

NOTARY LAW

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I. History of the Notary

A. Roman Period. The history of the notary is one of a learned profession. The function of the notary dates back to ancient Rome, probably before the time of Julius Caesar. Literate scribes set out stalls in the marketplace to record contracts and commercial transactions. Over time, these scribes became more involved with recording private law matters such as deeds, wills and transfers of property. The origin of the word notary probably comes from Cicero's secretary, M Tullius Tiro. Tiro developed a system of shorthand for recording Cicero's speeches. This shorthand was called *Notae Tironinae*. Any individual who adopted this shorthand method became known as a *Notarius*. Later, probably starting around the 1st century A.D. the term Notarius was restricted for use by the Registrars of provincial governors and secretaries to emperors.¹

B. Middle Ages. The function of the notary was retained by the various conquerors of the Roman Empire. The "Dark Ages", as this period is oftentimes called, was a period of general illiteracy and a lack of any semblance of a "rule-of-law". In the early 9th century, the Frankish emperor, Charlemagne, appointed commissioners to collect the taxes four times a year. He directed these itinerant justices to appoint "notaries" to accompany them on their rounds.² As a result of the increasing influence of the Catholic Church during this period, the popes started to appoint notaries. Sometime around 1271, William Durand (also known as Duranti, Durandus and Durantis), one of the most important of the liturgical writers and the secretary to Pope Gregory X wrote in his SPECULUM that "A notary public appointed by the Emperor or the Pope or by someone to whom they have granted this special privilege, may perform his office and draw up instruments anywhere, -EVEN IN FRANCE OR ENGLAND OR SPAIN". It is evident that even 700 years ago, the notary was a respected individual whose acts were recognized across international borders.³

¹ Halliwell, Tom. "History of Notaries." 2000. Personal Website of Tom Halliwell.
<http://www.learnedcounsel.com/notaryhistory.html>

² Ibid.

³ Ibid.

C. Modern Era.

1. Common Law Countries. In 1279, the Pope authorized the Archbishop of Canterbury to appoint notaries. Not surprisingly, most of these notaries were members of the clergy. This practice continued until 1533 when, as a result of the Protestant Reformation, power transferred from the Pope to the Archbishop of Canterbury in England. Today, in England, New Zealand, parts of Australia and some other countries, notaries are appointed by the Master of the Faculties, a judicial officer of the Archbishop of Canterbury.⁴ Unlike the U.S., the notaries of England and most of its former colonies are civil lawyers who practice more as solicitors than as barristers. Their responsibility is to the transaction rather than to the principal.

2. Latin Law Countries. “Roman law forms the basis of all legal systems of Western Europe with the exception of England and Scandinavia.”⁵ This “Code” law approach differs from the “Common” or “Customary” law developed in England. The Mexican and South American Notarios are the heirs of the Roman system.

3. United States. In the United States, notaries have historically not been members of either the clergy or the bar. They are creatures of the statutes of individual states. There is generally little, if any training required of the notary and the application process requires little in the manner of background information to allow the appointing authority to determine the fitness of the applicant. Recent California legislation requires the applicant to go through a background check and pass a written examination; however this is more the exception than the rule across the country. In some states, notaries are appointed by the Governor, in others by the Secretary of State. In Georgia, the power to appoint notaries is vested in the clerks of the superior courts. In Maryland, the application is submitted to the Secretary of State who then forwards it to the State Senator for the district in which the applicant resides. If the Senator approves the application, it is returned to the Secretary of State who forwards it to the Governor for appointment. Some states require the applicant to provide two affidavits from third parties as to the applicant’s character.

With this hodge-podge of laws, it is no wonder that our brethren in other countries often view the U.S. notary with a bit of skepticism. Moreover, the U.S. notary is restricted to at most, performing notarial acts only within the boundaries of the state and in some states, only within the boundaries of certain counties.

⁴ Cox, Noel. “The Notary Public – the third arm of the legal profession.” 6 New Zealand Business Law Quarterly 321-325 (2000).

⁵ Hoeter, Dr. Bernard. “Ancient History of Notaries.” The Scrivener, Vol 9 No.3, October 2000.

D. What is a Notary Public?

Notary public is defined as a public, civil or ministerial officer, and an impartial agent of the state, who in the performance of his duties, exercises a delegation of the state's sovereign power, as in attesting the genuineness of any deeds or writings in order to render them available as evidence of the facts therein contained, and in administering oaths and attesting to the authenticity of signatures. The notary is an officer known to the law of nations; hence his official acts receive credence, not only in his own country, but in all others in which they are used as instruments of evidence.⁶

The above definition is somewhat misleading, at least under most states' notary laws. Stating that the notary attests to the 'genuineness of any deeds or writings in order to render them available as evidence of the *facts therein contained...*' would lead the casual reader to think that the notary reviews the document, when in fact, the notary only observes the signing of the document or takes an acknowledgement from the signer after properly reviewing the identification of the signing party. The most important part of the definition is that the notary is an "impartial" agent of the state.

II. Colorado Notary Law

A. Resources. The Secretary of State's website for Notary information can be found at http://www.sos.state.co.us/pubs/bingo_raffles/notary_public.htm. All of the forms necessary to apply, re-apply, change a name or address are available as web-based forms on this site. The Notary Handbook is a valuable tool for both new and seasoned notaries. In addition to these items, the site contains a list of Frequently Asked Questions (and our recommended answers) along with a copy of the Notaries Public Act.

B. Perceived Deficiencies of Colorado law. The Colorado Notaries Public Act is a minimalist's attempt to regulate a serious and important function that unfortunately, isn't taken seriously by most people, notaries and attorneys included.⁷ After years of trying, the Secretary of State finally accomplished significant changes in the law during the 2009 legislative session. One of those changes was the requirement that the Secretary of State could adopt rules regarding the mandatory education of notaries. More states are looking at the number of notary misconduct cases in their jurisdictions and are passing legislation that mandates education and the use of a journal. Some states go so far as to require that applicants for a notary commission must pass a test before being commissioned. Colorado

⁶ 58 Am. Jur. 2d 523.

⁷ CRS §§ 12-55-101 *et seq.*

is contemplating rules that require either a test only for current notaries or education and a test for new notaries. Another change was the statutory requirement that a notary maintain a journal entry for every notarial act. Prior law only required the notary to create a journal entry for those acknowledgments of documents affecting title to real property and when the notary used an electronic notary signature and seal. As I will discuss later in this paper, a notary's journal provides a level of protection to the notary that may prevent spending time before a hearing officer. It can also be rebuttable proof that the notary met the standard of care required of the profession. Lax laws may create traps for the unwary by treating notaries and the notarial function in a casual manner.

C. Requirements to be a Notary. Colorado requires very little for an initial applicant.⁸

1. The applicant must be at least 18 and must be a resident of Colorado. There is no requirement that the applicant be a citizen of the United States. In fact, the U.S. Supreme Court held in *Bernal v. Fainter*, that resident aliens can be notaries because the duties are "essentially clerical and ministerial" and that notaries are not public "officials who perform functions that go to the heart of representative government."⁹

2. The applicant must be able to read and write the English language.

3. The addresses and telephone numbers of the applicant's business and residence in Colorado.

4. A statement that the applicant's commission has never been revoked, in any state.

5. A statement that the applicant has never been convicted of a felony, or of a misdemeanor involving dishonesty within the past five years. The Secretary of State does not do background checks but the above two statements are made under penalty of perjury.

6. An affirmation that the applicant is either:

a. A U.S. citizen

b. A legal resident of the United States under some federal law, e.g. an I-9 (green card).

c. A resident of the United States under color of law, e.g. a refugee properly admitted to the United States.

7. The applicant must submit a current, valid identification card, e.g. Colorado driver's license, passport, etc.

⁸ CRS § 12-55-104.

⁹ 467 U.S. 216 (1984)

D. The Application Process. One of the main reasons the Secretary of State provides this CLE training, as well as other training for notaries and notary applicants around the state, is the number of applications received that have to be returned for one reason or another. The Secretary of State's office receives approximately 2,200 new and renewal applications every month. The office returns 25-30% of all paper applications. From the standpoint of government efficiency, this is equivalent to adding one more employee if the office is to maintain a standard processing time of five days. Since it cannot add additional staff, the rejected documents cause the entire workflow to slow, resulting in a processing time of up to ten days. This means that all those who complete the form correctly suffer because of the inability of some to read and follow directions. Applicants are encouraged to use the online form completion and payment process and then submit the original signed and notarized form to the Secretary of State along with the applicant's identification. The application itself is straightforward. The website for online completion is found at <http://www.sos.state.co.us/NotaryPublic/applyIntro.do>. A copy of the paper form is attached as Exhibit A. The filing fee for a paper document has recently been raised to \$25.00. The filing fee when paying online is \$15.00.

Some of the problems that the office encounters are listed below.

1. Residence Address/Telephone. The Secretary of State has had at least one attorney notary argue that since "*residence*" isn't defined in the notary statutes, a post office box should be acceptable. The counter argument is that one doesn't live in a post office box. The rules of statutory construction provide that "Words and phrases shall be read in context and construed according to the rules of grammar and common usage."¹⁰ Black's Law Dictionary defines "Residence" as "A factual place of abode."¹¹ Webster's Deluxe Edition Dictionary defines "reside" as "To dwell permanently; to exist as a quality or attribute; live in or at. **residence** *n.*"¹² Colorado statutes provide:

"The residence of a person is the principal or primary home or place of abode of a person. A principal or primary home or place of abode is that home or place in which a person's habitation is fixed and to which that person, whenever absent, has the present intention of returning after a departure or absence, regardless of the duration of the absence. A residence is a permanent building or part of a building and may include a house, condominium, apartment, room in a house, or mobile home. No vacant lot or business address shall be considered a residence."¹³

¹⁰ CRS § 2-4-101

¹¹ Revised 4th Ed.

¹² 2001 Ed.

¹³ CRS § 1-2-102(1)(a)(I).

Therefore, the Secretary of State expects you to provide the address where you live most of the time, not the address where you receive mail. The Secretary of State's personnel are becoming very familiar with the addresses of all of the MailBoxesRUs and UPS stores around the state. An application where a home address is identical to one of these addresses will be rejected and may subject the applicant to penalties. Remember, this application is signed under oath. Telephone numbers are more problematic. Although the statute requires a telephone number in Colorado, it is entirely possible that the applicant has just moved from another state and only has a cell phone with an area code that isn't in Colorado. The answer is to put a note on the application that the number is a cell number.

2. Business Address/Telephone. The Secretary will reject an application that states the applicant has "No Business Address" when other information on the application indicates that the applicant does have a business address, such as an email address like Jane.Doe@wellsfargobank.com.

2. Name. The name used by a notary applicant is the name that the applicant wants to appear on the seal. The statute requires the "applicant's typed legal name."¹⁴ The Secretary of State doesn't really care what name you use. It must be the same name throughout the application, however. There is one notary in Colorado who goes by the name Ssnake. That's it, just Ssnake. The Secretary of State recommends using the name that you normally affix to checks or when you sign legal documents.

3. Signature. The signature must match the name. If the applicant types her legal name as Mary Smith, then the signature must be Mary Smith, not Mary S. Smith. In the case of Ssnake above, the notary signs his name with a series of symbols, including that of a snake.

4. Identification. Applicants fail to submit proper identification with their applications. This is true even when the applicant has paid online. The applicant forgets that the original signed and notarized document must still be mailed to the Secretary of State with a copy of the identification. A credit card is not a satisfactory piece of identification. Please do not submit your actual credit card. (Yes, it has happened, and more than once.)

Notary Powers.

1. Jurisdiction. A notary commissioned in Colorado can perform notarial acts anywhere within the state. However, a notary who lives on the Colorado border in Burlington cannot step across into Kansas and notarize a document in that state. A notary can perform a notarial act for anyone who appears before him, regardless of the residence of the principal, subject to some restrictions that will be discussed later. We recently had a notary inform the Secretary of State that she had notarized a document for another Colorado resident while in India. She wondered whether this was acceptable.

¹⁴ CRS § 12-55-104(2).

2. Administer oaths and affirmations. This power, along with taking acknowledgements, is one of the two most common powers that a notary will exercise. The oath requires that the principal swear before a deity, or affirm under penalty of perjury, that the principal is who he says he is and that he understands the document and is signing the document of his own free will. The notary can also swear a person into office.¹⁵

3. Take acknowledgements. “ ‘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.”¹⁶

4. Take depositions. Although notaries may take depositions, the notary who is not also a trained court reporter or stenographer is cautioned to be wary of taking on this notarial function.

5. Certify copies. Notaries may certify copies, subject to the limitations discussed below.

6. Give Notices of Protest and Dishonor of negotiable instruments. This is a specialized function and should only be performed by those notaries familiar with the law of presentment and dishonor in the Uniform Commercial Code¹⁷, specifically CRS 4-3-505(3)(b). Neither the Uniform Act nor the Model Act¹⁸ include presentment and dishonor in the enumerated powers of a notary. The comment to §5-1 of the Model Act states “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.” The Secretary of State sees a number of documents that have been notarized and the holder of the document wants the document to be authenticated. The document purports to be a Notice of Protest but it is generally a claim against a bank or other lender, along with named public officials, using admiralty law as the basis for the claim. Perhaps incorrectly, the Secretary of State refers to these individuals as “constitutionalists”.

E. Seals and Journal

1. The seal. Although a number of states make the use of a seal optional, Colorado requires that notaries acquire and use a seal. In 1995, fourteen states did not require the use of a seal.¹⁹ By 2004, only 7 states made the use of a seal optional. The seal imparts ritual and solemnity to documents that are “under seal”.²⁰ The seal also physically

¹⁵ CRS § 24-12-103.

¹⁶ Section 1. Definitions. (2), Uniform Law on Notarial Acts, Drafted by National Conference of Commissioners on Uniform State Laws, Annual Conference 1982. Approved by ABA February 9, 1983.

¹⁷ CRS §§ 4-3-501 through 4-3-506.

¹⁸ Model Notary Act, published by The National Notary Association, 2002.

¹⁹ Fischer, Douglas M. “The Seal: Symbol of Security”, Nat’l Notary Mag., Nov. 1995 at 12.

²⁰ Elliott, Karla J. “The Notarial Seal –The Last Vestige of Notaries Past”, 31 The John Marshall Law Review 903, Spring, 1998.

identifies the notary, giving rise to the requirement in many jurisdictions that the seal be kept under lock and key.

a. Colorado does not designate the size, shape or method of attachment of the seal. The seal can be a metal embosser or a rubber inked stamp. With the rise of copy machines, it became more difficult to copy a document that had an embossed seal so the use of the rubber stamp became more prevalent. The seal can be round, square, oblong or oval. The color of the ink can be anything the notary wants to use. The seal requires a border but the design of the border is up to the notary. There is a cautionary note here. The notary who uses hearts and flowers as a border and chartreuse ink on the stamp may be taken less seriously as a professional, “disinterested witness” than one who uses a more conservative approach to the seal.

b. Colorado requires that only three items may be inside the border of the seal: the words “State of Colorado”, “Notary Public” and the name of the notary as it appears on the commission certificate²¹. The commission expiration date, if it is on the seal, must appear outside the border. The Secretary of State’s office recommends as a best practice that the notary purchase a separate stamp for the commission expiration date or physically write in the expiration date on each notarial certificate. The stamp (if it was manufactured correctly) provides the notary with the assurance that the commission expiration date is always correct. The commission expiration date placed on the stamp form of seal ensures that the commission expiration date always appears in the notarial certificate; however it also means that the notary must purchase another seal every four years rather than just purchasing the much less expensive commission expiration stamp.

c. Ownership of the seal is with the notary. Even though a law firm or other employer pays for the notary to be commissioned and purchases or reimburses the notary for the seal and journal, the employer has no right to keep the seal upon the termination of the notary’s employment. In fact, possession and use of an official seal or journal by one who is not the commissioned notary is a Class 3 misdemeanor.²² Some states specifically declare the notary’s seal and/or journal to be the “exclusive property of that notary public.”²³

d. The notary must notify the Secretary of State within thirty days if a seal is lost or misplaced, or the notary becomes aware that someone else has control over the notary’s electronic signature.²⁴ If the notary decides to resign her commission, or move out of state, the notary must deliver the seal to the Secretary of State. If the notary dies, the personal representative or heirs should deliver the seal to the Secretary of State, if it is available.²⁵

²¹ CRS § 12-55-112(2).

²² CRS § 12-55-118.

²³ Cal. Gov’t Code 8206(2)(G)(d).

²⁴ CRS § 12-55-113.

²⁵ CRS § 12-55-115

2. The journal. As mentioned above, the Secretary of State was able to successfully amend the statute during the 2009 legislative session. That statutory change mandates the use of a notary journal for all notarial acts.²⁶

a. However, there is even an exception to this requirement. Where the notary's firm or employer maintains an original, copy or electronic record of the notarized document, a journal entry is not required.²⁷

b. When a journal is used, it should (but it is not required) contain the following information:

(1) Type and date of the notarial act. The type of act is oath and affirmation, acknowledgment, or certified copies.

(2) The title or type of document and the date of the document if different from the date of notarization.

(3) The name of each person whose oath, affirmation or acknowledgment or other statement is taken.

(4) The signature and address of the principal.

(5) The signature(s), printed name(s) and address(es) of any witnesses.

(6) Although not mentioned in the statute, the notary should also obtain and record the identification used by the principal, such as a drivers' license.

c. Like the seal, the notary's journal belongs to the notary, not to the firm or the employer.

d. The notary must notify the Secretary of State within thirty days if a journal is lost or misplaced.²⁸ If the notary decides to resign her commission, or move out of state, the notary must deliver the journal to the Secretary of State. If the notary dies, the personal representative or heirs should deliver the journal to the Secretary of State, if it is available.²⁹

F. Status Changes. A notary who changes her name must file a notice with the Secretary of State within 30 days.³⁰ This process is now done electronically via the Secretary of State's webpage. There is no cost to make these changes. All the notary has to do is register for online access via the website. A name change is less problematic than an address change. The Secretary of State receives numerous calls and complaints from principals who need to have the notary fix an error in the notarial certificate but cannot find the notary. The Secretary of State will revoke the commission of any notary who has been

²⁶ SB09-111, 1st Regular Session, Sixty-Seventh General Assembly.

²⁷ CRS § 12-55-111(3)(a).

²⁸ Supra note 23.

²⁹ Supra note 24.

³⁰ CRS § 12-55-114(2).

complained against for failure to change an address. The paper form is also available online. It can be printed out, completed and faxed to the Secretary of State.

III. Notarial Duties

A. Administer an Oath or Affirmation. The statute provides the form that a notary should use when administering an oath or affirmation.³¹ The words “subscribed and affirmed, or sworn to before me...” mean something. In an oath or affirmation, the principal must physically apply her signature in front of the notary at the time of the notarization. Colorado actually requires that the notary or any other person authorized to administer an oath have the person swearing lift his hand and swear “by the ever living God”,³² however, the Colorado Supreme Court said in *Rogers v. People*, a 1966 case involving the question of whether the appellant committed perjury in the absence of clear and convincing evidence that the appellant took an oath, “Under most office arrangements where handling of papers are routine and perfunctory, it is unlikely that ‘the ever living God’ terminology was invoked to witness the truth of the statement.”³³ The court did comment that the ceremonial function was important, when it questioned the lack of examination of the notary witness. “There was not even an attempt to elicit from the witness whether it was her custom in every case to administer the oath as required, or whether she did so in most cases or not at all.”³⁴ The inference can be made that the Court expects a notary or any other person administering the oath to at least perform some ritual whereby the principal ‘swears’ to the truthfulness of the statement. For those individuals who are conscientiously opposed to swearing before a deity, the statutes provide that he can affirm, under penalty of perjury to the truthfulness of the statement.³⁵ A random survey of notary participants who have participated in training provided by the Secretary of State indicates that most Colorado notaries do not actually adhere to the prescribed procedure for notarizing a sworn statement.

B. Take an Acknowledgment. An acknowledgment differs from an oath in three respects. The acknowledgment is not a sworn statement. Secondly, the signature of the principal doesn’t have to be affixed at the time of the notarization. The document or instrument may have been signed earlier and the principal only appears before the notary to “acknowledge” that the signature is his. Suggested forms of acknowledgements are found at CRS §12-55-208. Finally, an oath does not require that the notary identify the principal. When taking an acknowledgment however, the notary must perform additional tasks. The words “Acknowledged before me” means (a) That the person acknowledging appeared before the person taking the acknowledgment and that (b) he acknowledged he executed the instrument; and that (d) That the person taking the acknowledgment either

³¹ CRS § 12-55-119.

³² CRS §24-12-101.

³³ 161 Colo. 317; 422 P.2d 377 at 382.

³⁴ Ibid.

³⁵ CRS § 24-12-102.

knew or had satisfactory evidence that the person acknowledging was the person named in the instrument or certificate.³⁶ Satisfactory evidence includes but is not limited to:

1. The individual is personally known to the notary as the person named in the document.
2. The sworn statement of a credible witness who is known to the notary and who also knows the principal. This does not mean that the notary can be approached by a person who is not known
3. A current identification card or document issued by a federal or state governmental entity containing a photograph and signature of the individual who is so named. The current identification card can be:
 - a. A Colorado driver's license or a driver's license from another state.
 - b. A current U.S. passport.
 - c. The green ID card issued by the military. The new ID card, also called a Common Access Card or CAC has a computer chip in it with the service member's information. However, it does not have a signature as required by statute. The notary could, in good faith, use this identification because of the security used in its issuance and rely on the provision of the statute that says "includes but is not limited to..." However, the statute does require a photograph and signature. The issue may be moot however. It is unlikely that a young service member does not also have a state driver's license.
 - d. Local recreation district ID card when the card contains a picture and a signature.
4. Unacceptable ID. The notary must exhibit a reasonable standard of care when attempting to identify the individual who appears in front of him.
 - a. A birth certificate is not acceptable for notarial purposes. How a piece of paper that indicates that *someone* was born in 1949 is supposed to show that the person holding it is the person described in the document defies all common sense. Likewise, rent receipts that may indicate that someone lives at a particular address are not acceptable for notarial purposes. However, they are acceptable under state rules for voting purposes.³⁷
 - b. The Matricula Consular (MC) card is not an acceptable ID pursuant to statute as it is not issued by our federal or state governments. The MC is issued by the Mexican government to Mexican foreign nationals in the U.S. Legal residents of the United States would also have identification issued by the U.S. government. If the only ID that the principal has is an MC there is a reasonable inference that the individual is in the country illegally. There is nothing in the Colorado Notaries Public Act that would allow a notary to refuse to notarize a signature based on an individual's status in the United States. See 5. below. The main problem with the MC is that it has been the subject of much analysis

³⁶ CRS § 12-55-107(1).

³⁷ Help America Vote Act, Public Law 107-252, 107th Cong., 42 USC 15483(b)(2)(A)(i)(II),

concerning the ease with which it can be forged. The notary subjects herself to a challenge for not adhering to a common standard of care, when it can be shown that many of these identification documents are altered, forged or improperly issued. In 2003, the Colorado legislature passed HB 03-1224, "Secure and Verifiable Identity Document Act."³⁸ This Act defines "Secure and Verifiable Document" as "...a document issued by a state or federal jurisdiction or recognized by the United States government and that is verifiable by federal or state law enforcement, intelligence, or homeland security agencies."³⁹ Very few jurisdictions in the country accept the MC as secure identification. It is interesting to note that California recently introduced legislation that would allow the MC to be used as proper identification.⁴⁰

5. Problem areas. The statute gives the notary some discretion in the types of identification that can be accepted. However, it is not specific with respect to foreign documents. Colorado is a year-round tourist venue. There are many occasions when foreign visitors need to have a document notarized but the identification documents they produce do not fit squarely within the statutory language. A legitimate visitor may only have a British passport and a British driver's license. The reasonably prudent notary would be inclined to accept that identification. The Model Notary Act attempts to deal with this situation by stating that a "properly stamped passport" is acceptable, even without a physical description.⁴¹ The notary may also rely on the definition of "Secure and Verifiable Document" in 4b. above under the rule that a foreign passport is recognized by the U.S. government. It is unlikely that a notary who has exercised reasonable care in assessing identification will be held liable if the identification turns out to be false. The best practice would be to also include the appropriate entries in the journal.

6. Competency and free will. In a situation where the notary is taking an acknowledgment, there are two additional functions that the notary must attend to, in addition to properly identifying the principal. The notary must also determine through observation and questioning, whether the principal understands the document that she is signing and the import of the execution of that document and must determine whether the principal is signing of her own free will and is not under duress.⁴²

C. Copy Certifications. A notary may certify copies of documents that cannot be obtained from any clerk and recorder or custodian of documents *in Colorado*.⁴³ Most often, these documents are diplomas, bank statements, doctor's notes, medical files, etc. Although copies of school transcripts may be certified, most requestors of these documents want the sending school to certify them and send them directly to the receiving school or employer.

³⁸ CRS §§ 24-72.1-101 *et seq.*

³⁹ CRS § 24-72.1-102(5).

⁴⁰ SB 461 by Sen. Correa, introduced February 26, 2009. The bill would amend section 1185 of the California Civil Code.

⁴¹ *Supra* note 17 at § 2-17.

⁴² See Van Alstyne, Peter J., Notary Law, Procedures & Ethics, Notary Law Institute, Salt Lake City, UT, 5th Printing, 2005, at 19 for an excellent discussion.

⁴³ CRS § 12-55-120(1)(a).

1. Copies of birth and death certificates may not be certified by a notary. The state registrar in the Department of Public Health and Environment is the only source for certified copies.⁴⁴ Recent developments in the application for public benefits have made this provision incredibly difficult for applicants. Often, a certified copy of a birth certificate, along with some other form of identification is required in order to receive public benefits (e.g. Medicaid, WIC, etc.). The health department has published policy letters that allow Colorado notaries to make certified copies of birth certificates only, for the purpose of Medicaid applications.⁴⁵

2. Certified copies of marriage certificates can be obtained from the Clerk and Recorder of the county where the marriage was performed.

3. The recommended text for certifying a copy is found at CRS § 12-55-119.

D. The Notarial Certificate. The notarial certificate is the who, what, where, and when of the notarial process. The certificate is sometimes known as a jurat. The term jurat means “It is sworn” and should be used only when an oath or affirmation is being administered. The correct meaning of “certificate” is a *jurat* or an *acknowledgment*. Recommended forms for both the jurat and acknowledgments are found at CRS § 12-55-119 and CRS § 12-55-208.

1. The certificate must contain the county where the document was signed by the notary. In the case of a jurat, it will be the county where both the principal and notary sign the document. In the case of an acknowledgment, the principal may have signed the document elsewhere but acknowledges the signature before a notary. The certificate states the county where the principal acknowledged the signature before the notary and the notary has affixed her signature and seal.

2. The certificate must state whether it is a jurat or an acknowledgment by including the words “signed and sworn to or affirmed before me...” or “acknowledged before me...”

3. The certificate must name the principal e.g. “acknowledged before me by John Smith...”

4. The certificate must have the date of the notarization.

5. The certificate must have the notary’s signature.

6. The stamped or embossed seal and expiration date must appear somewhere near the notary’s signature.

7. The seal should not cover any of the text of the document. If there is no room for a certificate and seal, the notary should attach a second page containing the certificate, seal and expiration date.

E. Accommodating Physical Limitations. There are occasions when the notary is approached by a principal who either cannot write his name due to a physical disability or

⁴⁴ CRS §§ 25-2-101 *et seq.*

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illiteracy or who cannot communicate verbally with the notary. In the case of an individual who physically cannot sign, the statute provides that a third person may sign the document under the direction of the principal, while both are in the presence of the notary.⁴⁶ The law is silent as to the procedure for the principal who can only make a mark. In this case, it is recommended that the notary have at least one witness who witnesses the signing by mark and who signs the document as a witness. The notary would put in the certificate that the document was “signed and sworn to or affirmed (or acknowledged) before me by John Smith who made his mark in the presence of Harry Jones, witness”. The Model Act requires two witnesses but the notary affixes the mark or the signature on behalf of the principal in front of the two witnesses.⁴⁷ In the case of a principal who cannot communicate verbally or in writing, the law provides that the notary may use signals or electronic or mechanical means” to communicate.⁴⁸ The statute does not provide any guidelines as to how this process would work in the real world. The notary is cautioned about performing notarizations when he is dealing with an individual who cannot communicate. The best practice would be to have a third party who knows the principal and who can communicate with the principal and the notary. The notary runs the risk that the third party is not truthfully communicating the principal’s wishes. The alternative is that discrimination against a principal with a disability is probably a greater risk.

IV. Authentications

The Secretary of State ‘authenticates’ the signatures of notaries on documents that are being sent to foreign countries. The certificate that is attached to documents going to countries that are signatories to the Hague Convention of 5 October 1961 titled “Abolishing the Requirement of Legalisation for Foreign Public Documents” is called an Apostille. The certificate placed on documents going to non-signatory countries is called a Certificate of Magistracy. The Secretary of State will also provide a Certificate of Fact authenticating a notary’s signature and status for documents going to other states (although this appears to be unnecessary as most states have adopted the Uniform Recognition of Acknowledgments Act⁴⁹). The Secretary of State has recently adopted a new policy regarding the issuance of authentications. Prior to December 1, 2005, the notary section of the office would review the entire notarial certificate for deficiencies. Incomplete or incorrect certificates would cause the document to be rejected. This policy caused problems because the individual submitting the document for authentication was often the innocent party to a notary’s negligence. The notary section consulted other states’ administrative officers and reviewed the text of the Convention. Today, the policy is that an authentication will be issued if the notarial certificate meets three criteria: (a) the notary must be commissioned and current, (b) the notary’s signature must match the signature on file in the Secretary of State’s office and (c) the notary’s expiration date on the document must match that on file. If there are

⁴⁶ CRS § 12-55-110(1).

⁴⁷ Supra note 17 at § 9-5.

⁴⁸ CRS § 12-55-110(2).

⁴⁹ CRS §§ 12-55-201 *et seq.*

deficiencies in the notarial certificate or in the document, such as blank pages, etc. the notary section will provide a statement that the notary's signature has been authenticated but that there are deficiencies in either the document or the notary's certificate. For example, the office often sees acknowledgments where the name of the notary appears in the place where the name of the principal is to appear. Notaries often leave out the name of the county or the date. The information form (Attached as Exhibit B) states that the document itself may not be acceptable by the country to which it is being sent. This new procedure may not end everyone's problems but it may reduce the pain of rejected documents that cause people to miss airplane flights and adoption proceedings. In many of these countries, the administrative officer on the other end is often looking only to the Apostille or Certificate of Magistracy from the Secretary of State and so long as the document contains the information he is looking for, notarial deficiencies may be overlooked.

IV. Notarial Misconduct

Most of the complaints received by the Secretary of State deal with the inadvertent mistake made by the notary, rather than a deliberate attempt to flout the law. In many cases, the notary excuses the action by thinking "It's no big deal", "No one will notice". "I was in a hurry", "I was only trying to help out a friend, client, customer etc." Unfortunately, the notary's misconduct is often the result of practices and procedures of the notary's employer, many times a lawyer or law firm.

A. Personal Presence. The keystone of the notary's standard of care is the personal presence of the principal before the notary when subscribing to or acknowledging the document.⁵⁰ Most of the formal complaints against notaries are based on an allegation that the Complainant did not appear before the notary to sign the document. A percentage of this group alleges that not only did they not appear but that the signature is a forgery.

1. Administrative Cases.

a. Defendant notary testified before the hearing officer that she notarized a signature on a document faxed to the courthouse in Colorado while the principal was authorizing her to notarize it over the telephone from Arkansas. The notary testified that it was a valid notarization because "the principal had been a client of the law firm for a long time and she recognized his voice."⁵¹ The notary's commission was revoked.

b. Attorney was publicly censured for having pre-signed Affidavits of Service notarized by three notaries in adjoining law firm who had witnessed the signature of the process server on the first of such Affidavits but the process server did not appear before the notaries on subsequent Affidavits.⁵²

2. Civil Cases

⁵⁰ CRS §12-55-110(4)(a)

⁵¹ In re the Certificate of Appointment and Commission of Mary Nelson, Colorado Secretary of State Administrative hearing, October 7, 2005.

⁵² Colorado v. Peters and Kusic, 2003 Colo. Discipl., 82 P.3d 389 (2003).

a. A nineteen year old woman was injured in an automobile accident. The driver was insured for \$100,000. The father of injured woman negotiated a settlement with the insurance company for \$70,000 and used the money to pay off father's loans owed to the bank. The father took the release papers to a friend who was also a bank employee and a notary. The notary notarized a release without the daughter appearing in front of the notary. The Supreme Court. of South Dakota reversed the trial court's order of summary judgment for the defendants and said that the issues of fraud were material issues for the jury to decide and that if the notary was found to be a part of the fraudulent scheme, he would be liable to the plaintiff for damages.⁵³

b. Plaintiff's husband forged her signature on deeds of trust. A bank employee, who was a notary, notarized the signatures without plaintiff's presence by comparing the signatures on the deeds of trust to signatures on file at the bank. The Colorado Court of Appeals reversed the trial court's order of summary judgment against the plaintiff and remanded for a determination of whether the negligent notarization was a proximate cause of plaintiff's injuries.⁵⁴

3. The Law Firm. Legal Assistants and paralegals in law firms often are faced with the Hobbesian choice of violating their commissions under the Notary law or keeping their jobs. The common situation is the attorney who has a client in the office. The client needs to execute a document that must be notarized. For whatever reason, the attorney fails to call in a notary but after the client has left the building, realizes that the signature must be notarized. The attorney rushes down the hall to the paralegal/notary and claims that he (the lawyer) watched the client sign and he will vouch for the signature, so the notary must notarize the document. The notary should say "I'm sorry, I can't do that. You'll have to get the client back in here to acknowledge the signature." But the notary knows that if she says that, she may not have a job at the end of the day.⁵⁵

B. Disqualifying Interest. The second largest number of formal complaints contains allegations that the notary had a disqualifying interest in the transaction being notarized. The two specific prohibitions are (a) that the notary stands to "receive directly and as a proximate result of the notarization, any advantage, right, title, interest, cash, or property exceeding in value the sum of any fee properly received" or (b) "Is named individually as a party to the transaction."⁵⁶ A common problem occurs when a family member who happens to be a notary is asked to notarize a will wherein the notary is named as a beneficiary. A recent case before the Secretary of State involved a notary who, in addition to notarizing the document when the principal did not appear in his presence, was accused of having a disqualifying interest in the transaction. The notary was also the single member of the financial services limited liability company that brokered the loan. The financial services company was paid loan origination fees, brokers' fees and a 'yield spread' for the

⁵³ Tucek v. Mueller, 511 N.W. 2d, 832 (1993).

⁵⁴ Moon v. Platte Valley Bank, 634 P.2d 1036 (1981).

⁵⁵ See Colorado v. Crozier, 2003 Colo. Discipl. 74 P.3d 531 (2003). Attorney was disbarred, for among other failings, asking a notary public in his office suite to notarize a signature, despite his knowledge that neither he nor the notary had witnessed the signature.

⁵⁶ CRS § 12-55-110(2).

transaction. All of these fees amounted to several thousand dollars. The loan would not have gone through without the notarization. Had the notary used another notary to perform the notarization there would have been no problem, at least with this charge in the complaint.⁵⁷ The notary's commission was revoked.

C. Forgery. It should go without saying that signing another's name to a document with the intent to defraud is not acceptable behavior.⁵⁸ Moreover, if one forges a document and then notarizes that signature, there is a breach of the basic concept of the notary as a trusted, public officer. When the notary also happens to be an attorney, it brings disrepute on the profession. It is a violation of the criminal code, a violation of the Rules of Civil Procedure and constitutes professional misconduct. An attorney represented a client in a worker's compensation case. Without the client's consent, the attorney signed the client's name to a settlement agreement and then notarized the forged document. The attorney deposited the funds in his trust account and then refused to distribute the money to his client. He continually told his client for the next year that the case had not settled. The attorney was disbarred.⁵⁹

D. Notario Publico. Unless a notary is also an attorney (and hopefully, an attorney who speaks Spanish), she may not use the phrase "Notario" or "Notario Publico" in any advertisement or communication.⁶⁰ As I described above, the Latin law countries, such as Mexico, require more to be a notary than does Colorado. The Spanish speaking visitor from Mexico may think that a person who uses the term "Notario" to describe his services has more powers than the law actually provides. Further, the Spanish speaking person may actually think that the "Notario" is a lawyer when he is not. A candidate to be a *Notario Publico* in Mexico must:

1. Be Mexican by birth
2. Be between the ages of 25 and 60
3. Be in good health
4. Have a good reputation
5. Not be the leader of a church
6. Not have a criminal record
7. Have studied under a notary for at least 6 months prior
8. Take a written exam
9. ***Be a legal professional with the title of lawyer.***⁶¹

⁵⁷In re the Certificate of Appointment and Commission of Chap Van Le, Colorado Secretary of State Administrative hearing, October 26, 2005.

⁵⁸ CRS § 18-5-102.

⁵⁹ People v. Barringer, Colo. Discipl., 61 P.3d 495 (2001).

⁶⁰ CRS § 12-55-110.3(3).

⁶¹ Pikoff, Jonathan A. and Crimmins, Charles J. "Lost in Translation: Texas Notary Public v. Mexico *Notario Publico*", Presentation to the Texas Secretary of State, <http://www.sos.state.tx.us/statdoc/notariopublicoarticle.shtml>.

Additionally, the “Notario” has much broader powers than a U.S. notary. The Notario can:

1. Be an arbitrator
2. Be a mediator
3. Issue judicial opinions
4. Intervene in judicial proceedings
5. Ensure that documents such as bylaws of companies, wills, deeds, powers of attorney, real estate purchases and establishments of trusts do not include any legal inconsistencies
6. Ensure payment of taxes
7. Protocolize public deeds⁶²

E. Administrative Sanctions. Prior to Senate Bill 09-111, the Secretary of State could only revoke the commission of a notary who was guilty of any form of misconduct. The office actually found that some infractions were not as egregious as others and imposed voluntary suspensions and mandatory education. The Sunset Review conducted by the Department of Regulatory Agencies found that the Secretary of State did not have the authority to impose lesser sanctions, but recognized that not every infraction warranted revocation of the notary’s commission.⁶³

V. Notary as Preventer of Fraud

A. Identity Theft. Identity theft is the buzzword of the day. When most individuals read about identity theft, the first thing that comes to mind is the Internet. The second thing is “someone stole a driver’s license”. In fact, only about 12% of all reported cases of identity theft involve the Internet⁶⁴. Further, the reported number of cases of misuse of a forged or altered driver’s license is only about ½ of 1% of all cases. Approximately 50% of the reported cases, where the victim knew or identified the perpetrator, involved family members, “friends” and in-home help. Unfortunately, most of these cases involved fraud against the elderly where the victims lost a home or had a residence encumbered by a mortgage that had previously been free and clear, or lost all or a substantial portion of their savings. In many of these cases, the notary can provide an “eyes and ears” function to prevent the fraud from happening.

B. Situational Awareness. The notary is in a unique position to deter the type of theft and fraud mentioned above, where the victim knows the perpetrator. The notary needs to be “situationally aware” of the human interactions that are occurring in front of her.

⁶² Ibid.

⁶³ Office of Policy, Research and Regulatory Reform, 2008 Sunset Review, Colorado Notaries Public Act, October 15, 2008, pp. 17-23. The report is available at <http://www.dora.state.co.us/opr/archive/2008Notaries.pdf>.

⁶⁴ Federal Trade Commission – Identity Theft Survey Report, September 2003, at 28.

1. The notary is approached by an elderly person (the Principal) and a young man who introduces himself as her nephew. The document before the notary purports to be a general power of attorney, allowing the nephew to do everything that a general power would allow. However, upon questioning the principal, the notary discovers that the principal thinks she is signing a document that would only allow her nephew to sell her car for her. When the notary explains that the document may allow the nephew to do more than that, the principal exclaims "Oh no, he wouldn't do that, I trust him!" She continues to believe that the document is a limited power of attorney. What should the notary do? The notary should say, "I'm sorry, I cannot notarize the document for you. You should contact an attorney to have her explain this document to you."

2. The notary is approached by an elderly principal and the nephew. The principal appears to be physically frail but upon questioning, appears to know where she is and why she is there. However, the notary detects a certain nervousness and tension in the principal, especially when she is in close proximity to the nephew. The notary asks the nephew to step outside for a minute. When the nephew leaves, the principal becomes visibly more relaxed. When the nephew returns, the notary questions the principal about her understanding of the document. The document is again, a POA. During this questioning, the nephew keeps interrupting the notary with comments such as "She knows what she's signing, there's no problem" and "We have to be somewhere, can you hurry this up?" What should the notary do? The notary should say "I'm sorry, but I cannot notarize this document for you." The notary should not indicate that she believes the principal is under duress because it may put the notary at risk of physical harm. However, the notary could take the additional step of capturing the license number of the car and reporting the situation to social services (Adult Protective Services) or law enforcement.

3. The notary is approached by an elderly principal who is accompanied by his private nurse. The document is a Medical Durable Power of Attorney drafted by an attorney that designates another family member as the attorney-in-fact. The private nurse is not named in the document. However, upon questioning, the notary realizes that the principal doesn't know what season of the year it is, and isn't quite certain of the year or where he is. What should the notary do? This would appear to be an obvious case where the principal lacks the competence to execute the document. The notary should decline to notarize the document.

4. The notary is called to a nursing home to notarize the Will of a testator who has been diagnosed with terminal cancer. Upon arriving at the nursing home, the notary is introduced to a group of relatives of the principal who are the children from a previous marriage. The spokesperson of this group tells the notary that the principal wishes to execute a new will and asks the notary to notarize the signature and that of the witnesses. The spokesperson then asks the notary to step outside the room while she has the principal sign it "to give them a little privacy". What should the notary do? The notary should decline to notarize the will unless she can be present to watch the individual and the witnesses sign the will.

C. Identification. As described above, the notary has a duty to ensure that the principal has been properly identified in the case of an acknowledgment. The conscientious notary would apply this principle as a “best practice” when administering an oath or affirmation.

VI. Standard of Care and Liability for Breach

A. Notary Liability. It is well-settled that “standard of care” is the reasonable care that a person of like age, intelligence, and experience would ordinarily exercise under like or similar circumstances. In the case of a notary public, the standards are essentially established by the statutes. The Notaries Public Act lists those powers that a notary has and the notarial acts she can perform. The statute also lists those acts which the notary must do or is prohibited from doing. For example, the notary shall not sign a certificate that a document was attested by an individual, unless that individual attested such document while in the physical presence of the notary.⁶⁵ The notary who willingly notarizes a document where the principal did not appear before him commits official misconduct, is guilty of a class 2 misdemeanor and is liable for damages that are proximately caused by the misconduct.⁶⁶ The less common occurrence is that of the notary who notarizes a document where a person purporting to be the principal appears before the notary and signs the document but the notary has failed to adequately identify the signer. Here, it is a question of fact for the jury as to whether the notary exercised reasonable care in ascertaining the identity of the parties.⁶⁷ The question whether the notary exercised reasonable care can be answered in terms of the “business practices rule” or the notary’s consistent use of a journal for every notarial act. The existence of a journal creates a rebuttable presumption that the notary performed her duties correctly.⁶⁸

B. Employer Liability. Employers, in addition to notaries, may be held liable for a notary employee’s misconduct under Respondeat Superior.⁶⁹ The recent case of *Vancura v. Katris*,⁷⁰ found the employer to be directly liable for damages resulting from the employee notary’s notarization of a forged instrument. There, the court found that even in the absence of statutory required training for notaries, the employer faces liability for both incorrect instruction and the failure to instruct.

VII. Ethical Considerations

A. Attorney as Notary.

1. Colorado Rules of Professional Conduct. Most of the disciplinary cases in Colorado involving an attorney acting as a notary contain more serious allegations of an

⁶⁵ CRS § 12-55-110(4).

⁶⁶ CRS §12-55-116.

⁶⁷ *Ehlers v. United States Fid. & Guar. Co.*, 87 Wash. 662, 152 P. 518 (1915); 81 Wn. 2d 533; 503 P.2d 59 (1972); *City Consumer Services, Inc. v. Harold Metcalf et al.*, 161 Ariz. 1; 775 P.2d 1065 (1989).

⁶⁸ *Peltz v. Peltz et al.*, 2000 Tenn. App. LEXIS 672, (2000).

⁶⁹ *Independence Leasing Corporation v. Aquino*, 133 Misc. 2d 564; 506 N.Y.S.2d 1003 (1986); See *Supra* note 54 at 1036; See *Spyke, Nancy Perkins, “Taking Note of Notary Employees: Employer Liability for Notary Employee Misconduct”*, 50 Me. L. Rev. 23 (1998).

⁷⁰ Illinois Appellate 12-26-2008.

attorney's misconduct. Invariably, neglect of client matters, lying to the tribunal and misappropriation of client funds are the real reasons for suspension or disbarment.

a. Rule 4.1. Truthfulness in Statements to Others. A notarial certificate stating that a person appeared in front of the notary to execute the document when he did not would come under this rule.

b. Rule 8.4. Misconduct. This is the catch-all rule.

Violation of these rules in the framework of notary misconduct will usually result in sanctions. Liability under the Rules is not presumed. The Preamble to the Rules provides:

Violation of a Rule should not in and of itself give rise to a cause of action nor should it create any presumption that a legal duty has been breached. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability...."⁷¹

However, the liability of the attorney as a notary still exists pursuant to 12-55-116.

B. Attorney as Supervisor over Subordinate Lawyers. A lawyer is responsible for another lawyer's violation of the Rules where a lawyer supervises another lawyer in a firm or a lawyer is a partner in a firm, *and knows of the conduct at a time when its consequences can be avoided.*⁷² This situation arises when the supervising lawyer or partner becomes aware that the subordinate lawyer is improperly notarizing client documents, or (more likely) is directing non-lawyer staff to improperly notarize documents. It's very easy in a high pressure law office that deals with hundreds of documents that have to be notarized to take a cavalier attitude towards the notarization process. One wonders if these same lawyers would recommend to their clients "Oh – don't worry about it, it's only a minor law you are breaking."?

C. Responsibilities Regarding Nonlawyer Assistants. Rule 5.3 applies to the lawyer who encourages or demands that a legal assistant perform a notarization that violates the Notaries Public Act.

VIII. Update on Electronic Signatures for Notaries

A. Electronic Notaries in Colorado. Colorado's Notaries Public Law has been amended several times since 2002 in order to allow notaries to attach an electronic signature to documents that have never been converted into a paper format.⁷³ Rules have

⁷¹ Colorado Rules of Civil Procedure, Colorado Rules of Professional Conduct, Preamble, CRS Court Rules, Book 1, p. 803.

⁷² Ibid, Rule 5.1.

⁷³ See Shea, Michael L. and Timmons, Trevor, "Electronic Notaries in Colorado", Colorado Lawyer, June 2004, pp. 45-48 for a discussion of the legislative history and the technical concepts behind electronic signatures.

been adopted by the Secretary of State to define how a notary may apply to be an electronic notary, the type of electronic signature(s) that may be used and how the notary can apply the signature.

B. Essential Elements. Any notary can apply to be an electronic notary. It is a simple notification process. There is no fee required. The applicant makes a statement that she will use the electronic signature numbers issued by the Secretary of State (Document Authentication Numbers or DANs), or will use some other technology, *in addition to the DANs*. Since the implementation of the program, other technologies have appeared that appear to be easier for the notary to use.

1. DAN. The DAN is a seventeen digit number made up of an 11 digit number assigned by the office's computer system and a 6 digit randomly generated number. Upon notification that the notary is authorized to notarize electronically, the Secretary of State sends out an email to the notary that contains 50 DANs.

2. Usage. One DAN is used for each electronic signature. The notary must record the DAN and other recommended information in the notary's journal. When the notary has used all of the DANs, he requests the Secretary of State to issue more. He can request a specific number of DANs at that time.

C. How does a lawyer or law firm use electronic signatures?

1. Most of Colorado's larger district courts now require electronic filing of pleadings and motions by attorneys through the LexisNexis File and Serve service.⁷⁴ Most pleadings can be electronically signed by the attorney with /s/<typed name of attorney> format approved by the Supreme Court. However, in some practice areas, such as Family Law, the pleading must be accompanied by an Affidavit signed by the client, and notarized. In the Lexis system, that requires the attorney without an electronic notary to have the client sign with a wet signature and have the signature notarized by a wet signature of the notary. The document is then scanned into a PDF format and sent electronically through the system. This process slows the system down, especially if the attorney is a solo practitioner without the necessary hardware to create PDF files. The electronic notary can identify the client, witness the client sign the document with a typed signature and then apply the notary's electronic seal and signature. The Word or WordPerfect document can then be sent through the system without further manipulation. If the attorney has the ability to create PDF documents directly from Word, the same practice can be followed but the attorney has added a level of document security to the transaction by creating a PDF.

2. There is currently federal legislation working its way through the legislative process that will require all business entities to file a statement providing the names and addresses of the beneficial owners of the entity.⁷⁵ The National Conference of Commissioners on Uniform State laws ("NCCUSL") has drafted the Uniform Law Enforcement Access to Entity Information Act as a response to the Levin bill in order to

⁷⁴ Chief Justice Directive 06-02, available at http://www.courts.state.co.us/Courts/Supreme_Court/Directives/06-02.pdf

⁷⁵ Levin, Grassley, McCaskill bill S. 569, Incorporation Transparency and Law Enforcement Assistance Act

ameliorate some of the more onerous provisions.⁷⁶ S. 569, the Levin bill, requires a “formation agent” to verify the names and addresses and, in the case of non-United States beneficial owners, make a copy of the government issued passport with picture. The NCCUSL draft requires the “Entity Information Statement” containing the beneficial ownership information to be notarized. In Colorado, entity filings are accomplished electronically, the requirement that a statement be notarized complicates electronic filing unless the entity uses an electronic notary. Depending on how S. 569 ultimately comes out of committee or whether the states adopt the uniform law, electronic notaries may be very involved in the process of acquiring and submitting beneficial ownership information.

IX. Need for Future Legislation

The Secretary of State will propose additional amendments to the Notaries Public Act in 2010.

- Language that will allow notaries public to accept valid foreign passports or other valid identification issued by a non-U.S. government, e.g. Canadian driver’s license for purposes of the identification provision.
- The separate cash fund be eliminated and that all fees will go into the Secretary of State’s cash fund. This will make budgeting easier, especially if the legislature decides to take cash funds again.
- That notaries be allowed to charge a “reasonable” fee for their services, rather than a set fee of \$5.00 (\$10.00 for electronic notarizations).
- That notaries be allowed to put their commission expiration date inside the boundaries of the seal.

⁷⁶ Draft available at http://www.law.upenn.edu/bll/archives/ulc/roba/2009apr8_draft.pdf

**MAIL APPLICATION, COPY OF ID
AND APPLICATION FEE TO:**
COLORADO SECRETARY OF STATE
 1700 Broadway, Suite 300
 Denver, CO 80290
 303-894-2200 www.sos.state.co.us



Office Use Only

APPLICATION FOR NOTARY PUBLIC COMMISSION

PLEASE TYPE OR PRINT LEGIBLY. ALL SECTIONS MUST BE COMPLETED.

Print legal name as it will appear on official seal. Printed name and signature must be the same.

Last Name:	First Name:	Middle/Init (opt):	Suffix:	Current or prior commission expiration date:
Residence Address 1: A physical address is required.				Home Phone Number:
Address 2:		City:		Zip Code:
PO Box: (If applicable)		PO Box City:		PO Box Zip Code:
Email Address:				
Business Address 1: If employed, this is required. If not employed, write "None".				Business Phone Number:
Business Address 2:		City:		Zip Code:

