

Summary of Testimony regarding H.206 (Notaries Public)  
To: The House Committee on Government Operations  
Date: March 14, 2017

Presented by James Knapp, Co-Chair of the Vermont Bar Association – Real Estate Committee

Background: I am a licensed attorney who has been in practice for 37 years. I presently serve as the Co-Chair of the Vermont Bar Association Real Property Section, and I have also served as the recorder of the proceedings of the Title Standards sub-committee for more than 25 years. During my career I have been in private practice concentrating my practice in the area of real estate transactions including acquisition, financing, development and dispositions of all forms of property interest. I regularly provide continuing legal education programs for attorneys in all areas of real property law. My career includes being in private practice for 25 of the 37 years, a title insurance company underwriter and state counsel for 7 of the 37 years and was the Interim Director of Property Valuation and Review from 2013 to 2015. I was also a member of the adjunct faculty at Champlain College for over 10 years, presenting the Advanced Real Estate Course in the College's Paralegal program.

Major Points:

1. TRANSITION: The effective date of this Act is presently July 1, 2018. Existing Commissions will expire on February 10, 2019. Most notaries will not be in the mode of thinking about renewal until late 2018 or early 2019, so will the systems for training and examination be sufficiently developed, and sufficiently robust to allow for renewal of all the commissions that will need to be renewed? Having too few qualified notaries will adversely affect quite a few industries, not just real estate, but will also affect all kinds of businesses that rely on authenticated documents.
2. Who is going to provide the training necessary for those who desire to take the test to become a notary? Who is going to administer the tests? Will it be an online test, or one that must be attended personally?
3. Please consider whether it is appropriate to exempt a paralegal / legal assistant employed by a law firm, legal department of a business entity, or government office in each case working under the supervision of an attorney from taking the exam. Most individuals serving as paralegals or legal assistants are sufficiently conversant with the elements of the acknowledgements, in the same manner as attorneys and would not need to pass the exam. It adds another burden on a profession that does not really need the additional burden.
4. Because the requirement for journals appears to be omitted from the current draft, the specified forms of certificate should include something that indicates what the Notary relied upon to identify the person. That might include adding a sentence, paragraph, etc., that says: The identity of the person acknowledging this document was established by: [ ] personal knowledge of the notary; [ ] a government identification document; [ ] attestation by a reliable witness whose identity was suitably established, or other options as necessary.
5. Section 5264, the statute should specify whether an appearance by video conference, or in virtual reality or any of the other possibilities is considered a personal appearance or not. There are a lot of questions being asked right now about whether an appearance by SKYPE is considered personal appearance. Some states, I think it might be Virginia allow it. The

Legislature should determine whether Vermont will adopt a policy allowing “remote” acknowledgements, and if adopted, a description of the exact procedures to be followed to complete a remote acknowledgement.

6. Section 5267(c)(3). If Vermont notaries can only perform notarial acts in Vermont, what is the purpose to allowing a form of certificate authorized by another jurisdiction? The qualifying factor is that the certificate is authorized by the laws of the place “where the notarial act is performed”, but that will only be Vermont for Vermont notaries. If this section is intended to say – the certificate signed by a Vermont notary affixed to a document to be used in another place may be in the form of an acknowledgement approved for use in the State where the document would be delivered, then it should be revised.
7. Section 5268 – should address the validity of acknowledgements evidenced by certificates that are incomplete. What happens if various pieces of information are left out? How many errors will render the Certificate ineffective? Bear in mind that the Bankruptcy Court has voided mortgages and found them to be ineffective due to various defects in acknowledgements under present law. Adding to the number of mortgages rendered ineffective by apparently minor errors in the formalities will create additional problems in the real estate and finance industries.
8. Section 5268 – what happens if people continue to use the current form of Vermont acknowledgement – “free act and deed” language after this bill becomes law? It is highly likely that people who have created forms with the acknowledgements embedded in the form will take some time to rebuild forms. Will those acknowledgements be deemed defective, by Courts?
9. IMPORTANT – Unless §5274<sup>1</sup> is intended to address the issue of defective certificates, and that is not clear to me, the statute needs to provide a mechanism to fix a defective certificate in a recorded document. For example: In the event a certificate affixed to a document of record in the public records is determined to be defective as a result of a failure to comply with the requirements of this section, the notary who performed the original notarial act may certify in writing that the original act was properly done, notwithstanding the deficiency by executing a revised/corrected certificate and incorporating that certificate in a statement made under oath, and acknowledged before a different notary. The recording of the corrected certification shall be deemed to correct any deficiency in the prior certificate and shall ratify the prior certificate as of the date of the original certificate.
10. With the repeal of 24 VSA Chap. 5, Subchapter 9, town clerks will no longer be ex officio notaries. Should they be exempt from some aspects of the law (test/fees)? Would that exemption apply to deputy / assistant clerks in the employ of the municipality? What happens to Justices of the Peace who are presently accorded status as an ex officio notary? Will they be able to continue performing notarial acts; or will they be required to become notaries? If they are going to become notaries, will the Towns pay the fees or will that be an obligation of the individual Justices of the Peace?

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<sup>1</sup> Prior to the omission of Section 5271, this Section was numbered 5274. It appears that the section numbers were not revised yet in the draft that shows Section 5271 as being omitted.

11. IMPORTANT!: The repeal section needs to include 27 VSA §379, otherwise, there will be a potential conflict in the statutes regarding acknowledgements taken in foreign jurisdictions. In addition, 27 VSA §379 specifically authorizes Vermont notaries to travel out of state and take acknowledgements in other jurisdictions. This practice is applied in real estate transactions in border areas (New Hampshire, Massachusetts and New York). If this practice is going to be revoked, the revocation should be clear and express.
12. IMPORTANT!: This bill does not address the provisions of 27 VSA 341-342 and 463(b), all of which provide that deeds and other conveyances of interests in property must be acknowledged before << and here there is a list of people who are not notaries>>. Will those office holders who are not notaries still be allowed to take acknowledgements? If that is not the proposal, then those sections should be amended by this Act to remove the potential ambiguity. Perhaps you would strike the list of office holders and insert – after the word “acknowledged” the phrase: “as provided in 26 VSA Chap. 121.”

#### Recommendations for Technical Changes:

- Omit the word “estate” in the second line of Section 5204(10). The statutory definition of “Person” in 1 VSA §128 does not include an “estate”. The reference should be to a “personal representative” or to the “administrator” or “executor.” The estate itself is not a person.
- Omit the word “trust” in the second line of Section 5204(10). The statutory definition of “Person” in 1 VSA §128 does not include a “trust”. A trust is an agreement between two or more persons or a set of specified duties imposed by court order. The “person” involved in the trust arrangement is a trustee, not the trust.
- In §5224(4) Rules – what is the purpose of the word “Commission” following the words “notary public” in the second line.