish the procedure for their selection or term of office.

The Act uses the term “notarial officer” to describe notaries public and other persons having the power to perform notarial acts. These notarial acts are described in Section 2. Section 3 then describes who, in addition to notaries public, is a notarial officer in this state; Sections 4, 5, and 6 provide for the recognition of acts of notarial officers appointed by other jurisdictions.

§ 2. Notarial Acts

- (a) In taking an acknowledgment, the notarial officer must determine, either from personal knowledge or from satisfactory evidence, that the person appearing before the officer and making the acknowledgment is the person whose true signature is on the instrument.
- (b) In taking a verification upon oath or affirmation, the notarial officer must determine, either from personal knowledge or from satisfactory evidence, that the person appearing before the officer and making the verification is the person whose true signature is on the statement verified.
- (c) In witnessing or attesting a signature the notarial officer must determine, either from personal knowledge or from satisfactory evidence, that the signature is that of the person appearing before the officer and named therein.
- (d) In certifying or attesting a copy of a document or other item, the notarial officer must determine that the proffered copy is a full, true, and accurate transcription or reproduction of that which was copied.

- (e) In making or noting a protest of a negotiable instrument the notarial officer must determine the matters set forth in [Section 3-509, Uniform Commercial Code].
- (f) A notarial officer has satisfactory evidence that a person is the person whose true signature is on a document if that person (i) is personally known to the notarial officer, (ii) is identified upon the oath or affirmation of a credible witness personally known to the notarial officer or (iii) is identified on the basis of identification documents.

Commissioners' Comment

This section authorizes common notarial acts. It does not limit other acts which notaries may perform, if authorized by other laws.

Subsection (a) specifies what a notarial officer certifies by taking an acknowledgment. The notarial officer certifies to two facts: (1) the identity of the person who made the acknowledgment and (2) the fact that this person signed the document as a deed (or other specific instrument), and not as some other form of writing. The personal physical appearance of the acknowledging party before the notarial officer is required. An acknowledgment, as defined in Section 1(2) is a statement that the person has signed and executed an instrument; it is not the act of signature itself. Hence a person may appear before the notarial officer to acknowledge an instrument which that person had previously signed.

Similarly subsection (b) specifies the requisites of taking of a verification on oath or affirmation. There are again two elements: (1) the identity of the affiant and (2) the fact that the statement was made under oath or affirmation. Here again, the personal physical presence of the affiant is required.

Subsection (c) defines the requirements for witnessing (or attesting) a signature. Here only the fact of the signature, not the intent to execute the instrument, is certified

by the notarial officer.

Subsection (d) defines the standards for attestation or certification of a copy of a document by a notarial officer. This is commonly done if it is necessary to produce a true copy of a document, when the original cannot be removed from archives or other records. In many cases, the custodian of official records may also be empowered to issue official certified copies.

Where such official certified copies are available, they constitute official evidence of the state of public records, and may be better evidence thereof than a notarially certified copy.

Subsection (e) refers to a provision of the Uniform Commercial Code which confers authority to note a protest of a negotiable instrument on notaries and certain other officers.

Subsection (f) describes the duty of care which the notarial officer must exercise in identifying the person who makes the acknowledgment, verification or other underlying act. California law, for example, provides an exclusive list of identification documents on which the notarial officer may rely. These are documents containing pictorial identification and signature, such as local drivers' licenses, and U.S. passports and military identification papers, issued by authorities known to exercise care in identification of persons requesting such documentation.

§ 3. Notarial Acts in This State

- (a) A notarial act may be performed within this state by the following persons:
 - (1) a notary public of this State,

- (2) a judge, clerk or deputy clerk of any court of this State,
 - [(3) a person licensed to practice law in this State,] [or]
 - [(4) a person authorized by the law of this State to administer oaths,] [or]
 - [(5) any other person authorized to perform the specific act by the law of this State.]
- (b) Notarial acts performed within this State under federal authority as provided in section 5 have the same effect as if performed by a notarial officer of this State.
 - (c) The signature and title of a person performing a notarial act are prima facie evidence that the signature is genuine and that the person holds the designated title.

Commissioners' Comment

Subsection (a) lists the persons who are entitled to serve as notarial officers in the state. In addition to notaries public, all judges, clerks and deputy clerks of courts of the state may automatically perform notarial acts. The language follows the more modern form of the Uniform Recognition of Acknowledgments Act. It is more abbreviated than (sic) the Uniform Acknowledgments Act, in that it consolidates the several judicial offices into one listing.

Several optional additional notarial officers are listed. A state may authorize all duly licensed attorneys at law to serve as notaries public by virtue of their attorneys' licenses. It may also authorize other individuals who have authority to administer oaths to do so. If other particular officers, such as recorders or registrars of deeds or commissioners of titles, may perform notarial

acts in the state it would be advisable to list them here, because this list will be a ready reference point for those who seek to determine the validity of their acts, when they are used in another state.

Proof of authority of a notarial officer usually involves three steps: 1. Proof that the notarial signature is that of the named person, 2. Proof that that person holds the designated office, and 3. Proof that holders of that office may perform notarial acts.

Subsection (c) sets forth the presumption of genuineness of signature and the presumption of truth of assertion of authority by the notarial officer, the first two elements of authentication. Since the officers listed in subsection (a) are authorized to act by this statute, no further proof of the third element, the authority of such an officer, is required.

§ 4. Notarial Acts in Other Jurisdictions of the United States

- (a) A notarial act has the same effect under the law of this State as if performed by a notarial officer of this State, if performed in another state, commonwealth, territory, district, or possession of the United States by any of the following persons:
 - (1) a notary public of that jurisdiction;
 - (2) a judge, clerk, or deputy clerk of a court of that jurisdiction; or
 - (3) any other person authorized by the law of that jurisdiction to perform notarial acts.
- (b) Notarial acts performed in other jurisdictions of the United States under federal authority as provided in section 5 have the same effect as if performed by a notarial officer of this State.

- (c) The signature and title of a person performing a notarial act are prima facie evidence that the signature is genuine and that the person holds the designated title.
- (d) The signature and indicated title of an officer listed in subsection (a)(1) or (a)(2) conclusively establish the authority of a holder of that title to perform a notarial act.

Commissioners' Comment

Sections 4, 5, and 6 of this act are adapted from Sections 1 and 2 of the Uniform Recognition of Acknowledgments Act. That Act set forth the individuals outside of the state who could take acknowledgments or perform other notarial acts, and separately set forth the authentication of those acts which was necessary. Different standards applied in the cases of persons acting under the authority of another state, of the federal government, or of a foreign country. This statute distinguishes between the three kinds of authority from outside the state, and provides the authentication separately for each type.

Subsection (a) is adapted from Section 1 of the Uniform Recognition of Acknowledgments Act. Subsection (b) gives prima facie validity to the signature and assertion of title of the person who acts as notarial officer. It follows Section 2(d) of the Uniform Recognition of Acknowledgments Act. It thus provides the

first two elements of proof of authority of the notarial officer set forth in the comments to Section 3.

Subsection (c) provides the third element of that proof of authority. It recognizes conclusively the authority of a notary public or of a judge or clerk or deputy clerk of court to perform notarial acts, without the necessity of further proof that such an officer has notarial authority. It is copied from Section 2(a) of the Uniform Recognition of Acknowledgments Act. These two subsections abolish the need for a "clerk's certificate" to authenticate the act of the notary, judge, or clerk. The authority of a person other than a notary, judge, or clerk to perform notarial acts can most readily be proven by reference to the law of that state. Any other form of proof of such authority acceptable in the receiving jurisdiction, such as a clerk's certificate, as is currently provided by Section 2(c) of the Uniform Recognition of Acknowledgments Act, would also suffice.

§ 5. Notarial Acts Under Federal Authority

- (a) A notarial act has the same effect under the law of this State as if performed by a notarial officer of this State if performed anywhere by any of the following persons under authority granted by the law of the United States:
 - (1) a judge, clerk, or deputy clerk of a court;
 - (2) a commissioned officer on active duty in the military service of the United States;
 - (3) an officer of the foreign service or consular officer of the United States; or
 - (4) any other person authorized by federal law to perform notarial acts.
- (b) The signature and title of a person performing a notarial act are prima facie evidence that the signature is genuine and that the person holds the designated title.
- (c) The signature and indicated title of an officer listed in subsection

(a)(1), (a)(2), or (a)(3) conclusively establish the authority of a holder of that title to perform a notarial act.

Commissioners' Comment

Some acknowledgments are performed by persons acting under federal authority, or holding office under federal authority. This section provides for the automatic recognition of those notarial acts within the enacting state. The list of persons whose acts are immediately recognized by this section is drawn from Section 1 of the Uniform Recognition of Acknowledgments Act, but has been simplified. This law no longer limits recognition of the notarial acts performed by military officers to acts performed for persons in the military service "or any other persons serving with or accompanying the armed forces of the United States." Such a limitation in recognition merely places another cloud on the validity of the notarial act. The act does not purport to extend the authority of military officers to perform these acts, but merely immunizes the private party relying on them from any consequences of the officer's excess of authority. Both in the case of commissioned military officers and foreign service officers, the language has been modified to reflect modern descriptions of the offices in question. In both instances, the further reference to "any other person authorized by regulation" has also been omitted as duplicative of paragraph 4 of this subsection.

Subsection (b), like its counterpart in Section 4, is drawn from Section 2(d) of the Uniform Recognition of Acknowledgments Act. It confers prima facie validity upon the

signature and assertion of rank or title by the notarial officer, thus providing the first two elements of proof described in the comments to Section 3.

Subsection (c) is drawn from Section 2(a) of the same law. It provides the third element of proof of the notarial officer's authority. It immediately recognizes the authority of a judge or clerk, or military officer or foreign service or consular officer to perform notarial acts, without the necessity of further reference to the federal statutes or regulations to prove that the officer has notarial authority. There is no need for further authentication of these persons' authority to perform notarial acts. A variety of other federal officers may be authorized to perform notarial acts, such as wardens of federal prisons, but their authority must be demonstrated by other means. The authority of such an officer to perform the notarial act can most readily be demonstrated by reference to the federal law or published regulation granting such authority. Any other form of authentication, such as a clerk's certificate, could also be used.

A military officer who performs notarial services should insert the appropriate title (e.g., commanding officer) in the place designated for "title (and rank)" to conform to 10 U.S.C. § 936(d). The officer's rank and branch of service should also be inserted there.

§ 6. Foreign Notarial Acts

- (a) A notarial act has the same effect under the law of this State as if performed by a notarial officer of this State if performed within the jurisdiction of and under authority of a foreign nation or its constituent units or a multi-national or international organization by any of the following persons:
- (1) a notary public or notary;
 - (2) a judge, clerk, or deputy clerk of a court of record; or
 - (3) any other person authorized by the law of that jurisdiction to perform notarial acts.

- (b) An “Apostille” in the form prescribed by the Hague Convention of October 5, 1961, conclusively establishes that the signature of the notarial officer is genuine and that the officer holds the indicated office.
- (c) A certificate by a foreign service or consular officer of the United States stationed in the nation under the jurisdiction of which the notarial act was performed, or a certificate by a foreign service or consular officer of that nation stationed in the United States, conclusively establishes any matter relating to the authenticity or validity of the notarial act set forth in the certificate.
- (d) An official stamp or seal of the person performing the notarial act is prima facie evidence that the signature is genuine and that the person holds the indicated title.
- (e) An official stamp or seal of an officer listed in subsection (a)(1) or (a)(2) is prima facie evidence that a person with the indicated title has authority to perform notarial acts.
- (f) If the title of office and indication of authority to perform notarial acts appears either 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.

Commissioners’ Comment

This section deals with the authority of notarial officers empowered to act under foreign law. Note that the act of any notary is recognized, as well as that of judges or clerk of courts of record. The notarial acts of other persons will be recognized if they are authorized by the law of the place in which they are performed.

Proof of validity of foreign notarial acts is a more difficult problem than recognition of such acts from other states of the United States, because the relative authority of public and quasi-public officers may vary.

See the special rules previously provided under the Uniform Recognition of Acknowledgments Act, Section 2(b).

The United States is now a party to an international convention regarding the authentication of notarial and other public acts. The first method of recognition of foreign notarial acts is that set forth in the treaty. The Apostille may be stamped on the document or an attached page by a specified officer in the foreign country. It has the following form.

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:

It may be in the language of the issuing country, but the words “Apostille (Convention de La Haye, du 5 octobre 1961)” are always in French. Under the terms of the treaty, to which the United States is a party, the Apostille must be recognized if issued by a competent authority in another nation which has also ratified it. The text of the convention is reproduced in the volume of 28 U.S.C.A. containing the annotations to Rule 44 of the Federal Rules of Civil Procedure, and in Martindale-Hubbell.

Although federal law provides for mandatory recognition of an Apostille only if issued by another ratifying nation, this statute provides for recognition of all apostilles issued by any foreign nation in that form. They, are in effect, no more than a standard form for authentication. Use of the form eases problems of translation.

Recognition may also be accorded in a number of other ways, which are taken from Section 2(b) of the Uniform Recognition of Acknowledgments Act.

§ 7. Certificate of Notarial Acts

- (a) A notarial act must be evidenced by a certificate signed and dated by a notarial officer. The certificate must include identification of the jurisdiction in which the notarial act is performed and the title of the office of the notarial officer and may include the official stamp or seal of office. If the officer is a notary public, the certificate must also indicate the date of expiration, if any, of the commission of office, but omission of that information may subsequently be corrected. If the officer is a commissioned officer on active duty in the military service of the United States, it must also include the officer’s rank.
- (b) A certificate of a notarial act is sufficient if it meets the requirements of subsection (a) and it:
 - (1) is in the short form set forth in Section 8;
 - (2) is in a form otherwise prescribed by the law of this State;
 - (3) is in a form prescribed by the laws or regulations applicable in the place in which the notarial act was performed; or
 - (4) sets forth the actions of the notarial officer and those are sufficient to meet the requirements of the designated notarial act.
- (c) By executing a certificate of a notarial act, the notarial officer certifies that the officer has made the determinations required by Section 2.

Commissioners' Comment

This section requires a written certification by the notarial officer of the notarial act. That certification may be simple. It need only record the notarial act and its place and date, together with the signature and office of the notarial officer. Subsection (b) provides that the certificate may be in any one of the short forms set forth in this act, or in any other form provided by local law, or in any other form provided by the law of the place where it is performed, or in any form that sets forth the

requisite elements of the appropriate notarial act. Thus acknowledgments or other notarial acts executed in the more elaborate forms of the former Uniform Acknowledgments Act or the Uniform Recognition of Acknowledgments Act would continue to qualify under subsection (b)(4). Subsection (c) reemphasizes the obligation of the notarial officer to make the determinations required by Section 2 and to certify that the officer has done so.

§ 8. Short Forms

The following short form certificates of notarial acts are sufficient for the purposes indicated, if completed with the information required by Section 7(a):

(1) For an acknowledgment in an individual capacity:

State of _____
(County) of _____

This instrument was acknowledged before me on (date) by (name(s) of person(s)).

(Seal, if any)

(Signature of notarial officer)

Title (and Rank)

[My commission expires: _____]

(2) For an acknowledgment in a representative capacity:

State of _____
(County) of _____

This instrument was acknowledged before me on (date) by (name(s) of person(s)) as (type of authority, e.g., officer, trustee, etc.) of (name of party on behalf of whom instrument was executed.)

(Seal, if any)

(Signature of notarial officer)

Title (and Rank)

[My commission expires: ____]

(3) For a verification upon oath or affirmation:

State of _____
(County) of _____

Signed and sworn to (or affirmed) before me on (date) by
(name(s) of person(s) making statement).

(Seal, if any)

(Signature of notarial officer)

Title (and Rank)

[My commission expires: ____]

(4) For witnessing or attesting a signature:

State of _____
(County) of _____

Signed or attested before me on (date) by (name(s) of person(s)).

(Seal, if any)

(Signature of notarial officer)

Title (and Rank)

[My commission expires: ____]

(5) For attestation of a copy of a document:

State of _____
(County) of _____

I certify that this is a true and correct copy of a document in
the possession_____
Dated _____

(Seal, if any)

(Signature of notarial officer)

Title (and Rank)

[My commission expires: _____]

Commissioners' Comment

This section provides statutory short forms for notarial acts. These forms are sufficient to certify a notarial act. See Section 7(b)(1). Other forms may also qualify, as provided in Section 7.

See Section 7(a). A military officer who is acting as a notarial officer will normally enter both title (e.g., commanding officer, Company A, etc.) and rank (Captain, U.S. Army) as identification.

A notarial seal is optional under this Act.

§ 9. Notarial Acts Affected by This Act

This [Act] applies to notarial acts performed on or after its effective date.

§ 10. Uniformity of Application and Construction

This [Act] shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this [Act] among states enacting it.

§ 11. Short Title

This [Act] may be cited as the Uniform Law on Notarial Acts.

§ 12. Repeals

The following acts and parts of acts are repealed:

- (1) [The Uniform Acknowledgment Act (As Amended)]
- (2) [The Uniform Recognition of Acknowledgments Act]
- (3) _____.

Commissioners' Comment

This statute is intended to replace the Uniform Acknowledgment Act and the Uniform Recognition of Acknowledgments

Act, and may also replace other state legislation on this topic.

§ 13. Time of Taking Effect

This [Act] takes effect _____.

APPENDIX 3**MODEL NOTARY ACT ADOPTIONS**

Either by legislation, administrative rule or gubernatorial executive order, over 40 U.S. states and territorial jurisdictions have adopted provisions of the National Notary Association's Model Notary Act (MNA) in one or more of its 1973, 1984 and 2002 versions. (The 1973 version was titled the Uniform Notary Act.) The following 12 jurisdictions are among those that have adopted extensive portions of the MNA:

American Samoa	2002 MNA by legislative enactment. Also, NNA's Code of Professional Responsibility (see Appendix 1) was adopted as a training text for the Territory's notaries public.
California	1973 MNA by legislative enactment. This landmark bill included requirements for notary journal signatures and for fingerprinting of commission applicants.
Guam	1984 MNA by legislative enactment. Spearheaded by Guam's Attorney General, the Act was codified into statute virtually verbatim and <i>in toto</i> .
Massachusetts	2002 MNA by governor's executive order. This was the first instance in modern times of a state governor establishing comprehensive rules of conduct for notaries.
Mississippi	2002 MNA by administrative rule. Mississippi's Secretary of State adopted the Act's long-needed modernizations to compensate for legislative disinterest in notary reforms.
Missouri	1973 MNA by legislative enactment. Spearheaded by Missouri's Secretary of State, the legislation updated and expanded the state's notary statutes.
New Mexico	2002 MNA by legislative enactment. This established long-needed statutory rules based extensively on the Act's definitions, prohibitions and operating practices.
North Carolina	2002 MNA by legislative enactment. Spearheaded by North Carolina's Secretary of State, the new law drew from both paper-based and eNotarization articles of the Act.
Northern Marianas	1984 MNA by legislative enactment. The Pacific island Commonwealth embraced the Act in its statutes virtually verbatim and <i>in toto</i> .

Rhode Island	2002 MNA by governor's executive order. Rhode Island's Governor and Secretary of State collaborated to put in place a fraud-deterrent code of conduct for notaries.
Virginia	2002 MNA by legislative enactment. Spearheaded by Virginia's Secretary of the Commonwealth, the bill drew from both the paper-based and eNotarization articles.
West Virginia	1973 MNA by legislative enactment. This pioneering legislation was one of the very first comprehensive revisions and modernizations of notary statute in the 20th century.



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