Comments of Gerard Ashton on "An act relating to regulating notaries public" (H.206)

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I have previous experience with the Office of Professional Regulation, and with computers, because I am licensed as a professional engineer in the electrical field, and worked at IBM as an electronics engineer for over two decades. My comments do not necessarily reflect the views of anyone else.

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Comments applying to both H.206 and RULNOA

Journals (§ 5071)

One journal at a time

H.206 adopts one version of the options from RULNOA; notaries can keep one journal at a time, either electronic or tangible, but not both. Journal entries must be made contemporaneously with the notarial act. The comments of the RULNOA drafting committee indicate that while, in the case of a large transaction with numerous notarial acts, the entry need not be made immediately, it should be made by the end of the transaction. But electronic systems are not completely reliable; a notary may be unable to make an electronic journal entry for many reasons, such as using an electronic journal at work but needing to notarize a record away from work, to a lack of cell phone coverage, to a major disaster that disrupts power and communications. Language should be inserted to allow journal entries to be made as promptly as reasonably practicable when the electronic journal is not available at the time and location of the notarial act.

Purely oral oaths need to be journaled

In settings where oral oaths are administered, such as committee hearings, it will be necessary for the notarial officer to make an entry in the journal for each witness.

Public record status of journals

The journal section makes no statement of whether journals are public record. If they are, or if they are for those notaries who obtained their commission for no fee because they are judges, justices of the peace, law enforcement officers, etc., then it will be very burdensome for the notaries to interpret Vermont's complex list of exceptions to the public records access law (V. S. A. Title 1 Chapter 5 Subchapter 3). This could be especially tricky when the record that was notarized would be protected from public access (for example a notarized permission slip for a school field trip abroad) ; would the corresponding journal entry be protected?

If journals, especially electronic journals, are treated as public records somewhat personal information including home addresses could be made public on a wholesale basis. Since notaries must record expiration dates of IDs, and Vermont driver licenses expire on the driver's birthday, birthday information would become public, even though some businesses use birth dates as a security measure in identifying customers.

Oaths and affirmations

§ 5004, "Definitions", at (6), distinguishes between "administering an oath or affirmation" and "taking a verification on oath or affirmation". It isn't clear what this means. If a person takes an oath of office, is that an administration of an oath but not a verification on oath because the incoming officer is not verifying the truthfulness of a written record, but instead making a promise about future conduct? Similarly, is a person who takes an oath before giving oral testimony not making a verification on oath, because the statements which are sworn are not a written record?

It makes a difference because § 5063, REQUIREMENTS FOR CERTAIN NOTARIAL ACTS, requires the notarial officer to establish the identity of a person giving an acknowledgement, making a verification on oath or affirmation, or whose signature is witnessed, but does not require establishing the identity of the oath-taker if an oath is administered without a verification. This omission might be necessary, because it might otherwise be impossible for a person to testify in a court case if they lacked the necessary identification documents and could not produce a credible witness to their identity.

If indeed the identity of oath-takers who are not making a verification need not be established, the journal portion of the bill should make it clear the method of identification need not be recorded in the journal in these cases.

Adapting RULNOA for Vermont

RULNOA is written with the expectation that it will be adapted to fit in with the laws and government structure of the adopting state. Some of the adaptations for Vermont seem questionable to me.

SHORT TITLE (§ 5001)

Calling the act the "Uniform Law on Notarial Acts", and leaving off the word "Revised" at the beginning, will tend to produce non-uniformity among the adopting states. Also, a 1982 effort of the Uniform Law Commission, also called the "Uniform Law on Notarial Acts" could easily be confused with this bill.

PROHIBITIONS; OFFENSES (§ 5045)

In paragraph (g)(2) there is a requirement that advertisements by non-attorney notaries must include a statement, "I am not an attorney licensed to practice law in this State...." But the person reading the advertisement may be in another state, and may be confused by the phrase "this State". It should be changed to "Vermont".

NOTARIAL ACTS IN THIS STATE; AUTHRORITY TO PERFORM (§ 5061)

This section begins by allowing only notaries public to perform notarial acts in this state; even judges may not perform notarial acts without first obtaining a notary public commission. Since some of these officials would be accustomed to using titles like "Superior Judge" or "Superior Court Clerk" in connection with notarial acts, it might be wise to specify if they must use the title "Notary Public" or if their customary title is allowed.

Also, paragraph (d) appears to have a typographical error. The comments in the RULNOA make it clear that the reason the signature and title of the notarial officer conclusively establishes the authority of the officer to perform the notarial act is because this bill gives the authority to the specified notarial officers. Any questions about the genuineness of the signature or whether the individual who signed the certificate really held the office are dealt with in paragraph (c). The only officer who is specified to be able to perform notarial acts by this bill is a notary public, thus "(b)(1) or (2)" should be replaced with "(a)".

AUTHORIZED NOTARIAL ACTS (§ 5062)

This bill disallows performing a notarial act with respect to a record if the notarial officer or his/her spouse is a party or has a direct beneficial interest. This again illustrates that the bill ignores the possibility of purely oral oaths; it would seem that while a notary public could not administer an oath associated with a record to a spouse, the notary could administer an oath if there were no associated record.

Also, quite a few notaries will also be judicial officers of some kind. In 12 V.S.A. 61 (a) judicial officers are disqualified from acting in a judicial capacity if the officer "is related to either party, if a natural person, within the fourth degree of consanguinity or affinity". It may be wise to add a paragraph allowing a notary public to perform notarial acts notwithstanding 12 V.S.A. 61 (a).

SHORT FORM CERTIFICATES (§ 5068)

The short certificate for an acknowledgement in an individual capacity is misaligned and should be made similar to the other short certificates.

REPEAL (Sec. 5 of this bill)

In addition to the laws set to be repealed by this bill, there are other laws that should be examined for possible repeal or modification.

V. S. A. Title 12 Chapter 211: Oaths, Subchapter 2: Administration of Oaths

In addition to the people who will be notaries public under this bill, § 5852 allows the presiding officer, secretary, or clerk of either house of the General Assembly, or the Governor to administer oaths of office. This would seem to conflict with this bill.

§ 5853 allows, in addition to the people who will be notaries public under this bill, " registers of courts, committees of the general assembly, and referees, auditors, commissioners, special masters, and committees appointed by a court of law, may administer oaths necessary to be taken for the establishment of truth or the furtherance of justice in any matter coming before such court, board or commission for investigation." If these oaths are in writing, they would appear to be notarial acts and thus there would be a conflict with this act.

§ 5854 states oaths may be administered "masters appointed by a Superior Court under an order of referee may administer oaths in all cases where an oath is required, unless a different provision is expressly made by law; and a notary public need not affix his or her official seal to a certificate of an oath administered by him or her. County clerks and clerks of the Criminal Division of the Superior Court may certify the oaths administered by them under the seal of the court." The provision about a notary public not affixing a seal is clearly contradictory. With recent county government changes, I'm not sure where county clerks fit in.

§ 5855 allows commissioned military officers of high enough rank to perform some notarial acts, and does not specify if the officer needs to be in Vermont at the time of the notarial act. Considering the extensive provisions to recognize notarizations under federal and military authority provided in this bill,

this section may have outlived its usefulness. It is also confusing to have it stashed away in a separate part of the law rather than consolidating it (if it has any future value) in this bill.

V. S. A. Title 27 Property, Chapter 5: Conveyance Of Real Estate

This chapter has several sections that are redundant to, and in some cases contradict this bill. § 341 allows masters and county clerks to take acknowledgements of deeds, even though they are not necessarily notaries public.

§ 341 (a) and § 463 (b) contain redundant list of who may take an acknowledgement; § 341 (a) states that notaries public do not need to use a seal.

§ 379 (a) provides for when acknowledgements which were taken out of state should be recognized for deeds and other conveyances, and powers of attorney for the conveyance of lands. These provisions are redundant to the provisions in this bill, and may potentially conflict with the provisions of this bill.

Also, § 379 (b) provides "Acknowledgments for deeds and other conveyances, and powers of attorney for the conveyance of lands, which are taken out of state before a proper officer of this state, shall be valid as if taken within the state." This is ironic, since this bill does not provide any similar privilege for officers of other states to take acknowledgements while they are visiting Vermont. Also, the provision for acknowledgement of deeds and other conveyances is probably useless today, since modern real estate transactions are likely to require several other kinds of documents to be notarized. The power of attorney provision might still be useful. Even if this provision has any merit, consideration should be given to whether it belongs in the property law, away from all the other notarial provisions of this act.