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H.206 NOTARIES PUBLIC

Presented to the House Committee on Government Operations

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We all use notaries. We rely on them to prevent fraud and to bring our private papers and transactions into the public sphere in a reliable way. The Notary Public plays a key role in lending integrity to those important transactions of commerce and law. Because of this, we need sound standards for the performance of notarial acts and an update to the notary laws that were adopted in the late 1700's and have seen very few changes since then.

We are seeking these changes to:

- Ensure that Vermont's standards are current and compatible with other states and will not interfere with interstate transactions or commerce;
- Provide clear standards for notaries to follow and for the public to rely on, including identification and record keeping;
- Protect the public and preserve the integrity and reliability of notarized transactions; and
- Create a more stable and streamlined system of licensing and accountability that serves the public in an efficient and effective way.

Many professions have standards of practice and ethical norms for their practitioners. The need for practice standards is particularly important for notaries. There are very few standards for notaries in the current law - and in some cases, very little understanding or appreciation for the seriousness and importance of notarial acts.

1) Standards and existing law. Based on the experience of the Secretary of State's office, through requests for training for notaries and for regulation and standards, it appears to be very easy to commit fraud in the State of Vermont. Currently, there are no statutory requirements or guidance for:

- Reviewing documents
- Verifying the identity of the signer
- Recordkeeping requirements for the notary to keep a register or journal
- Affixing the notary signature to the document (including the fact that no seal is required)

2) Consistency and compatibility with other states and countries. The Uniform Law Commission recommends updating all states' notaries public regulation, prompted by the:

- Increasing variation amongst the states

- Increasing nationalization of the banking and finance industries
- Evolution and expansion of electronic communications and records in commercial transactions

3) The current regulatory system. Today, notary commissions are based on an antiquated law and system of commissioning and non-enforcement:

- Spread across 14 County Clerks and Assistant Judges, back to Clerks to log oaths, and then on to the Secretary of State's office, where we file oaths and signatures and create a lookup database
- Commissions happen all at once with little to no notice, and all expire 2/10 with a limbo period due to the high volume and multiple steps with multiple parties
- No enforcement, nowhere for the public to turn, very little training

In summary, the proposed legislation would bring notary public and notarial act regulation into this century by modernizing and clarifying the law governing notaries public, their responsibilities and duties, and providing a stable infrastructure for the performance of notarial acts. The revisions set standards and create requirements that are protective of the public without being unduly burdensome to notaries public.

H.206 highlights:

- Regulation by the Office of Professional Regulation (OPR) as a new advisor profession with two notaries appointed by the Secretary of State to advise on all matters related to notary regulation
- Uniform standards for notaries and notarial acts recognized by most states and countries
- Qualifications to become a notary: 18, citizen, resident or employment in Vermont, pass an exam testing minimal competency
- Authority to deny an application or discipline based on: violation of the chapter, discipline in another state, conviction of a felony or any crime related to the practice of the profession
- Renew commissions every two years and allows OPR to require up to 4 hours of continuing education
- OPR maintained database of notaries
- Any person seeking a notarization must appear in person
- Notary must verify the identity of the person and witness the signature
- Notary must evidence any notarial acts by certificates attached to the notarized record, specifies the contents of the certificate and provides for form and content
- A notary to have a stamp and to keep a journal
- Allows OPR to establish rules for notarization of electronic records
- Permits a notarial officer to refuse to act under certain circumstances
- Provides for recognition of valid notarizations from other states, from federally recognized American Indian tribes or nations, or under federal law or the law of foreign nations
- Professional regulation fees apply, placing these fees in the regulatory fee fund (special fund)
- Proposed fees are \$30 for a two year commission, \$30 at renewal every two years
- Repeals current notary laws, including the chapter in T.24, and in T.32, the county clerk appointments and fees
- Takes effect July 1, 2016 with new commissions by OPR after this date
- Renewals for existing notaries will happen with OPR at the next notary expiration

What Is Notarization?

From the National Notary Association

<http://www.nationalnotary.org/knowledge-center/about-notaries/what-is-notarization>

Notarization is the official fraud-deterrent process that assures the parties of a transaction that a document is authentic, and can be trusted. It is a three-part process, performed by a Notary Public, that includes of vetting, certifying and record-keeping. Notarizations are sometimes referred to as "notarial acts."

Above all, notarization is the assurance by a duly appointed and impartial Notary Public that a document is authentic, that its signature is genuine, and that its signer acted without duress or intimidation, and intended the terms of the document to be in full force and effect.

The central value of notarization lies in the Notary's impartial screening of a signer for identity, willingness and awareness. This screening detects and deters document fraud, and helps protect the personal rights and property of private citizens from forgers, identity thieves and exploiters of the vulnerable. Every day the process of notarization prevents countless forged, coerced and incompetent signings that would otherwise overwhelm our court system and dissolve the network of trust allowing our civil society to function.

The Different Notarial Acts

Acknowledgments. An acknowledgment is typically performed on documents controlling or conveying ownership of valuable assets. Such documents include real property deeds, powers of attorney and trusts. For an acknowledgment, the signer must appear in person at the time of notarization to be positively identified and to declare ("acknowledge") that the signature on the document is his or her own, that it was willingly made and that the provisions in the document are intended to take effect exactly as written.

Jurats. A jurat is typically performed on evidentiary documents that are critical to the operation of our civil and criminal justice system. Such documents include affidavits, depositions and interrogatories. For a jurat, the signer must appear in person at the time of notarization to sign the document and to speak aloud an oath or affirmation promising that the statements in the document are true. (An oath is a solemn pledge to a Supreme Being; an affirmation is an equally solemn pledge on one's personal honor.) A person who takes an oath or affirmation in connection with an official proceeding may be prosecuted for perjury should he or she fail to be truthful.

Certified Copies. A copy certification is performed to confirm that a reproduction of an original document is true, exact and complete. Such originals might include college degrees, passports and other important one-and-only personal papers which cannot be copy-certified by a public record office such as a bureau of vital statistics and which the holder must submit for some purpose but does not want to part with for fear of loss. This type of notarization is not an authorized notarial act in every state, and in the jurisdictions where it is authorized, may be executed only with certain kinds of original document.

Each state and U.S. territorial jurisdiction adopts its own laws governing the performance of notarial acts. While these different notarial laws are largely congruent when it comes to the most common notarizations, namely acknowledgments and jurats, there are unusual laws in a number of states. In the state of Washington, for example, certification of the occurrence of an act or event is an authorized notarization. And in Maine, Florida and South Carolina, performing a marriage rite is an allowed notarial act.

The Parts of a Notarization

The Notary's screening of the signer for identity, volition and awareness is the first part of a notarization.

The second part is entering key details of the notarization in the Notary's "journal of notarial acts." Keeping such a chronological journal is a widely endorsed best practice, if not a requirement of law. Some states even require document signers to leave a signature and a thumbprint in the Notary's journal.

The third part is completing a "notarial certificate" that states exactly what facts are being certified by the Notary in the notarization. Affixation of the Notary's signature and seal of office on the certificate climaxes the notarization. The seal is the universally recognized symbol of the Notary office. Its presence gives a notarized document considerable weight in legal matters and renders it genuine on its face (i.e., prima facie evidence) in a court of law.

NATIONAL CODE OF PROFESSIONAL CONDUCT 10 PRINCIPLES

The principles are guidance only from a national association with voluntary membership. These are not legally binding on any notary, but are a good example of why notaries should be regulated and legally required to follow certain standards.

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 the Notary believes 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.

SECTION BY SECTION BILL SUMMARY – NOTARIES PUBLIC

OFFICE OF PROFESSIONAL REGULATION

Adds “Notaries Public” to the list of professions regulated under OPR

UNIFORMITY OF APPLICATION AND CONSTRUCTION

The act is construed to try to promote uniformity among states.

RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT

Implementing the provisions of the Uniform Electronic Transactions Act and the federal Electronic Signatures in Global and National Commerce Act, specifies the conditions for notarization of electronic records.

DEFINITIONS

Acknowledgment, notarial act, notary public, stamp, signature.

DIRECTOR DUTIES

Places them within OPR as an “advisor” profession. Authority to discipline, create rules.

ADVISOR APPOINTEES

Two notaries public to advise the director.

COMMISSION AS NOTARY PUBLIC; QUALIFICATIONS; NO IMMUNITY OR BENEFIT

Sets forth the qualifications to become a notary: 18, citizen, resident or employment on Vermont, not disqualified (see below), pass an exam, fee.

GROUND TO DENY, REFUSE TO RENEW, REVOKE, SUSPEND, OR CONDITION COMMISSION OF NOTARY PUBLIC

Deny an application or discipline an existing notary commission based on: violation of the chapter, discipline in another state, conviction of a felony or any crime related to the practice of the profession, grounds applicable to all profession under Title 3.

RENEWALS; CONTINUING EDUCATION

Renew commission every two years and allows OPR to require up to 4 hours of continuing education.

DATABASE OF NOTARIES PUBLIC

OPR maintains a database so that anyone can verify a person is a notary public.

PROHIBITIONS; OFFENSES

Prohibits practice without authority, practice of law, immigration work, use of certain titles such as “notario publico” and outlaws false and deceptive advertising.

AUTHORITY TO PERFORM NOTARIAL ACT

Only by notaries. Prohibit notarial officers from acting in any transaction in which the officer or his or her spouse, is a party or has a direct beneficial interest.

REQUIREMENTS FOR CERTAIN NOTARIAL ACTS; PERSONAL APPEARANCE REQUIRED; IDENTIFICATION OF INDIVIDUAL

Requires any person seeking a notarization to appear in person before the notarial officer.

Requires the notary to verify the identity of the person and to witness the signature or receive an acknowledgement or verification of the signature.

SIGNATURE IF INDIVIDUAL UNABLE TO SIGN

May direct another person to sign for them.

CERTIFICATE OF NOTARIAL ACT; SHORT FORM CERTIFICATES; STAMPING DEVICE

Requires a notary to evidence any notarial acts by certificates attached to the notarized record. Specifies the contents of the certificate and provides for form and content. Requires a stamp.

JOURNAL

Requires a notary to keep a journal and how to maintain it.

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

Allows the commissioning authority to establish rules for the implementation of the act and standards for notarization of electronic records.

AUTHORITY TO REFUSE TO PERFORM NOTARIAL ACT

Permits a notarial officer to refuse to act if satisfactory identification is not provided or if not otherwise satisfied by the interaction. The notary may not refuse to act, of course, if the refusal would be prohibited by other law.

VALIDITY OF NOTARIAL ACTS

Failure of the notary to comply with the law does not automatically invalidate the notarial act. Others can seek remedies under law to invalidate the act.

NOTARIAL ACT IN THIS STATE; NOTARIAL ACT IN ANOTHER STATE; NOTARIAL ACT UNDER AUTHORITY OF FEDERALLY RECOGNIZED INDIAN TRIBE; NOTARIAL ACT UNDER FEDERAL AUTHORITY; FOREIGN NOTARIAL ACT

Provides for recognition of valid notarizations from other states, from federally recognized American Indian tribes or nations, or under federal law or the law of foreign nations.

FEES

In Title 3, professional regulation fees apply, placing these fees in the regulatory fee fund (special fund). Fees proposed are \$30 for a two year commission, \$30 at each renewal.

REPEAL

Repeals current notary laws, including the chapter in T.24, and in T.32, the county clerk appointments and fees.

APPLICABILITY; NOTARY PUBLIC COMMISSION IN EFFECT

Takes effect July 1, 2016, new commissioning by OPR after this date. Renewals of commissioning for existing notaries will happen with OPR.

SAVINGS CLAUSE

Nothing here affects notarial acts prior to July 1, 2016.

FROM THE REVISED UNIFORM LAW ON NOTARIAL ACTS (RULONA):

<http://www.uniformlaws.org/Act.aspx?title=Law%20on%20Notarial%20Acts,%20Revised>

RULONA carries forward the traditional principles that notarial officers and the public understand and use, dedicated to preserving the integrity and reliability of notarized transactions. It recognizes and facilitates the notarization of electronic records and harmonizes their use with widely adopted state and federal laws dealing with electronic commercial transactions. It should be enacted in each state as soon as possible.

RULONA, upon which this proposal is based, is designed to modernize and clarify the law governing notaries public, their responsibilities and duties, and to provide a stable infrastructure for the performance of notarial acts with respect to electronic records.

RULONA harmonizes treatment of notarization of all records, whether on paper or electronic. It works together with the Uniform Electronic Transactions Act (1999) and the federal Electronic Signatures in Global and National Commerce Act (2000), as well as the Uniform Real Property Electronic Recording Act (2005).

Prefatory Note

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

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

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

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

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

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

Another means of assuring the integrity of the notarial process, strongly urged by commissioning officers and notarial associations, is to require that all notaries public maintain journals chronicling all notarial acts. This position is not without controversy, however, and other voices strongly argue that such requirements are unnecessarily burdensome. This Act includes optional provisions requiring a notary public to maintain a journal of all notarial acts that the notary public performs (Section 19), leaving the ultimate decision to the several states. A journal may be maintained on either a tangible or electronic medium, but not both at the same time. It further specifies the information that must be entered in the journal. This Act replaces past references to a notarial seal with an official stamp. It defines an official stamp as a physical or electronic image and includes the traditional seal (Section 2(8)).

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

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

Convention”) as a means of providing conclusive authentication of notarial acts that are performed by a notarial officer of a foreign state (Section 14(e)). It also recognizes a consular authentication as an alternative means of providing that conclusive authentication of a foreign notarial act (Section 14(f)).

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

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

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