

***ESSENTIAL NOTARY STANDARDS
AND
PRINCIPLES IN THE RECORDING PROCESS***

**Notary Public Sub-Committee
of the
Property Records Industry Joint Task Force
Standards Committee**

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Introduction

The offices of county recorder and notary public share a joint focus of attention: real property documents. Both recorder and notary are dedicated to ensuring the reliability and authenticity of the land record.

Because a major function of the county recorder is to create and maintain an accessible and authentic public record of documentary transactions affecting title to real property, the importance of any recorded document's authenticity is paramount. The essential function of a notary¹ is to ensure such authenticity. Notaries are appointed by the states to serve the public as impartial witnesses and, though their exact duties may vary from state to state,² all notaries have the duty to witness signatures, administer oaths and take a signer's acknowledgment that a signature was freely made. While there are several common notarizations, including signature witnessings and copy certifications, it is the acknowledgment that is the predominant notarization in real estate authentication. In an acknowledgment, the notary certifies having positively identified a document signer who personally appeared before the notary and admitted having signed the document freely.³

Because the authenticity of any recordable document depends on the quality of its acknowledgment, the significance of a proper notarization cannot be overstated.

The recorder, as public archivist, accepts documents presented as authentic provided that the final authentication act – the acknowledgment – appears properly executed. Thus, necessarily, the recorder in particular and society in general repose great trust in the notary's capability as a screening agent.

Since notarization is the final act before a document can be accepted into the public record, the Property Records Industry Joint Task Force recognizes that the successful administration of a secure and reliable land records system entails providing

specific standards for notaries handling recordable instruments in order to reduce document rejection and facilitate automated processing of documents by the recorder. It also entails strong encouragement for notarial education and support of notarial principles and practices that will ensure the integrity of the real property conveyance process.

Document Rejection

There are a number of reasons for document rejection and many of them relate to the notarial act. The annual national costs associated with rejection, from faulty notarization and other imperfections, are estimated to be \$400 million.⁴

Among the most common reasons for document rejection stemming from notarization are:

- (a) Omission of the notary's signature or seal.
- (b) Illegible notary signature or seal.
- (c) Improper form of acknowledgment.⁵
- (d) Incomplete or incorrect execution of the form of acknowledgment (e.g., omission of the date or name of the principal, or incorrectly spelled name of the principal).
- (e) Omission of the form of acknowledgment (i.e., notary merely "stamps and signs").⁶
- (f) Omission or illegibility of the principal's signature.

Standards

The Property Records Industry Joint Task Force supports promulgation of notarial standards that can both provide needed direction to notaries and be acceptable to recording agencies. Statutory regulations notwithstanding, the communication and distribution of information regarding notarial recording requirements can work to eliminate documents rejected as a result of improper notarization, and help facilitate automated recording.

Property records industry participants, including those active in title insurance, escrow, real estate, mortgage banking, notary education and land recording, will use their respective distribution channels to promote these standards as they apply to traditional paper documents, realizing that the advent of electronic document recording will necessitate future development and promulgation of separate standards for electronic notarial certificates:

- (1) Any separate notarial form not part of a recordable document shall:
 - (a) Be the same size as the pages of the document.
 - (b) Be attached at the same point(s) and in the same manner as the pages of the document.
 - (c) Immediately follow – not precede – the signature page of the document.

- (2) A notary completing acknowledgment wording on a recordable document shall:
 - (a) Sign with a color of ink sufficient to distinguish the original signature from a copy.
 - (b) Create a record that is reproducible.
 - (c) Fill in or line through every blank space, or remainder of a blank space, to prevent unauthorized insertions in the notary form.

- (d) Make a selection for every option presented, including “is/are”; “he/she/they”; “party(ies)”; “__he__”; and the like.⁷
- (3) A notary affixing an official seal of office on the notarial form of a recordable document shall:
- (a) Use a dark color ink suitable for imaging, preferably black, to distinguish the original seal from a copy.
 - (b) Use a dark, preferably blue, ink for signatures and initials.
 - (c) Avoid printing over any text, writing or signature.
 - (d) Affix a legible second seal impression if any portion of the first impression is faint or unreadable.
 - (e) Not attempt by hand to correct, update or make legible any seal impression.
 - (f) Render photographically reproducible any embosser seal affixed.
- (4) When corrections are made to a recordable document:
- (a) Correction fluid shall not be used on the form of acknowledgment.
 - (b) Corrections on the form of acknowledgment shall be initialed by the notary.
 - (c) The notary shall encourage the signer to initial corrections in the text of the document.

Additionally, the Property Records Industry Joint Task Force encourages the advancement of programs and initiatives that provide educational instruction to notaries. In recognition of their responsibility, whether reinforced by regulatory or statutory directives, notaries must seek instruction on notarization and keep current on the laws and

requirements of the notarial office and, in particular, maintain a solid understanding of the basic principles and practices of notarization as they relate to the real estate recording process.⁸

The notary has a duty to the state to follow its laws and serve its residents. Conversely, the state has a responsibility to the notary to provide training and guidance. Notaries are integral to the processing of documents of great sensitivity and value. Each state should properly screen notary applicants to ensure that the notary commission is meaningful. For notarizations to be ultimately trustworthy, they must be performed by applicants who have been qualified by more than submitting an application.

The state, at the least, should provide all notaries with an updated handbook about the duties and practices of the office. Although testing is not now the rule in most jurisdictions,⁹ states must strive to mandate this procedure for determining competence on the part of all applicants. The increased costs can be borne by those applying for the notary office and by the industries they represent.

In the legislative arena, the state must ensure that the laws guiding notaries are clear and contain provisions such as the journal or recordbook requirement and identification standards that protect both the notary and the public.

Finally, sanctions for improper notary performance are essential. The commissions of incompetent or unscrupulous notaries must be quickly revoked and, if appropriate, criminal prosecutions set in motion.¹⁰

Electronic Recording

While historically the recording process has dealt with instruments made of paper, plastic or other pliant, sheeted substance, the next challenge for recorders today is adapting the process to electronic instruments.

Enactment of the *Uniform Electronic Transactions Act (UETA)*¹¹ by state legislatures, beginning in 1999, and of the *Electronic Signatures in Global and National Commerce Act (“E-Sign”)*¹² by the U.S. Congress, in 2000, have accelerated the movement toward electronic recording.

Indeed, electronic recordings, preceded by electronic notarization, have already been performed in several states, albeit in pilot programs or other strictly controlled circumstances.

Electronic recordings thus far have generally been of one of two types. First, there have been electronic transmissions, from a remote site to a recording office, of the image of a traditional paper document executed and notarized in traditional fashion.¹³ Second, there have been electronic transmissions, from a remote site to a recording office, of an electronic document executed and notarized using “electronic signatures.”¹⁴ As defined in the *UETA*, an electronic signature is “an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record.”¹⁵

The electronic signatures used in electronic recordings of the second type are created through public key cryptography and known as “digital signatures.” All electronic notarizations performed thus far that are known to the Property Records Industry Joint Task Force have adhered to the traditional principles requiring the document signer to appear in person before the notary at the time of notarization. However, a few states (e.g., Arizona) have enacted laws¹⁶ that would abandon personal appearance by equating any person’s use of a digital certificate, without the presence of a notary, to acknowledgment before a notary.

E-Sign does not alter basic recording requirements; it just legally recognizes signatures affixed electronically. It also provides for electronic notarization. If applicable law requires a signature to be notarized, the requirement may be satisfied

when an electronic signature is accompanied by the official electronic signature of a notary. E-Sign Section 101 (g) states that electronic documents can be notarized by having a notary affix or logically associate his or her electronic signature with the principal's signature. We recognize that the intent of UETA and E-Sign is for no embosser or stamp seal to be required for an electronic notarization.

The Property Records Industry Joint Task Force maintains that fundamental recording principles and those of notarization should be considered in any development of electronic recording processes or procedures.¹⁷ This is particularly significant when considering the notarial act most often executed on real estate documents submitted to recorders – the acknowledgment.

Acknowledgment

In 1982, the National Conference of Commissioners on Uniform State Laws addressed the acknowledgment in its publication of the *Uniform Law on Notarial Acts (ULONA)*¹⁸ The *ULONA* is a modernization and consolidation of the two prior acts, the *Uniform Acknowledgment Act* of 1939¹⁹ and the *Uniform Recognition of Acknowledgments Act* of 1969.²⁰

Within the *ULONA*, the Commissioners' commentary²¹ asserted: "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...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 has previously signed."

Because the acknowledgment is perhaps the most common and important of all notarizations performed in the United States and that used to authenticate documents of great monetary value, it is essential that its principal components be understood by parties interested in the integrity of recordable documents.

The essential components of an acknowledgment must include:²²

- (1) Personal Appearance. The document signer must appear in person before – and directly communicate with – the notary public (or other legally authorized substitute), face to face. Physical presence allows the notary to identify the signer and make observations and commonsense judgments that this individual appears willing and aware.
- (2) Proof of Identity. The notary must positively identify the document signer either through personal knowledge of the individual’s identity, reliable identification documents (“ID cards”) or the sworn vouching of a personally known credible identifying witness.²³
- (3) Act of Acknowledgment. The signer admits or recognizes the existence of an agreement by signing and thereby evidencing intention that this particular document shall be binding and in full force and effect. Acknowledgment may also include the admission of ownership of a previously made signature.
- (4) Lack of Duress. Essential to the acknowledgment is the notary’s observation that the signer was not under direct physical or psychological threat or duress at the hands of a third party.

(5) Awareness. Also essential to the acknowledgment is the notary's observation and lay judgment that the signer appears to be aware of the document signing. Only a few states²⁴ stipulate that ascertaining a signer's awareness is a statutory duty for the notary; however, only a reckless notary would proceed with a notarization if there were any reasonable doubt about the signer's awareness of the transaction.

The Property Records Industry Joint Task Force recommends that any "electronic acknowledgment" should maintain the same basic principles as those of the traditional act of acknowledgment itemized above.

Conclusion

The advent of electronic recording lends a new impetus and urgency to proposals for heightened cooperation between county recorders, property records industry participants and notaries.²⁵ While the technological issues may be complex, traditional levels of assurance can be maintained by establishing consistency, requiring notarial competency and promoting fundamental principles necessary to the continuation of a reliable land records systems.

It is intended that adoption of the standards and recommendations set forth in this White Paper of the Property Records Industry Joint Task Force will not only remove or reduce present disruptions in the process of recording paper documents, but foster workable, consumer-protective procedures for electronic recording.

Notes, References and Citations

1. BLACK'S LAW DICTIONARY (1968, 4th Ed. Rev.) defines a Notary Public as follows: "A public officer whose function it is to administer oaths; to attest and certify, by his hand and official seal, certain classes of documents, in order to give them credit and authenticity in foreign jurisdictions; to take acknowledgments of deeds and other conveyances, and certify the same; and to perform certain official acts, chiefly in commercial matters, such as the protesting of notes and bills, the noting of foreign drafts, and marine protests in cases of loss or damage." (Underline added.)
2. The precise duties of notaries in all U.S. states and jurisdictions are compiled in the National Notary Association's 2002-2003 U.S. NOTARY REFERENCE MANUAL (2001, 6th Ed.).
3. The MODEL NOTARY ACT OF 2002 defines an acknowledgment as follows: "'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." Drafted by a national panel of state officials, law professors, surety executives and notaries, the MODEL NOTARY ACT OF 2002 is published by the National Notary Association as a guide for state lawmakers; it is an updating and significant expansion of the MODEL NOTARY ACT OF 1984 and the UNIFORM NOTARY ACT OF 1973.

4. This dollar amount is cited by Carl Ernst, CEO of Ernst Publishing Co., LLC.
5. The proper statutory forms of acknowledgment for all U.S. states and jurisdictions are compiled in the 2002-2003 U.S. NOTARY REFERENCE MANUAL – see *supra* note 2.
6. On every notarized document, there is an absolute necessity for notarial “certificate” wording of some kind to indicate exactly what the notary is certifying. Indeed, THE NOTARY PUBLIC CODE OF PROFESSIONAL RESPONSIBILITY makes this requirement one of its “Standards of Professional and Ethical Practice”:

IV-A-1: Notarial Wording Required

The Notary shall not notarize any document unless it bears jurat, acknowledgment or other notarial “certificate” wording that specifies what the Notary is attesting.

Illustration: The Notary is asked by a stranger to “certify” an engineering drawing to protect an invention. When the Notary appears perplexed by the request, the stranger says, “Just stamp, date and sign it – that’s all I need.”

The Ethical Imperative: The Notary declines to “notarize” any document that does not bear notarial certificate language. Merely “stamping, dating and signing” is insufficient because there is no wording to indicate exactly what the Notary’s seal and signature are certifying.

7. A repeated theme in National Notary Association educational materials for notaries is the need to fill out notarial certificates accurately and completely; a failure to do so may not only render a document open to legal challenge but also cast doubt on the professional competence of the notary. See, for example, NOTARY HOME STUDY COURSE (1998, 7th Ed.), pp. 86-87.

8. So critically important is the notary's obligation to understand the basics of notarization and to keep abreast of pertinent developments affecting notarial duties that THE NOTARY PUBLIC CODE OF PROFESSIONAL RESPONSIBILITY makes self-education one of the Notary's 10 Guiding Principles and devotes six separate Standards of Professional and Ethical Practice to elaborate on this obligation:

Guiding Principle X

The Notary shall seek instruction on notarization, and keep current on the laws, practices and requirements of the notarial office.

In regard to educating notaries about the real estate recording process, many of the practical illustrations posed in the CODE'S 85 Standards address common dilemmas related to the preparation of real estate documents.

9. Of the 50 states and District of Columbia, only 15 of these jurisdictions require notary commission applicants to take and pass an examination on notarial duties. See *Guide to Notary Commission Eligibility* in THE NATIONAL NOTARY, May '01, p. 21. Only two states, Florida and North Carolina, mandate that applicants pass a course of instruction on notarization.

10. For a discussion of the legal mechanisms used to discipline miscreant notaries, see John T. Henderson and Peter D. Kovach, *Administrative Agency Oversight of Notarial Practice*, THE JOHN MARSHALL LAW REVIEW, Spring '98, pp. 857-877. This article focuses mainly on disciplinary programs in the state of Pennsylvania.

11. Drafted by the National Conference of Commissioners on Uniform State Laws, the UNIFORM ELECTRONIC TRANSACTIONS ACT was approved and recommended for enactment in all the states by the NCCUSL at its annual conference in 1999. Soon

thereafter, California became the first of now more than 30 states to introduce and legislatively adopt the UETA in some form.

12. Enacted by the U.S. Congress as Senate Bill 761 without a single dissenting vote, the ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT took effect on October 1, 2000, with certain provisions related to electronic record retention effective March 1, 2001.

13. A current program in Orange County, California, allowing electronic transmission and recording of the images of notarized paper documents, is of this type.

14. The first known official recording of an electronically notarized and remotely transmitted digital document occurred in Utah on September 10, 1999. See *A Look at the Technology Used in Signing the First Recordable Electronic Document*, NOTARY BULLETIN, Feb. '00, p. 9.

15. This definition of “electronic signature” is found in Section 2, Subsection 8, of the UETA. See *supra* note 11.

16. See ARIZONA REVISED STATUTES ANNOTATED, Section 41-356. Signed into law on April 10, 2000, as Chapter 210, these statutes permit electronic notarization in or out of a notary’s presence.

17. See the National Notary Association’s A POSITION ON DIGITAL SIGNATURE LAWS AND NOTARIZATION (2000), p. 8: “The fundamental principles and process of notarization must remain the same regardless of the technology used to make a signature,

because, while technology may be perfectible, the basic nature of the human beings who use it is not. Any process – paper-based or electronic – that is called notarization must involve the personal physical appearance of a signer before a commissioned Notary Public.”

18. The UNIFORM LAW ON NOTARIAL ACTS was approved and recommended for enactment in all the states by the NCCUSL at its annual meeting in 1982.

19. The UNIFORM ACKNOWLEDGMENT ACT, approved and recommended for enactment in all the states by the NCCUSL in 1939, was subsequently amended in 1960.

20. The UNIFORM RECOGNITION OF ACKNOWLEDGMENTS ACT was approved and recommended for enactment in all the states by the NCCUSL at its annual meeting in 1968.

21. This is the “Commissioners’ Comment” at the end of Section 2 of the ULONA – see *supra* note 18.

22. See A POSITION ON DIGITAL SIGNATURE LAWS AND NOTARIZATION – *supra* note 17, pp. 3-4.

23. While state laws generally stipulate that any credible witness relied on by the notary to identify a stranger must be personally known to the notary, two states – California and Florida – allow reliance on two unknown credible witnesses to identify a stranger, if both witnesses have acceptable documentary identification and have no interest in the transaction at hand. See CALIFORNIA CIVIL CODE, Section 1185(c), and FLORIDA STATUTES, Section 117.05(5).

24. See, for example, FLORIDA STATUTES, Section 117.107(5): “A notary public may not notarize a signature on a document if it appears that the person is mentally incapable of understanding the nature and effect of the document at the time of notarization.” Also, see OFFICIAL CODE OF GEORGIA ANNOTATED, Section 45-17-8(b), which prohibits notarization for a person “whose demeanor causes compelling doubts about whether the person knows the consequences of the transaction requiring a notarial act.”

25. More than one observer has opined that digital signature technology may increase rather than lessen the importance of the notary. See, for example, Glen-Peter Ahlers, Sr., *The Impact of Technology on the Notary Process*, THE JOHN MARSHALL LAW REVIEW, Spring '98, p. 912: “At first blush it might seem that a notary’s purpose, to note the identity of one who signs a document, is rendered moot in the digital age since computers and not people will be generating documents. But perhaps the greater complexity...of today’s technological documents should demand a greater effort to identify the person at the keyboard who signs or acknowledges an electronic document. Instead of causing the death of notaries public, technology might instead increase their importance.”