

**THE**  
**MODEL NOTARY ACT**

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### Model Notary Act Revision Committee

The Model Notary Act of 2022 Revision Committee comprised public-spirited individuals who generously contributed their time and expertise to review the Act, exclusive of the Comments and appendices (see Foreword). No part of the Model Notary Act necessarily has been approved by every individual, organization, or agency represented. The Committee does not lobby for adoption of the Act. The organizations cited below were represented by Committee members at the time of their participation and are not necessarily their current affiliations.

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## Foreword

### History

In 2023, the National Notary Association (“NNA”) commemorates fifty years of publishing model laws that have shaped the standards and practices of notaries public in the United States.

The Association’s first effort at proposing model notary public laws was the Draft Legislation for a Uniform Notary Act (hereinafter referred to as “UNA”). It was drafted with the assistance of the Yale Law School and published on September 1, 1973. Its Preface declared the Act would satisfy the great need to modernize and make uniform the various state notary public statutes for two reasons: 1) because notarial acts are likely to have interstate implications, and 2) original justifications for the diverse notary public laws of the time had become societal anachronisms.

In 1984, eleven years later to the day, a revised version of the UNA was published under a new name: the Model Notary Act (hereinafter referred to as “MNA 1984”). The Preface to the MNA 1984 emphasized the Act further heightened “protection for the public by reflecting the most modern techniques for detecting and deterring fraud, whether by screening applicants for a commission or in performing a notarial act.” Eighteen years later, on September 1, 2002, the Model Notary Act of 2002 (hereinafter referred to as “MNA 2002”) was published. Its Foreword announced that the MNA 2002 would direct notaries to shift from their traditionally passive to a more proactive role. It also expanded the MNA 1984 by, *inter alia*, including the first-ever model statutory provisions for notarizing electronic records.

By 2010, notarial practice and technology had quickly evolved to the point where another revision was necessary. On January 1, 2010, the Model Notary Act of 2010 (hereinafter referred to as “MNA 2010”) was published. It significantly extended the proactivity of the MNA 2002 into the electronic world by updating Article III (“Electronic Notary”) in response to the adoption of the Uniform Electronic Transactions Act (hereinafter referred to as “UETA”) and enactment of the federal Electronic Signatures in Global and National Commerce Act (hereinafter referred to as “E-SIGN”). That Article addressed the developing realities and demands of technology, business, and government, and empowered notaries to use fraud-deterrent electronic tools to ensure both the integrity and the authenticity of notarized records.

In January 2017, the NNA introduced the Model Electronic Notarization Act of 2017 (hereinafter referred to as “MENA 2017”). It was designed to be a specialized version of the earlier Acts exclusively dedicated to the notarization of electronic records. By then, two states — Virginia and Montana — had enacted laws authorizing notaries to use communication technology to facilitate the personal appearance between the notary and individual requesting the notarization who were in locations distant from each other. The MENA 2017 offered a bracketed chapter on this nascent, but emerging form of notarization now enacted in over forty states and referred

to in the law by the various names of “remote notarization” (*see* W.VA. CODE § 39-4-38(a)(2)), “remote online notarization” (*see* MONT. CODE ANN. § 1-5-602(26)), “online notarization” (*see* TEX. GOV’T CODE § 406.101(9)), and “notarial acts for remotely located individuals” (*see* WASH. REV. CODE ANN. § 42.45.280(3)).

### **Influence**

Over the years, the NNA’s Model Acts have been used by legislators and notary-regulating officials around the nation as part of notary law reform efforts in nearly all states and three U.S. territories. At least two federally recognized Indian tribes have enacted versions of NNA Model Acts. Many jurisdictions have adopted selected versions of the Model Acts. (*See*, for example, VA. CODE ANN. § 47.1-2 through § 47.1-20.1, defining certain notarial acts and enacting a journal requirement and other provisions related to the notarization of electronic records, and both MONT. CODE ANN. § 1-5-603(10) and OKLA. STAT. ANN. tit. 49, § 205, authorizing notaries to perform remote notarial acts.) Other jurisdictions enacted substantive portions of an MNA model. (*See*, for example, MO. REV. STAT. ANN. tit. XXXII, ch. 486; N.C. GEN. STAT. ch. 10B, and S.C. CODE ANN. tit. 16, ch. 1 and 2.) In other jurisdictions, virtually the entire comprehensive MNA was adopted verbatim. (GUAM CODE ANN. tit. 5, ch. 33, “Model Notary Law.”)

Notably, NNA Model Acts also have also influenced other areas of law. They have been adopted by administrative rule (*see* former MISS. ADMIN. CODE tit. 25, ch. 33 and current W.VA. CODE OF STATE RULES § 153-45-1 *et seq.*) and put into effect by gubernatorial executive order (*see* MASS. EXEC. ORDER 455 (04-04) and R.I. EXEC. ORDER 09-08).

Aside from the above-noted adoptions, the detailed treatment of notarial practice and extensive commentary sections uniquely inform policymakers on a breadth of both policy and principled implementation options available to them.

### **Model Notary Act of 2022**

Now twelve years removed from the publishing of the MNA 2010 and five years since the release of the MENA 2017, the NNA offers the Model Notary Act of 2022 (hereinafter referred to as “MNA 2022”). Its purpose is to integrate updated sections of these Model Acts into one cohesive, unifying act. Both the MNA 2002 and MNA 2010 cordoned off the technology provisions in a separate article following the paper-based notarization sections. In some sense, this inadvertently may have communicated that paper-based notarizations were of greater significance than electronic ones. As a separate act focusing only on notarial acts on electronic records, the MENA 2017 may have contributed to that view. The MNA 2022 merges both paper-based and technology provisions into one unified Act. This new arrangement reinforces the fact that notarial acts on electronic records and involving audio-visual communication have equal status with traditional paper notarial acts and makes clear that the Act’s standards apply to the

performance of all notarial acts regardless of the tools used to perform them.

### **Drafting Process**

The National Notary Association empaneled a group of distinguished individuals from the notary public, business, governmental, legal, surety, and technology communities to serve on a revision committee to assist in drafting this Act. A wide range of industries and agencies that handle or generate notarized records was represented.

A draft of the black letter text of the Act exclusive of the Comments and appendices was disseminated to the committee members for comment. The resulting observations and critiques were then integrated into the final draft by an executive subcommittee. Coincident to this effort, detailed “Comment” sections were written to explain the positions taken by the drafters, as well as clarify related matters. Model Rules were drafted by NNA staff to implement the Section 1-7 rulemaking provision (Appendix I) and arrange the Act’s provisions and Model Rules in Appendix I into rules to implement the Revised Uniform Law on Notarial Acts (hereinafter “RULONA”) (Appendix II).

This latest version of the Model Notary Act draws from many sources. Drafters not only reviewed and analyzed current notary statutes and regulations, but also surveyed reported legal cases and administrative rulings concerning notaries and notarization. Additionally, the MNA 2022 reflects technological developments related to electronic records and signatures.

### **Format**

The Act is comprised of twelve chapters containing over one hundred sections. Each chapter begins with a general comment drafted by the reporters, which is followed by the statutory sections. Each section of every chapter has its own legal commentary, as well.

Both the “general” and “individual section” Comments explain the Act’s provisions, some of the supporting thought processes behind them, and their ramifications. The commentary is not an official part of the proposed legislation text. Principally, the commentary represents the views of the reporters who drafted it, in conjunction with comments submitted by review committee members and discussions with the other members of the executive subcommittee that produced the final draft.

There are numerous citations throughout the Foreword and Comment sections. All references to the Act are made by citing to the section (*e.g.*, § 3-4). Standard citation form is used to refer to reported cases and both state statutes and regulations, except that the publishers and dates of publication for the latter have been omitted.

### **Brackets and Parentheses**

Certain material in the MNA 2022 has been put in brackets. This serves any one of the following purposes:

- 1) An indication that a generic term (*e.g.*, “[commissioning official]”) has

been used. The adopting jurisdiction should here insert appropriate specific terminology that is consistent with its statutory scheme. Thus, if the Secretary of State is the commissioning official, the adopting state should substitute “Secretary of State” everywhere the former appears in the Act.

2) An indication that insertion of a numerical or dollar amount is necessary. If a particular number or amount is strongly preferred by the MNA drafters, this number will be placed within brackets (*e.g.*, “[\$25,000]”). If there is no preference for a particular amount, the brackets will enclose the word “dollars” (“[dollars]”). This informs the legislature adopting the Act that the drafters did not have a recommendation on point.

3) The need for the lawmakers to fill in the blank space with a pertinent citation (*e.g.*, “[the [State’s] administrative procedures act]”) or criminal offense (*e.g.*, [class of offense]).

4) To alert lawmakers that a particular topic engendered considerable debate among the MNA drafters, as was the case with Section 4-4 (*i.e.*, use of “personal knowledge”). For any set of brackets enclosing a provision or portion of a provision of the MNA that prompted debate among the drafters, a corresponding set of brackets may be found in the Comment. (*See, e.g.*, the bracketed paragraphs in the Comment for Section 4-4 pertaining to “personal knowledge” as a means of identifying principals and credible witnesses.)

5) To provide optional language as in Section 2-35 (clarifying that a verification on oath or affirmation was formerly known as a “jurat”).

Parentheses indicate instructions in notarial certificate forms or provide a summary of a cited section for clarification (*e.g.*, “(relating to disposition of notarial records)”).

### **2025 Revision**

In early 2025, the National Notary Association was asked to clarify whether the MNA permits notaries public to use interpreters to facilitate communication with a principal or other individuals present during a notarial act who have communication disabilities, in accordance with the *Americans with Disabilities Act*. While Section 4-5 partially addresses this issue, Section 4-3 could be interpreted as prohibiting the use of interpreters in such circumstances. Recognizing the need for clarity, the executive subcommittee directed NNA staff to amend these sections and accompanying comments to align more closely with the requirements of the *Act*. The resulting amendments and comments to these sections reflect the views of NNA staff who drafted them.

### **Model Rules**

The Model Notary Act of 2022 is supplemented by three appendices. Appendix I, Model Notary Act Model Rules (hereinafter “Model Rules”), provides model regulatory provisions to implement the specific areas for which rules are authorized or mandated by Section 1-7. This streamlines the Act itself while offering additional provisions more appropriately suited to be



considered through an official rulemaking process. Appendix II, Model Rules to Implement the Revised Uniform Law on Notarial Acts, crafts the Act and Model Rules into a set of regulatory provisions to implement the RULONA. Appendix III lists the major state and known federally recognized Indian tribal adoptions of the Model Notary Act over the years.

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## Table of Contents

<b>Model Notary Act Revision Committee .....</b>	<b>iii</b>
<b>Foreword.....</b>	<b>v</b>
<b>Chapter 1 – Implementation .....</b>	<b>1</b>
§ 1-1. Short Title.....	1
§ 1-2. Purposes.....	1
§ 1-3. Interpretation. ....	3
§ 1-4. Prospective Effect.....	4
§ 1-5. Severability Clause.....	5
§ 1-6. Validity and Effect.....	5
§ 1-7. Rules.....	5
§ 1-8. Repeals. ....	7
§ 1-9. Effective Date.....	8
<b>Chapter 2 – Definitions.....</b>	<b>9</b>
§ 2-1. Acknowledgment.....	9
§ 2-2. Affirmation.....	10
§ 2-3. Audio-Visual Communication.....	10
§ 2-4. Certification of Life.....	11
§ 2-5. Commission.....	11
§ 2-6. Copy Certification.....	12
§ 2-7. Credential.....	13
§ 2-8. Electronic.....	13
§ 2-9. Electronic Signature.....	14
§ 2-10. Foreign State.....	14
§ 2-11. In My Presence.....	14
§ 2-12. Journal of Notarial Acts and Journal.....	15
§ 2-13. Notarial Act and Notarization.....	16
§ 2-14. Notarial Certificate.....	17
§ 2-15. Notarial Officer.....	18
§ 2-16. Notarial Record.....	18
§ 2-17. Notary Public and Notary.....	19
§ 2-18. Oath.....	19
§ 2-19. Official Seal.....	20
§ 2-20. Person.....	20
§ 2-21. Personally Identifiable Information.....	21
§ 2-22. Principal.....	22
§ 2-23. Real Time.....	22
§ 2-24. Record.....	23
§ 2-25. Register and Registration.....	23
§ 2-26. Requester.....	24

§ 2-27. Sign.....	24
§ 2-28. Signature.....	25
§ 2-29. Signature Witnessing.....	25
§ 2-30. Sole Control.....	26
§ 2-31. State.....	27
§ 2-32. Tamper-Evident.....	27
§ 2-33. Technology System.....	27
§ 2-34. Verification of Fact.....	28
§ 2-35. Verification on Oath or Affirmation.....	29
<b>Chapter 3 – Authorization to Perform Notarial Acts .....</b>	<b>30</b>
§ 3-1. Notary Public Commission.....	30
§ 3-2. Notary Public Registration.....	32
§ 3-3. Course and Examination.....	33
§ 3-4. Commission Application and Registration Forms.....	35
§ 3-5. Oath of Office and Bond.....	37
§ 3-6. Commission and Registration Records.....	39
§ 3-7. Jurisdiction and Term.....	40
§ 3-8. Database of Notaries Public.....	41
§ 3-9. Notification of Changes.....	42
§ 3-10. Resignation.....	43
§ 3-11. Designation of Personal Representative.....	45
<b>Chapter 4 – Powers and Limitations of a Notary Public.....</b>	<b>48</b>
§ 4-1. Authorized Notarial Acts.....	48
§ 4-2. Audio-Visual Communication Authorized.....	50
§ 4-3. Requirements for Notarial Acts.....	52
§ 4-4. Verification of Identity.....	56
§ 4-5. Accommodations for Individuals With Disabilities.....	61
§ 4-6. Disqualifications.....	63
§ 4-7. Refusal to Notarize.....	66
§ 4-8. Improper Influence.....	68
§ 4-9. Improper Records.....	69
§ 4-10. Intent to Deceive.....	70
§ 4-11. Improper Use of Title, Official Seal.....	71
§ 4-12. Unauthorized Practice of Law; Permissible Advice.....	71
§ 4-13. Misrepresentation and Improper Advertising.....	73
§ 4-14. Notarial Officers Other Than Notaries Public.....	74
<b>Chapter 5 – Fees of Notary Public.....</b>	<b>76</b>
§ 5-1. Imposition of Fees.....	76
§ 5-2. Maximum and Ancillary Fees.....	79
§ 5-3. Prepaid and Non-Refundable Fees.....	81
§ 5-4. Notice of Fees.....	83

<b>Chapter 6 – Notarial Records .....</b>	<b>85</b>
§ 6-1. Journal Requirements. ....	85
§ 6-2. Journal Entries. ....	90
§ 6-3. Audio-Visual Recording Requirements.....	93
§ 6-4. Security of Notarial Records. ....	95
§ 6-5. Notarial Record Repositories.....	99
§ 6-6. Copying and Examining of Notarial Records.....	100
§ 6-7. Disposition of Notarial Records. ....	104
 <b>Chapter 7 – Notarial Certificate .....</b>	 <b>107</b>
§ 7-1. Notarial Certificate Requirements. ....	107
§ 7-2. Sufficiency of Notarial Certificate. ....	110
§ 7-3. Notarial Certificate Forms. ....	111
§ 7-4. Corrections to Notarial Certificate. ....	115
 <b>Chapter 8 – Signature and Official Seal of Notary Public .....</b>	 <b>118</b>
§ 8-1. Notary Public Signature.....	118
§ 8-2. Official Seal. ....	120
§ 8-3. Obtaining and Providing Official Seal. ....	124
§ 8-4. Security of Technology System and Official Seal.....	127
§ 8-5. Disablement of Official Seal and Technology System.....	129
 <b>Chapter 9 – Technology Systems.....</b>	 <b>132</b>
§ 9-1. Authorized Use of Technology Systems. ....	132
§ 9-2. [Approval][Registration] of Technology Systems.....	133
§ 9-3. Requirements for All Technology Systems. ....	134
§ 9-4. Requirements for Audio-Visual Communication. ....	137
§ 9-5. Notification of System Use.....	139
§ 9-6. Notary Not Liable for System Failure. ....	139
§ 9-7. Protection of Personally Identifiable Information. ....	140
§ 9-8. List of [Approved][Registered] Technology Systems.....	142
 <b>Chapter 10 – Recognition of Notarial Acts.....</b>	 <b>143</b>
§ 10-1. Notarial Acts of This [State].....	143
§ 10-2. Notarial Acts of Other States.....	144
§ 10-3. Notarial Acts of Federally Recognized Indian Tribe.....	146
§ 10-4. Notarial Acts of United States. ....	148
§ 10-5. Notarial Acts of Foreign State. ....	149
 <b>Chapter 11 – Authentication of Notarial Acts.....</b>	 <b>151</b>
§ 11-1. Form of Evidence. ....	151
§ 11-2. Prohibition. ....	152
§ 11-3. Fees.....	153

<b>Chapter 12 – Liability, Sanctions, and Remedies.....</b>	<b>154</b>
§ 12-1 Liability of Notary Public, Surety, and Employer. ....	154
§ 12-2. Complaints.....	162
§ 12-3. Remedial Actions for Misconduct. ....	165
§ 12-4. Civil Penalty. ....	172
§ 12-5. Administrative Adjudications; Hearings; Appeals. ....	173
§ 12-6. Criminal Sanctions. ....	176
§ 12-7. Impersonation. ....	177
§ 12-8. Wrongful Possession or Destruction. ....	179
§ 12-9. Improper Influence. ....	179
§ 12-10. Additional Remedies or Sanctions Not Precluded.....	180
 <b>Appendix I: Model Notary Act Model Rules.....</b>	<b>181</b>
Section 3-3. Course and Examination.....	182
Section 3-8. Database of Notaries Public .....	185
Section 4-4. Verification of Identity .....	186
Section 6-5. Notarial Record Repositories.....	192
Section 8-3. Procurement of Official Seal .....	196
Section 9-1. Technology Systems.....	199
Section 12-2. Complaints Against Notary Public .....	202
 <b>Appendix II: Revised Uniform Law on Notarial Acts Model Rules</b>	<b>203</b>
Chapter 1. Implementation.....	204
Chapter 2. Definitions .....	204
Chapter 3. Commission to Perform Notarial Acts .....	206
Chapter 4. Notification Requirements .....	210
Chapter 5. Standards for Notarial Acts .....	212
Chapter 6. Tamper-Evident Technologies .....	216
Chapter 7. Notarial Acts for Remotely Located Individuals .....	219
Chapter 8. Audiovisual Recordings [and Journals] .....	222
Chapter 9. Certificate of Notarial Act.....	228
Chapter 10. Notary Public Signature and Official Stamp .....	229
 <b>Appendix III: Major Model Notary Act Adoptions.....</b>	<b>233</b>



## Chapter 1 – Implementation

### Comment

General: Chapter 1 states the purposes and sets out the applicability of the Act. Its content is substantially similar to the MNA 2010, but there are some changes of significance. For example, Section 1-2 has been modified and expanded. Section 1-3 also has an important new addition. Section 1-6 was

added to make clear that all prior, properly performed notarial acts are grandfathered under the Act. The most notable change, however, is the inclusion of Section 1-7 which now specifically grants rulemaking authority to the commissioning official on a range of matters.

### § 1-1. Short Title.

This [Act] may be cited as the [Model Notary Act of 2022].

### Comment

Consistent with prior versions of the Act, the drafters continued to follow the practice of using the name of the original act followed by the year of adoption. Even though the Act now includes material drawn from the MNA 2017, the drafters determined it was best to

house the entire body of notary law in one act. In doing so, an important statement has been made: all notarial acts — whether paper-based or electronic — need to be executed with the same degree of care and given the same recognition.

### § 1-2. Purposes.

This [Act] shall be construed and applied to advance its underlying purposes, which are, to:

- (1) promote, serve, and protect the public;
- (2) simplify, clarify, and modernize the law governing notaries public;
- (3) establish rules of conduct for notaries public;
- (4) protect the interests of notaries public;
- (5) recognize the significant discretion notaries public exercise in performing notarial acts;
- (6) facilitate cross-border recognition of notarial acts;
- (7) integrate procedures for notarial acts involving the use of technology; and
- (8) unify state notarial laws.

### Comment

Paragraph (1) reaffirms the positions of both the MNA 2010 and MNA 2017 that promoting the interests of the public is of paramount concern and the overarching goal of the Act (*accord*,

*see* N.C. GEN. STAT. § 10B-2(2)). Notaries are first and foremost public servants who are duty-bound to follow the dictates of applicable law. This helps ensure that innocent members of the

public do not fall prey to the unscrupulous. The Act adopts the position that notaries are first and foremost public servants.

Paragraph (1), as supplemented by Paragraph (3), (mandating that notaries follow rules of conduct) constitutes the driving spirit of the entire Act. Notaries public have powers that when used implicate the rights of not only the principal (*see* § 2-22, *infra.*), but also all others who rely on the notarization. Thus, notaries must be disinterested actors whose only benefit in the notarization is the prescribed fee (*see* § 4-6, prohibiting a notary from having an interest in the transaction) and any reimbursement allowed by law (*see* § 5-2, *infra.*). Other provisions in the Act that foster this objective include, *inter alia*, Section 4-6(a)(1) (no notarization of one's own signature); Section 4-6(a)(3) (disqualification when principals are relatives); Section 4-11 (no testimonials); and Section 5-2(a) (no surcharges on fees).

Paragraph (2) stakes out equally important territory: simplifying, clarifying, and modernizing notarial laws. The Act now has eliminated several provisions that had multiple subsections and substituted for them simpler, more straightforward provisions. More definitions have been added to Chapter 2, which will make many of the statutory provisions easier to understand. Lastly, the Act addresses recent developments in notarial practice that will facilitate creating security in the fast-growing and quickly expanding universe of electronic transactions.

Some state notary laws are carry-overs from antiquated statutes (*see, e.g.,* N.Y. CONS. LAWS (EXEC. LAW) §§ 135 to 144), some are minimalist (*see, e.g.,* ALA. CODE §§ 36-20-70 to 36-20-75), but most are a patchwork product of numerous unrelated legislative amendments (*see, e.g.,* CAL. GOV'T. CODE §§ 8200 to 8230

& CAL. CIV. CODE §§ 1181 to 1197). The Act offers a comprehensive statute that addresses all contemporary notarial issues, including how best to facilitate professional standards of practice for paper-based notarizations, as well as their electronic counterparts, and integrates them into one workable piece of legislation.

Paragraph (3) introduces a new purpose for the Act: notary conduct. This term is intended to include “notarial ethics.” Although the Act does not establish any ethical standards, *per se*, it recognizes that a notary owes special duties both to principals and the public, and consequently should be given the same deference as other professionals. Since professions impose ethical standards upon their members, this should be the case for notaries as well. Consistent with this view, in 1998, the National Notary Association published *The Notary Public Code of Professional Responsibility*, and subsequently revised it in 2020. Many sections of the Act reflect standards of practice contained in the updated *Notary Public Code of Professional Responsibility of 2020*, which, when properly followed, will promote professionalism and foster ethical conduct.

Paragraph (4) also is new. As stated in Paragraph (1), the Act already serves to protect the public, but it is not always recognized that the notaries public who perform authorized official witnessings have interests to be protected as well. Several sections of the Act promote this purpose. Section 5-2(b) authorizes notaries and persons representing notaries to recover ancillary fees for the performance of notarial acts, and Section 5-3 authorizes notaries and persons acting for or on behalf of notaries to require fees to be prepaid. Section 4-6(b)(1) clarifies that notaries who have businesses as signing agents may be paid a signing agent fee provided there are not



any disqualifying interests.

Paragraph (5) also is new to the Act. While it is generally recognized that the office of notary public is ministerial (*see Bernal v. Fainter*, 467 U.S. 216, 104 S. Ct. 2312, 81 L. Ed. 2d 175, 1984 U.S. LEXIS 93, 52 U.S.L.W. 4669 at 3), in recent years the role of notary public has been expanded to give notaries authority to apply more discretion in performing their duties than may have existed in the past. One example is the authorization for a notary public to refuse to perform a notarial act if the notary “is not satisfied” 1) the individual executing a record is competent or has the capacity to execute the record, 2) the individual’s signature is not knowingly and voluntarily made, and 3) there is not a state or federal law prohibiting the refusal. (*See, e.g.*, MINN. STAT. ANN. § 358.58 Subd.1 and R.I. GEN. LAWS § 42-30.1-7.) Authorizing a notary to assess whether an individual is “competent” is more than a ministerial function. To that end, the Act supports the expansion of a notary’s discretion by providing a definition of “competent” for this very purpose (*see* § 4-3(e)(1)).

Paragraph (6) recognizes the modern reality of cross-border commerce and seeks to facilitate the same. Principals who migrate from one jurisdiction to another or enterprises that conduct multi-state businesses need to have records that are recognized wherever presented. To this end, Chapter 10 of the

Act implements rules to help accomplish this important goal. (For a statute on point, *see* N.C. GEN. STAT. § 10B-2(5).)

Paragraph (7) addresses the reality that electronic transactions are becoming more prevalent, but also on a path to becoming the principal way business transactions are handled. The same may be said very soon for personal transactions, as well. One goal of the Act is to ensure that workable notarial procedures are in place to accommodate this reality. To this end, the drafters promulgated rules for notarial acts on electronic records (*see particularly* Chapters 8 and 9) and involving the use of audio-visual communication (*see, e.g.*, §§ 4-2, 4-3(d), and Chapter 9). To that end, the goal of Paragraph (8) to unify state notarial laws will be of great import.

Paragraph (8) promotes harmonizing state notary public laws where possible and consistent with the objectives of the Act. On point, the Act seamlessly weaves the paper- and technology-based statutory rules in a workable piece of legislation. As explained in the Foreword, this ensures that the legal and best practice principles which traditionally have governed paper-based notarial acts apply equally to notarial acts on electronic records and involving the use of audio-visual communication. Having a simple, effective statute that accomplishes this goal is good reason for jurisdictions to adopt the Act.

### **§ 1-3. Interpretation.**

In this [Act]:

- (1) unless the context otherwise requires, words in the singular include the plural, and words in the plural include the singular; and
- (2) the words “written” or “writing” include information created on a tangible or an electronic medium.

#### **Comment**

As per Paragraph (1), the Act follows accepted statutory interpretation

practice. For example, under this rule, the singular “notary public” would include

all notaries public.

Paragraph (2) is a new addition that simply provides that the terms “writing” or “written” apply to both electronic and

handwritten material. This ensures that information created on either medium will be treated the same way insofar as any provision of the Act is concerned.

#### **§ 1-4. Prospective Effect.**

- (a) The bond, seal, and commission term of notaries public commissioned before [the effective date of this [Act]] shall not be invalidated, modified, or terminated by this [Act].
- (b) A notary public shall comply with this [Act] when applying for a new commission after [the effective date of this [Act]].
- (c) A notary public shall comply with this [Act] in performing notarial acts after [the effective date of this [Act]].

#### **Comment**

Subsection (a) protects valid notary commissions existing when the Act is adopted. The status of a notary holding a valid commission continues according to the terms and conditions at the time of commissioning. Such a “grandfathering” rule is common when a legislature adopts new rules directly impacting the qualifying rules for a state-issued commission or license and related statutory-imposed requirements. For example, realtors and lawyers do not have to retake “entry into the profession” exams every time the legislature or court changes the “entrance” requirements.

Notably, the statute applies to the notary’s bond and seal. It is unlikely the provision would impact a physical seal, unless it was destroyed during the commission term. A notary, however, could qualify to perform notarial acts on electronic records after the Act is adopted. That could raise the question of whether the notary would follow the rules of the Act or the law in existence when the original notary commission was obtained. The language of Paragraph (a) suggests that the seal as was prescribed when the notary received her commission will control.

A similar issue could arise with the notary’s bond. Since generally the notary’s

bond and commission expire concurrently, the new bond limit applies for the new commission.

Notwithstanding the above, Subsection (b) makes clear that when renewing a commission all the “grandfathered” notaries will have to satisfy the new rules. Thus, if the notary has a \$15,000 bond for her commission at the time the Act was effective and the Act raises the bond to \$25,000, when she renews the commission under this Act, a bond for \$25,000 would have to be obtained for the new commission.

The commissioning official can promulgate rules to address this situation. Good practice might suggest that if the legislature decided to raise the dollar amount of the required bond, any bond with a lower amount would have to be increased to the new statutorily prescribed amount at the time of renewing the commission.

Subsection (b) makes clear that any notary who applies for a new commission after the effective day of the Act must comply with the terms of the Act. Notaries seeking new commissions will not be grandfathered but must follow the Act’s commissioning rules. There are not any exceptions.

Significantly, Subsection (c) provides

that although the status of a current commission is not affected by the Act, the new notarization operating rules (*see generally* Chapters 4, 5, 6, 7, 8, and 9) and concomitant obligations (*see generally* Chapter 3) must be followed

immediately by all notaries public, which includes those who were commissioned prior to the adoption of the Act. Given the latter, commissioning officials should consider how best to inform notaries of their new duties.

### **§ 1-5. Severability Clause.**

If any provision of this [Act] or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this [Act] that can be given effect without the invalid provision or application, and to this end the provisions of this [Act] are severable.

#### **Comment**

This Section provides the standard way in which to deal with the invalidity of any section of a statute. The remainder of the statute stays in effect and is applied without the invalid provision(s). (*See, e.g.*, 5 ILCS § 70/1.31; CODE OF R.I. REGS. tit. 220, ch. 50-05-2, § 2.6; and W.VA. CODE OF STATE RULES § 153-22-12.1.) The merit of the provision is readily apparent.

Without such a clause legislators

would be forced to reenact the entire statute every time a provision was amended or successfully challenged. Moreover, if any one provision was challenged in court, the plaintiff could request an order staying the operation of that provision until the matter is decided. Without a severability clause, all of the other sections of the Act related to the one being challenged could be included in a stay order.

### **§ 1-6. Validity and Effect.**

This [Act] shall not affect the validity or effect of a notarial act performed before [the effective date of this [Act]].

#### **Comment**

Section 1-6 borrows the RULONA's savings clause (*See* RULONA § 29.) The prospective application of Section 1-4 also means notarial acts performed under prior law obtain their validity and effect under that law and not this Act, since the notarial act may have been performed under different standards. If, for example, a notary public performed a notarial act for the notary's spouse before the state had enacted Section 4-6(a)(3), disqualifying

the notary public if the notary notarizes for a spouse, the validity or legal effect of the notarial act cannot be impeached by the new statute. (*See, e.g.*, N.J. STAT. ANN. § 52:7-10.7.c; 57 PA. CONS. STAT. ANN. § 304(b)(2)(iii); and W.VA. CODE § 39-4-4(b).) Similarly, a notarial act performed in compliance with a prior law repealed by the Act (*see* § 1-8) is not affected by the repeal of the law under this Act.

### **§ 1-7. Rules.**

The [commissioning official] [may][shall] adopt rules to implement this [Act], including but not limited to the:

- (1) approval of courses of instruction and administration of the examination under Sections 3-3 and 12-3(d)(3);
- (2) database of notaries public under Section 3-8;
- (3) forms of satisfactory evidence of identity and identity verification under Section 4-4;
- (4) use of repositories and disposition of notarial records under Sections 6-5 and 6-7;
- (5) Certificate of Authorization to Purchase an Official Seal form and approval of official seal vendors under Sections 3-6(c) and 8-3;
- (6) [approval][registration] of technology systems under Chapter 9; and
- (7) form for complaints against notaries public under Section 12-2.

### Comment

Section 1-7 vests the commissioning official with official rulemaking power to implement the Act. The drafters provided the adopting jurisdictions the option to determine whether rulemaking should be discretionary or required. Although this Section authorizes the commissioning official to adopt rules for any chapter or section thereof, seven specific areas of importance are listed. The drafters, however, intended the “including but not limited” language to make clear that the commissioning official has authority to adopt rules on such other areas as is deemed necessary or appropriate.

One new feature of this Act is Appendix I (“Model Notary Act Model Rules”). It provides rules for each of the enumerated paragraphs. The drafters recognized that rules could have been incorporated into the black letter law of the Act itself, but that would have considerably lengthened the Act. Moreover, the drafters determined that these standards were better suited to being addressed through the official rulemaking process. Insofar as the substance of this Section is concerned, each of the seven items are discussed separately below.

Paragraph (1) authorizes adoption of rules for the mandatory educational course and examination required of all

notaries public including those who will register to perform notarial acts on electronic records or involving the use of audio-visual communication. (For jurisdictions that provide rulemaking authority, *see. e.g.*, COLO. REV. STAT. ANN. § 24-21-527; KAN. STAT. ANN. § 53-5a-27(a)(7); N.C. GEN. STAT. § 10B-14(a); and OHIO REV. CODE ANN. tit. 1, ch. 147, § 147.021(B).) Rules to implement this Paragraph may be found in Model Rules 3-3.1 through 3-3.3 in Appendix I.

Paragraph (2) provides authority to adopt rules with respect to the database maintained by a commissioning official through which the public may verify the authority of a notary public to perform notarial acts on paper and electronic records, as well as whether the commissioning official has taken action against the notary. (*See* § 3-8, *infra*.) Section 8-3(d)(3) requires licensed vendors of official seals to verify the commission of the notary public before shipping or delivering a physical or electronic official seal. Model Rule 3-8.1 in Appendix I implements this Paragraph by providing the specific, limited information that is to be included in the database entry for each notary.

The focus of Paragraph (3) is to authorize rules for any method that provides “satisfactory evidence” for the purpose of verifying the identity of a

principal for a notarial act performed in the notary's physical presence or by means of audio-visual communication required by Section 4-4(c)(1). (For statutes that address the latter, *see, e.g.*, IDAHO CODE § 51-114A(8)(b); OKLA. STAT. ANN. tit. 49, § 203.A.3; and TENN. CODE ANN. § 8-16-302(8).) A commissioning official may supplement the list of physical identification credentials to be presented by a principal to a notary public for a paper-based notarial act in Section 4-4(b)(1) by adopting a rule for the same. Model Rules 4-4.1 through 4-4.7 in Appendix I implement this Paragraph.

Paragraph (4) authorizes the commissioning official to adopt rules related to repositories of notarial records (jurisdictional statutes conferring similar authorization include MO. REV. STAT. ANN. § 486.1195.4(b) and TENN. CODE ANN. § 8-16-308(c)). Model Rules 6-5.1 through 6-5.5 in Appendix I implement this authorization. These rules address the 1) [approval][registration] of repositories, 2) termination of [approval] [registration], 3) contract between the repository provider and notary public, 4) use and security of repositories, and 5) particulars of the notification that a notary public will be using a repository.

Paragraph (5) addresses rulemaking

authority related to the form used by a notary public to obtain an official seal from a licensed vendor of official seals. Model Rule 8-3.1 in Appendix I implements this authority. Paragraph (5) also authorizes the commissioning official to adopt rules related to the approval of licensed official seal vendors. Model Rules 8-3.2 and 8-3.3 in Appendix I implement this authority.

Paragraph (6) relates to the [approval] [registration] of technology systems. "Technology system" is defined in Section 2-33 of the Act. The substantive provisions related to technology systems are addressed in Chapter 9. Model Rules 9-1.1, 9-1.2, and 9-1.3 in Appendix I provide guidance on implementing those provisions.

Paragraph (7) authorizes the commissioning official to promulgate a rule specifying the contents of the form to be used in lodging a complaint against a notary public. (*See, generally*, § 12-2 and Comment. For states that confer the commissioning official with similar authority, *see, e.g.*, IND. ADMIN. CODE tit. 75, § 7-4-1(b) and CODE OF R.I. REGS. tit. 220, ch. 050-05-2, § 2.3.) To assist commissioning officials, Model Rule 12-2.1 in Appendix I specifies the content for a complaint form.

### § 1-8. Repeals.

The following acts or sections of acts are repealed:  
[\_\_\_\_\_].

### Comment

This Section recognizes that states adopting this Act may either already have in place an existing notarial statute, or notary provisions in a variety of different statutes. To the extent provisions of this Act are inconsistent with existing statute, this Section provides a simple vehicle for repealing them. States that adopt the Act in its entirety can simply have it repeal its

existing notary statutes *in toto*. A state may want to enact only portions of this Act. That may be accomplished in more than one way. A state that wants to retain some of its current statute could repeal those sections it wants to replace with sections of this Act, and then adopt sections of the Act to replace the repealed ones. That could be done with one piece of legislation that contains

appropriate references to the existing statute and the new legislation. Section 1-8 provides a simpler solution. Under it the entire Act is subject to the few sections that the legislators do not want to adopt. All the legislators need do is to indicate the existing statutory section(s) or parts of sections(s) to be repealed, and adoption of the Act will do so.

It is possible that some extant rules affecting notaries are not inconsistent with the Act and ought not be repealed. These might include rules prohibiting notary fees for notarial acts related to elections or the securing of veterans'

benefits (*see, e.g.*, CAL. ELEC. CODE § 8080), the use of the official notary public title or seal to endorse or oppose a political candidate (*see, e.g.*, VA. CODE ANN. § 47.1-15), or any of several other things. In those instances, using the language of Section 1-8 will accomplish the task. All that need be done is to adopt the entire Act, and then indicate that the entire existing act, "except for the following provisions thereof, is repealed." (The underscoring is provided for illustrative purposes only, and usually would not be found in the legislative bill under consideration.)

#### **§ 1-9. Effective Date.**

This [Act] shall take effect [\_\_\_\_\_].

## Chapter 2 – Definitions

### Comment

General: The MNA 2022 has 35 global definitions, 1 more than the MNA 2010, which had 22 definitions in Articles I and II and 12 in Article III (“Electronic Notary” Article). Some definitions have been eliminated (*e.g.*, “credible witness,” “official signature,” and “regular place of work or business”), new definitions have been added (*e.g.*, “certification of life,” “foreign state,” and “personally identifiable information”), and other definitions have been moved to the

specific chapter in which they appear (*e.g.*, “capable of independent verification” (§ 9-(3)(b)) and “official misconduct” (§ 12-1(g)). Finally, 7 additional non-global terms have been defined in the chapters in which they appear (*e.g.*, “competent” and “free will” in § 4-3(e) and “open format” in § 6-1(i)).

The Comments explain what each term is intended to mean in the context of the Act, and the role each plays in the notarial process.

### § 2-1. Acknowledgment.

“Acknowledgment” means a notarial act in which a principal in the presence of a notary public declares having signed a record.

### Comment

The definition of “acknowledgment” has been simplified. Now it only requires the principal, in the notary’s presence, to declare that the record was signed. The prescriptions contained in the former definition (*see* MNA 2010 § 2-1) were moved elsewhere (*see* § 4-3(a)). The definition indicates it is permissible for principal to sign the record outside the notary’s presence, and then “declare” having signed it in the notary’s presence.

Under the new provision there is no longer the need for the principal to declare she voluntarily signed the record for the purposes stated therein. Some statutory acknowledgment forms bear language to that effect (*See, e.g.*, ARK. CODE ANN. § 16-47-107 and CONN. GEN. STAT. ANN. § 1-34; *also see* *Lyle Farms P’ship v. Lyle*, 2016 Ark. App. 577, 507 S.W.3d 519, 2016 Ark. App. LEXIS 602.) The drafters thought the former definition could unwittingly impose unintended obligations upon the principal. The concern follows from the

fact that a principal may read a record, not truly understand its effect, but nonetheless sign it. It was suggested that an acknowledgment ought not require the principal to speak to the purpose or intent of the record. The definition does not make the acknowledgment itself an admission that the principal understood the legal significance of the record. Indeed, it does not speak to the contents at all, but only means that the signing serves to adopt the record as the principal’s act. The legal ramifications of the record are subject to an independent determination.

The new version also eliminates the portion of the prior definition that spoke to a signer acting in a “particular representative capacity.” A notary should not be required to determine whether someone signed for herself or on behalf of someone else. Technically, to do so would speak to the contents of the record, which is beyond the scope of a notarization. Accordingly, Section 7-3

no longer contains a notarial certificate form of acknowledgment for a principal acting in a representative capacity.

Lastly, the definition now addresses the signing of a “record.” This is the term used in the Act (*see* § 2-24) to cover both paper instruments and electronic records. Since a purpose of the Act is to unify

state notary public laws (§ 1-2(8)), the provisions related to notarial acts on electronic records and involving the use of audio-visual communication were combined throughout the Act. The drafters determined the term “record” would adequately be applied to any medium on which a notarial act was performed.

### **§ 2-2. Affirmation.**

“Affirmation” means a notarial act or part thereof in which a principal or required witness in the presence of a notary public makes an oral or written vow of truthfulness or fidelity on penalty of perjury without invoking a deity or using any form of the word “swear.”

#### **Comment**

Section 2-2 provides a definition of “affirmation” that contains all of the standard components of an oath (*see* § 2-18). An affirmation serves as the functional equivalent of an “oath” for principals who prefer not to pledge to a deity or supreme being. Several states define the term in its statutes. (*See, e.g.,* MO. REV. STAT. ANN. § 486.600(2); N.C. GEN. STAT. § 10B-2); S.C. CODE ANN. § 26-1-5(2); UTAH CODE ANN. § 46-1-2(13); and WYO. STAT. ANN. § 32-3-102(a)(ii).) As required for most notarial acts, the principal must personally appear before and satisfactorily prove identity to the notary public (*see* § 4-3(a)). To solemnify an affirmation, the Act compels the principal to understand that the statement is made under penalty of perjury.

This Act does not prescribe wording for an affirmation. It assumes that a simple statement including the language “I affirm” and “under penalty of perjury” will suffice. The notary may orally state the affirmation and have the principal positively assent to it, or the principal may speak the entire affirmation aloud.

It is preferable for assent to be made by oral response, but any action (*e.g.,* a hand gesture or nod) could constitute assent if clearly made for the purpose of adopting the affirmation, especially in the case of a principal who is physically incapable of communicating orally. While it is not necessary that the principal raise his right hand to make an affirmation, notaries are encouraged to require any ceremonial gesture that they feel will most compellingly appeal to the conscience of the principal. When associated with a notarial certificate, good practice would suggest that the notary read aloud affirmation wording and obtain the principal’s oral assent. The key point is that a proper affirmation requires a positive and unequivocal response by the principal.

An affirmation standing alone is a notarial act, but most often it is administered as part of a verification on oath or affirmation (*see* § 2-35). In these latter instances the affiant will be required to sign an affidavit or other record.

### **§ 2-3. Audio-Visual Communication.**

“Audio-visual communication” means being able to see, hear, and communicate with another individual in real time using electronic means.



### Comment

Section 2-3 defines “audio-visual communication” which was carried over from the MENA 2017 (changing only “video” to “visual”). (Statutes with similar definitions include NEV. REV. STAT. ANN. § 240.1821; KAN. STAT. ANN. § 53-5a15(g)(1); MD. CODE ANN. (STATE GOV’T) § 18-201(c); and OKLA. STAT. ANN. tit. 49, § 202.1, using the term “communication technology.”) The

essential components of an appearance before a notary public by means of audio-visual communication are the same as for a physical appearance. Specifically, the notary and principal must be able to “see, hear, and communicate with” one another. Importantly, this Section mandates that the audio-visual transmission be in “real time.” “Real time” is defined in Section 2-23.

### § 2-4. Certification of Life.

“Certification of life” means a notarial act in which a notary public attests that a principal appearing in the presence of the notary is alive at such time.

### Comment

Section 2-4 defines a new notarial act: “certification of life.” It is used in situations where evidence is required to prove that an individual is alive. (*See* MONT. CODE ANN. § 1-5-603(11)(b).) Interestingly, WASH. REV. CODE ANN. § 42.45.140(6) authorizes a notary to certify that an act or event has occurred, which could include that a principal is alive.) As an example of how this notarial act can be used, consider a situation where a foreign national residing in the United States must submit documentation to her home government to receive her pension payments. The pensioner can satisfy this requirement by appearing before a notary public to obtain an attestation from the notary that the pensioner is alive.

The justification for adding this notarial act to the Act is two-fold. First, as shown above, there is a need for these certifications. Second, notaries public

are prohibited from using their official position for anything other than what is prescribed in the Act. (In prior Model Notary Acts these were limited to the notarial acts of acknowledgment, jurat, signature witnessing, copy certification and verification of fact. Each of these notarial powers are authorized by the Act, but none of them can satisfy the need addressed by a “certification of life” notarization. Since a notary public essentially verifies that a principal is alive when performing other notarial acts, having a separate notarization to verify life merely carves out a piece of existing notarial authority and makes it a separate notarial act. There should not be any objection to this since it merely allows notaries to assist more members of the public without expanding their extent powers. (*See* § 4-3(a) which prescribes the formal requirements for performing a certification of life.)

### § 2-5. Commission.

“Commission” means:

- (1) to authorize a notary public to perform notarial acts;
- (2) the official record of a notary’s authorization to perform notarial acts; or

- (3) the proof of a notary’s authorization to perform notarial acts issued to the notary or maintained in the database required by Section 3-8.

### Comment

Section 2-5 identifies the different ways the term “commission” is used in the Act. (*See* S.C. CODE ANN. § 26-1-5 and N.C. GEN. STAT. § 10B-3(4).) Many states use the term “commission” (*see, e.g.,* COLO. REV. STAT. ANN. § 24-21-520 and IOWA CODE ANN. § 9B.21), others use “appointment” (*see, e.g.,* CONN. GEN. STAT. ANN. § 3-94b and NEV. REV. STAT. ANN. § 240.010), while yet others use both (*see, e.g.,* CAL. GOV’T CODE § 8201.5 and NEB. REV. STAT. § 64-101).

Paragraph (1) addresses the commissioning official’s authority to confer notarial status upon an individual. Paragraph (2) references the official record of the authority conferred in

Paragraph (1). Paragraph (3) identifies the two sources where proof of a notary public’s authority to perform notarial acts can be found. The first is the certificate of commission or other written evidence of authority issued to the notary by the commissioning official. The second is the public database required to be maintained by the commissioning official pursuant to Section 3-8. Section 3-8(b) specifically provides that the database is of a notary’s commission and registration. (In this context “registration” means the grant of authority to perform notarial acts on electronic records or involving the use of audio-visual communication. (*See* § 2-25, *infra*.)

### § 2-6. Copy Certification.

“Copy certification” means a notarial act in which a notary public attests that a copy of a record, tangible copy of an electronic record, or copy of a notarial record is an accurate, exact, and complete copy of the record.

### Comment

The wording of this notarial act has been substantially changed from its definition in both the MNA 2010 and MENA 2017. The change expands the application of this notarial act. The Section no longer spells out the process to be followed by the notary in performing a copy certification. (That has been moved to Section 4-3(b).) Now it simply authorizes three specific types of copy certification: a copy of a record (*see* Section 2-24, *infra*), a paper copy of an electronic record, and a copy of a notarial record (*see* Section 2-16, *infra*). “Certifying” means that the notary has compared the copy with another record and attests that the two

copies are identical in all respects.

Numerous jurisdictions have enacted provisions allowing notaries public to perform copy certifications of a variety of records. (*See, e.g.,* ARK. CODE ANN. § 21-14-106(b); GA. CODE ANN. § 45-17-1(2); MASS. GEN. LAWS ANN. ch. 222, § 15(a); MD. CODE ANN. (STATE GOV’T) § 18-216(f); N.M. STAT. ANN. § 14-14A-2.F; and OR. REV. STAT. § 194.215(8).) Even with such broad support for the notarial act, there are jurisdictions which do not expressly allow notaries to perform copy certifications (*see, e.g.,* ALA. CODE § 36-20-73; MICH. COMP. LAWS § 55.291(1); and N.C. GEN. STAT. § 10B-3(11)) or permit notaries to certify

copies of certain records only (*see* CAL. GOV'T CODE §§ 8205(a)(4) and 8206(e)).

Many jurisdictions recently have added the ability of a notary public to certify a tangible copy of an electronic record (*see, e.g.*, HAW. REV. STAT. ANN. § 456-14(c); IDAHO CODE § 51-104(3); and N.D. CENT. CODE § 44-06.1-01.1). The sudden rise in remote notarization authorizations has raised a concern regarding land title recording offices that

have not transitioned to electronic recording. Those recording offices would not be able to accommodate the filing of notarized electronic records. Authorizing these offices to have a notary public certify that a paper copy of a notarized electronic record is a true and accurate copy of the electronic record will encourage the adoption of remote notarization and “in-person electronic notarization.”

### § 2-7. Credential.

“Credential” means a record evidencing an individual’s identity.

#### Comment

The drafters borrowed the updated definition of “credential” from the MENA 2017 because the term increasingly is being considered synonymous with “identification document.” In current usage the latter may refer either to 1) a tangible or paper identification document, such as a driver’s license, passport, or credit card with the bearer’s signature (*see* N.J. STAT. ANN. § 5:12-101h.(e)) or 2) an identifying electronic device or process. (The federal Transportation Worker Identification Credential which utilizes biometrics contained in an integrated computer chip housed within the card to

identify the bearer is an example of the latter.) Defining a “credential” as a “record” includes both tangible or electronic proofs of identity (*see* § 4-4(b)(1)(A) and Comment) and reinforces the view that all records are considered as equals under the Act. Use of “credential” throughout the Act also is consistent with state remote notarization statutes that define “credential analysis” as a method of verifying the identity of a remotely located principal. (*See, e.g.*, MONT. CODE ANN. § 1-5-602(5); OKLA. STAT. ANN. tit. 49, § 202.2; and TENN. CODE ANN. § 8-16-302(2).)

### § 2-8. Electronic.

“Electronic” means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

#### Comment

This definition, which was borrowed from the UETA (UETA § 2(5)), has been carried over from the MNA 2002 and 2010, and MENA 2017. The drafters use this term because the UETA has 1) been adopted by virtually every jurisdiction (*see, e.g.*, GA. CODE ANN. §§ 10-12-1 to 10-12-20; KAN. STAT. ANN. §§ 16-1601 to 16-1620; ME. REV. STAT. ANN. tit. 10,

ch. 1051, §§ 9401 to 9419; NEB. REV. STAT. §§ 86-612 to 86-643; and UTAH CODE ANN. §§ 46-4-101 to 46-4-503 (followed in *VT Holdings LLC v. My Investing Place LLC*, 440 P.3d 767 (UT App. 2019)); or (2 served as the starting point for other variations of UETA legislation enacted throughout the country (*see, e.g.*, CAL. CIV. CODE §§

1633.1 to 1633.17; ARIZ. REV. STAT. ANN. §§ 44-7001 *et seq.*; *see also Rigsby v. GoDaddy Inc.*, No. CV-19-05710-PHX-MTL, 2021 U.S. Dist. LEXIS 111085 (D. Ariz. June 14, 2021); *Martin v. TEKsystems Mgmt. Inc.*, No. CV-20-02192-PHX-SPL, 2021 U.S. Dist. LEXIS

107262 (D. Ariz. June 3, 2021).

The term “electronic” is to be liberally construed to embrace not only computer-generated signatures and records, but also those created by other technologies that may currently be in use or developed in the future.

### § 2-9. Electronic Signature.

“Electronic signature” means an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record.

#### Comment

Section 2-9 has been carried over from the MENA 2017 and MNA 2002 and 2010, which borrowed the definition from the UETA. (*See* UETA § 2(7).) The definition describes the different possible forms of an electronic signature and is intended to be as inclusive as possible. No doubt, technologies not yet developed

will create new ways to produce electronic signatures that would satisfy the definition.

Note that this Section only defines the term “electronic signature.” Authority to use an electronic signature is provided elsewhere in the Act. (*See* § 4-1(b), *infra*.)

### § 2-10. Foreign State.

“Foreign state” means a government other than the United States, a state, or a federally recognized Indian tribe.

#### Comment

Section 2-10 refers to any governmental entity that is not under the jurisdiction of the United States. The term is borrowed from the RULONA. (*See* RULONA § 14A(a)(2).) A federally recognized tribe is one which the United States has entered into a government-to-government relationship. (*See Yellen v. Confederated Tribes of the Chehalis Reservation*, 141 S. Ct. 2434 (2021); *see*

*also Agua Caliente of Cupeño Indians v. Sweeney*, 932 F.3d 1207 (9th Cir. 2019).) In the Act, “foreign state” appears in the context of the recognizing notarial acts from nations and states outside the United States (*see* § 10-5(a)) and certifying the authority of notaries public as well as notarial officers for notarial acts destined outside the United States (*see* § 11-1).

### § 2-11. In My Presence.

“In my presence” and “in the presence of” means:

- (1) the notary public is physically close enough to see, hear, communicate with, and receive credentials from any individual involved in the notarial act; or
- (2) the notary public and any individual involved in the notarial act are

able to interact simultaneously with one another in real time by means of audio-visual communication.

### Comment

Section 2-11 identifies the basic elements required to be considered “present” before a notary. The definition draws from the definition of “personal appearance” in MNA 2010 Section 2-15 (see N.C. GEN. STAT. § 10B-3(16), which essentially adopted Paragraph (1)) and “appear in person” (2017 MENA 2017 § 2-1; see also MONT. CODE ANN. § 1-5-602(2); NEV. REV. STAT. ANN. § 240.1882.1; WASH. ADMIN. CODE § 308-30-020; and WYO. STAT. ANN. § 32-3-102(a)(iii)). It has two parts. Paragraph (1) addresses “in person” notarizations. Paragraph (2) defines “presence” for remote notarization purposes.

Paragraph (1) of the definition notes the importance of being physically close enough to receive credentials from any individual involved in the notarial act. For example, to be in the presence of a notary it is essential that a party to the notarization be able to share a driver’s license for proper identification purposes.

Paragraph (2) emphasizes that when the notary public and principal are in separate locations, they must be able to communicate in real time (see § 2-23, *infra*.) by means of an audio-visual communication (see § 2-3, *supra*.).

“Personal appearance” is the fundamental manner in which principals avail themselves of the jurisdiction, authority, and legal power of a notary public as a public officer. (See, e.g., *Colburn v. Mid-States Homes, Inc.*, 266 So.2d 865 (Ala., 1972); *Humble Oil & Refining Co. v. Downey*, 183 S.W.2d 426

(Tex. 1944); *Yates v. Ley*, 92 S.E. 837 (Va., 1917); and *Commonwealth v. Haines*, 97 Pa. 228 (Pa. 1881).)

Most states that allow notarizations on electronic records today either stipulate the principal must be physically present before the notary or prohibit the notary from performing the notarial act when the principal is not present. (See IOWA CODE ANN. §§ 9B.6.1 and 9B.2.10; W.VA. CODE § 39-4-6(a); and N.C. GEN. STAT. § 10B-116).)

In 2000, Utah became the first state allowing a notarial act to be performed by electronic communication. (UTAH CODE ANN. § 46-1-2 (2000)), defining “acknowledgment” as “an admission made in the notary’s presence or by an electronic communication that is as reliable as an admission made in the presence of the notary, provided that the electronic communication is authorized by law or rule...” This provision and its implementing regulation (UTAH ADMIN. CODE § R154-10-502 (2001)) were repealed in 2006 and 2008, respectively.

In 2012, the Commonwealth of Virginia authorized notaries public to use audio-video conference technology to perform electronic notarial acts. (See VA. CODE ANN. § 47.1-2 — “satisfactory evidence of identity.”) As of the date of publication, most states had followed Virginia’s lead in authorizing notaries to perform notarial acts using audio-visual communication to satisfy the personal appearance requirement when the principal was located remotely.

## § 2-12. Journal of Notarial Acts and Journal.

“Journal of notarial acts” and “journal” mean:

- (1) a record of notarial acts that is created and maintained by a notary public; or

- (2) all journals of notarial acts created and maintained by a notary public.

### Comment

This definition of “journal of notarial acts” has been reworded from its definition in MNA 2010 Section 2-6, and MENA 2017 Sections 9-1 and 9-2. The MNA 2010 identified the journal as being a “book” (§ 2-6) and “electronic record” (§ 15-4). The MENA 2017 permitted the journal to be either a “permanently bound book” (§ 9-2) or an “electronic journal” (§ 9-3).

The “journal of notarial acts” as defined in Paragraph (1) indicates a notary maintains one journal that catalogues all of her notarial activities. As such, it serves as an official record of all notarial acts performed by the notary. Also, according to the Act, it must include requests for notarizations that were refused, *e.g.*, the principal was unable to provide adequate identification (*see* § 6-2(d)). Moreover, good practice advises recording such activities so there is a written history explaining why the notary so acted in the event of a subsequent inquiry on point.

The drafters specifically used the term “record” in the definition. As per Section 2-24, this means the journal can be either created on a tangible or electronic medium, provided the contents are “retrievable in perceivable form” (*see* § 2-24, *infra.*). Thus, both

paper- and technology-based notarial acts should be entered into the journal. The Act does not mandate whether the journal must be either paper-based or electronic. This silence indicates that it is the notary’s choice. Whatever format is chosen, the Act provides requirements for the same. (*See* §§ 6-1(c) and 6-1(g) for the format requirements for each type of journal.)

Paragraph (2) effectively states that the “journal” includes all journals “created and maintained by a notary public.” This language suggests that a notary could maintain a paper-based journal that would include both paper-based notarizations and notarizations on electronic records or involving the use of audio-visual communication (or an electronic journal that also included paper-based notarizations). It also suggests that a notary could have a journal for each technology system the notary uses (*see* § 2-33, *infra.*), and that the “journal” consists of the total of all journals the notary collects over the years.

Importantly, Paragraph (2) makes clear that no matter how many separate books or electronic journals the notary uses to detail her notarial activities, all of those books and electronic journals together constitute the notary’s journal.

### § 2-13. Notarial Act and Notarization.

“Notarial act” and “notarization” mean any official act that a notary public is authorized to perform under this [Act], including any act on an electronic record or involving the use of audio-visual communication.

### Comment

This definition of “notarial act” and “notarization” expands upon the definition that appeared in the MNA 2010. (*See*

MNA 2010 § 2-9; *see also* MO. REV. STAT. ANN. § 486.600(10); N.C. GEN. STAT. § 10B-3(11); and S.C. CODE ANN.

§ 26-1-5(8).) To be as expansive as possible, the definition specifically references electronic records and audio-visual transactions. One purpose of the Act is to unify state notary laws (§ 1-2(8)). Using the same term to refer to all notarial acts places notarizations of electronic records and involving the use of audio-visual communication on par with paper-based notarial acts and gives proper recognition and authority to any official act a notary public performs irrespective of the tools and medium used to perform it.

This provision also serves another purpose, *i.e.*, to distinguish official notarial acts from other activities in which a notary might engage. For example, Section 5-2(b) authorizes a notary public or a person acting for or on behalf of a notary to charge ancillary fees for certain non-notarial services, such as creating copies, mailing paper records, and traveling to perform a notarial act. These activities are not “notarial acts” although they are performed within the context of rendering services in connection with them.

### § 2-14. Notarial Certificate.

“Notarial certificate” means the part of, or form attached to or logically associated with, a record that is completed by the notary public, bears the notary’s signature and official seal, and states the facts attested by the notary in a notarial act.

#### Comment

This definition changes some of the language of its predecessor provision, MNA 2010 Section 2-9. Now the definition includes the words “logically associated with” to accommodate notarial acts on electronic records.

A notarial certificate is the notary public’s official statement of facts surrounding the performance of a notarial act. Every notarial act must be evidenced by a notarial certificate. The notarial certificate emphasizes the significance of the notarial act. (*See* §§ 7-1(a) and 7-3.)

By definition, the certificate is “part of” of the record 1) into which it is integrated or upon which it is endorsed, or 2) to which it is “attached.” (*See, e.g.*, CAL. GOV’T CODE § 8205(a)(2); GA. CODE ANN. § 45-17-33; MASS. GEN. LAWS ANN. ch. 183, § 29; S.D. CODIFIED LAWS § 18-4-22; and WASH. REV. CODE ANN. § 42.45.130(7), which provides, — “[if] a notarial act is performed regarding a tangible record, a certificate must be

part of, or securely attached to, the record.”

“For purposes of attaching a notarial certificate to a tangible document, ‘securely attached’ means stamped, stapled, grommited, or otherwise permanently bound to the tangible document. The term ‘securely attached’ does not include the use of tape, paper clips, or binder clips” (MISS. ADMIN. CODE tit. 1, ch. 50, pt. 5, R. 50.7.3).)

If the notarial certificate is electronic, the notarial certificate must be “logically associated with” the electronic record. “Logically associated with” is borrowed from the UETA. (*See* UETA §§ 2(8) and 11; *see also* RULONA § 15(f).) The National Association of Secretaries of State (NASS) National Electronic Notarization Standards emphasize that “logically associated with” must be done in a “tamper-evident manner”: “When performing an electronic notarization, a notary public shall complete an electronic notarial certificate and attach or logically associate the notary’s electronic signature

and seal to that certificate in a tamper-evident manner. Evidence of tampering pursuant to this standard may be used to determine whether the notarial act is valid or invalid” (NASS NAT’L ELEC. NOT. STAND., “Form and Manner of Performing the Electronic Notarial Act” 5). According to one state, “logically associated with” makes the electronic notarial certificate immediately perceptible and reproducible: “In performing an electronic notarial act, all of the following

components shall be attached to, or logically associated with, the electronic document by the electronic notary public and shall be immediately perceptible and reproducible in the electronic document to which the notary public’s electronic signature is attached: ... the completed wording of one of the following notarial certificates: (a) Acknowledgment, (b) jurat, (c) verification or proof, or (d) oath or affirmation” (NEB. REV. STAT. § 64-309).

### **§ 2-15. Notarial Officer.**

“Notarial officer” means an individual, including a notary public, authorized to perform notarial acts under this [Act] or other law of this [State].

#### **Comment**

This Section introduces the broad term “notarial officer.” It recognizes that there are individuals who are not notaries public, but who by dint of their offices nonetheless are authorized to perform notarial acts. (See LA. REV. STAT. ANN. §§ 35:391-418, providing that the governor may appoint “ex officio” notaries public for various state and local governmental agencies who have limited notarial powers in their respective agencies and authorities during their terms of employment and who must not charge fees when performing notarial acts; see also CAL. CIV. CODE § 1181.

*Cf.* DEL. CODE ANN. tit. 29, § 4306, providing for the governor’s appointment of limited governmental notarial officers for police agencies at the request of the administrative head of the police agency for a 2-year term.) Notwithstanding the title of the Act, Section 4-14 requires notarial officers other than notaries public to comply with certain provisions of the Act, Section 10-1 expressly recognizes notarial acts performed by these notarial officers, and Section 11-1 provides that the authority of these notarial officers may be authenticated for notarized records destined outside the United States.

### **§ 2-16. Notarial Record.**

“Notarial record” means a journal or audio-visual recording of a notarial act required by Chapter 6 of this [Act] or any other record that pertains to the notary public’s office or actions.

#### **Comment**

The Act has adopted this new term to describe any record that pertains to the notary public’s performance of her duties. The journal is the primary source of such information, and for notarial acts involving the use of audio-visual

communication, an audio-visual recording constitutes another. The definition also references any other record that pertains to the notary public’s office or actions. These include: 1) Section 6-4(h), which provides that a notary public’s official



notification to the commissioning official that the notary's journal is stolen, lost, destroyed, compromised, or otherwise rendered unusable or unreadable is to be kept by the notary as a notarial record; 2) Section 8-4(g), which requires the same for a notification to the commissioning

official regarding a stolen, lost, damaged, destroyed, or compromised official seal; and 3) Section 6-6(d), which requires the notary to keep as a notarial record the signed notice of an individual requesting a photocopy or certified copy of a notarial record.

### **§ 2-17. Notary Public and Notary.**

"Notary public" and "notary" mean an individual commissioned to perform notarial acts under this [Act].

#### **Comment**

This Section performs the simple function of defining the terms for the primary actors described in this Act. The definition distinguishes these titles from that of a notarial officer. (*See* § 2-15.) The latter only has limited notarial powers that flow through his office, which cease upon termination of the same. An example of a notarial officer is a judge, court clerk, or recorder of deeds. A notary public, however, retains her authority throughout the term of her commission, and only loses her powers

before then if she either resigns or for disciplinary reasons has her commission suspended or revoked. Under the Act, a notary public is a notarial officer, but a notarial officer is not a notary public. This is so because a notary public is "commissioned." (*See* §§ 2-5 and 3-1.) A notarial officer merely is "authorized" to perform notarial acts. Finally, under the Act, a notary public is subject to oversight and regulation by the commissioning or regulating official. (*See, generally*, Chapter 12.)

### **§ 2-18. Oath.**

"Oath" means a notarial act or part thereof in which a principal or required witness in the presence of a notary public makes an oral or written vow of truthfulness or fidelity on penalty of perjury while invoking a deity or using any form of the word "swear."

#### **Comment**

Section 2-18 provides a traditional definition of "oath" as it defined in notarial statutes. (*See* CONN. GEN. STAT. ANN. § 3-94a(7) and UTAH CODE ANN. § 46-1-2(13).) An oath is the alternative to an affirmation (*see* § 2-2), but both serve the same purpose and have the same legal effect. The sole distinction between the two is that an oath-taker pledges to a supreme being or uses the word "swear" in any of its forms to indicate a solemn commitment of

conscience. An affiant does not.

The procedural rules relating to an taking an oath apply equally to an affirmation. (*See* § 2-2 and Comment; *see also* § 4-3(a).) A person who takes an oath need not comply with any particular ceremony, such as swearing on or touching a Bible or other revered text. Notaries, however, have discretion to utilize gestures or ceremonies that they believe will most compellingly appeal to the conscience of the oath-taker.

**§ 2-19. Official Seal.**

“Official seal” means:

- (1) a physical device or an electronic process for affixing or attaching on a notarial certificate the information related to the notary public’s commission; or
- (2) the information related to the notary public’s commission or an affixed image of the information itself.

**Comment**

The definition of “official seal” in Section 2-19 conceptually is the same as the one that appeared in MNA 2010 Section 2-13. made clear that the term “seal” may denote the inking, embossing, or other physical device used by a notary to create an image containing certain information on a tangible notarized record. Some jurisdictions distinguish the tool (“stamping device”) from the image it produces (“official stamp”) (*see, e.g.*, VT. STAT. ANN. tit. 26, §§ 5304(11) and (16) and W.VA. CODE §§ 39-4-2(8) and (13)), while others define “seal” as the device that generates the image it produces (*see* S.C. CODE ANN. § 26-1-5(18) and VA. CODE ANN. § 47.1-2 “Seal”).

MNA 2010 Section 19-1 required the notary to “attach” or “logically associate” the electronic seal with the electronic signature. That language was adopted from UETA § 2(8).

Paragraph (1) has been updated to accommodate technology-based notarial acts by essentially merging the MNA 2010 paper-based and electronic seal definitions (§§ 2-13 and 19-1, respectively). Defining an official seal for use on tangible and electronic records in one section fulfills the Act’s purpose to unify state laws (*see* § 1-2(8)) and iterates the position that notarial acts on tangible and electronic

records stand on equal footing.

Paragraph (2) indicates the official seal may be either a physical image on a tangible record or an electronic or digital image on an electronic record or may simply constitute the information related to the commission of a notary public itself. (*See* § 8-2(c).) The latter is based on UETA § 11 and Uniform Real Property Electronic Recording Act (URPERA) § 3(c), with the latter clarifying that “[a] physical or electronic image of a stamp, impression, or seal need not accompany an electronic signature.” Thus, under the UETA, URPERA, and this Act, there is nothing magical or inherently more legal about the official seal appearing as an image on an electronic record, although many states require it. (*See, e.g.*, MONT. ADMIN. CODE § 44.15-107 and N.C. ADMIN. CODE tit. 18, § 07C .0402(e); *but see* TEX. GOV’T CODE §§ 406.013(d) and 406.101(5), clarifying that an electronic seal is “information ... that confirms the online notary public’s name, jurisdiction, identifying number, and commission expiration date and generally corresponds to information in notary seals used on paper documents” and that the requirement of an image “does not apply to an electronically transmitted authenticated document”).

**§ 2-20. Person.**

“Person” means an individual, corporation, business trust, statutory trust, estate, private trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

### Comment

This is the first time the defined term “person” appears in one of the Model Acts. The definition is borrowed from RULONA Section 2(9) and differs only in the addition of the word “private” before “trust.” The definition is designed to include all legally recognized entities.

The drafters adopted the term to accommodate references in the Act. The definition absent the reference to a “private” trust is identical to the ones used in other jurisdictions. (*See, e.g.*, D.C. CODE ANN. § 1-1231.01(12) and N. D. CENT. CODE § 44-06.1-01.9.)

### § 2-21. Personally Identifiable Information.

“Personally identifiable information” means information that:

- (1) identifies an individual;
- (2) is not available from any public record or other public source; and
- (3) includes a photograph, Social Security or credential number, address, phone number, or any identifier, descriptor, or indicator that when used in combination with other information identifies an individual.

### Comment

Today, most individuals seeking a notarization do not personally know the notary public who is asked to perform the notarization. Consequently, these notarizations will require either reliable credentials or a credible witness to prove who she or he is. (These requirements are set out in state statutes. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 222, § 1, defining “Satisfactory evidence of identity”; TEX. CIV. PRAC. & REM. CODE § 121.005(a)(2), identifying required “Proof of Identity of Acknowledging Person”; and VT. STAT. ANN. tit. 26, § 5365(b)(1)(a) and (b), enumerating items that are “Satisfactory Evidence” for identification purposes; and in this Act in § 4-4.) When the former option (which is the most common) is used, the credentials presented to prove identity expose a person’s private, personal information not only to the notary, but also to others who might have access to the notary’s journal or technology system used to execute the notarization. (For journal access, *see* § 6-6. For rules relating to accessing a technology system, *see* § 9-3(b).) Even though the Act limits

access to journals and technology systems, access still exists. Controlled access, as provided by the sections noted above, does not guarantee the information is protected. The more eyes that fall upon information, the greater the risk that information will be compromised. Unfortunately, access to information delivers the key that opens the door to fraud.

Notaries have been collecting private information from principals for centuries. (A 1650 law of the Massachusetts Bay Colony authorized every notary public to charge a prescribed fee “[f]or entring [a writing of procuration and letter of attourney] at lardge in his booke” and “[for] entring a bill of exchangde and protest at lardge in his booke” (Nathaniel B. Shurtleff, Ed., *The Records of the Governor and Company of the Mass. Bay in New England*, Vol. III, 1644-1657 at 210. The original spelling has been used.) Today, however, formal record-keeping is more the “order of the day” than it was yesteryear. Maintaining records with sensitive personal information invites

the unscrupulous to try and access it. This is particularly the case when the information is contained in electronic journals and audio-visual recordings of notarial acts that are stored online. Thus, it is critical that there are safeguards in place to ensure private information is not comprised. The drafters determined to address this matter by adding to the Act

the definition “personally identifiable information.” (*See also* § 4-4(e).)

Section 2-21 models the definition after several known statutory definitions and rules. (*See, e.g.*, CAL. CIV. CODE §§ 1798.3(a) and 1798.140(o)(1); 15 U.S.C. § 6809(4)(A); 18 U.S.C. § 2710; 2 CFR § 200.79; and MASS. CODE REGS. tit. 201, § 17.02.).

### **§ 2-22. Principal.**

“Principal” means an individual who appears in the presence of a notary public for:

- (1) an acknowledgment;
- (2) a verification on oath or affirmation;
- (3) a signature witnessing;
- (4) an oath or affirmation; or
- (5) a certification of life.

#### **Comment**

This important definition used throughout the Act has been reworded from its prior use in both MNA 2010 Section 2-17 and MENA 2017 Section 2-12. The term now specifies each of the notarial acts for which an individual must appear in person before a notary. The above-noted acts are those that require a signature, an oath and affirmation, or a certification by the notary that the individual is alive (thus requiring the notary to verify the identity

of the individual). For a statute that applies it only to online notarial acts, *see* OHIO REV. CODE ANN. § 147.60(K): “‘Principal’ means a natural person whose electronic signature is notarized in an online notarization, or the natural person taking an oath or affirmation from the online notary public. ‘Principal’ does not include a natural person taking an oath or giving an affirmation in the capacity of a witness for the online notarization.”

### **§ 2-23. Real Time.**

“Real time” means the actual span of uninterrupted time during which all parts of a notarial act involving the use of audio-visual communication occur.

#### **Comment**

This definition is derived from MENA Section 5A-1(5). In its original form it addressed “the actual span of uninterrupted time during which all parts of an electronic notarial act occur” within the context of a notarial act involving audio-visual communication. The definition in this Act serves the same

purpose. (For statutes that take a similar approach or use the term, *see* IND. ADMIN. CODE tit. 75, § 7-1-5 and NEV. ADMIN. CODE § 240.722.3.)

Some jurisdictions use the term “real time,” but do not define what it means. (*See, e.g.*, COLO. REV. STAT. ANN. § 24-21-514.5(5); IDAHO ADMIN. CODE §

34.07.01.013.01.d; and UTAH ADMIN. CODE § R623-100-5.B.2.ii.)

Jurisdictions that follow the RULONA utilize the phrase “communicate with each other simultaneously by sight and sound” to convey the same thought. (*See, e.g.*, N.H. REV. STAT. ANN. § 456-B:6-a.I(a)(1); N.J. STAT. ANN. § 52:7-10.10.a(1)(a); and WIS. STAT. ANN. § 140.145(1)(a)1.)

The drafters insisted that any technology system used to facilitate the performance of a notarial act involving audio-visual communication must record, transmit, and preserve all interactions between the parties without interruption

or editing. (*See, e.g.*, IDAHO ADMIN. CODE § 34.07.01 R. 015.01; N.M. ADMIN. CODE § 12.9.4.12; and TEX. ADMIN. CODE §§ 87.71(1) and (2), requiring audio-video feeds to provide for “synchronous” feeds of sufficient resolution and audio clarity to enable the notary and remotely located individual to see and speak with each other. This would rule out any system in which a principal might pre-record a video of her- or himself requesting a notarial act and presenting identification credentials, and then later actually appear in person before the notary via audio-visual communication.

### § 2-24. Record.

“Record” means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

#### Comment

This definition is the same one used in the MNA 2002 and 2010, and MENA 2017. These acts borrowed the definition from UETA § 2(13). The definition remains viable today as it still includes information from both a tangible or intangible source and can be retrieved in a “perceivable form.” In sum, a “record” is what used to be called a “document,” but now can exist in an electronic format as well as a tangible form.

As is the case in the UETA, in this Act the term “electronic record” is chosen when the context refers explicitly to a record in electronic form (*see, e.g.*, § 9-4(4)) and “tangible record” when the context refers explicitly to a paper record (*see, e.g.*, §§ 2-27(1) and 2-28(1)). In this Act, when a record can be either tangible or electronic the generic “record” is used. (*See, e.g.*, the definition of “credential” in § 2-7 and “journal” in § 2-12.)

### § 2-25. Register and Registration.

“Register” and “registration” mean the act of applying for authorization, or the authorization granted, to perform notarial acts on electronic records or involving the use of audio-visual communication.

#### Comment

This definition is new to the Act. It has two prongs: register and registration can mean either a notary public’s act of applying for authorization to perform notarial acts on electronic records or involving the use of audio-visual communication, or the authorization

“granted” to perform these acts.

There are at least four approaches related to the grant of authority to perform notarial acts on electronic records or involving the use of audio-visual communication. First, there is the requirement of a separate commission

(*see, e.g.*, TENN. CODE ANN. § 8-16-306 and TEX. GOV'T CODE § 406.105). Second is a registration process similar to the one adopted by the Act (*see, e.g.*, NEV. REV. STAT. ANN. § 240.192 and S.C. CODE ANN. § 26-1-20(A)). Third, states that follow the RULONA require a notary public simply to provide a “notification” to the commissioning officer or agency that the notary will be performing notarial acts on electronic records or for remotely located individuals (*see, e.g.*, COLO. REV. STAT. ANN. §§ 24-21-514.5(3) and 24-21-520 and IOWA CODE ANN. §§ 9B.14A.7 and 9B.20). Fourth, there are states with other names for this process, including “certification” (UTAH CODE ANN. § 46-1-3.5) and “endorsement” (D.C. CODE ANN. § 1-1231.01(3) and WASH. REV. CODE ANN. §

42.45.200(7)(b)).

Under the Act, “registration” is the chosen method for a commissioned notary to be authorized to perform notarial acts on electronic records or those involving audio-visual communication. The Act makes clear that any authority to perform these technology-based notarial acts derives from the underlying notary public commission. It adopts a process somewhat short of a formal commission, for example, one with an application process (*see* § 3-4(a)), and a course of instruction and examination (*see* § 3-3(b)), but not a second surety bond and oath of office. Although the definition is silent on point, only a commissioned notary can be registered (*see* § 3-2(b)), but Section 3-2(c) allows a notary to apply for a commission and registration at the same time.

### § 2-26. Requester.

“Requester” means an individual who asks the notary public to perform:

- (1) a copy certification; or
- (2) a verification of fact.

#### Comment

This Section is identical to the MNA 2010 and MENA 2017 except for the name of the actor. What was called a “requester of fact” in prior acts (*see e.g.*, S.C. CODE ANN. § 26-2-75(D)) has been changed to “requester” in this one. As mentioned in the Comment to MNA 2010 Section 2-19, neither a “copy certification” nor a “verification of fact” require the notary to determine the identity or capacity of the person making

the request. Although not specifically stated, since there is not any requirement that the requester appear before notary public, a requester could make the request remotely. Also, because a copy certification and verification of fact are official notarial acts, the notary must record them in her journal. The entry would include the name and address of the requester, but not the requester’s signature or evidence of identity.

### § 2-27. Sign.

“Sign” means to authenticate or adopt with present intent:

- (1) a tangible record by executing or adopting a physical symbol; or
- (2) an electronic record by executing or adopting an electronic signature.

#### Comment

Although notarial acts require the principal and notary to sign a record and

notarial certificate, respectively, none of the prior Model Acts defined what it meant “to sign.” The drafters now have made clear that by “signing” a record or notarial certificate the principal and notary either authenticates or adopts it.

The definition proceeds to clarify that one “authenticates” or “adopts” either a tangible or electronic record. In doing so, the Section simply states “executing or adopting a physical symbol” suffices for paper-based records, and “executing or adopting an electronic signature” is required for electronic records. The

critical requirement is that there be an intent to authenticate or adopt the record by signing. The medium and type of signature is neutral: intent can be demonstrated by using a physical symbol (handwritten signature or mark) on a tangible record or any type of electronic signature (electronic sound, symbol, or process) on an electronic record.

The definition is an adaptation of the term used in RULONA Section 2(11). (*Accord*, D.C. CODE ANN. § 1-1231.01(14); IDAHO CODE § 51-102(12); and MISS. CODE ANN. § 25-34-3(j).)

### **§ 2-28. Signature.**

“Signature” means:

- (1) a symbol physically created by an individual that evidences the signing of a tangible record; or
- (2) an electronic signature created by an individual that evidences the signing of an electronic record.

#### **Comment**

As with the definition of “sign” above, Section 2-28 is the first time the term “signature” is defined in a Model Act. The MNA 2002 and 2010 as well as the MENA 2017 did, however, define “electronic signature” (*see* §§ 14-7, 15-9, and 2-9, respectively). The drafters decided to define the term in a very straightforward way, following the RULONA (*see* RULONA § 2(12) and N.M. STAT. ANN. § 14-14A-2.M). It basically defines the term as “something” created “by an individual that evidences the signing of a “(prescribed)” record.”

The “prescribed” record in Paragraph (1) is tangible, and the one in Paragraph (2) is electronic.

A different definition that expands on both the RULONA and this Section 2-28 has been enacted by the state of Michigan. It is as follows: “‘Signature’ means an individual’s written or printed name, electronic signature, or mark, attached to or logically associated with a contract or other record and executed, adopted, or made by the individual with the intent to sign the record” (MICH. COMP. LAWS § 55.267(b)).

### **§ 2-29. Signature Witnessing.**

“Signature witnessing” means a notarial act in which a notary public attests that a principal signed a record in the presence of the notary.

#### **Comment**

“Signature witnessing” is a notarial act recognized in a sizeable number of

jurisdictions. (*See, e.g.*, MASS. GEN. LAWS ANN. ch. 222, § 1 and WYO. STAT.

ANN. § 32-3-102 (xxxix).)

One state’s definition of “attesting” and “attestation” highlights the essence of a signature witnessing under the Act. It reads as follows: “the notarial act of witnessing or attesting a signature or execution of a deed or other written instrument, where such notarial act does not involve the taking of an acknowledgment, the administering of an oath or affirmation, the taking of a verification, or the certification of a copy.” (See GA. CODE ANN. § 45-17-1(1).) Technically, the act is neither an acknowledgment (§ 2-1) nor a verification on oath or affirmation (§ 2-35). The drafters contemplate that this simple witnessing will be used in lieu of a verification on oath or affirmation when an oath or affirmation is not needed, and as a substitute for an acknowledgment when a positive declaration that the signing principal acknowledges the signature is not required. A signature witnessing could be the preferred notarial act for a circumstance in which the precise date of signing a record is needed. (See MISS. ADMIN.

CODE tit. 1, ch. 50, pt. 5, R. 50.6.4.E.)

A signature witnessing is consistent with, has the same authority and integrity as any other notarial act under the Act, and must meet the personal appearance, identification, and other requirements specified in Section 4-3(a) in order to be valid. As with a verification on oath or affirmation, the principal’s affixation of the signature in this type of notarial act must be observed by the notary at the time of the notarization (see MISS. ADMIN. CODE tit. 1, ch. 50, pt. 5, R. 50.6.4.C). With the increasingly greater number of electronic records being notarized, the drafters envision a growing need for the notarial act of signature witnessing because of the number of transactions that require a signature merely for the purposes of adopting the record being used. If a principal electronically signs by clicking a “Sign Here” button in a software application or on a website, the very brief time it takes to do so could go unnoticed but for a notary public overseeing the execution of the signature and certifying that the signature was made on a certain date.

### § 2-30. Sole Control.

“Sole control” means being in the direct physical custody of the notary public or safeguarded by the notary with a password or other secure means of authentication.

#### Comment

This definition first appeared in the MENA 2017. The definition has not changed since that time. It was adopted in substance from the definition in the administrative rules of Florida and North Carolina. (FLA. ADMIN. CODE § 1N-5.001(8) and N.C. ADMIN. CODE tit. 18, §§ 07C.0102(9) and (10), respectively.)

A notary may affix an electronic signature using a physical token or a technology system that is accessed through standard login credentials

(username and password). Thus, the notary could be required to maintain “direct physical control” of the token that is used to create the electronic signature or simply ensure that the login credentials to any system not under the notary’s direct physical control are not compromised. “Other secure means of authentication” could include existing technologies such as biometrics (*e.g.*, fingerprint, retinal or facial scans) as well as those that will be developed in the future.



**§ 2-31. State.**

“State” means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

**Comment**

This definition first appeared in the MENA 2017. It was borrowed from the Uniform Law Commission’s definition. (*See, e.g.*, RULONA § 2(14); *see also* MISS. CODE ANN. § 25-34-3(m) and 57

PA. CONS. STAT. ANN. § 302.) In this Act, the term usually is bracketed as a reference to the enacting state or other jurisdiction. “State” does not include a federally recognized tribal government.

**§ 2-32. Tamper-Evident.**

“Tamper-evident” means that any change to a record provides evidence of the change.

**Comment**

The term was introduced in MENA Section 2-19 and appears in the laws of many jurisdictions (*see, e.g.*, ARK. CODE ANN. §§ 21-14-302(13), 21-14-306(b)(2)(A), and 21-14-306(c)(4) and S.C. CODE ANN. § 26-2-5(15)). It was mentioned in RULONA Section 20(a) and appears in the laws of states that have followed it (*see, e.g.*, IDAHO CODE § 51-120(1); KAN. STAT. ANN. §§ 53-5a19(b) and 53-5a21(a); and MD. CODE ANN. (STATE GOV’T) § 18-220(a)).

The term is more all-inclusive than the narrower negative connotations that the word “tamper” suggests. Certainly, “tamper-evident” refers to any illegal attempt by an individual to make unauthorized changes to a record, but the term may also be used to refer to “any” changes to a record — authorized or not. The changes, which may include amendments to the text of the record, addition of one or more principals’

electronic signatures, or the notary’s electronic signature and seal, may be logged and time-stamped at the moment of occurrence. This will create an audit trail comprising all actions taken with respect to the record. Thus, all changes are “evident,” but it is ultimately up to the transacting parties relying upon the record, or a court, to determine whether a given action or change is authorized or unauthorized.

Tamper-evident does not carry the same meaning as “tamper-proof.” A tamper-proof technology would prevent any changes from being made to the record once it was applied. In a notarization on an electronic record, this would be highly undesirable. If a record required multiple principals to sign the record at separate times, a “tamper-proof” technology applied after the first signature would prevent the other principals from signing the record later.

**§ 2-33. Technology System.**

“Technology system” means a set of applications, programs, hardware, or software designed to enable a notary public to perform notarial acts on electronic records or involving the use of audio-visual communication.

### Comment

“Technology system” is adapted from the term “electronic notarization system” that first appeared in a Florida administrative rule (*see* FLA. ADMIN. CODE § 1N-5.001(4)) and which subsequently appeared in the MENA 2017 (*see* § 2-7). The new term is broadened to apply to the use of audio-visual communication to perform notarial

acts. A technology system may be a dedicated, end-to-end solution comprising hardware (for example, a signature pad or public key certificate installed on a physical token or device) and software, or software installed in the online environment (a “web application”). (*See* Chapter 9 for standards governing technology systems.)

### § 2-34. Verification of Fact.

“Verification of fact” means a notarial act in which a notary public reviews public or vital records, or other legally accessible data, to ascertain or confirm any of the following:

- (1) date of birth, death, marriage, or divorce;
- (2) name of a relative or spouse; or
- (3) any matter authorized for verification by a notary by other law of this [State].

### Comment

This notarial act first appeared in the MNA 2002. Its definition has changed slightly since its introduction in that Act. Specifically, Paragraph (2) now authorizes confirming the name of a “relative or spouse.” In the prior Acts this Paragraph only allowed confirming the name of “a parent, marital partner, offspring, or sibling.” It is unclear whether “spouse” was intended to include “marital partner.”

Some would argue this provision creates a notarial power that is beyond the notary’s traditional ministerial role. Locating, reading, and interpreting legal records is generally regarded as being in the bailiwick of attorneys. The extraction of certain basic information from public, vital, or other records — *e.g.*, date of birth or death, date of marriage or divorce — however, is not a function requiring legal training. Such information, as certified by a notary, is often requested by foreign agencies in the context of the adoption process. Thus, verification of fact was conceived in part to lessen the

bureaucratic hardships imposed on couples attempting to adopt foreign children.

Under Paragraph (1), the drafters limited this Act’s reach to verification of the date of one’s birth, death, marriage, or divorce to the name of a relative (which may involve confirming family lineage) or the name of a spouse under Paragraph (2), and to “any matter authorized for verification by a notary by other law of this” jurisdiction under Paragraph (3). As possible examples in the latter category, there might be verifications of vehicle identification numbers or the contents of abandoned safe deposit lock boxes as are currently authorized under various titles in some state notary statutes. (For the former, *see* FLA. STAT. ANN. § 319.23(3); for the latter, *see, e.g.*, N.J. STAT. ANN. § 17:14A-51.) Few jurisdictions have yet adopted provisions authorizing this broader type of verification, and those recently adopted provisions should be examined to identify the kinds of facts

which may be verified by notaries public. (*See, e.g.*, MONT. CODE ANN. § 1-5-610(11) (certification of fact or event); VA. CODE ANN. § 47.1-2 (an individual's authorization to access a building); WAGANAKISING TRIBAL CODE OF LAW § 6.2403W.5) (tribal citizenship); and WASH. REV. CODE ANN. § 42.45.010(8) (occurrence of an event or performance of an act.)

The verification of fact notarial certificate in Section 7-3(g) is drafted to give notaries the flexibility to obtain the fact or facts to be verified in multiple ways. For example, a notary could visit a pertinent government office that houses public, vital, or other records to ascertain the needed facts, or accept a record from the "requester" (*see* § 2-26). Clearly, the former option is preferred, but notaries are given discretion in the

latter case to assess the trustworthiness of any presented record. Although verifying the identity of the "requester" is not required (*see* § 4-3(c)), the notary is well-advised to positively identify the presenter if he appears personally for the notarial act and inspect the proffered credential (*see* § 2-7) for evidence of tampering or counterfeiting, much like a notary inspects credentials presented by principals.

When this notarial act was first introduced, it was presented in brackets to indicate verifying a fact departed from the notary's traditional duties. After careful consideration, the drafters decided to remove the brackets in the MNA 2010 to enhance the public utility of the notary public office. They believed then as now that the duties being conferred were not beyond the ken of notaries.

### **§ 2-35. Verification on Oath or Affirmation.**

"Verification on oath or affirmation" [formerly known as "jurat"] means a notarial act in which a principal in the presence of a notary public makes and signs an oath or affirmation of the truthfulness or accuracy of statements in a record.

#### **Comment**

This notarial act is what previously was known in past Model Acts as a "jurat." The drafters changed the name for a variety of reasons. One is that it is more specific as to what the act entails and means. Another reason is that the term "jurat" is defined in some law dictionaries and statutes to be the notarial certificate for what is essentially a verification on oath or affirmation (*e.g.*, "a certification added to an affidavit or deposition stating when and before what authority the affidavit or deposition was made" (*see* BLACK'S LAW DICTIONARY (7th ed. West 1999); *see also* CAL.

GOV'T CODE § 8202 and S.C. CODE ANN. § 26-1-5(6)). Some apply the term "jurat" to any notarial certificate form, including that for acknowledgments. A final reason for the change is to foster uniformity of state laws (*see* § 1-2(8)) by aligning the Act with the majority of states that use the term "verification on oath or affirmation" to describe this notarial act. (*See, e.g.*, D.C. CODE ANN. § 1-1231.01(18); IND. CODE ANN. § 33-42-0.5-35; and R.I. GEN. LAWS § 42-30.1-2(17); *cf.* MO. REV. STAT. ANN. § 486.600(9), retaining "jurat" as the name for this notarial act.)

### Chapter 3 – Authorization to Perform Notarial Acts

#### Comment

General: This Chapter is an amalgamation of Chapters 3 and 4 of the MNA 2010. Instead of having one chapter devoted to “commissioning” and another spelling out application details, the new Chapter 3 handles both tasks. As was the case in the MNA 2010, the Chapter still sets out the requirements needed to obtain a notary commission (§ 3-1(a)) and uses a separate provision (§ 3-4) to spell out the application process. Additionally, this Chapter establishes a registration requirement for notaries who want to notarize electronic records or avail themselves of using audio-visual communication when performing notarial acts. The Chapter also addresses other key matters, *e.g.*, educational training and examination (§ 3-3) and oath of office and bond requirements (§ 3-5), as well as the length (§ 3-7) and resignation

(§ 3-10) of a commission. Some of the sections address ministerial matters. (*See, e.g.*, § 3-6, directing the commissioning official to “approve and issue” notary commissions to qualified applicants, and § 3-8, maintaining a “publicly accessible” database for, *inter alia*, verifying whether a person is a commissioned or registered notary or has been sanctioned by the commissioning official (§§ 3-8(a)(1) and (3), respectively).) Other sections are more substantive in nature. (*See, e.g.*, § 3-1, providing the requirements to obtain a notary commission.) Also notable is the new Section 3-11, which mandates that an applicant for a commission and notary identify a personal representative. Under Section 3-11, the representative is authorized to perform several important acts in the event of the notary’s death or incapacity.

#### § 3-1. Notary Public Commission.

- (a) An applicant for a commission as a notary public shall:
  - (1) be at least 18 years of age;
  - (2) reside or have a regular place of work or business in this [State];
  - (3) legally reside in the United States;
  - (4) read and write English;
  - (5) provide proof of having completed a course of instruction required by Section 3-3(a);
  - (6) pass a written examination required by Section 3-3(a);
  - (7) submit to a background check of possible criminal offenses under Section 12-3(a)(2) that would disqualify the applicant from performing the duties of a notary; and
  - (8) list any denials, suspensions, restrictions, or revocations of a professional license or commission issued by this [State] or any state.
- (b) Information required by Subsection (a)(7) shall be used by the [commissioning official] and designated [State] employees only for the purpose of performing official duties under this [Act] and shall not be disclosed to any person other than:
  - (1) a government agent acting in an official capacity and authorized to obtain such information;

- (2) an individual authorized by court order; or
- (3) the applicant or the applicant's authorized agent.

### Comment

This Section addresses the requirements that must be satisfied in order to obtain a commission to perform notarial acts.

Subsection (a) lists eight requirements. The first four are standard fare. (*See, generally*, ALASKA STAT. § 44.50.020; CONN. GEN. STAT. ANN. § 3-9b(b); LA. REV. STAT. ANN. § 35:191; and N.Y. CONS. LAWS (EXEC. LAW) § 130.) Paragraphs (1) and (4) set the minimum age (18 years old) and proficiency (the ability to read and write English) requirements. Paragraphs (2) and (3) are residency rules. Paragraph (2) mandates that the notary have a substantial contact with the State (either as a resident or with a regular place of work or business). In this context “regular” is intended to mean “usual” or “customary” as opposed “occasional.” (*See* BLACK’S LAW DICTIONARY, Sixth. Ed.) There are some jurisdictions that limit notary public commissions to state residents. (*See, e.g.*, CAL. GOV’T CODE § 8201(a)(1), which is qualified only by § 8203.1 that authorizes certain military personnel to receive commissions, and FLA. STAT. ANN. § 117.01(1).) Other states authorize nonresidents who work or have a practice in the state to receive commissions. (*See, e.g.*, COLO. REV. STAT. ANN. § 24-21-521(3)(c) and OR. REV. STAT. § 194.315(2)(b).) Still other states authorize nonresidents of an adjoining state who work in the state to receive commissions. (*See, e.g.*, 5 ILCS § 312/2-101 and N.H. REV. STAT. ANN. § 455:2.) One notable exception to these rules allows anyone who is a resident of the United States to obtain a notary commission (WIS. STAT. ANN. § 140.02(1)(a)). Paragraphs (5) and (6) address important educational and examination requirements that notaries

must satisfy. The drafters have always taken the position that a properly trained notary is essential to protect the interests of the public. (*See* MNA 2010 §§ 3-1(b)(5) and 4-3; *see also* CODE OF COLO. REGS. tit. 8, ch. 1505-11, R. 2.1; MONT. CODE ANN. § 1-5-620(3)(b); and N.C. GEN. STAT. § 10B-5(b)(6).) Certain jurisdictions have mandated that notary commission applicants pass an examination only. (*See, e.g.*, HAW. ADMIN. CODE § 5-11-32 and UTAH CODE ANN. § 46-1-3(6).)

Although not professionals *per se*, notaries public are involved with many commercial and personal transactions which involve substantial sums of money and address important private matters. Thus, it is essential that notaries are well trained in their profession to ensure the interests of parties to a notarized transaction are protected from error, and worse, fraud. Mandating notary applicants take a course of instruction and passing a written exam as set out in Section 3-3(a) addresses the goal of having only devoted, qualified individuals serve as notaries public. The drafters resolved to require both a course of instruction and an examination instead of requiring one or the other. The examination both complements and reinforces material learned in the course. When designed and administered effectively, the examination also can enhance learning and lead to better recall of the information in a practical context when notaries perform notarizations.

Paragraph (7) requires every applicant to undergo a background check. The objective is to identify applicants whose prior bad acts suggest they do not have the moral integrity to serve as a notary. It is common for a

notary commission applicant to be required to certify on the commission application that she either has not been convicted of a crime or disclose any and all such convictions. (*See* FLA. STAT. ANN. § 117.0.1(2); GA. CODE ANN. § 45-17-2.1(a)(2)(F); and N.H. REV. STAT. ANN. § 455:2.) In recent years, many jurisdictions have added background check requirements for a notary public commission. (*See, e.g.,* CAL. GOV'T CODE § 8201.1; IND. ADMIN. CODE tit. 75, § 7-2-1(b)(11); OHIO REV. CODE ANN. § 147.01(A)(3); and OR. REV. STAT. § 194.370.)

Paragraph (8) requires an applicant to list any actions taken against a professional license or commission in any jurisdiction, a requirement common

to many jurisdictions. (*See, e.g.,* GA. CODE ANN. § 45-178-2.3(b)(2) and UTAH CODE ANN. § 46-1-3(2)(d)(iv).) Subsection () makes clear that the applicant's information collected by the commissioning official in conducting the background check only be used in their official capacities. (*See* OHIO REV. CODE ANN. § 147.022(D).) Disclosure of such information is prohibited except to 1) a government agent acting in an official capacity with access authority to the information, 2) a person pursuant to court order, or 3) the applicant's authorized agent. These restrictions impose a duty on the commissioning official to take steps to ensure that the information is kept confidential subject to the permitted disclosures.

### **§ 3-2. Notary Public Registration.**

- (a) An individual may perform notarial acts on electronic records or involving the use of audio-visual communication upon being registered with the [commissioning official] in compliance with this Section and any rules adopted by the [commissioning official].
- (b) An individual may not perform notarial acts on electronic records or involving the use of audio-visual communication without being commissioned as a notary public.
- (c) An individual may apply for a commission and register at the same time.
- (d) An individual who registers shall:
  - (1) if the applicant is a notary public, register with the name that appears on the notary's commission;
  - (2) provide proof of having completed a course of instruction required by Section 3-3(b);
  - (3) pass a written examination required by Section 3-3(b); and
  - (4) register with the [commissioning official] for each commission term.

### **Comment**

This Section permits a notary public to be authorized to execute notarial acts on electronic records and involving the use audio-visual communication. In both the MNA 2010 (§ 16-1) and MENA 2017 (§ 3-1), the drafters posited that

requiring a notary to obtain an additional commission to perform notarial acts on electronic records would be inconsistent with the spirit of the permission granted in the UETA and E-SIGN acts for notaries to perform notarizations on

electronic records. In addition, such a restriction might put an administrative burden on the commissioning body. Certain jurisdictions, nevertheless, have instituted the requirement to obtain a separate commission to perform technology-based notarial acts. (*See, e.g.,* HAW. REV. STAT. ANN. § 456-24(a); TENN. CODE ANN. § 8-16-306(a); and TEX. GOV'T CODE § 406.105(a)); *see also* WASH. REV. CODE ANN. § 42-45-200(7)(b), clarifying that an “electronic records notary public commission” may take the form of an “endorsement” to the underlying notary public commission.)

Consistent with prior NNA Model Acts, Subsection (a) only requires interested notaries public to register their official capability of notarizing electronic records with the commissioning official before performing such acts. (*See* § 3-2(a). *See also* ARK. CODE ANN. § 21-14-302(6); NEB. REV. STAT. §§ 64-302 and 64-402(9); NEV. REV. STAT. ANN. § 240.186; OKLA. STAT. ANN. tit. 49, § 204; and S.C. CODE ANN. § 26-2-5(8).) This registration requirement generally mirrors the requirement for notaries in jurisdictions that have enacted the RULONA to “notify” the commissioning official or agency that they will be performing notarial acts on electronic records and identify the tamper-evident technology they intend to use. (A number of states have adopted this view. *See, e.g.,* ARIZ. REV. STAT. ANN. §§ 41-263.F and 41-268.A; KAN. STAT. ANN. §§ 53-5a15(f) and 53-5a-21(b); MICH. COMP. LAWS § 55.286(2); N.H. REV. STAT. ANN. §§ 456-B:6-a.VII and 456-

B:8-b.II; and WIS. STAT. ANN. §§ 140.145(7) and 140.20(2).) Subsection (a) also implies that the commissioning official has authority to promulgate rules for notarizations on electronic records or involving the use of audio-visual communication, but the authority to do so is not spelled out specifically in the Act. (*But see* § 1-7, broadly authorizing the commissioning official to adopt rules to implement the Act.)

Subsection (b) allows a notary to apply for a commission and register at the same time. (*See, e.g.,* MO. REV. STAT. ANN. § 486-1120.4 and NEB. REV. STAT. § 64-406(5).) This convenience will enable notaries interested in performing technology-based notarial acts to start doing so without being subject to a delay in first obtaining a notary commission before submitting and receiving approval for a registration.

Subsection (c) sets forth several straightforward registration requirements. The education requirement is noteworthy. Certain jurisdictions require either that a notary public take a course only to satisfy the registration requirement (*see, e.g.,* IOWA ADMIN. CODE § 721-43.5(3)a; MO. REV. STAT. ANN. §§ 486.910 and 486.1125; and S.C. CODE ANN. § 26-2-30) or require a course for registration to perform technology-based notarial acts in addition to the course required to obtain a notary public commission. (*See* MONT. ADMIN. CODE § 44.15.101(1)(j).) The applicant not only must complete a course of instruction or training approved by the commissioning official, but also pass a written exam.

### § 3-3. Course and Examination.

- (a) Within 6 months of applying for a commission, every applicant shall satisfactorily complete a course of instruction approved by the [commissioning official] on notarial laws, procedures, and practices of at least [4] hours and pass an examination of the course.
- (b) Before each registration, an individual shall satisfactorily complete a course of instruction of [2] hours approved by the [commissioning

official] on the laws, procedures, and practices pertaining to notarial acts on electronic records or involving the use of audio-visual communication and pass an examination of the course.

### Comment

Given the imprimatur associated with a notarial act, notaries should demonstrate that they fully understand their duties. Having education and testing requirements satisfy that need.

Subsection (a) provides the contours of the required course and exam as well as when it must be taken — within 6 months of applying for a notary commission. The course must contain instruction on notarial laws, procedures, and practices. The drafters suggest 1) the course be at least [4] hours long, and 2) recommend that the commissioning official approve it. Although not expressly stated, the commissioning official may delegate its approval authority to some other person or entity to act on its behalf.

The requirements of this Section are consistent with jurisdictions that have enacted comparable provisions. (*See, e.g.,* CAL. GOV'T CODE § 8201(2), requiring first-time commission applicants to take a 6-hour course and renewing applicants, a 3-hour course; FLA. STAT. ANN. § 668.50(11)(b), requiring a first-time applicant to take a course of at least 3 hours within 1 year prior to application; MONT. CODE ANN. § 1-5-620(3)(a), requiring new commission applicants to take a course of at least 4 hours within the previous 12 months and renewing applicants to take at least 4 hours of continuing education within the previous 12 months or at least 2 hours in each of the previous 3 years; N.C. GEN. STAT. § 10B-8, requiring applicants for an initial notary public commission to take a course of not less than 6 hours within 3 months preceding application; and VT. STAT. ANN. tit. 26, § 5343(a), requiring

2 hours of continuing education.)

Section 1-7(1) authorizes or requires the commissioning official to implement rules for the approval of courses of instruction and administration of examinations required under this Section. In Appendix I, several rules implement the requirements of Section 1-7(1). These include specifications for the course of instruction for both traditional and technology-based notarial acts (Model Rule 3-3.1), the notary public examination (Model Rule 3-3.2), and qualifications and approval of course providers and courses (Model Rule 3-3.3).

Subsection (a) does not require the course of instruction to be taught or delivered in a particular way. The drafters determined to give commissioning officials flexibility in this matter, given that some students learn best from an in-person, live classroom type of course, while others learn from self-study and online courses, and depending upon the jurisdiction, a certain mode of instruction will be more practical — for example, an online course for populations residing in remote and outlying areas. (*See* Model Rule 3-3.1 and Explanatory Note in Appendix I.)

Subsection (a) additionally requires an applicant to pass a written exam, which though not specifically stated, would be based on the material covered in the course. (*See* CAL. GOV'T CODE § 8201.2(a), providing that a course of study proposed by a vendor shall be approved if it includes all material an applicant must know to complete the written examination; *see also* N.M. STAT. ANN. § 14-A4A-21.A; OR. REV. STAT. §



194.235(1); 57 PA. CONS. STAT. ANN. § 322(a); and WYO. STAT. ANN. § 32-3-121(a), all requiring the examination to be based on the course of study.) There are various models for administering the examination. (See Model Rule 3-3.2 and Explanatory Note in Appendix I which discusses the several ways the examination may be administered.) Certain states require applicants for a notary public commission to pass an examination but do not require applicants to complete an education course. (See, e.g., HAW. ADMIN. CODE § 5-11-32 and UTAH CODE ANN. § 46-1-3(6).)

Subsection (b) imposes a similar education and examination requirement for notaries public who want to register for performing notarial acts on electronic records or involving the use of audio-visual communication. (See, e.g., FLA. STAT. ANN. §§ 117.225(2) and 117.295(6), requiring a course of study only; IOWA ADMIN. CODE § 721-43.5(3), requiring a course of study for notaries who perform notarial acts for remotely located individuals; KAN. STAT. ANN. § 53-5a23(a), requiring both a course and examination for notaries performing notarial acts with respect to electronic records; and NEB. REV. STAT. §§ 64-305(1) and 64-404(1), requiring a course and examination for notaries performing notarial acts on electronic records or involving the use of audio-visual

communication.) This requirement is in addition to the general education requirement of Subsection (a) for obtaining a notary commission. Designed to ensure that notaries who opt to work in the electronic universe — whether it be on electronic records, using audio-visual technology, or both — are qualified to do so, the drafters concluded that having both requirements would not meet with any objection.

The number of hours for the courses of instruction have been bracketed. The drafters believe the number of hours prescribed are reasonable given the importance of notaries public acquiring and demonstrating knowledge of the applicable notarial law and rules and performing important notarial acts. Notwithstanding that view, legislatures, with guidance from the commissioning official, should decide the length of such a course that is appropriate for their respective jurisdictions. Also, nothing in the Act precludes the commissioning official from educating and testing on non-notary matters. Some examples of these subjects might include some very general legal concepts, for example, notarial liability, reasonable care, and due diligence. Teaching and testing on matters such as these would reinforce to notaries the vital role they play and the consequences that can flow if they break the law.

### **§ 3-4. Commission Application and Registration Forms.**

- (a) An applicant for a commission and registration shall complete an application in the form prescribed by the [commissioning official].
- (b) In addition to the statement of qualifications required by Section 3-1, the [commissioning official] may require additional information to be included in the application for a commission and registration.
- (c) Every applicant for a commission shall sign the following declaration on the commission application form: “I, \_\_\_\_\_ (name of applicant), solemnly swear or affirm under penalty of perjury that the information in this application is true, complete, and correct; that I understand the official duties and responsibilities of a notary public in this [State]; and that I will perform all notarial acts in

accordance with the law.”

- (d) Every applicant for a commission shall pay to this [State] a nonrefundable application fee of [dollars], which fee shall include the cost of the background check required by Section 3-1(a)(7).
- (e) [Every applicant for registration shall pay to this [State] a nonrefundable registration fee of [dollars].
- (f) An applicant applying for renewal of a commission shall comply with the provisions of this Chapter.

### Comment

This Section requires a person interested in 1) being commissioned as a notary, 2) having a commission renewed, or 3) seeking registration to execute technology-based notarizations complete an application. (*See* Subsections (a) and bracketed [(f)], respectively.) The Act identifies the commissioning official as the overseer of the process. While in most states it is the Secretary of State that serves as the commissioning official (*see, e.g.,* MO. REV. STAT. ANN. § 486.605.1 and OHIO REV. CODE ANN. § 147.01(D)), the Act brackets the designation to accommodate those jurisdictions that opt for another official or department to handle these matters. (*See, e.g.,* D.C. CODE ANN. § 1-1231.19(a), designating the Mayor of the District; GA. CODE ANN. § 45-17-1.1, designating clerks of the superior court; HAW. REV. STAT. ANN. [§ 456-1.5], designating the Attorney General; N.J. STAT. ANN. § 52:7-11, designating the State Treasurer; UTAH CODE ANN. § 46-1-3(a), designating the Lieutenant Governor; WASH. REV. CODE ANN. § 42.45.200(1), designating the Director of the Department of Licensing; and WIS. STAT. ANN. § 140.02, designating the Department of Financial Institutions.) Some states vest commissioning authority in the Governor with the assistance of the Secretary of State. (*See* DEL. CODE ANN. tit. 29, § 4301.)

Section (a) simply provides that an applicant for a notary commission and, if

applicable, registration (*see, generally,* § 3-2), complete an application prescribed by the commissioning official. Previous Model Acts specified the informational requirements for the commission application form. (*See* MNA 2002 and 2010, §§ 4-1 and 4-2, respectively.) The drafters of this Act determined to allow the commissioning official to determine the contents of the application instead of legislating it. (*See, e.g.,* CONN. GEN. STAT. ANN. § 3-94d; S.D. CODIFIED LAWS § 18-1-1; TEX. GOV'T CODE § 406.005; and UTAH CODE ANN. § 46-1-3(3)(a)(ii).)

Subsection (b) authorizes the commissioning official to request additional information that may be relevant to the commissioning or registration process (*see* MICH. COMP. LAWS § 52.275(h)). This may include relevant matters that would not be disclosed in a criminal background check, such as civil lawsuits where the applicant was accused of negligence, fraud, misrepresentation, or similar acts that did not rise to the level of criminal review. (*See, e.g.,* CAL. GOV'T CODE § 8214.1(e); MO. REV. STAT. ANN. § 486.605.4(5); and R.I. GEN. LAWS § 42-30.1-16(4).)

Subsection (c) mandates the applicant by declaration swear under penalty of perjury that the application is, *inter alia*, 1) complete and accurate, 2) that the applicant understands the duties and responsibilities of the office, and 3)

the applicant will perform the same in the accordance with the law. Interestingly, Subsection (c) does not mention whether the statement must be notarized notwithstanding the fact it is a “swearing under penalty of perjury.” Several jurisdictions require the oath of office to be sworn to or affirmed before a notary public. (*See, e.g.*, South Carolina (notary public application form.) This reverses the MNA 2010, which required the oath of office to be sworn or affirmed in the presence of a notary of the applicant’s state (*see* MNA 2010 § 4-4; *see also* Florida’s notary public application form.)

Subsection (d) requires the applicant to pay a fee for the background check in Section 3-1(a)(7). (*Accord*, CAL. GOV’T CODE § 8201.1(d).) Implicit in Subsection (d) is the payment of any fees for the actual taking of the fingerprints, whether taken electronically or rolled in ink on fingerprint cards, in addition to the fee for processing the fingerprint

images and returning the results.

[Subsection (e) imposes a registration fee, but it is bracketed as some jurisdictions might not elect to charge applicants a fee for registering to perform technology-based notarial acts. Some jurisdictions charge a fee to register or notify the commissioning official that the notary will be performing notarial acts on electronic records or involving the use of audio-visual communication (*see, e.g.*, IND. ADMIN. CODE tit. 75, § 7-3-2(a)(6); NEV. REV. STAT. ANN. § 240.192.1(c); and N.C. GEN. STAT. § 10B-108), while others do not impose a fee (*see* Minnesota’s (“E-Notarization Authorization Form” and Rhode Island’s “Notary Public Information”).]

Subsection [(f)] (which would become Subsection (e) for jurisdictions opting out of bracketed Subsection [(e)]) makes clear that a notary seeking renewal of a commission must comply with all of the provisions of this Section.

### § 3-5. Oath of Office and Bond.

- (a) A commission shall not [become effective][be issued] until the applicant has filed an oath of office and a bond in the amount of [\$25,000] with the [designated office].
- (b) The bond for the full term of the notary public’s commission shall be executed by a surety licensed to do business in this [State], and exclusively conditioned on the faithful performance of notarial acts.
- (c) The bond shall cover all notarial acts authorized under this [Act].
- (d) The surety for a notary public’s bond shall report a claim against the bond to the [commissioning official] within 30 days after the claim has been paid.
- (e) The [commissioning official] shall immediately notify a notary public whose bond has been exhausted by claims paid out by the surety that the notary’s commission is immediately suspended until:
  - (1) a new bond is obtained by the notary; and
  - (2) the [commissioning official] has concluded any action taken against the commission of the notary under Section 12-3(a).

#### Comment

Subsection (a) serves two purposes. First, it makes clear that a commission is

either not effective or will not be issued until the applicant files the oath and a

bond.

Notwithstanding its title, this Section does not specifically address the oath of office. It merely references the oath as one of the prerequisites to a notary commission becoming effective or being issued. An oath of office is universally required of notary commission applicants (*see, e.g.*, FLA. STAT. ANN. §§ 117.01(2) and (3); KY. REV. STAT. ANN. §§ 423.390(2)(h) and (4); MISS. CODE ANN. § 25-34-41(3)).

A bond is a contract between three parties: 1) the principal or primary party who performs the contractual obligation; 2) the obligee, the party to whom the obligation is performed and who requires the bond — typically the state commissioning the notary; and 3) the surety, the individual or company who assures the obligee that the principal can perform the contractual obligation. A notary bond is a relatively inexpensive form of consumer protection. It is akin to credit extended to the principal for ensuring faithful performance of her duties as a notary.

In the jurisdictions which have enacted the RULONA, the comparable provision is Section 21(b), which is bracketed. The RULONA replaces the term “bond” with “assurance.” That section prescribes that the assurance must be in the form of a surety bond “or its functional equivalent.” The RULONA official comment explains: “An example of an assurance that is the functional equivalent of a surety bond would be an irrevocable letter of credit issued by a bank as long as that letter of credit meets the requirements established by the commissioning officer or agency ...”

The drafters recommended a bond in the amount of [\$25,000]. States with similar limits include Alabama (ALA. CODE § 36-20-71(a)); Indiana (IND. CODE ANN. § 33-42-12-1(c)(4)); and Montana (MONT. CODE ANN. § 1-5-619(d)). The drafters placed the figure in

brackets indicating it is a recommended amount. States can opt for a higher or lower amount. In the jurisdictions not requiring the surety bond or “assurance” to be \$25,000, bond amounts range from \$500-\$15,000. (*See, e.g.*, WIS. STAT. ANN. § 140.02 (\$500); KY. REV. STAT. ANN. § 423.390(5) (\$1,000); D.C. CODE ANN. § 1-1231.19(e) (\$2,000); ALASKA STAT. § 44.50.034 (\$2,500); S.D. CODIFIED LAWS § 18-1-2 (\$5,000); ARK. CODE ANN. §§ 21-14-101(e)(1) and (2) (\$7,500); 57 PA. CONS. STAT. ANN. § 321(d)(1)(i) (\$10,000); and CAL. GOV’T CODE § 8212 (\$15,000).) The drafters did not specify with whom the oath and bond should be filed. Typically, bonds are filed either centrally with the commissioning official (*see, e.g.*, ARIZ. REV. STAT. ANN. § 41-269.D and MISS. CODE ANN. § 25-34-41(4)) or locally with the county probate judge, clerk, register of deeds, or recorder (*see, e.g.*, ALA. CODE § 36-20-71 and TENN. CODE ANN. § 8-16-104(a)). Thus, each jurisdiction will substitute for the bracketed “designated office” the name of office that will receive the bond. The drafters also placed the words “become effective” and “be issued” in brackets. Those states that require the bond to be filed after the commission is issued may prefer to use the bracketed “become effective” wording. (*See* CAL. GOV’T CODE § 8213.) States that require the bond to be filed with the commissioning official at the time of submission of the notary application, and therefore before the commission is issued, may prefer to use the bracketed “be issued” language. (*See* MISS. CODE ANN. § 25-34-41(4) and TEX. GOV’T CODE § 406.010(a).)

Subsection (b) begins by making clear the bond must last for the full term of the commission. (*See* KY. REV. STAT. ANN. § 423.390(4) and N.M. STAT. ANN. § 14-14A-20.D.) The obligation of the notary’s bond is the guarantee of the notary’s faithful performance for those

protected by the bond. (*See, e.g.*, ARK. CODE ANN. § 21-14-101(e)(1); HAW. REV. STAT. ANN. § 456-5; S.D. CODIFIED LAWS § 18-1-2; and TEX. GOV'T CODE § 406.010(a); *but see* MO. REV. STAT. ANN. § 486.615.1, stating that payment of bond funds protects any person injured by the notary's official misconduct.) If the notary fails to fully and faithfully perform all duties required under law, the obligation of the bond becomes void; otherwise, it remains in full force and effect during the notary's commission term.

Subsection (b) requires the bond to be issued by a surety licensed in the state of commissioning. While in the past several states allowed for one or more personal sureties to provide the notary public's bond (*see* TENN. CODE ANN. § 8-16-104(a)), the trend has been to move towards requiring the surety to be a surety company (*see* IDAHO CODE § 51-121(3)(a)(i)) or insurance agent (*see* OKLA. STAT. ANN. tit. 49, § 2.B.1) licensed in the state of the commission or approved by the commissioning official (*see* WIS. STAT. ANN. § 140.02(1)(d)).

Subsection (c) clarifies that the bond covers all notarial acts authorized under the Act. The crucial point here is that the bond is intended to cover paper notarial acts and notarizations performed on electronic records or involving the use of audio-visual communication. This is consistent with the view of the Act that the notary obtains one commission or authorization to perform notarial acts, for which one surety bond is required.

While a second step of registration is required to perform technology-based notarial acts (*see* § 3-2), this registration is not a commission to perform notarial acts. It is noteworthy that some states require a higher bond for notarial acts involving audio-visual communication. (*See* FLA. STAT. ANN. § 117.225(6) and 5 ILCS 312/2-105(b) (cont. enact. by 2021 P.A. 102-160, eff. Jan. 1, 2022).)

Subsection (d) obligates the surety to report all claims against the bond to the commissioning official. (*See* FLA. STAT. ANN. § 117.01(8) and MO. REV. STAT. ANN. § 486.615.2; *see also* NEV. REV. STAT. ANN. § 240.033.2, requiring the surety to report the exhaustion of the surety bond.) Although not addressed in this Subsection, reporting allows the commissioning official to monitor notaries who have numerous claims and intervene if it is deemed necessary. Moreover, it will provide the commissioning official notice if the bond has been exhausted.

Such notice will trigger Subsection (e), which will immediately suspend the commission. (*See* NEV. REV. STAT. ANN. § 240.033.5.) The suspension will stay in effect until a new bond is issued and any sanction imposed by the commissioning official has concluded (*see* Paragraph (2)). Although these sanctions appear to be primarily punitive in nature, the reality is that there are more significant, unstated purposes to be served. This includes protecting the public from injury caused by improper or unauthorized notarizations.

### **§ 3-6. Commission and Registration Records.**

- (a) The [commissioning official] shall approve and issue a commission and, if applicable, registration, to any applicant who satisfies the requirements of this Chapter.
- (b) A commission and registration shall include the notary's commission identification number and starting and ending dates of the term.
- (c) The [commissioning official] shall provide a Certificate of Authorization to Purchase an Official Seal in a form prescribed by

the [commissioning official] to every individual commissioned as a notary public and registered.

#### Comment

Section 3-6 provides some simple operating rules for the commissioning official. Subsection (a) requires the commissioning official to approve and issue the commission or a registration to applicants who have satisfied the statutory rules. (For similar rules, *see* KY. REV. STAT. ANN. § 423.390(3); MISS. CODE ANN. § 25-34-41(5); R.I. GEN. LAWS § 42-30.1-15(f); and S.C. CODE ANN. § 26-2-20(D).)

Subsection (b) requires the commissioning official to provide the notary an identification number and identify the term of the commission. The notary's commission expiration date and identification number will appear on the notary's official seal (*see* §§ 8-2(c)(3) and

4) and be entered into the database required under Section 3-8 (*see* Model Rule 3-8.1 in Appendix I that specifies the information to appear in the database).

Subsection (c) provides that each commissioned or registered notary receive an official certificate authorizing the recipient to purchase an official seal. The Certificate of Authorization to Purchase an Official Seal form is a fraud-deterrent measure designed to regulate and protect the issuance of official seals. (*See* § 8-3 and Comment, *infra*.) Section 1-7(5) authorizes or requires the commissioning official to adopt rules to implement this Subsection and Section 8-3. (*See* Rule Model Rule 8-3.1 and Explanatory Note in Appendix I.)

### § 3-7. Jurisdiction and Term.

- (a) An individual commissioned as a notary public may perform notarial acts in any part of this [State] for a term of [4] years unless the commission has been resigned under Section 3-10 or suspended or revoked under Section 12-3.
- (b) A notary public who is registered may perform notarial acts on electronic records or involving the use of audio-visual communication in any part of this [State] during the term of the notary's commission and registration.
- (c) Unless resigned under Section 3-10(d) or terminated under Section 12-3, the term of a notary public's registration shall begin on the registration starting date set by the [commissioning official] and end on the expiration date of the notary's current commission.

#### Comment

Subsection (a) makes clear that a notary can perform notarial acts anywhere in the commissioning state for a [4]-year term. Although 4-year notary public commission terms are favored by a majority of the states, terms vary throughout the country. Terms can be for

1 year (*see* 5 ILCS 312/2-101 (residents of bordering states); 2 years (*see, e.g.*, DEL. CODE ANN. tit. 49, § 4307(a) (initial term) and VT. STAT. ANN. tit. 26, § 5304); 3 years (*see* IOWA CODE ANN. § 9B.21.6 (for an Iowa resident)); 5 years (*see, e.g.*, MINN. STAT. ANN. § 359.02

and W.VA. CODE § 29C-2-102); 6 years (*see, e.g.*, S.D. CODIFIED LAWS § 18-1-1 and WYO. STAT. ANN. § 32-3-120(e)); 6 to 7 years depending on date of birth (*see* MICH. COMP. LAWS § 55.269(2)); 7 years (*see, e.g.* MASS. GEN. LAWS ch. 222, § 14; ME. REV. STAT. ANN. tit. 5, ch. 5, § 82.4.A (for a Maine resident) (eff. until July 1, 2023; and ME. REV. STAT. ANN. tit. 4, ch. 39, § 1922.2.A (eff. July 1, 2023)); 8 years (*see* IND. CODE ANN. § 33-42-12-1(h)); 10 years (*see* S.C. CODE ANN. § 26-1-10), and even for a lifetime (*see* LA. ADMIN. CODE § 46:XLVI.111.B). Given the varied length of commission terms, the drafters decided to place the number of years in brackets to allow the enacting jurisdiction to set the length of the commission.

The general, overarching rule limits a notary authority to be exercised in the commissioning jurisdiction. (*See, e.g.*, R.I. GEN. LAWS § 42-30.1-15(a)(1) and WIS. STAT. ANN. § 140.10(1)(a).) Two unique exceptions to this rule should be noted. First, certain states have reciprocity arrangements authorizing notaries of adjoining states to perform notarial acts in their state if the other state has a similar law. (*See, e.g.*, MONT. CODE ANN. § 1-5-605(4); N.D. CENT. CODE §

44.06.1-09; and WYO. STAT. ANN. § 32-3-104(c).) Second, the Commonwealth of Virginia authorizes its notaries public to perform notarial acts outside the Commonwealth (VA. CODE ANN. § 47.1-13.B.)

Subsection (b) ties the length of a notary public's registration to perform notarial acts on electronic records or involving the use of audio-visual communication to the term of the notary's commission. As is the case with the grant of authority for notary commissions, the jurisdictional powers of a registered notary are limited to the notary's physical presence in the commissioning state. Section 4-3(d)(1) establishes this jurisdictional location requirement for notarial acts involving audio-visual communication as a duty.

Subsection (c) clarifies that the notary public's authority terminates if the notary resigns the commission, or it is either revoked or suspended. If suspended, the commission will be reinstated only by the terms of the suspension. Although not specifically stated, a notary who resigns the commission would have to apply for and be issued a new commission before she could perform notarial duties.

### § 3-8. Database of Notaries Public.

- (a) The [commissioning official] shall maintain a database of notaries public on a publicly accessible website which:
  - (1) may be used to verify the validity of a notary's commission;
  - (2) indicates whether a notary is registered to perform notarial acts on electronic records or involving the use of audio-visual communication; and
  - (3) indicates any action taken against the commission of a notary under Section 12-3.
- (b) The database maintained by the [commissioning official] shall be proof of the notary public's commission and registration.

#### Comment

Section 3-8 mandates that the database of notaries public. Many commissioning official maintain a jurisdictions have a similar rule. (*See,*

*e.g.*, IOWA CODE ANN. § 9B.24; WASH. REV. CODE ANN. § 42.45.220; and W.VA. CODE § 39-4-22.)

Subsection (a) delineates the several purposes of the database which must be accessible on a public website. The website serves as an official list of duly commissioned notaries (Paragraph (1)), as well as those who also are registered to perform technology-based notarial acts (Paragraph 2). Another objective is to provide the public a list of all notaries. This will facilitate members of the public to find a conveniently located notary. Further, the database will be used by licensed official seal vendors to verify the mailing address and commission status of notaries to whom it issues official seals (*see* § 8-3). It also will serve as a full disclosure service that alerts the user to any sanctions the notary has received (Paragraph 3). That may well be valuable information a user would want to know when selecting a notary. It should also encourage notaries to be

careful when executing any notarization, for failure to do so may result in finding sanctions attached to the notary's database record.

Subsection (b) establishes the website as an official roster of duly commissioned notaries. It is imperative that the resource be an "official" listing so that the public can depend on the information provided by it. To assist members of the public who use the website to either find or confirm the status of a notary public, the Subsection requires that the commissioning official timely update it.

Section 1-7(2) provides the legislature the option to either authorize or require the commissioning official to adopt rules regarding the publicly accessible database. Model Rule 3-8.1 in Appendix I provides the implementing rule that specifies the information on each notary public that may be listed in the database. (*See* Model Rule 3-8.1 and Explanatory Note.)

### **§ 3-9. Notification of Changes.**

- (a) A notary public shall notify the [commissioning official] within [10] days of any of the following in a manner prescribed by the [commissioning official] and include in the notification all information the [commissioning official] may require:
  - (1) a change of the notary's residence, business, or mailing address;
  - (2) a change of the notary's email address;
  - (3) a change of name by court order or marriage;
  - (4) any change to the information submitted for registration;
  - (5) commencement of any action under Section 12-3(a) (relating to remedial actions for misconduct); and
  - (6) final adjudication of any action reported under Paragraph (5).
- (b) A notary public who notifies the [commissioning official] of a name change as required by Subsection (a)(3) shall use the new name in performing notarial acts only upon completion of the following steps:
  - (1) the notary has delivered or electronically transmitted the notice required by Subsection (a)(3);
  - (2) the [commissioning official] has confirmed reception of the notice; and
  - (3) the notary has obtained a new official seal in compliance with Section 8-3 bearing the new name exactly as in the confirmation.



### Comment

Subsection (a) addresses changes in the notary's status that need to be shared with the commissioning official. Most jurisdictions have such a reporting requirement. (*See, e.g.*, VA. CODE ANN. § 47.1-18, requiring notification of a change of address; ALASKA STAT. § 44.50.066(a), requiring notification of a name change; S.C. CODE ANN. § 26-2-130(B), requiring notification if the notary's registered device for creating electronic signatures expires or is changed; and IND. CODE ANN. § 33-42-12-3(c), requiring the notary to self-report the notary's conviction of certain crimes.) The updated information must be reported within [10] days of its occurrence.

Paragraph (1) requires reporting changes in residence, business, or mailing address. Some address changes may impact a notary's commission status and necessitate resignation of the office and thus must be reported. (*See* §§ 3-10(b)(1) and (2).) Even if the address change does not affect a notary's commission or qualifications to perform notarial acts, the commissioning official must be apprised of a change so that there always is up-to-date information in the event the notary must be contacted in the future.

Changes to information reportable under Paragraph (4) would include, *inter alia*, any information relevant to the

registrant's notarial status as well as changes related to the technology system being used, such as a new technology system provider. Section 9-5 requires a notary who uses a new technology system not previously reported to notify the commissioning official of the same within 10 days of its initial use.

Importantly, Paragraph (5) requires a notary to self-report the commencement of any action brought against her under Section 12-3(a). This would include the notary's conviction or either a plea of admission or *nolo contendere* to certain crimes, a finding against or admission of liability by the notary in a civil lawsuit based on the notary's deceit or official misconduct, the revocation, suspension, restriction, or denial of a commission or professional license in the commissioning or any other jurisdiction, and a finding that the notary had engaged in official misconduct. (*See* § 12-3(a) and Comment.)

Subsection (b) provides rules on what must be done before using a new name for notarial purposes. A notary who changes his name must continue using the former name when notarizing records until three steps are completed — notification to the commissioning official (Paragraph (1)), confirmation of reception of the notification (Paragraph (2)), and procurement of an official seal bearing the new name (Paragraph (3)).

### § 3-10. Resignation.

- (a) A notary public who resigns the commission shall notify the [commissioning official] by providing a signed notice indicating the effective date of resignation.
- (b) A notary public shall resign the commission if the notary:
  - (1) is a resident of this [State] and ceases to reside in this [State], unless the notary maintains a regular place of work or business in this [State];
  - (2) is a nonresident of this [State] and ceases to maintain a regular place of work or business in this [State];

- (3) is adjudicated incompetent by a court of competent jurisdiction;  
or
- (4) becomes permanently unable to perform notarial acts.
- (c) A notary public who resigns the commission shall comply with:
  - (1) Section 6-7(a) (relating to disposition of notarial records); and
  - (2) Section 8-5(a) (relating to disablement of official seal and, if applicable, technology system).
- (d) A notary public may terminate the notary's registration by notifying the [commissioning official] in a manner prescribed by the [commissioning official] and terminating or disabling all or any part of technology system whose exclusive purpose was to perform notarial acts on electronic records or involving the use of audio-visual communication.
- (e) A notary public may terminate the notary's registration and maintain the notary's commission.

### Comment

Section 3-10 provides rules to be followed upon the resignation of a commission. The public interest demands that notarial authority be relinquished if a notary public no longer satisfies the qualifications that initially led to the receipt of a commission or is incapable of discharging official duties under the commission.

Subsection (a) states the requirements for a notary who voluntarily resigns the commission. (*See* MISS. ADMIN. CODE tit. 1, ch. 50, pt. 5, R. 050.5.2.A; N.C. GEN. STAT. § 10B-54; and OHIO REV. CODE ANN. § 147.05(C).) A signed notice — which could be written or electronic (*see* §§ 1-3(2), 2-27, and 2-28) — that specifies the date of resignation must be mailed or transmitted to the commissioning official.

Subsection (b) requires forced resignation for certain specified reasons. Paragraph (1) applies to notaries who are residents of the state. If a resident-notary no longer resides or maintains a regular place of work or business in the state, the notary must resign. Paragraph (2) applies to nonresident notaries. If a nonresident-notary no longer has a regular place of

work of business in the state, the notary must resign. Paragraph (2) does not deal with the situation in which a nonresident notary moves their place of residence within the state. The best practice would be to notify the commissioning official of the address change (*see* § 3-9(a)(1)) and then follow any directive from the official regarding applying for a commission as a state resident. Paragraph (3) requires a notary who is judicially adjudicated as incompetent or becomes permanently unable to perform the duties of a notary to resign (*See* MO. REV. STAT. ANN. § 486.790 and N.C. GEN. STAT. § 10B-54(b).) The statute does not address temporary disability, but the notary must self-impose a temporary suspension during that period. This can be accomplished by notifying the commissioning official under any rules the official has promulgated on point. If there are not any such rules, the notary should contact the commissioning official for guidance.

Subsection (c) requires a notary who resigns to follow the dictates of Sections 6-7 and 8-5 which relate to the disposition of notarial records and disablement of

the official seal and technology system, if any, utilized exclusively for performing notarial acts on electronic records or involving the use of audio-visual communication. Transferring possession of notarial records — journals of notarial acts and recordings of notarial acts involving audio-visual communication (*see* § 2-16) — upon resignation as required by Paragraph (1) ensures that these valuable public records of notarial acts are available to be obtained by the public, law enforcement, the courts, and any other entities in the future. Several jurisdictions have a comparable law or rule. (*See, e.g.*, CAL. GOV'T CODE § 8209, requiring the notary's journal(s) to be deposited with the clerk of the county in which the notary's oath and bond are filed; D.C. CODE ANN. § 1-1231.18(e), requiring the notary's journal(s) to be transmitted to the Mayor; OR. REV. STAT. § 194.300(1), authorizing the notary's employer, by agreement, to retain the notary's journal(s); and WASH. ADMIN. CODE § 308-30-210(3), requiring the access instructions to the notary's electronic journal to be provided.)

Disablement or destruction of the official seal as required under Paragraph (2) is commonly required and protects

against improper notarial acts being performed after resignation. (*See, e.g.*, COLO. REV. STAT. ANN. § 24-21-518(1); OKLA. ADMIN. CODE § 655:25-3-2(c); and UTAH CODE ANN. § 46-1-16(9); *but see* N.C. GEN. STAT. § 10B-54(b), requiring resigning notaries to deliver their official seals to the Secretary of State.) Disablement of an electronic official seal, if the notary was registered, is also required by Paragraph (2). Disabling access to any technology system that was used to perform notarial acts on electronic records or involving audio-visual communication similarly prevents authorized technology-based notarial acts from being performed using the resigning notary's login credentials. (*See, e.g.*, NEB. REV. STAT. § 64-311(1); OKLA. ADMIN. CODE § 655:25-11-4(d); and TENN. CODE ANN. § 8-16-312(b).)

Subsections (d) and (e) recognize the distinction between paper- and technology-based notarizations and allow a notary to terminate the registration while retaining the underlying notary commission. This is a commonsense approach to assist a notary who is both commissioned and registered to maintain notary status. (*See* MO. REV. STAT. ANN. § 486.990.2.)

### **§ 3-11. Designation of Personal Representative.**

- (a) An applicant for a commission and a notary public shall designate a personal representative to carry out the requirements of this Section.
- (b) A notary public shall inform the notary's personal representative of all the following:
  - (1) the location of the notary's official seal or seals and notarial records;
  - (2) if the notary is registered, the technology system providers used to perform notarial acts on electronic records or involving the use of audio-visual communication;
  - (3) any repositories used to store notarial records under Section 6-5, if applicable; and
  - (4) the personal representative's responsibilities under this Section.
- (c) As soon as is reasonably practicable following the death or adjudication of incompetency of the notary public, the notary's personal

representative shall:

- (1) notify the [commissioning official] of the death or adjudication in writing;
  - (2) notify any technology system providers the notary had used to perform notarial acts on electronic records or involving the use of audio-visual communication or notarial record repository providers the notary had used to store notarial records, if applicable, of the death or adjudication;
  - (3) comply with Section 6-7(a) (relating to disposition of notarial records); and
  - (4) comply with Section 8-5(a) (relating to disablement of official seal and, if applicable, technology system).
- (d) A personal representative shall use any information disclosed by the notary public under Subsection (b) only for the purposes of carrying out the requirements of this Section.

### Comment

Section 3-11 introduces a new concept of a designated personal representative. State laws routinely require the notary public's personal representative to carry out certain duties on the deceased notary's behalf. (*See, e.g.,* N.D. CENT. CODE § 44-06.1-16.3; N.M. STAT. ANN. § 14-14A-17.A; and VT. STAT. ANN. tit. 26, § 5370(b).) Certain states even impose penalties on personal representatives who fail to do so. (*See* ARIZ. REV. STAT. ANN. § 41-317.B and HAW. REV. STAT. ANN. § 502-74.) Unfortunately, notaries public seldom designate a personal representative or guardian before it is too late. This may, in part, be a result of the fact that no jurisdiction requires a notary to name a personal representative or guardian to be included in the notary's records on file with the commissioning official. Requiring the same might prove to be beneficial in many instances.

Subsection (a) mandates that every applicant for a commission and notary name a personal representative. The commissioning official could easily implement this requirement. All that need be done is to require the individual

to identify a prospective personal representative on the application to become a notary public. (*See* § 3-4(b), authorizing the commissioning official to include in the application for a commission or registration any additional information the commissioning official may require.) The contact information of the designated personal representative would be required, as well. Such a change would ensure that all new and existing notaries public will have the required personal representative. To capture those notaries public whose commissions are not up for renewal for some time, the commissioning official can inform them that they are required to name a personal representative within a reasonable time after the statute is adopted. The reporting could be done electronically, which would make the process quite simple.

The provision is designed to ensure that upon a notary's death or incompetency 1) notarial records are preserved and transferred to the appropriate agency or repository, 2) the privacy of all notarial journals, records, and items related to the notary's office are safeguarded, and 3) if the notary performed technology-based

notarizations, those system providers are notified of the situation so that they can take steps to prevent unlawful improper use of the technology.

Subsection (b) specifies the particulars concerning the notary public's commission and registration that a notary must make known to the personal representative.

Subsection (c) outlines the duties of the personal representative when the representative's powers are invoked. Paragraph (1) dictates that the representative inform the commissioning official of the notary's death or disability. Paragraph (2) requires the personal representative to share the same information with any provider of services that assists in performing notarial acts on electronic records or involving the use of audio-visual communication. Paragraph (3) directs the personal representative to handle the disposition of all notarial records. Paragraph (4) mandates the representative to disable the official seal and any technology systems the deceased notary may have used. This latter duty

may effectively be accomplished when notifying the technology system provider of the deceased notary's death as required by Paragraph (2) and requesting the deceased notary's account and login credentials be destroyed once notarial records are distributed to their intended recipients.

Subsection (d) underscores the fact that a personal representative is placed in a position of trust and confidence. Personal representatives are prohibited from using any information disclosed by a notary public under Section 3-10 other than to fulfill their responsibilities. Divulging the whereabouts of the deceased notary's official seal or technology system access instructions could potentially result in these tools being used to perform notarial acts in the deceased notary's name. That opens the door to fraud and other misdeeds. Similarly, divulging any personal information in a deceased notary's journal could have potentially damaging consequences for the parties whose information was disclosed.

## Chapter 4 – Powers and Limitations of a Notary Public

### Comment

General: Chapter 4 establishes the core notarial duties, requirements for proper execution of the same, and the duties as well as limitations and proscribed activities relating to the notary public office. Insofar as the former is concerned, Sections 4-1 and 4-2 are the principal provisions relating to notarial powers. Sections 4-3, 4-4, 4-5, 4-6, and 4-7 generally address matters related to the proper execution of these powers. Sections 4-8 through 4-13 impose restrictions on notaries and the notary public office. Section 4-14 mandates that notarial officers (individuals who are not notaries public but have notarial powers by dint of their positions) comply with certain requirements of the Act when performing notarial acts.

Chapter 4 essentially sets the boundaries of notarial authority. It, however, relies on subsequent chapters to flesh out a range of issues related to the exercise of notarial powers. These include, *inter alia*, charging and collecting permissible notarial and ancillary fees (Chapter 5), maintaining notarial records (Chapter 6), evidencing a notarization with a notarial certificate (Chapter 7), and properly authenticating the notarial certificate with a signature and official seal (Chapter 8).

The balance of the Chapter addresses important limitations on notarial activities.

Section 4-8 prohibits a notary from influencing anyone seeking a notarial act (*i.e.*, a principal or requester) as to whether to participate in the transaction relating to the notarial act. The Section also makes clear that a notary is not authorized to assess and then give an opinion on any aspect of a record or the transaction to which it relates. Section 4-9 proscribes the notary from notarizing any incomplete record or a photograph. Section 4-10 mandates the notary does not exercise her power in a way that would abet deceit or fraud. Section 4-11 prohibits a notary from using the official seal for any improper purposes.

Sections 4-12 and 4-13 make clear that the notary public shall neither claim nor exercise authority not granted by the notary commission. Section 4-12 addresses the unauthorized practice of law. It prohibits a non-lawyer notary from giving legal advice, while Section 4-13 prohibits the notary from misleading the public by claiming to have powers that some notaries in foreign countries may have.

Section 4-14 recognizes that some public officials have notarial powers given to them under the authority of the statute that created their office. It requires those notarial officers to comply with sections of this Act when performing notarial acts.

### § 4-1. Authorized Notarial Acts.

- (a) A notary public is authorized to:
  - (1) take acknowledgments;
  - (2) execute verifications on oath or affirmation;
  - (3) attest to signature witnessings;
  - (4) administer oaths and affirmations;
  - (5) perform certifications of life;
  - (6) make copy certifications;
  - (7) issue verifications of fact; and

- (8) perform any other acts authorized by the law of this [State].
- (b) A notary public who is registered may perform a notarial act on an electronic record.

### Comment

This Section confers the authority for notaries public to execute notarial acts. Those specific acts are enumerated in Subsection (a). All but one of these notarial acts appeared in the MNA 2010 (§§ 5-1 (1)-(7)), and another was renamed. As to the latter, the term “jurat” has been changed to “verification on oath and affirmation.” (See § 2-35 and Comment for the rationale supporting the change. *Additionally, see* 5 ILCS § 312/6-102(b) and MICH. COMP. LAWS § 55.267.) The new notarial act is “certification of life.” (For the definition and discussion of this new notarial act, *see* § 2-4 and Comment.)

Paragraph (8) is essentially the same provision as MNA 2010 Section 5-1(7). It recognizes that that a legislature may authorize a notary to perform notarial acts in addition to those listed in this Section. Such notarial acts would have the same force and effect as other identified notarial acts. Although there is not any requirement that new notarial acts be added to this Section, doing so might be beneficial. Having all authorized notarial acts enumerated in one place likely would be helpful to both notaries and principals alike. Moreover, good practice might well suggest such a path be followed. Indeed, having all authorized notarial acts listed or referenced in one place would make it easier for notaries to keep track of changes to their authority. Additionally, notaries from other states easily would be able to ascertain all of the authorized notarial acts in a foreign jurisdiction should they have a client who needs such information

Examples of notarial powers that are authorized in places other than the state’s notary public statutes include the authorization given to notaries public by

certain states to solemnize marriages (*see, e.g.,* TENN. CODE ANN. § 36-3-301); call town meetings (*see* ME. REV. STAT. ANN. tit. 30-A, § 2521); open and inventory safe deposit boxes (*see, e.g.,* FLA. STAT. ANN. § 655.94(1) and N.Y. CONS. LAWS (BANK. LAW) § 335.1(b)); and summon witnesses (*see* MASS. GEN. LAWS ANN. ch. 233, § 1).

The language of Paragraph (8) is self-executing. Thus, any new notarial act that is authorized can be performed as soon as it is enacted, subject to any restriction imposed by the legislature such as a specified effective date. The latter is commonly used in many statutes. (*See, e.g.,* KY. REV. STAT. ANN. § 423.310(1)(h) and R.I. GEN. LAWS § 42-30.1-3; *see also* NEB. REV. STAT. § 64-107(3).)

It should be noted that in affirmatively specifying the powers of a notary public, the drafters did not authorize the performance of certain acts recognized in some jurisdictions. Three such notarial acts include the taking of proofs of execution by a subscribing witness (*see, e.g.,* S.C. CODE ANN. § 26-1-5(21) and VA. CODE ANN. § 55-118.1), protesting a note (*see, e.g.,* 57 PA. CONS. STAT. ANN. §§ 302 and 305(e) and S.D. CODIFIED LAWS § 18-1-1(2)), and taking and certifying depositions (*see, e.g.,* CONN. GEN. STAT. ANN. § 59-148c(a) and OHIO REV. CODE ANN. § 147.07). In recent years, some states have taken steps to restrict or repeal the authority to execute these infrequently performed acts. (*See, e.g.,* NEV. REV. STAT. ANN. § 240.075.10, limiting the performance of protests to certain notaries; and 2005 AK. SESS. LAWS 60 (H.B. 97) § 10, repealing depositions and protests.)

Subsection (b) restates a provision originally found in the MNA 2002 and 2010 and appears in the MENA 2017. It is consistent with the goals to 1) put notarial acts on electronic records on a par with paper-based notarial acts and 2) establish a unified act to address all notary laws and practice. The wording of Subsection (b) is simple, but its effect is powerful. Its language simply provides that any registered notary public may perform notarial acts on electronic

records. (See §§ 9-3 and 9-4, *infra.*, identifying the technology system requirements that will enable notarial acts of electronic records.) The drafters intended that the authorization of Subsection (b) would apply to notarial acts that are performed in the physical presence of a notary. The authorization to perform notarial acts on electronic records involving the use of audio-visual communication will be expressly covered by Sections 4-2 and 4-3(d)(3), *infra.*

#### **§ 4-2. Audio-Visual Communication Authorized.**

- (a) A notary public who is registered may perform a notarial act involving the use of audio-visual communication in compliance with this [Act] and any rules adopted by the [commissioning official] for a principal who is located:
  - (1) in this [State];
  - (2) outside this [State] but within the United States; or
  - (3) outside the United States if:
    - (A) the act is not known by the notary to be prohibited in the jurisdiction in which the principal is physically located at the time of the act; and
    - (B) the record is part of or pertains to a matter that:
      - (i) is to be filed with or is before a court, governmental entity, or other entity located in the territorial jurisdiction of the United States, or
      - (ii) involves property located in or a transaction substantially connected with the United States.
- (b) Except as otherwise provided by other law of this [State], a notary public may administer an oath or affirmation under this Section.
- (c) For purposes of this Section, “outside the United States” means outside the geographic boundaries of the 50 states of the United States of America, the District of Columbia, Puerto Rico, the United States Virgin Islands, and any territory, insular possession, or other location subject to the jurisdiction of the United States.

#### **Comment**

This Section permits registered notaries to perform notarial acts via audio-visual communication as that term is defined in Section 2-3, *i.e.*, the parties to the notarization “being able to see, hear, and communicate with one another

in real time using electronic means.” As an introductory matter, it must be emphasized that Section 4-2 permits registered notaries to perform these acts. A notary is not required to register or perform technology-based notarizations.



Moreover, to date, no principal is required to have a record notarized in this way. While some principals will want a notarial act to be performed using audio-visual communication for the sake of convenience, others will not be comfortable using it and will instead ask for a physical, face-to-face meeting with the notary.

Under Subsection (a), the notary must be registered to perform notarial acts as set out in Sections 2-25 and 3-2 and have the requisite technology system (*see* § 2-33) to do so. Special rules for performing notarial acts involving the use of audio-visual communication are provided in Section 4-3(d). That Section references Chapter 9 (*see* § 4-3(d)(4)) which provides requirements for the technology systems used to perform these acts. (*See, e.g.*, § 9-4(2), requiring a secure authentication process to access the system and § 9-4(3), requiring the system to enable the notary to verify the identity of every party to the notarial act.)

Subsection (a) specifically invites the commissioning official to adopt rules for audio-visual communication used in notarizations consistent with the Act. (*See* §§ 1-7(3), (4), and (6) which explicitly authorize or require rulemaking on matters that relate to notarial acts involving the use of audio-visual communication.) Notaries are permitted to perform these notarial acts when the principal is in the home state or another state in the United States. Similar authority is granted for foreign transactions (*i.e.*, outside of the United States), but only if specific requirements are met. One is that the notary is not aware that the act is prohibited in the jurisdiction where the principal is physically located. (*See, e.g.*, MD. CODE ANN. (STATE GOV'T) § 18-214(a)(4)(ii); OHIO REV. CODE ANN. § 147.64(C)(2)(a) and OKLA. STAT. ANN. tit. 49, § 205.3.b. *Cf.* IOWA CODE ANN. § 9B.14A.3.d(2) and KAN. STAT. ANN. § 53-5a-15(b)(4)(B).) Insofar as foreign

notarial authority is concerned, the U.S. State Department has expressed concern that in some foreign jurisdictions it is a criminal act for any individual to perform a public act if not lawfully appointed as a notary public of the foreign jurisdiction. This could potentially subject both the notary duly commissioned in the United States to perform a notarial act using audio-visual technology and the principal of the notarization located in the foreign jurisdiction to criminal penalties in the foreign jurisdiction.

Notably, the Act does not create a duty for a notary to investigate whether an electronic act performed by audio-visual communication is prohibited in a foreign jurisdiction. When notarizing an electronic record involving the use of audio-visual communication for a principal located outside the United States, the record itself must have a nexus to a matter with a court or other entity subject to the jurisdiction of the United States or involve property within or a “transaction substantially connected with the United States.” (*See* RULONA § 14A(b)(2).) The thrust of this Subsection is to require principals with foreign records and transactions involving matters pertaining to the foreign jurisdiction to engage the services of a notary public or notarial officer of that jurisdiction.

Subsection (b) provides specific authority for a notary to administer an oath or affirmation via audio-visual communication. These two notarial acts differ from the other notarial acts permitted to be performed through audio-visual communication mentioned in this Section. Specifically, neither of them is applied to a record. Notably, Subsection (b) recognizes some states may not want an oath or affirmation to be executed using audio-visual communication and provides an easy method for those exceptions to be made. The official comment to Section 14A(h) of the 2021 amendments to the RULONA,

from which Subsection (b) is derived, provides an alternate way to construe and apply this provision when it states: “Subsection (h) also recognizes that other state law or regulation may already establish other requirements for the remote administration of an oath or administration (sic). If this Subsection is in conflict, the other state law or regulation continues to regulate the remote administration of an oath or affirmation.”

Subsection (c) provides the definition of what constitutes “outside the United States” for purposes of Subsection (a)(3). It defines the term in reference to “geographical boundaries.” For these purposes, the “geographic boundaries” include all fifty states, the District of Columbia, and other territories

(e.g., Puerto Rico and the Virgin Islands) subject to the jurisdiction of the United States. (*Accord*, COLO. REV. STAT. ANN. § 24-21-502(15) and WYO. STAT. ANN. § 32-3-102-1(a)(xxiii).)

Since the publication of the MENA 2017, there has been widespread adoption of laws enabling notaries to use audio-visual communication. (*See, e.g.*, IDAHO CODE § 51-114A; MD. CODE ANN. (STATE GOV’T) § 18-223; N.J. STAT. ANN. § 52:7-10.10; OKLA. STAT. ANN. tit. 49, §§ 201-214; TEX. GOV’T CODE § 101-113; and W.VA. CODE § 39-4-37.) Consistent with these adoptions, the drafters decided to remove the brackets from the provisions authorizing the use of audio-visual communication for this Act that were adopted from the MENA 2017.

#### § 4-3. Requirements for Notarial Acts.

- (a) A notary public shall perform a notarial act authorized by Section 4-1(a)(1) through (5) only if the principal at the time of notarization:
  - (1) appears in the presence of the notary;
  - (2) is identified by the notary through satisfactory evidence of identity [or personal knowledge];
  - (3) appears to be competent;
  - (4) appears to be acting of his or her own free will; and
  - (5) communicates directly with the notary in a language both understand, except as provided in Section 4-5 (relating to accommodations for individuals with disabilities) and subject to Section 4-7 (relating to refusal to notarize).
- (b) A notary public shall perform a copy certification of a record only if the notary reasonably believes the record is neither a vital nor public record.
- (c) A notary public shall perform a verification of fact only if the notary reasonably believes the public or vital record, or other legally accessible data provided by the requester, supports the fact to be verified.
- (d) In addition to the requirements of this Section, a notary public shall perform a notarial act involving the use of audio-visual communication only if the notary:
  - (1) is physically present within this [State] at the time the notarial act is performed;
  - (2) executes the notarial act in a single continuous session;
  - (3) confirms that any record requiring a signature, if applicable, is

- in electronic form;
  - (4) uses a technology system that complies with the requirements of Chapter 9;
  - (5) is satisfied that the notary and any individual involved in the notarial act are simultaneously viewing the same electronic record and that all signatures and any changes and attachments to the electronic record are made in real time;
  - (6) is satisfied that the quality of the audio-visual communication is sufficient to make the determinations required for the notarial act under this [Act] and any other law of this [State]; and
  - (7) identifies in the notarial certificate the jurisdiction within this [State] in which the notary is physically located while performing the notarial act.
- (e) For purposes of this Section:
- (1) “competent” means the principal reasonably appears in possession of the mental capacity to understand the nature and consequences of the notarial act; and
  - (2) “free will” means the principal reasonably appears to be acting without coercion, duress, or undue influence exerted by another individual.

### Comment

Section 4-3 is one of the most important sections in this Act and is derived from MNA 2010 Section 5-3. Subsection (a) and has been rephrased to make clear that the requirements within it are positive obligations imposed upon the notary for authorized notarial acts that require a principal’s signature. The Subsection does not identify those acts, but instead references them by their respective section number (§§ 4-1(a)(1) through (5), inclusive). Other notarial acts do not require the same prescriptions to make them trustworthy. Those acts have their own subsections dedicated to them. (*See* Subsections (b) and (c).)

Subsection (a) provides five requirements that must be satisfied for each of the referenced notarizations. It does not specify any other particulars of the act being notarized. The latter are provided in the definitions of the notarial

acts themselves. (*See, e.g.*, § 2-1 which defines an “acknowledgment” as an act in which the principal in the presence of the notary “declares having signed a record” and § 2-18 which defines an “oath” as an act wherein the oath taker “makes an oral or written vow of truthfulness or fidelity on penalty of perjury invoking a deity or using any form of the word “swear.”)

Paragraphs (1)-(5) specify the five requirements which must be satisfied by the principal at the time of the notarial act. Each principal must: 1) be in the “presence of the notary” (whether that be physically or virtually (*see* § 4-3(d)(1)); 2) be properly identified by the notary; 3) appear to be competent; 4) appear to be acting under his or her own free will; and 5) be able to directly communicate effectively with the notary.

Paragraphs (1) and (2) specify requirements — the principal’s physical

presence and properly proved identity — that are specifically defined and regulated by the Act. (*See* § 2-11, defining “in my presence” and § 4-4, prescribing rules for the verification of principals’ identities.)

Paragraphs (3) and (4) address the competence and willingness of the principal to engage in the notarial act. The former follows the lead of two of the first jurisdictions that addressed this matter (*see* FLA. STAT. ANN. § 117.107(5) and GA. CODE ANN. § 45-17-8(b)(3)) and is shaped by RULONA Section 8(a)(1), the latter using the term “competent” that is adopted in Paragraph (3). The provision does not require the notary to inquire into the principal’s knowledge or understanding of the record to be notarized. Nor does it ask that the notary actively inquire into or investigate the transaction. Instead, it demands that the notary form a judgment from the circumstances as to whether the principal is generally aware of what is transpiring. Thus, if a principal presented a power of attorney and then asked the notary to notarize “this contract to purchase a burial plot,” the notary might have a basis to determine that the principal was not competent.

Usually, this provision will become critical only when the notary believes the principal suffers from a mental infirmity. It, however, also can come into play when principals are operating under the heavy influence of alcohol or drugs. In such instances, it is expected that the notary will make a commonsense judgment or determination about the principal’s competence, mainly through conversing with and observing the individual. To assist the notary in complying with the duty imposed by Paragraph (3), Subsection (e)(1) defines “competent” (*see* Comment below).

The obligation imposed upon the notary in Paragraph (4) is like that set forth in Paragraph (3) relating to the principal’s competence. In Paragraph

(4), the issue is volition. The Paragraph reinforces the view that a signing is the voluntary and intended act of the principal. If the principal is being unduly influenced by another or is acting under duress, the notary should not perform the notarization.

Paragraph (5) obligates the notary to perform a notarial act only if the notary can communicate with the principal directly in the same language. This paragraph was updated in the 2025 revision to provide an exception when either the notary or principal has a hearing, vision, or speech disability and must rely on an interpreter or other auxiliary aids and services to facilitate effective communication between the parties under Section 4-5(b). (*See* CODE OF COLO. REGS tit. 8, ch. 1505-11, R. 2.3.) Additionally, Paragraph (5) references the proscription set forth in Section 4-7(a), prohibiting a notary from refusing to perform a notarial act because of an individual’s disability.

If neither the notary nor principal has a disability, but they cannot understand each other’s spoken words because both do not speak the same native language, the notary cannot make a meaningful judgment about this individual’s competence or volition (*see* the above discussions regarding Paragraphs (3) and (4)), nor could the notary administer and understand the response of the principal to any oath or affirmation that is required for proper performance of the notarial act (*see* §§ 2-2, 2-18, and 2-35). In such cases, a notary must not rely on a foreign language interpreter to communicate with the principal (*cf.* ARIZ. REV. STAT. ANN. § 41-253.F.2, authorizing use of a translator). It is the notary and not a foreign language interpreter or translator who must certify the facts of the notarial act in the certificate of notarial act. Thus, the notary must witness these facts firsthand to be able to evidence them truthfully. A notary public who cannot adequately communicate with a principal

who speaks a foreign language should refer the individual to a bilingual notary.

Subsections (b) and (c) separately establish the execution standards for copy certifications and verifications of fact, respectively, as these notarizations do not require the personal appearance or proof of identity for a requester. (For the definition of “requester,” *see* § 2-26.) Each is similar in that the capacity of the principal or requester is not the primary concern. For these acts it is the record itself that is under scrutiny. In both instances the provisions impose a “reasonable belief” standard on the notary as to whether the record itself meets the requirements of the notarial act. The reasonable care standard is articulated plainly in Section 12-1(a).

The standard for certifying a copy of a record is straightforward. The notary must reasonably believe the record to be copied is neither a vital nor public record. An example of a vital record is a birth certificate. An example of a public record is a deed that has conveyed an interest in real property. Several jurisdictions proscribe the certifying of copies of records that are vital or public records. (*See, e.g.,* COLO. REV. STAT. ANN. § 24-21-505(b); CONN. GEN. STAT. ANN. § 3-94a(2); FLA. STAT. ANN. § 117.107(12)(a); GA. CODE ANN. § 45-17-8(a)(6); and MO. REV. STAT. ANN. § 486.600(4)(a).)

Performing a certification of fact requires the application of the same reasonable care standard as for a copy certification. It should be noted, however, that unlike a copy certification, the provision authorizes a notary to analyze public or vital records to verify the fact. The “facts” a notary may verify are limited to those delineated in the definition of the term (*see* § 2-34 and Comment).

Subsection (d) sets forth the requirements for notarizing an electronic record involving the use of audio-visual communication. They are based on

MENA 2017 Section 5A-4. Paragraphs (1) and (7) are requirements that are similar to those for paper-based notarial acts. (*See* §§ 3-7(a) and 7-1(a), respectively.) The other requirements are unique to notarial acts involving the use of audio-visual communication.

Paragraph (2) is critical to the integrity of remote notarial acts. The notary must meet with the principal and perform all facets of the notarial act in the same continuous session within the technology system used to perform the act.

Paragraph (3) requires the record to be notarized using audio-visual communication to be an electronic record. During the COVID-19 pandemic, several state governors issued executive orders suspending the personal appearance requirement for notarizations and authorized paper records to be signed and notarized using audio-visual communication. Many of these orders were subsequently extended by successive orders (*see, e.g.,* KAN. GOV. EXEC. ORDERS 20-20, 20-28, 20-40, 20-49, 20-64, 21-02, and 21-10). Eventually, in 2021, the Uniform Law Commission amended the RULONA with bracketed provisions to specifically authorize the notarization of paper records for remotely located individuals. (*See* 2021 RULONA § 14A[(d)] and [(e)].) Several states have enacted explicit statutes authorizing these “paper remote” notarial acts. (*See, e.g.,* ALA. CODE § 36-20-73.1; MONT. CODE ANN. § 1-5-602(25); S.D. CODIFIED LAWS § 18-1-11.1; and W.VA. CODE § 39-4-38.) Nevertheless, both the Act and MENA 2017 take the position that notarial acts involving the use of audio-visual communication may be performed only on electronic records that are executed and notarized with electronic signatures.

Paragraph (4) follows logically from Paragraph (3). Since the record to be notarized using audio-visual communication must be electronic, a

technology system that is defined (*see* § 2-33 and Comment) and regulated (*see* Chapter 9) must be used.

Paragraph (5) presents a particular challenge: How can a notary be sure that the principal and notary are viewing and signing the same electronic record? When a principal appears physically before a notary, the principal signs the record and hands it across the table to the notary. Establishing that the record requiring the notary's signature is the same record the principal signed thus is not usually a matter of contention. This same dynamic can be applied to the signing of electronic records. The electronic record may be presented using a technology system that allows the electronic record to be uploaded and managed in the system and viewed by the principal and notary in real time. (*See* RULONA § 14A(c)(2).) Paragraph (5) also addresses a related issue, *i.e.*, ensuring all parties to the notarial act are viewing any changes to the record simultaneously. That requires real-time display of all actions taken on an electronic record involved in the notarial act, just as would be observable by a notary with a paper notarization.

Paragraph (6) requires the notary public to be satisfied that the quality of the audio-visual transmission allows the notary to perform all facets of the notarial act. If, for example, the video transmission is slow and choppy, the

communication between the principal and notary may be impaired to the point where the notary must determine that the notarization cannot continue. (*See, e.g.*, MONT. CODE ANN. § 1-5-603(10)(b)(v) and WYO. STAT. ANN. § 32-3-11(k)(ii)(D). *See also* IDAHO ADMIN. CODE § 34.07.01 R. 015; IND. ADMIN. CODE tit. 75, §§ 7-8-2(2) and (3); and UTAH ADMIN. CODE § R623-100-6.B.)

The terms “competent” and “free will” now are defined in Subsection (e) (*See* RULONA § 8(a)(1) and (2), but the term “competent” is not defined). Specifically, Paragraph (1) requires the notary to assess the principal for competence and conclude with reasonable belief that he or she has the mental capacity to understand the nature and consequences of the notarial act.

Paragraph (2) considers “free will” to mean that the principal “reasonably” appears to be acting on her own free will and not subject to “coercion, duress, or undue influence.” Whereas asking a notary to make this assessment might seem problematic, these criteria closely mirror those demanded of witnesses to last wills, and those are routinely accomplished without subsequent incident. (*See, for example*, 755 ILCS § 5/6-4(a)(3), which provides that an attesting witness to a last will must attest to, *inter alia*, that he believed the testator was of sound mind and memory at the time of signing ... the will.)

#### **§ 4-4. Verification of Identity.**

- (a) A notary public shall verify the identity of each principal and any credible witness in compliance with the requirements of this Section.
- (b) Subject to Subsection (c), a notary public shall verify the identity of a principal through satisfactory evidence of identity by means of:
  - (1) any of the following unexpired credentials:
    - (A) a tangible or an electronic driver's license or nondriver identification issued by this [State] or any state;
    - (B) a United States passport or passport card;
    - (C) a foreign passport;

- (D) an Armed Forces of the United States or United States Department of Defense credential;
- (E) an inmate credential that is issued by [name of federal, state, or local corrections authority] for an inmate in custody;
- (F) a consular identification issued by a consulate from the applicant's country of citizenship; or
- (G) any credential issued by a federal, state, or tribal government that is in a language understood by the notary and bears the photograph, signature, and physical description of the principal; or
- (2) the oath or affirmation of a credible witness disinterested in the record or transaction who personally knows the principal and whose identity is proven to the notary by a credential described in Paragraph (1) [or who is personally known to the notary]; or
- (3) a verification of identity that complies with Subsection (c)(1).
- (c) For a notarial act involving the use of audio-visual communication, a notary public shall verify the identity of a principal through satisfactory evidence of identity by means of:
  - (1) at least 2 different factors of identity verification that comply with rules adopted by the [commissioning official]; or
  - (2) the oath or affirmation of a credible witness who personally knows the principal and whose identity is proven to the notary in compliance with Subsection (c)(1) [or who is personally known to the notary].
- (d) [A notary public may verify the identity of a principal or credible witness under this Section through personal knowledge if the notary's familiarity with the individual results from interactions with that individual over a period of time sufficient to reasonably dispel any uncertainty that the individual has the identity claimed.
- (e) For purposes of this Section:
  - (1) "identity verification" means a process or service by which the identity of an individual who is not in the physical presence of a notary public is proved; and
  - (2) "factor" means knowledge, or a physiological, biological, or behavioral characteristic of, or a tangible item belonging to, an individual that is used for identity verification.

#### **Comment**

Section 4-4 addresses the requirements for verifying the identity of a principal or credible witness. The provision provides a wide range of identification methods. Subsection (a) establishes that the verification must meet the requirements set out in the Section. This is an important provision

because the methods used to verify identity will depend on whether the notarial act is performed in the physical presence of the notary public or by means of audio-visual communication. Subsection (b) provides a roster of credentials that will satisfy the identification test for a notarial act performed in the physical presence of the notary public. Subsection (c) provides an identification protocol to be followed for identifying remote principals for notarial acts involving the use of audio-visual communication. Only these methods, and no others (including those outlined in Subsection (b)) are permitted to be used for this purpose. [Subsection (d) is a bracketed provision related to using the notary's personal knowledge to identify a principal or credible witness.] Subsection (e) provides definitions of terms used in this Section.

Subsection (b) enumerates those credentials (*see* § 2-7 and Comment) that can be used for establishing satisfactory evidence of identity for principals who appear in the physical presence of a notary public for a notarial act. There are three approaches used by jurisdictions with respect to the credentials that may be presented to a notary as satisfactory evidence of identity. The first is to specify generally acceptable characteristics of credentials. For example, a statute may require a credential to be government issued, unexpired, and contain certain attributes such as a physical description, photograph, and signature, but stop short of listing approved credentials. (*See, e.g.,* MASS. GEN. LAWS ANN. ch. 222, § 1 “Satisfactory evidence of identity”; NEB. REV. STAT. § 64-105(2)(a)(i); and TEX. CIV. PRAC. & REM. CODE § 121.005(a)(2).)

A second approach is for a state to enumerate specific credentials that constitute satisfactory evidence of identity. (*See, e.g.,* CAL. CIV. CODE §§ 1185(b)(3) and (4), FLA. STAT. ANN. § 117.05(5)(b)2; TENN. CODE ANN. § 66-

22-106(c)(2); and VA. CODE ANN. § 47.1-2 “Satisfactory evidence of identity”.)

Certain jurisdictions follow a third approach by combining elements of the other two approaches. (*See e.g.,* ARIZ. REV. STAT. ANN. § 41-255.B.1; MD. CODE ANN. (STATE GOV'T) § 18-206(b); NEV. REV. STAT. ANN. §§ 240.1655.4(c), (d), and (f); and 57 PA. CONS. STAT. ANN. § 307(b).)

The Act follows the second approach and lists the specific credentials a notary public may accept as satisfactory evidence of identity. (*See* Paragraph (1).) Credentials that may be presented to a notary public include, *inter alia*, the traditional driver's license or any nondriver identification issued by a state, including an electronic driver's license or nondriver ID (*see* Model Rule 4-4.2 in the Appendix I, providing specifications for these electronic credentials); a passport from the United States or a foreign country, as well as a passport card from the same; and credentials from the United States Armed Forces or Department of Defense. The Section also allows a properly issued credential to an inmate (*see* ARIZ. REV. STAT. ANN. §§ 41-255.B.1(d) and (e); CAL. CIV. CODE § 1185(b)(4)(A); and FLA. STAT. ANN. §§ 117.05(5)(b)2.g and h), a consular identification card (*see* 5 ILCS § 312/6-102(d)(3); MD. CODE ANN. (STATE GOV'T) § 18-206(b)(1)(i); and NEV. REV. STAT. ANN. § 240.1655.4(d)), and any credential issued by a federal, state, or tribal government that has a photograph, signature, and physical description of the principal in a language that the notary can understand. In adopting this approach, the drafters provided a wide range of credentials that could satisfy the satisfactory evidence standard and a means by which the commissioning official could supplement the list through adopting a rule pursuant to Section 1-7(3) if additional credentials are deemed necessary, useful, or expedient.

Paragraph (2) also allows identity to



be proven by the oath or affirmation of a credible witness who personally knows the principal and whose identity can be proven through any credential listed in Paragraph (1). The use of credible witnesses to establish satisfactory evidence of identity is approved by most states. (*See, e.g.*, IND. CODE ANN. § 33-42-9-4(b)(2) and KY. REV. STAT. ANN. § 423.325(2)(c).) The witness must be “disinterested” in order to be a “credible” witness. (*See, e.g.*, FLA. STAT. ANN. § 117.05(5)(b)1.e; MO. REV. STAT. ANN. §§ 486.600(7) and (21)(b); NEB. REV. STAT. § 64-105(2)(a)(ii); and N.C. GEN. STAT. § 10B-3(5).) The MNA 2010 authorized the use of 1 credible witness personally known to the notary public or 2 witnesses who are unknown to the notary but who present an acceptable identification credential (MNA 2010 § 2-20(2)). In this Act, the drafters determined 1 credible witness who presents a valid credential would be sufficient, but there was considerable discussion about disallowing the use of credible witnesses altogether. Some viewed credible witnesses as relics whose sworn testimony was necessary as a means of identity verification before identification credentials became the predominant means for proving identity to a notary. Others believed that credible witnesses still should be allowed in certain instances, for example, among senior citizens who may not possess an unexpired credential. (For a discussion of the reference to the bracketed language in Paragraph (2) related to the notary’s personal knowledge of the credible witness, *see* the Comment on Subsection [(d)] below.)

Paragraph (3) allows a notary public to rely on multiple factors of identity verification for notarial acts involving audio-visual communication set out in Subsection (c). This approval was adopted from Montana (MONT. CODE ANN. § 1-5-603(13)). The drafters believed these new forms of satisfactory evidence of identity

could equally be applied to verifying identities for notarial acts performed in the physical presence of the notary.

Subsection (c) specifies satisfactory evidence of identity for remote principals who use audio-visual communication to meet with the notary for a notarial act. Arguably this is the most critical policy issue in implementing notarial acts involving the use of audio-visual communication. It would be inherently insecure to solely allow principals to present tangible credentials to the notary via a video screen. Therefore, one of the two methods specified in Paragraphs (1) and (2) must be used in these circumstances. The first is to require the remote principal’s identity to be verified using at least 2 different factors of “identity verification” as defined in Subsection (e)(1) (*see* Comment below) that comply with rules adopted by the commissioning official pursuant to Section 1-7(3). Since technology is rapidly evolving, the drafters did not enumerate specific forms of identity verification in Section 4-4 as they did for tangible credentials presented for notarial acts performed in the physical presence of the notary. The drafters determined that rulemaking would be the best vehicle to specify these acceptable forms of identity verification. (*See* the Comment on Subsection (e) below.) Paragraph (2) authorizes the second approved method — a credible witness who presents multiple factors of identity verification to verify the identity of a remotely located principal for a notarial act involving the use of audio-visual communication. (*See, e.g.*, COLO. REV. STAT. ANN. § 24-21-514.5(6)(b)(I); N.M. STAT. ANN. § 14-14A-5.C(1)(b); and WIS. STAT. ANN. § 140.145(3)(a)2.)

[Subsection [(d)] offers jurisdictions another identity verification option. It allows the notary to be the individual whose personal knowledge of the principal can be used to verify identity. (For jurisdictions that allow this “proof of

identification,” *see, e.g.*, ARK. CODE ANN. §§ 21-14-111 and 21-14-309(b)(2); HAW. REV. STAT. ANN. §§ [456-1.6] and 456-23(b); MICH. COMP. LAWS §§ 55.285 and 55.286b(5)(a); OKLA. STAT. ANN. tit. 49, §§ 113, 202.12, and 208.B.1; S.C. CODE ANN. §§ 26-1-5(14) and 26-1-120(A); TEX. CIV. PRAC. & REM. CODE § 121.005(b)(1); and VT. STAT. ANN. tit. 26, §§ 5363(a)-(c) and 5365(a.) Although most notarial acts will be based upon identification through evidentiary means (*see* Subsection (b)), almost all jurisdictions permit the notary public to verify identity of principals based on the notary’s personal familiarity with another individual. The Act provides a rule of reason for determining personal knowledge. (*See Anderson v. Aronsohn*, 63 CAL. APP. 737 (1923), stating that “the degree of acquaintance which would authorize a notary to certify that he had personal knowledge involves something more than mere casual meetings, and must be based upon a chain of circumstances surrounding the person tending to show that he is the party he purports to be.”) The definition does not quantify the number of interactions nor the length of the acquaintance sufficient to convince a notary that an individual has the claimed identity. This is left to the notary’s best judgment. (*See* § 1-2(5) and Comment.) However, the drafters firmly believed that any reasonable doubt (*see* § 12-1(a)) on the part of the notary about whether a signer is “personally known” must result in relying on acceptable identification credentials or a qualified credible witness in order to proceed with the notarization.

A unique California law (*see* CAL. CIV. CODE § 1185) prohibits notaries from relying on personal knowledge to identify principals or credible witnesses in the performance of notarial acts. This provision was enacted at the behest of the California law enforcement community which has perceived an overly liberal interpretation of “personal knowledge”

was the basis for too many identifications by notaries. Prosecutors complained this practice resulted in a lack of recorded evidence in journals of notarial acts (*e.g.*, identification credential serial numbers) that might be useful in investigating criminal acts of forgery.

Thus, Subsection [(d)] prompted considerable debate among the drafters. On the one hand, the drafters did not want to take away from notaries the valuable option of using personal knowledge as the basis for an identification. In employment contexts and with respect to senior citizens presenting for a notarial act, for example, notaries may routinely notarize records for principals they have personally known for years. It seemed unrealistic and impractical for notaries to require presentation of an approved credential from parties who clearly meet the personal knowledge standard and in cases in which identity verification was not controversial.

On the other hand, the earlier noted California statute swayed certain drafters to suggest that the use of personal knowledge opens the door to fraud and forgery involving impostors seeking the notarization of property deeds, powers of attorney, election-related records, and other records of high value. They noted that in today’s world most people have at least one identification credential that satisfies the requirements for verification of identity for a notarial act (*e.g.*, a driver’s license or state non-driver’s identification credential) and that some notaries public might overuse personal knowledge to identify principals whom they do not personally know. Ultimately, the drafters decided to bracket the personal knowledge provision in Subsection [(d)] as well as elsewhere in the Act (*see* §§ 4-3 and 7-3) and give enacting jurisdictions the option to include or not include it.]

Subsection [(e)] defines two terms used in the Section, *i.e.*, “identity verification” and “factor,” that appear in

Subsection (c)(1). Paragraph (1) defines “identity verification” as a “process or service” used to prove the identity of a person who is not in the physical presence of the notary. (*See* ALASKA STAT. § 44.50.200(8); FLA. STAT. ANN. § 117.201(7); IDAHO CODE § 51-114A(1)(c); and KAN. STAT. ANN. § 53-5a15(g)(3).) The value of this option will depend on the integrity of the process or service, each of which perhaps ought to be approved by the commissioning official. The drafters explicitly authorize or require the commissioning official to provide guidance on identity verification in a rule under Section 1-7(3). Model Rules 4-4.3, 4-4.4, 4-4.5, 4-4.6, and 4-4.7 in Appendix I implement the Section 1.7(3) rulemaking provision.

Paragraph (2) defines “factor” as some knowledge, personal characteristic, or tangible item belonging to the person that is used to identify the individual. In the identity management field, it is

commonly accepted that the verification of identity of an individual in an online context should involve multiple factors of identity. There are three such factors: 1) Something one “has” (*e.g.*, an identification credential or a cell phone), 2) Something one “knows” (*e.g.*, a password or answers to challenge-response questions), and 3) Something one “is” (*e.g.*, a biometric such as a fingerprint, or retina or facial scan). Successful presentation of at least two distinct factors of identity verification provides satisfactory evidence of identity for a notarial act involving the use of audio-visual communication for a remotely located individual. (*See, e.g.*, KAN. STAT. ANN. § 53-5a15(b)(1)(C); N.J. STAT. ANN. § 52:7-10.10.d(1)(c); OR. REV. STAT. § 194.277(3)(a)(C); and TENN. CODE ANN. § 8-16-310(a)(2)(A).) Model Rules 4-4.3, 4-4.4, 4-4.5, 4-4.6, and 4-4.7 in Appendix I implement these distinct factors.

#### **§ 4-5. Accommodations for Individuals With Disabilities.**

- (a) A notary public shall not discriminate against a principal or any individual involved in a notarial act on the basis of disability.
- (b) A notary public, when necessary and consistent with other applicable law, shall provide appropriate auxiliary aids and services to ensure effective communication with any individual involved in a notarial act who has a vision, hearing, or speech disability.
- (c) A notary public may perform a notarial act on a record requiring the signature of a principal physically unable to sign if:
  - (1) the principal directs an individual other than the notary to sign on behalf of the principal;
  - (2) the individual signs the principal’s name in the presence of the principal; and
  - (3) the notary adds the following or a substantially similar statement below the signature: “Signature affixed by (name of individual) at the direction of (name of principal unable to sign) in accordance with Section 4-5 of [Act]”.

#### **Comment**

Section 4-5 plays an extremely significant role in the Act. It prohibits

notaries from discriminating against individuals with disabilities, mandates

that notaries take steps to communicate effectively with individuals who have certain disabilities, and provides a proxy accommodation for persons who cannot sign a record requiring a notarial act without assistance. (*See* COLO. REV. STAT. ANN. § 24-21-508(2) and FLA. STAT. ANN. § 117.05(14).)

The 2025 revision added new Subsection (a) and amended Subsection 4-5(b) (formerly Subsection (a)).

Section 4-5 is grounded in the federal *Americans with Disabilities Act* of 1990 (ADA), which prohibits discrimination against individuals with disabilities and ensures equal access to services and employment opportunities.

For notaries public operating as sole proprietors without a fixed physical location — *i.e.*, those who provide mobile notarial services by traveling to clients' homes or places of business — the ADA's applicability may depend on the circumstances. Title I would not apply in the absence of employees, and certain provisions of Title III, such as physical accessibility standards, may not be as relevant in the absence of a fixed public-facing physical location. However, other provisions of Title III remain applicable, including those requiring effective communication and the nondiscriminatory provision of services (*see* 42 U.S.C. §§ 12182(a) and 12182(b)(2)(A)(iii); and 28 C.F.R. § 36.303).

The requirements set forth in Subsections 4-5(a) and (b), as well as in Section 4-7(a), are designed to reinforce and ensure compliance with these legal obligations.

Subsection (a) prohibits notaries from discriminating in the provision of notarial services based on disability. While Section 4-7(a) bars notaries from refusing to provide notarial services based on the disability of a principal, the act of refusing service constitutes only one form of discrimination. Subsection (a) expands this prohibition, addressing

discrimination in a more comprehensive manner. As will be discussed below, discrimination includes the failure to provide necessary auxiliary aids and services to ensure that communication with individuals with disabilities is as effective as communication with others. Furthermore, discrimination occurs when individuals with disabilities are provided services that are fundamentally different from those offered to individuals without disabilities. In addition, notaries must ensure that their services are physically accessible to individuals with disabilities.

Subsection (b) imposes a duty on notaries public to take proactive steps to facilitate communication with individuals with certain disabilities. The ADA requires covered entities to provide necessary auxiliary aids and services to facilitate effective communication with an individual who has a disability unless it causes undue burden or fundamental alteration of the service, in this context notarial services. (28 C.F.R. § 36.303(h); *see also*, U.S. Department of Justice, “ADA Requirements: Effective Communication,” [www.ADA.gov](http://www.ADA.gov). Accessed March 26, 2025.) The auxiliary aid or service must be provided in an accessible format, in a timely manner, and in a way that protects the privacy and independence of the individual (28 C.F.R. § 36.303(c)(1)(ii)).

Under the ADA, a “qualified interpreter” is considered one type of “auxiliary aid or service” that may be used to help facilitate communication (28 C.F.R. § 36.303(b) “auxiliary aids and services”).

The state of Colorado has adopted a unique regulation that applies the policy of Subsection (b). (*See* CODE OF COLO. REGS. tit. 8, ch. 1505-11, R. 2.3.) It authorizes a notary public to use an interpreter for deaf, hard of hearing, or deafblind individuals, provided 1) the interpreter has a valid certification issued by the registry of Interpreters for the Deaf, Inc. or a successor entity, or valid sign language interpretation certification

approved by the Colorado Commission for the Deaf, Hard of Hearing, and DeafBlind; and 2) the interpreter does not have a disqualifying interest in the notarial act as the term is defined under the regulation, including grounds along the lines of Section 4-6(a)(1)-(3), *infra*. The Colorado regulation thus presents a reasonable accommodation to facilitate communication with persons with certain disabilities who seek notarial services.

Understandably, a notary who is a sole proprietor may not have the wherewithal to overcome the limitations of all who seek a notarial act. Consequently, the application of the Section is intended to be consistent with the undue burden and fundamental alteration provisions of the ADA. For example, it may be an undue burden for a sole proprietor notary to supply a sign language interpreter at the request of a deaf individual. In such cases, the notary should consider providing an alternative aid or service (*i.e.*, written notes), if that alternative ensures that communication with the deaf individual is as effective as communication with others. (See “ADA Requirements: Effective Communication.” ADA.gov. Accessed March 26, 2025.) If the nature, complexity, and length of the required communication is such that an alternative aid or service would not result in effective communication, the notary may decline to provide service to the individual. In this situation, neither the principal nor the notary is well-served by ineffective means of communication.

Subsection (b) directs the notary to act “when necessary and consistent with other applicable law.” The reference to “law” would include federal laws such as the ADA and any local laws (*i.e.*, laws enacted in the jurisdiction in which the notary is located). (See LA. CIV. CODE

ANN. Art. 1580.1.)

Subsection (c) provides “proxy” signature rules for an individual unable to sign. The principal may direct the proxy to sign on behalf of the principal in the presence of the principal. In other proxy settings, (such as will proxy signings) signing in one’s “presence” generally means that the principal needs to be able to see the proxy sign, *i.e.*, be in the unblocked line of sight of the proxy so the principal could see the proxy sign, but not necessarily or actually watch the proxy do so. The rules here are consistent with the rule states have adopted for individuals who are unable to sign their names on a will. (See, *e.g.*, UNIFORM PROBATE CODE § 2-502(a)(2) and Illinois Probate Code, 755 ILCS § 5/403-a; *but see Barbee v. Johnson*, 190 N.C. App. 349 (2008), where the blind property owner’s name was signed on the lease by his wife as a proxy but there was no evidence that the signature was witnessed by two disinterested persons apart from the notary.) They also are consistent with similar provisions in state notary statutes. (See, *e.g.*, KY. REV. STAT. ANN. § 423.335 and MISS. CODE ANN. § 25-34-19; *cf.* MNA 2010 § 5-4; HAW. REV. STAT. ANN. § 456-19 and MICH. COMP. LAWS § 55.293, authorizing the notary to sign as proxy.) Notably, the drafters also intended the Section 2-11 definition of the term “in my presence” to apply to this Section, thus permitting a proxy signing using audio-visual communication. Finally, Paragraph (3) requires the notary to provide the required statement that the proxy signed in the record in accordance with the mandates of Paragraphs (1) and (2). This provides those relying on the proxy signature another level of certainty as to the genuineness of the signature.

#### § 4-6. Disqualifications.

- (a) A notary public is disqualified from performing a notarial act if the notary:

- (1) is a party or signatory to, or named in the record that is the subject of, the notarial act;
  - (2) will receive as a direct or indirect result any commission, fee, advantage, right, title, interest, cash, property, or other consideration other than the fees specified in Section 5-2;
  - (3) is a spouse, domestic partner, or known family member related by blood, marriage, or adoption to the principal or any required witness; or
  - (4) is an attorney or professional who has rendered services associated with a record or transaction requiring a notarial act for a fee other than the fees specified in Section 5-2.
- (b) Notwithstanding Subsection (a)(2), a notary public is not disqualified for:
- (1) accepting a fee for services performed as a signing agent if payment of that fee is not contingent upon the signing or notarization of any record; or
  - (2) receiving a salary and payment of expenses for services rendered under this [Act] from an employer for whom the notary performs notarial acts in the course of employment.

#### Comment

Section 4-6 describes situations in which a notary has a disqualifying interest and, therefore, must not proceed with a related notarization.

Subsection (a) enumerates four conflict of interest scenarios that disqualify a notary from performing a notarization. Paragraph (1) states the basic rule that a notary may not notarize a record in which he or she is either a principal or otherwise named. (*See, e.g.*, CAL. GOV'T CODE § 8224.1; GA. CODE ANN. § 45-17-8(c); IND. CODE ANN. § 33-42-13-3(a)(10); N.H. REV. STAT. ANN. § 455:2-a; and OHIO REV. CODE ANN. § 147.141(A).) This rule goes beyond the basic prohibition against notarizing one's own signature. It also prohibits the notary from acting if mentioned in the record. Being named in the record impugns the notary's disinterest in the transaction and casts in doubt whether he or she impartially can meet the obligations imposed by law. (*See, e.g.*, NEB. REV. STAT. § 64-105.01(2)

and UTAH CODE ANN. § 46-7-1(2), disqualifying a notary who is individually named in the record to be notarized.)

Paragraph (2) addresses the "interest in the transaction" issue more squarely. It specifically prohibits a notary from performing a notarial act related to a transaction from which the notary could benefit. This rule is common to most jurisdictions. (*See, e.g.*, MINN. STAT. ANN. § 358.54 Subd. 2; N.D. CENT. CODE §§ 44-06.1-23.6.b and c; and 57 PA. CONS. STAT. ANN. § 304(b)(1).) However, being an employee who performs a notarization for an employer does not create an interest governed by this Paragraph, unless the employee receives a benefit directly related to the completion of the act. Issues with respect to employee-notaries are specifically addressed in Section 6-4(d) (journal), Section 8-4(d) (official seal), and Sections 12-1(d)-(f) (liability). Additionally, in recognizing that employees may notarize records for their employers, it is

contemplated that notarization in similar business relationships is permissible. A jurisdiction could specifically authorize corporate officers and directors to notarize records for their business organizations. (*See, e.g.*, ARK. CODE ANN. § 21-14-109 and NEB. REV. STAT. § 64-211 through 64-215.) The drafters did not feel this needed to be stated separately, concluding that it was implicitly permitted by language that did not specifically prohibit it. (*But see* Paragraph (4) which explicitly disqualifies attorneys from notarizing records for clients.)

Paragraph (3) offers an expanded view of disqualifying relationships for a notary. Most jurisdictions that address the matter confine such disqualification to close family members, but the drafters felt that broader coverage best fostered the integrity of the notarial act. Particularly noteworthy is the position that for these purposes a domestic partner must be treated identically to a spouse. Also, the Act includes “in-laws,” “half,” and “step” relatives as family members who ought to have their records notarized by completely independent and disinterested notaries. (*See, e.g.*, ME. REV. STAT. ANN. tit. 4, ch. 19, § 954-A (eff. until July 1, 2023); ME. REV. STAT. ANN. tit. 4, ch. 39, § 1904.3 (eff. July 1, 2023); NEB. REV. STAT. § 64-105.01; and NEV. REV. STAT. ANN. § 240.065.)

Paragraph (4) raises a controversial issue. Attorneys often notarize their clients’ records. The drafters believed, however, that attorneys clearly have an interest in records they draft or offer advice on for clients that should disqualify them from notarizing those records. A separate non-notarial fee probably is being earned for providing legal services in these cases. States that step into these waters typically grant a carve-out to attorneys. (*See, e.g.*, CAL. GOV’T. CODE § 8224; KAN. STAT. ANN. § 53-5a-25(d); and NEV. REV. STAT. ANN. § 240.065.2.)

Whereas it could be argued that an attorney’s notarization of a client’s record would run afoul of Paragraph (2), the drafters thought it best to state the disqualification separately. Another consideration was whether the attorney’s role as advocate for a client is compatible with the notary’s role as disinterested witness, especially if the notarized record becomes evidence in litigation and the attorney is asked to testify as the supposed impartial notary in a case in which he or she is representing the client.

Notably, nothing in Paragraph (4) would prevent a paralegal, legal secretary, or other notary associated with the attorney from notarizing the record. Even so, an attorney’s employment of a notary does not relieve the notary from fulfilling all of the obligations imposed by the Act with respect to proper execution of a notarial act.

Subsection (b) has two exceptions to the disqualification rule. Paragraph (1) addresses “notary signing agents” who perform a courier and clerical function in bringing loan records to a borrower and, before notarizing these records, ensure that they are signed in the proper places. This Paragraph allows signing agents to charge fees for their non-notarial functions as a signing agent as long as payment of the non-notarial fees does not depend on performance of a notarial act. In other words, the notary signing agent who travels to deliver loan records to a borrower must be paid for the assignment by the contractor even when the borrower decides not to sign, or when a discovered impropriety or discrepancy prevents the notary from completing the notarial act. This removes the signing agent’s incentive to exert pressure on the borrower. (*See* MISS. ADMIN. CODE tit. 1, ch. 50, pt. 5, R. 50.5.2, applying this principle to employees and provides that a regular salary or wage includes bonuses, provided the bonus “is not related to or contingent upon the completion of a

notarial act.”)

Paragraph (2) clarifies for employee-notaries that receiving a salary or

expenses for notarial services does not disqualify them from performing notarial acts in the course of employment.

#### § 4-7. Refusal to Notarize.

- (a) A notary public shall not refuse to perform a notarial act based on an individual’s race, nationality, ethnicity, citizenship, immigration status, advanced age, gender, gender identity, sexual orientation, religion, politics, lifestyle, disability, or on any disagreement with the statements in or purposes of a record.
- (b) A notary public shall refuse to perform a notarial act if:
  - (1) the notary knows or has a reasonable belief that the notarial act or the associated transaction is unlawful; or
  - (2) the act is prohibited by this [Act] or other law of this [State].
- (c) A notary public who is registered shall refuse to perform a notarial act on an electronic record or involving the use of audio-visual communication if the notary has a reasonable belief that a technology system does not meet the requirements of this [Act].
- (d) A notary public may refuse to perform a notarial act if the refusal is not prohibited by a federal law or law of this [State].

#### Comment

This Section emphasizes that the notary’s role is that of a public official. As such, the notary is subject to certain obligations imposed by that status. This concept appeared in both MNA 2002 Section 5-3 and MNA 2010 Section 5-6. The version in this Act is more detailed than its predecessors. Also, there is now a new subsection (Subsection (c)) to address notarial acts on electronic records. The discussions of the individual subsections below flesh out balancing the statutory duty “to notarize” and those situations where the notary either must or may refrain from doing so. (See Subsections (b) and (d), respectively.) The distinction is important because it can help notaries avoid complaints to the commissioning official and possible legal actions.

Subsection (a) establishes the basic premise that a notary cannot discriminate against a person requesting a notarial act based upon either 1) the individual’s

personal characteristics or beliefs, or 2) the substance of or statements made in the record to be notarized.

Subsection (a) identifies a wide range of personal classifications that are covered under the proscription. These include many of the commonly protected group classifications found in statutes such as race, religion, gender, and disability. To maximize the mandate to treat all would-be principals and requesters equally, the drafters added additional specific personal characteristics to the Subsection. These include, *inter alia*, the individual’s gender identity, sexual orientation, politics, and lifestyle.

The drafters also believed it was important that a notary not refuse to act based upon her disagreement with the content or purpose(s) of the record. Whereas the latter certainly is sound policy and consistent with the concept of a notary being a public official, this proscription may have limited effect



since a notary generally should only scan a record for its completeness. Reading the record to determine its content and purposes is generally considered to be beyond a notary's purview. Indeed, absent a record with a title that indicates its purpose, a notary should not be privy to the content of the same.

Subsection (b) has two subparts. Paragraph (1) mandates a notary refuse to perform a notarization if she reasonably believes the notarial act or associated transaction is unlawful, or the act itself is prohibited by law. (*See, e.g.*, NEV. REV. STAT. ANN. § 240.060, stating that notaries have the power to "perform notarial acts in *lawful* transactions" (Emphasis added).) The proscription should provide any person relying on the identity of a principal to the notarized record some comfort in that a disinterested third party verified the identity of the signer who will be bound to the terms of the record. This, in turn, affords notarized records credibility insofar as the notary, as an independent third party, verified the signer's identity and willingness to adopt the record as her own. This credibility, in turn, gives some comfort to parties who rely on the authenticity of the notarized record. (*See, generally*, HAW. REV. STAT. ANN. § 456-22; KAN. STAT. ANN. § 53-5a08; and MINN. STAT. ANN. § 358.70.)

Importantly, the notarization does not guarantee the lawfulness or, if applicable, enforceability of the record. It only states that the principal proved his identity to the notary consistent with statutory requirements, and that in performing her notarial duties the notary did not discover anything untoward that would lead her to reasonably believe the notarization or related transaction was unlawful. Thus, Paragraph (1) speaks to the limitations on the authority a commission vests in a notary. The notary is not authorized or required to take any action designed to acquire essential

information regarding either a record or any underlying transaction related to the notarized record. Thus, for example, the notary cannot make searches or conduct inquiries to determine the truthfulness or accuracy of a record or lawfulness of a transaction. (*See, e.g.*, MO. REV. STAT. ANN. § 486.655.) Such activities go well beyond the scope of the notary's authority which is solely to comply with the statutory requirements of each notarial act she executes.

Paragraph (2) mandates that the notary refuse to notarize if to do so would violate either this Act or any other law of the state. Notably, "State" is in brackets. This allows the adopting jurisdiction to either 1) enter the name of the state, or 2) provide language that would make "any other law" refer not only to just state laws, but those of counties, cities, and other governmental entities with lawmaking authority, as well. Although not specifically stated, a notary would also be required to refuse to perform a notarial act that would violate federal law.

Subsection (c) is a new addition to this Subsection that first appeared in MENA 2017 Section 4-3(3). It addresses issues that may arise for a registered notary public asked to notarize an electronic record or use audio-visual communication as part of a notarial act. (*See* §§ 9-3 and 9-4 which establish the specific requirements a technology system must satisfy in order to execute or assist in executing technology-based notarial acts.) In such instances, the system itself is critical to a proper and safe notarization. If the notary reasonably believes the system does not satisfy the statutory requirements, then the notary must refuse to proceed with the notarization. (*Accord*, WYO. STAT. ANN. § 32-3-112(b), providing that "A notarial officer shall refuse a request that would require the officer to use an electronic notarization system or other form of communication technology that does not meet the

requirements of this act.”) This Subsection puts the onus on the notary to have a reasonable belief the technology system was secure. This likely would require the notary to do some form of research on the system itself to ascertain whether it comes from a reliable provider, as well as if there have been any complaints about it from other users. Merely asking the system provider if the system is reliable likely would not meet the “reasonable belief” test. Over time, as courts resolve disputes regarding this issue, the definition of “reasonable belief” for these purposes will become clearer.

Subsection (d) closes the loop on a notary’s right to “refuse to notarize.” Whereas Subsections (b) and (c) mandate the notary does not notarize in certain instances, Subsection (d) provides the notary some discretion as to whether to execute a requested notarization in other situations. It is not uncommon for companies to have notaries who execute notarizations for company business. If such an employee-notary works in a back office, there would not be any way

for a would-be principal or requester to get access to the notary without getting permission. A business not “open” to the public is not required to provide access to its private premises for the purposes of seeing the in-house notary public. For enterprises that are open to the public, such as a bank, access to that business’s notary is still problematic. The bank may limit notarial services to bank related-business or only its clientele. Even if it did permit notarizations for non-clients, the bank could have procedures in place that allow such notarizations only if the in-house notary is not handling other bank business.

Importantly, the discretion provided in Subsection (d) is not unfettered. A notary can never perform a notarial act if prohibited to do so by a federal law or law the notary’s jurisdiction. (*See* § 4-7(b)(2); *see also* RULONA § 8(b).) Equally important, this Act is the law of any jurisdiction that adopts it. Thus, Subsection (a) applies and mandates that a notary cannot refuse to notarize based upon the characteristics enumerated in it.

#### **§ 4-8. Improper Influence.**

- (a) Unless Section 4-7(b)(1) applies, a notary public shall not influence a principal or requester either to enter into or avoid a transaction involving a notarial act.
- (b) Except as provided by Section 4-1(a)(7), a commission as a notary public neither authorizes nor requires a notary to investigate, ascertain, or attest to the lawfulness, propriety, accuracy, or truthfulness of a record or transaction requiring a notarial act.

#### **Comment**

This Section emphasizes the notary’s role as that of an impartial participant when performing her official duties. The thrust of this Section is to make clear that a notary is not actively engaged in the underlying record or transaction and should not take any action on either that goes beyond the notary’s statutory duties. As such, with

respect to the record requiring a notarial act, the notary plays a passive role that allows her to maintain objectivity when fulfilling her notarial obligations. (*Accord*, MO. REV. STAT. ANN. § 486.655.)

Subsection (a) proscribes a notary public from exercising any influence over a principal seeking a notarization. The provision makes clear that the

notary's neutral role prohibits her from advising any party to the transaction on whether or not to proceed with the notarization. For example, Subsection (a) would forbid a notary from informing a principal that the interest rate on the principal's loan transaction which requires the notary's services is higher than the loans of the notary's other recent clients. Such a comment could possibly influence the principal's decision related to the notarial act. A notary is not authorized to provide an opinion as to the wisdom or folly of the underlying action relating to the notarization. Indeed, the notary's participation in and knowledge of the transaction is limited to the duties required under the Act to complete the notarial act. (*See* § 4-1.) If asked by a principal or any other person privy to the notarization to comment on the matter to which the notarization relates, the notary must decline to do so. Failure to follow that dictate could result in the notary being liable for damages to a person who relied upon the information.

Subsection (b) underscores the limited authority conferred by a notary public commission. As noted above, a notary's duties are confined to those established by the Act. Subject to the one exception that is discussed below, a notary is neither authorized nor obligated to investigate any aspect of a transaction

related to the notarization. Indeed, the notarization promises no more than what the language in the notarial certificate states or that the notary fulfilled the duties required by the Act that may not be directly reflected in the notarial certificate (*e.g.*, maintaining impartiality as required by Section 4-6). A notary never vouches for the legality, truthfulness, or accuracy of a record. Nonetheless, a notary may "wear two hats" and by virtue of a professional credential, certification, or training (*e.g.*, a law, real estate, or insurance license) may be authorized and obligated to vouch for a record's legality, accuracy, and truthfulness. That authority, however, comes from the other credential and not the notary public commission. Thus, any damages that flow from substantive errors in the record are recoverable from the individual in her status as an attorney (or other professional status) and not as a notary. The one and only exception to this Subsection, *viz.*, a reference to Subsection 4-1(a)(7), involves issuing a "verification of fact." A notary would have to make an investigation into certain matters to perform that notarial act, so the exception is needed. (*See* § 2-34, identifying the steps that must be taken to complete this notarial act which includes the material the "notary public reviews" to, *inter alia*, "confirm" certain facts.)

#### § 4-9. Improper Records.

- (a) A notary public shall not perform a notarial act on a record that requires a principal's signature if the record is missing information or pages.
- (b) A notary public shall not authenticate a photograph.
- (c) A notary public shall not authenticate the accuracy or completeness of a translation.

#### Comment

Section 4-9 identifies records that may not be notarized. Subsection (a) bans notarizing a signature on a record that contains missing information or pages.

(*See, e.g.*, CAL. GOV'T CODE § 8205(a)(2); FLA. STAT. ANN. § 117.107(10); MASS. GEN. LAWS ANN. ch. 222, § 16(g); MO. REV. STAT. ANN. § 486.665.1(1); NEB.

ADMIN. CODE tit. 433, § 6.002.01(B); and S.C. CODE ANN. § 26-1-90(D)(1).) “Missing information” includes a record that has unfilled blanks in its text or missing pages. It also could be a record that is blank and has no text. Nothing in this Section authorizes nor obligates the notary to read the record itself. A principal’s privacy rights are important. The notary should do no more than scan the pages for missing information or pages and to glean information about the record for entry in the journal. (For more information on this point, *see* THE NOT. PUB. CODE OF PROF. RESP. (2020) VII-A-1, VII-A-2, and Commentary.)

Subsection (b) specifies that a notary public may not authenticate a photograph. One state, however, approves a notary to do so. (*See* MONT. CODE ANN. § 1-5-603(11)(c).) Although not every jurisdiction addresses this issue, it is an important matter because some requests to notarize photographs, particularly for certain medical license applications, have significance. (*But see* ALA. ACT NO. 2021-85, repealing the requirement for a notary public to certify the backside of a photograph on a pharmaceutical license application). Making and certifying the accuracy, completeness, authenticity, or other attribute of a photograph, even if the notary had a hand in its production,

involves a subjective judgment which is not an appropriate function of a notary. At best, a notary may notarize another person’s signed statement of certain facts relating to the picture. Moreover, nothing precludes this statement and the notary’s completed notarial certificate from being executed on or across the photograph itself. But that notarization does not authenticate the photograph; it only verifies that a principal proved his or her identity, and perhaps took an oath if the principal swore to or affirmed the statement related to the photograph.

Subsection (c) prohibits a notary from certifying a translation of a record. When a foreign-language record must be officially translated, it is typical for the translator to sign and have notarized the translator’s statement that the record was accurately translated. Nothing in Subsection (c) would prevent a notary from notarizing the translator’s statement or declaration. The notary, however, may not officially translate a record under the notary’s title and official seal, even if the notary was fluent in the language. This would be a violation of Sections 4-11 and 4-13(a). The notary could step aside as the notary in the transaction, make the translation, certify to the accuracy of the translation by signing the translator’s declaration, and have another notary notarize the signature.

#### **§ 4-10. Intent to Deceive.**

A notary public shall not perform a notarial act with the intent to deceive or defraud.

#### **Comment**

This provision is axiomatic. It is substantially identical to its predecessor in the MNA 2010. The provision articulates the principle that undergirds the role of a notary public. The notary shall not engage in deceptive practices for to do so denigrates the office and opens notarial

acts to question. For notarizations to have value, they must be a product of integrity and reliability. Additionally, the enunciated principle not only is a mandatory obligation, but also both speaks to the integrity of the notary public office and establishes an ethical

imperative that must be followed. (See THE NOT. PUB. CODE OF PROF. RESPON. (2020) IV-E-1 and IV-E-2.) Most states have provisions that prohibit notaries from performing notarial acts with the intent to deceive or defraud. (See CONN.

GEN. STAT. ANN. § 3-94h(1); GA. CODE ANN. § 45-17-8(d); MASS. GEN. LAWS ANN. ch. 222, § 16(h); UTAH CODE ANN. § 46-1-9(2); and VA. CODE ANN. § 47.1-15. See also N.Y. CONS. LAWS (PENAL LAW) § 175.40.)

#### **§ 4-11. Improper Use of Title, Official Seal.**

A notary public shall not use, or knowingly authorize the use of, the title notary public or official seal to endorse, promote, denounce, or oppose any product, service, contest, candidate, or other offering, or for any other purpose than performing notarial acts.

#### **Comment**

Section 4-11 is designed to prevent misuse of the notary's title and seal, which when affixed to a record provides an imprimatur of official significance. This provision was carried over from MNA 2010 Section 5-11 ("Testimonials"). It promulgates a rule that ought not need to be stated, but unfortunately there are unscrupulous members of all professions, and notaries are no exception. When a record bears an official title of someone who has sanctioned the record, the record attains a certain gravitas. Using the official seal alone may carry even greater weight as many members of the public might associate a seal with official or authoritative approval of the item to which it is affixed. Readers of a

record bearing a seal may well be misled to believe the contents of the record are accurate or carry some legal consequence even though they do not.

Section 4-11 identifies a range of activities for which the official seal or title cannot be used. Indeed, a notary who uses his or her official seal or title for such purposes with the intent to deceive someone into believing the seal or title imparted an official government endorsement would be in violation of Section 4-10. Several jurisdictions have a prohibition along the lines of Section 4-11. (See, e.g., N.C. GEN. STAT. § 10B-24; UTAH CODE ANN. § 46-1-10); and VA. CODE ANN. § 47.1-15(2); cf. NEV. REV. STAT. ANN. § 240.145.1.)

#### **§ 4-12. Unauthorized Practice of Law; Permissible Advice.**

- (a) A notary public who is not an attorney licensed to practice law in this [State] shall not assist another individual in drafting, completing, selecting, or understanding a record or transaction requiring a notarial act.
- (b) A notary public who is not an attorney licensed to practice law in this [State] shall not determine the type of notarial act or certificate to be used.
- (c) Subsection (b) does not prohibit a notary public from describing the requirements of a notarial act or providing samples of notarial certificates authorized by this [Act] to assist a principal or requester determine the type of notarial act or certificate to be used.
- (d) Notwithstanding Subsections (a) and (b) and subject to Section 4-

6(a)(4), a notary public who is duly licensed in a particular industry or professional field is not prohibited by this Section from assisting another individual in drafting, selecting, completing, or understanding a record or notarial certificate related to a matter within that industry or field.

### Comment

This Section addresses matters relating to a notary's representations to the public. The provisions in this Section are designed to ensure the public is not misled by a notary as to what she is legally authorized to do. The proscriptions are provided in three separate subsections.

Section 4-12 combines MNA 2010 Sections 5-12 and 5-13 and is renamed by combining their captions. Subsection (d) carries over MNA 2010 Section 5-13. Subsection (c) is new. While Subsections (a) and (b) carry the proscriptions detailing what a notary cannot do, Subsections (c) and (d) identify the "Permissible Advice" (as per the title of this Section) that a notary can provide.

Subsection (a) essentially provides that a notary who is not an attorney is not authorized and should not provide legal assistance to principals or others involved in a notarization. This position is consistent with that of other jurisdictions. (*See* 5 ILCS § 312/3-103(c) and GA. CODE ANN. § 45-17-8.2(b); *but see B. & L., Inc. v. P.R. Cast. Steel Corp.*, 114 D.P.R. 808, 813 (1983). (Puerto Rico is one of the few jurisdictions in which there is no separation between the attorney and the notary).) The Section specifies the acts that fall under the proscriptions. These include actions directly related to executing the record (*i.e.*, drafting and completing it) as well as selecting it (*e.g.*, identifying a pre-printed legal form). Moreover, the non-attorney notary is not authorized to explain what a record means, and, perhaps more importantly, provide any guidance with respect to the transaction itself.

Subsection (b) expands upon this

prohibition regarding providing legal advice by making it clear that a notary who is not an attorney is not authorized to determine the type of notarial act or required certificate therefor to be used. Such advice falls outside of the scope of notarial authority.

Subsection (c) specifies the assistance a notary public can provide to a client by carving out two safe harbors from Subsections (a) and (b). The first is permitting the notary to describe the requirements of any notarial act. The second allows the notary to show samples of notarial certificates to a client. These are benign acts that do not cross the line into the unauthorized practice of law. Recommending which notarial certificate to use, however, would do so. The drafters viewed what is needed for this type of assistance to be reasonably within the knowledge base of any commissioned notary.

It is not uncommon for a client to tell a notary that she has a record to be notarized. This necessitates the notary understand the type of notarization the client wants. The notary cannot ask a series of questions and then select the notarization to be made. That violates Subsection (b). The notary, however, can show the client distinct types of notarial certificates and let the client decide which one to use. Oftentimes this problem is obviated by the fact that many records contain notarial certificates on them, so all that needs to be done is to execute the notarial act using the certificate appearing on the record.

Subsection (d) allows a non-attorney notary who has a professional

license to select, draft, complete, or advise on a record or certificate relating to that expertise. (See MASS. GEN. LAWS ANN. ch. 222, § 17(d) and MO. REV. STAT. ANN. § 486.675.2.) A change from MNA 2010 Section 5-13 is that the notary only need be licensed in a particular field and not duly qualified, trained, licensed, and experienced, as was the case before.

Importantly, the new rendition of the provision in this Act now specifically references Section 4-6(a)(4) which disqualifies the notary from performing a notarial act for which the professional received remuneration for services related to the transaction or record to be

notarized. In those instances where the notarization is related to the services provided which will generate a fee, the notary is no longer a disinterested party to the record to be notarized, and thus is prohibited from providing any notarial services related to it. This is consistent with the principle that a notary must not have any interest in the transaction to which a notarization relates. To do so compromises the notary's impartiality which in turn makes the record suspect.

It is worth noting that the Section does not speak to penalties for violations noted in the Chapter. That task is handled in Chapter 12. (See, generally, § 12-1.)

#### **§ 4-13. Misrepresentation and Improper Advertising.**

- (a) A notary public shall not claim to have powers, qualifications, rights, or privileges that the office of notary public does not provide, including the power to counsel on immigration matters.
- (b) A notary public who is not an attorney licensed to practice law in this [State] and advertises notarial services in a language other than English shall include in the advertisement, including those on the Internet and broadcast media, the following, prominently displayed or communicated in the same language:
  - (1) the statement: "I am not an attorney and have no authority to give advice on immigration or other legal matters"; and
  - (2) the maximum and ancillary fees for notarial acts specified in Section 5-2.
- (c) A notary public shall not use the term "notario publico" or any equivalent non-English term in any business card, advertisement, notice, sign, or other written matter, including those on the Internet and broadcast media.

#### **Comment**

Section 4-13 is a restatement of Section 5-14 in MNA 2010, save for an addition to Subsections (b) and (c). Specifically, these provisions now include "on the Internet and broadcast media" advertising mediums.

Subsection (a) forbids the notary from misrepresenting notarial authority. (See, e.g., GA. CODE ANN. § 45-17-8.2(a); MICH. COMP. LAWS § 55.291(3); and

S.C. CODE ANN. § 26-1-90(K). See also WASH. REV. CODE ANN. § 42.45.230(5).) Immigration and other legal matters are of particular concern here because in civil law jurisdictions the attorney-like *notario publico* may be authorized to deal with these issues. To prevent public confusion and thwart unscrupulous notaries from attracting business for unauthorized acts, the Act mandates that

notaries do not misrepresent the powers associated with the notary public office. Nothing in the Subsection prohibits an attorney-notary from claiming powers afforded by a license to practice law. The specific misrepresentation of using the notary public's title translated into a foreign language is dealt separately under Subsection (c).

Subsection (b) is designed to supplement the proscription against misrepresentation of authority spelled out in Subsection (a). The drafters recognize that there is a significant Spanish-speaking population in this country familiar with the powers of the *notario publico*. As an added precaution to avoid confusion and misunderstanding about the extent of the American notary's notarial powers, the Act requires any notary who advertises notarial services in a foreign language to stipulate clearly in the advertisement that the notary is not a lawyer and may not provide legal advice or counsel. Specific reference is made to immigration matters because it is often the subject of greatest interest to foreign-born residents who are less than fluent in English. To further deter exploitation of unknowledgeable foreign individuals, the Act mandates that a notary who advertises in a foreign language state the maximum and ancillary fees for notarial acts in the same language.

Jurisdictions which have enacted the RULONA have broadened the scope of the provision in Subsection (b) by requiring notaries public who are not attorneys to post a prescribed notice if they advertise in *any* language, and not just a foreign one. (See, e.g., MINN. STAT. ANN. § 358.72 Subd. 4; MISS.

CODE ANN. § 25-34-47; and WYO. STAT. ANN. § 32-3-123(e).) Even though many jurisdictions have enacted this particular provision, the drafters considered the scope of this variation to be unnecessarily broad for two reasons: first, it is primarily constituents who read, write, and speak a foreign language that are particularly susceptible to the misrepresentation that is the focus of Subsection (b), and second, the cost of providing the prescribed notice in every advertisement would not be practical given the maximum fees state notary laws typically authorize a notary to charge.

Subsection (c) takes the final step in attempting to clearly distinguish the United States notary public from the *notario publico* of civil law Latin nations. (See, e.g., CONN. GEN. STAT. ANN. § 3-94a(a); D.C. CODE ANN. § 1-1231.25(c); IOWA CODE ANN. § 9B.25.3; and R.I. GEN. LAWS § 42-30.1-18(c).) The Act forbids a notary from using the term *notario publico* in any commercial communication or other written matter. Also prohibited is the use of equivalent non-English terms designating other attorney-like civil law notarial officers, including *notaire* (French) and *notaio* (Italian). Although the Subsection speaks specifically to written material, the drafters intended the prohibition to extend to all types of solicitations, whether they be oral or written. Here again this Act's Subsection (c) differs from the provision contained in the RULONA. That Act prohibits only the use of the term *notario* or *notario publico*. (See, e.g., IDAHO CODE § 51-125(d)(3); OR. REV. STAT. § 194-350(d)(3); and 57 PA. CONS. STAT. ANN. § 325(c)(1).)

#### **§ 4-14. Notarial Officers Other Than Notaries Public.**

Notarial officers, other than notaries public, who are authorized to perform notarial acts by laws of this [State] other than this [Act], shall comply with the following sections of this [Act]:

- (1) Chapter 4 (relating to authorized notarial acts and the requirements and prohibitions for performing notarial acts);



- (2) Chapter 6 (relating to notarial records), except for the administration of an oath or affirmation that is used in a court or judicial proceeding; and
- (3) Chapter 7 (relating to execution of notarial certificates) [, except for Section 7-1(a)(5)].

### Comment

The Act recognizes that notarial officers (*see* § 2-15 and Comment) other than notaries public are authorized to perform notarial acts (*See, generally,* § 10-1). These are individuals who derive their authority to perform notarial acts from other laws of the state and not necessarily a notary public commission. Nevertheless, Section 4-14 requires that they follow the notarial dictates in Chapters 4, 6, and 7. (Chapter 4 addresses the powers and limitations of a notary public, Chapter 6 speaks to notarial records, and Chapter 7 describes the notarial certificate.) In making this requirement, the drafters are ensuring that every notarial act performed in the state, no matter who executes it, will be made in accordance with the statutory requirements, evidenced by a properly completed and signed notarial certificate, and recorded in a journal. (*Cf.* VT. STAT. ANN. tit. 26, § 5305, which grants exceptions to notarial officers from certain requirements of Vermont's notary public statutes; *see also* RULONA § [19], which only requires notaries public and not notarial officers to keep a journal of notarial acts.)

Paragraph (1) requires notarial officers to abide by Chapter 4. In mandating notarial officers to do so, the principal and those who rely on the notarization know, *inter alia*, that the notary acted within her authority (§ 4-1), met the statutory requirements for properly executing a notarization (§ 4-3) that included using an appropriate method

to verify the identity of the principal (§ 4-4), accommodated individuals with disabilities (§ 4-5), did not have an interest in the notarial act (§ 4-6), refused improper notarizations (§ 4-7), did not exert improper influence (§ 4-8) or act with intent to deceive (§ 4-10), did not notarize improper records (§ 4-9), used the officer's title and official seal, if any, properly (§ 4-11), and did not practice law (§ 4-12) or misrepresent their authority (§ 4-13).

Paragraph (2) requires all notarial officers to keep records of the notarial acts they execute. (*See, generally,* Chapter 6.) One exception is granted for oaths and affirmations that are used in a court or judicial proceeding. The drafters thought that since these proceedings are appropriately regulated by law, under the oversight of the courts, recorded, and evidenced in court records, journal records would not be necessary. Nothing in Paragraph (2) prevents a notarial officer from voluntarily recording the oath or affirmation in a journal of notarial acts.

Paragraph (3) requires a notarial officer to follow Chapter 7 with respect to executing a certificate of notarial act. (*See, generally,* Chapter 7.) [The exception clause in Paragraph (3) is bracketed because certain notarial officers may be required by other applicable law to use the official seal pertaining to their broader office when executing matters related to that office, including notarial acts. Thus, use of an official notary public seal would not be required.]

## Chapter 5 – Fees of Notary Public

### Comment

General: This Chapter, which deals with notarial and ancillary fees for both traditional and technology-based notarial acts, was developed principally from the coverage of the same topics in the MNA 2010 Chapters 6 and 21, and MENA 2017 Chapter 10. Several significant changes to the treatment of the subject of fees for notarial and related services are incorporated.

Chapter 5 is written carefully to apply only to “fees” that a notary or person acting for or on behalf of a notary is allowed to “charge” or be “charged” (§§ 5-1(a) and 5-2(a)) or that a notary or person acting for or on behalf of a notary “charges or collects” (§§ 5-1(c) and (d); 5-2(b); 5-3(a); and 5-4). Chapter 5 does not apply to a gift or gratuity initiated or offered by a principal, requester, or other person.

The issue of the propriety of gifts and gratuities arises often enough that it is addressed generally by the 2020 *Notary Public Code of Professional Responsibility* II-A-3. While the issue may not be addressed directly in this Chapter, the Act incorporated a change in Section 4-6(2) that certainly has implications on the subject. It announces that a notary public is disqualified if the notary will receive any “other consideration *other than* the fees specified in Section 5-2” (emphasis added). Numerous jurisdictions have adopted comparable prohibitions (*see, e.g.,* ALASKA STAT. § 44.50.062(6)(B); MASS. GEN. LAWS ANN. ch. 222, § 16(a)(vi); and MISS. CODE ANN. § 25-34-7(2)(c)), but they only rule out any such consideration that exceeds the value of the maximum fees for notarial acts.

### § 5-1. Imposition of Fees.

- (a) For performing a notarial act, a notary public or person acting for or on behalf of a notary may charge up to the maximum fees specified in Section 5-2.
- (b) A notary public and person acting for or on behalf of a notary may enter into an agreement that provides for the remittance, distribution, and sharing of fees.
- (c) A notary public or person acting for or on behalf of a notary who charges or collects a fee shall provide an itemized receipt for all services rendered to each principal or requester.
- (d) A notary public or person acting for or on behalf of a notary who charges or collects a fee shall not condition the fee for any reason set forth in Section 4-7(a) but may waive or reduce the fee for humanitarian or charitable reasons.

### Comment

Section 5-1 treats several introductory issues about notarial and ancillary fees. Subsection (a) includes the almost universally recognized feature that a fee

“may” be charged, but a fee does not have to be assessed. Fees less than the amounts identified in Section 5-2(a), or no fee at all, may be charged, as those

identified fees are the “maximum” fees permitted. Virtually all notary public fee-capping statutes have adopted comparable permissive language or have said fees “shall not exceed” the maximum amounts identified (or similar words). (*See, e.g.*, CONN. GEN. STAT. ANN. § 3-95 and DEL. CODE ANN. tit. 29, § 4311(a).)

Some statutes and regulations have separately and expressly permitted waiver or reduction of maximum notary fees. (*See, e.g.*, ARIZ. ADMIN. CODE § R2-12-1102(B); D.C. CODE ANN. § 1-1231.23(c); and GA. CODE ANN. § 45-17-11(c).)

Subsection (a) includes a major change in the law. That is, either the notary or a person acting for or on behalf of a notary is authorized to charge notarial fees. (*See* MD. CODE ANN. (STATE GOV’T) § 18-107(a)(2); OKLA. STAT. ANN. tit. 49, § 209.) The sizeable majority of jurisdictions still authorize only notaries to assess notarial fees. (*See, e.g.*, ARK. CODE ANN. § 21-6-309(a); DEL. CODE ANN. tit. 49, § 4311; HAW. REV. STAT. ANN. § 456-17; IND. CODE ANN. § 33-42-14-1(a); S.D. CODIFIED LAWS § 18-1-9; and WYO. STAT. ANN. § 32-3-126(a).)

Allowing a “person” (defined in § 2-20) — including private employers, contracting companies, and other representatives of notaries public to collect notarial fees, as Subsection (a) does, promotes the interest of fostering greater public access to notarial services. This provision is in accord with an increasing trend evidenced by several jurisdictions allowing fee charging or sharing (*See, e.g.*, FLA. STAT. ANN. § 117.275 (relating to online notarial acts); MD. CODE ANN. (STATE GOV’T) § 18-107(a)(2); TENN. CODE ANN. § 8-21-1201(a); TEX. GOV’T CODE § 406.024(a); and VA. CODE ANN. § 47.1-20.B.)

Subsection (b) is a new provision designed to elaborate upon Subsection (a). It makes clear that a person representing a notary may either charge and collect the entirety of fees or may

share fees in part with the notary. The provision requires that, if fees are to be charged, and if the parties wish to address the manner of remitting, distributing, and sharing fees, the notary and person representing the notary must reach an agreement in order to do so. (*See, e.g.*, CAL. GOV’T CODE § 8202.7; MONT. CODE ANN. § 1-5-626(5); OR. REV. STAT. § 194.400(4); and 57 PA. CONS. STAT. ANN. § 329.1(d)(2), applying this principle to an agreement between the notary and the notary’s employer.)

Such an agreement should be a genuine consensual arrangement. While this provision allows for the agreement to be oral or written, the best practice standard would suggest that it be in writing. Read in context of Subsection (a), Subsection (b) makes clear that the notary and notary’s representative may by agreement share ancillary fees under Section 5-2(b).

Subsection (b) also fills a gap which heretofore existed in notary law, namely, authorization of a technology system provider by agreement to collect the fees on behalf of a notary or person representing a notary and then distribute the fee (after first assessing the cost of accessing or using the technology system) to the notary or the notary’s representative. In practice, this authorization would apply when the consumer downloads a mobile app through which the notarial act involving audio-visual communication is performed. In this business model, the technology system provider requires the consumer to pay for the notarial act through the app and then pays the notary a portion of the fee. There are other technology system providers whose business model is to sell their service to the notary for a monthly subscription or a per-transaction fee. In this case, the notary would collect the fee directly from the consumer, as has traditionally been the practice with traditional paper-based notarial acts.

Subsection (c) is a new provision and an important addition to the process for charging and collecting notarial and ancillary fees. This provision requires written receipts to be provided for all such fees and for those receipts to be itemized. The required receipt is to be provided by “the person who charges or collects a fee,” which person may be the notary or notarial officer, person acting for or on behalf of a notary, or a technology provider. The customary and sound business practice in almost all consequential business settings is that written receipts are provided or are available upon request, and receipts should be itemized. Notarial settings should be no different. (*See* 5 ILCS § 312/3-104(d) (cont. amend. by 2021 P.A. 102-106 as § 312/3-104(e), eff. Jan. 1, 2022).) A complete and proper receipt serves the interests of the customer, the notary, the public, and the state.

To underscore the importance of a notary public issuing a fee receipt, the MNA 2022 mandates three written items as the record-keeping for a notarization—the notarial certificate, the itemized receipt of fees (if fees are assessed and collected), and the journal entry.

By implication from custom and usage, the itemized receipt for notary public and ancillary fees must contain the elements necessary to achieve the purposes of a receipt. That is, it must include sufficient information to identify the date of the pertinent notarial act, the parties (the payer and payee(s)), the services rendered, any expenses reimbursed, and the fee amounts paid. As well, itemized fee amounts are required to be included in the mandatory journal entry for the notarial act set out in Section 6-2(a)(7), which refers to “every fee charged under Section 5-2.”

Subsection (d) is intended to prevent discriminatory mistreatment of principals and requesters by prohibiting notaries public, persons acting for or on behalf of

notaries, and technology providers who collect notarial and ancillary fees from conditioning the payment of such fees on attributes of principals or requesters as listed in Section 4-7(a). (In general accord, *see* MNA 2010 § 6-1(b) and MO. REV. STAT. ANN. § 486.685.4.) Subsection (d) does not address whether assessment of a fee charged under Section 5-2 may be conditioned on the customer or non-customer status of the principal or requester. Few existing statutes or regulations deal directly with this issue. Some jurisdictions have adopted provisions prohibiting notaries public and employers of notaries from refusing notarial services for persons who are not established customers. (*See, e.g.,* ARIZ. REV. STAT. ANN. § 41-269.G.2; IOWA CODE ANN. § 9B.8.3 and MASS. GEN. LAWS ANN. ch. 222, § 16(b).) Notaries, persons acting for or on behalf of notaries, and technology system providers should establish uniform practices of charging or not charging fees to individuals in a non-discriminatory fashion. (*See* 2020 NOT PUB. CODE PROF. RESP. § I-B-1, requiring the notary to “serve all of the public in an honest, fair, and impartial manner”; *see also* ARIZ. ADMIN. CODE § R2-12-1102(B), which requires notaries to establish uniform and consistent fees.)

Under Subsection (d), a notarial or ancillary fee may be reduced or waived for non-discriminatory, humanitarian, or charitable reasons, such as for seniors, homeless persons, military personnel, veterans, first responders, prisoners, hospitalized patients, and the like. (*See* MNA 2002 and 2010 § 6-1(b); *see also* 2020 NOT PUB. CODE OF PROF. RESP. § I-B-2; MO. REV. STAT. ANN. § 486.685.4; and WAGANAKISING ODAWAK TRIBAL CODE OF LAW § 6.2406.A.2.) While few statutes deal with this issue, there can hardly be much controversy about it, which is likely a reason so few statutory provisions treat the topic.

**§ 5-2. Maximum and Ancillary Fees.**

- (a) The maximum fees that may be charged for notarial acts are:
  - (1) for taking an acknowledgment, [dollars] per signature;
  - (2) for executing a verification on oath or affirmation, [dollars] per signature;
  - (3) for attesting to a signature witnessing, [dollars] per signature;
  - (4) for administering an oath or affirmation, [dollars] per individual;
  - (5) for performing a certification of life, [dollars];
  - (6) for making a certified copy, [dollars] per page certified with a minimum total charge of [dollars]; and
  - (7) for issuing a verification of fact, [dollars].
- (b) In addition to the maximum fees specified in Subsection (a), a notary public or person acting for or on behalf of a notary who charges or collects a fee for a notarial act may charge a travel, technology system usage, notarial record copy, or administrative or clerical fee if:
  - (1) the fee is reasonably necessary to facilitate performance of the notarial act;
  - (2) the person informs the principal or requester of the fee in advance;
  - (3) the person explains to the principal or requester that the fee is separate from the fee for the notarial act and neither specified nor mandated by law; and
  - (4) the person and principal or requester agree to the amount of the fee in writing.

**Comment**

Section 5-2 authorizes the charging of maximum notarial and ancillary fees associated with the provision of notarial services. Subsection (a), setting out a schedule of the maximum fees which may be charged for various notarial acts, reflects the choice to statutorily cap such fees by specifying the dollar limits which may be charged for each. The vast majority of jurisdictions set maximum fees for notarizations by statute or regulation. (*See, e.g.*, COLO. REV. STAT. ANN. § 24-21-529(2) (for “notary’s electronic signature”); FLA. STAT. ANN. § 117.05(2)(a); OR. REV. STAT. § 194.400(1); S.C. CODE ANN. § 26-2-70(B) (for notarization of electronic records); S.D. CODIFIED LAWS § 18-1-9; UTAH CODE ANN. §§ 46-1-12(1)(a)(i)-(v);

WASH. ADMIN. CODE § 308-30-220(1); and W.VA. CODE § 39-4-30.)

The policy of setting maximum fees for notarial acts usually is based on a desire to protect consumers. It is reasoned that if a legislature creates a requirement for certain records to be notarized in statute (for example, real property and estate planning records), then notarial fees should be capped to ensure access to notarial services remains affordable.

The amount of the fee is bracketed by the drafters, permitting a jurisdiction to determine the amount of its maximum fee for each different notarial act. Consistent with the purpose of the Act to unify state notary laws (§ 1-2(8)), the Act takes the position that the stated

maximum fee applies to paper-based notarial acts and notarial acts on electronic records and involving the use of audio-visual communication.

Numerous jurisdictions have now set maximum notary fees at \$10 for tangible and/or technology-based notarial acts. (*See, e.g.*, MICH. COMP. LAWS § 55.285(7); MONT. CODE ANN. § 1-5-626(1); N.H. REV. STAT. ANN. § 455:11; and UTAH CODE ANN. §§ 46-1-12(1)(a)(i)-(v).) Currently, two states have set maximum notary fees at \$15. (*See* CAL. GOV'T CODE § 8211 and NEV. REV. STAT. ANN. § 240.100(1).)

For notarial acts on electronic records or involving the use of audio-visual communication, one state authorizes the Secretary of State to adopt a regulation setting the fee for a remote notarial act at a maximum of \$50 (*see* MD. CODE ANN. (STATE GOV'T) § 18-107(a)(2)) and numerous others have set separate maximum fees at the level of \$25 (*see, e.g.*, FLA. STAT. ANN. § 117.275; MINN. STAT. ANN. § 358.645 Subd. (3)(c); N.H. REV. STAT. ANN. § 455:11.III; OHIO REV. CODE ANN. § 147.08(A)(2); OKLA. STAT. ANN. tit. 49, § 209; and WIS. ADMIN. CODE DFI-CCS 25.06), while others authorize \$25 in addition to the notarial fee (*see* TENN. CODE ANN. § 8-16-311 and TEX. GOV'T CODE § 406.111).

A different choice has been exercised by several jurisdictions that do not set specified maximum notary fees but instead allow notaries to charge reasonable fees. (*See, e.g.*, ARK. CODE ANN. §§ 21-6-309(a)(1) and 21-14-308(a)(1), and TENN. CODE ANN. § 8-21-1201(a).) A state notary statute may specifically authorize notarial fees to be assessed and collected, but not set a schedule of fees or establish maximum fees, and not expressly limit fees to reasonable amounts. (*See* KY. REV. STAT. ANN. § 423.430(1) (if “clearly disclosed” in advance of service, “a notary public may charge a fee”).)

A few state statutes do not expressly announce that notaries may charge fees, do not identify maximum notary fee amounts, and do not expressly limit notaries to charging not more than reasonable fees.

Subsection (b) allows for the charging of ancillary fees which may be associated with notarizations — namely, travel, technology system usage, notarial record copy, and administrative or clerical fees. Taken together with Subsection (a), Subsection (b) promotes the stated purpose of the Act to protect the interests of notaries (*see* § 1-2(4) and Comment.)

There is a concern that specified maximum notary fee caps might be circumvented by notaries who charge ancillary or associated fees for non-official activities. To protect consumers, Subsection (b) limits recovery of ancillary fees to four specified kinds, and mandates four specified requirements in order to charge and collect for each: 1) that the ancillary fee is reasonably necessary to facilitate performance of the notarial act, 2) that advance notice of the ancillary fee is given to consumers, 3) that consumers are informed the ancillary fee is separate from the fee for the actual notarial act and neither specified or mandated by law, and 4) that there is advance agreement of consumers to pay the ancillary fee. In addition, there are the requirements for persons charging ancillary fees to give advance written notice of their fees to consumers and provide itemized receipts for official and ancillary fees (*see* § 5-4 and 5-1(c), respectively).

Two preliminary matters should be stated. First, if a state were to choose not to enact Subsection (b), the absence of a statutory reference to ancillary or associated fees would not likely operate to bar recovery by a notary for an ancillary fee. Second, the statutory maximum notary fees in Subsection (a)

do not apply to ancillary fees. For instance, if a notary were asked by a principal to make ordinary photocopies of notarized tangible records or to mail notarized records, the fees for these services would not be considered in determining compliance with the statutory maximum notary fee. (*See, e.g.*, D.C. CODE ANN. § 1-1231.23(b); FLA. STAT. ANN. § 117.275; and KY. REV. STAT. ANN. § 423.430(2).)

Subsection (b) allows notaries to be compensated for travel associated with the performance of a notarial act. (*See* MONT. CODE ANN. § 1-5-626(2)(a)(ii); N.D. CENT. CODE § 44-06.1-28; and OHIO REV. CODE ANN. § 147.08(D).) Nevertheless, the concept of a travel fee is not a definite matter. A travel fee should include necessary and reasonable out-of-pocket costs of transportation (such as vehicle rental and mileage, fuel, and public transportation or rideshare fares), lodging, meals, and the like. However, some state statutes and regulations may more narrowly limit travel reimbursement. (*See, e.g.*, ARIZ. REV. STAT. ANN. § 41-316.B, limiting recovery to the amount authorized for mileage expenses and per diem subsistence for state employees; CONN. GEN. STAT. ANN. § 3-95, limiting travel to an additional thirty-five cents for each mile of travel; and MD. CODE ANN. (STATE GOV'T) § 18-107(b)(1), limiting the fee to the prevailing rate for business travel established by the IRS per mile and an additional fee not to exceed \$5).

The time involved in travel is also an issue. A travel fee might be thought to include reasonable compensation for the time of the notary involved in necessary travel. At least one state has expressly provided for compensation of the notary's travel time at the current rate of \$15 or

\$30 per hour depending upon the time of day of the travel (NEV. REV. STAT. ANN. § 240.100.3(d)).

Subsection (b) also authorizes compensation for "technology system usage." Unlike paper-based notarizations in which the costs for ink pens, official seals, and paper journals are relatively low and usually borne by the notary or the notary's employer, technology-based notarizations require a notary to use a technology system that has significant costs associated with such use. Some states expressly allow for assessment of an additional technology fee. (*See, e.g.*, FLA. STAT. ANN. § 117.275; MISS. ADMIN. CODE tit. 1, ch. 50, pt. 5, R. 50.9.2; MONT. CODE ANN. § 1-5-626(2)(a)(i); NEV. REV. STAT. ANN. § 240.197.1(g); and N.M. STAT. ANN. § 14-14A-28.E.)

Subsection (b) additionally clarifies that the provision of a copy or certified copy of a notarial record, such as a copy of a journal entry, constitutes an ancillary service for which a fee may be charged and collected.

Finally, Subsection (b) permits assessment of an administrative or clerical fee, or what is commonly called a "service fee" or "transaction fee." Some notaries and employers of notaries are known to have assessed and collected this type of fee. A few states have expressly recognized and approved these fees. (*See, e.g.*, MISS. ADMIN. CODE tit. 1, pt. 5, ch. 50, R. 50.4.2(D) ("Clerical and administrative fees, if charged, shall be itemized in the [notary] journal").)

As with each of the types of ancillary fees, the four-part test set out in Paragraphs (1) through (4) must be satisfied in order to protect consumers. And advance notice of administrative, clerical, service, or transaction fees and itemized fee receipts must be provided.

### § 5-3. Prepaid and Non-Refundable Fees.

- (a) A notary public or person acting for or on behalf of a notary who charges or collects any fee for a notarial act may require payment of

- the fee prior to performance of a notarial act.
- (b) Any fee paid prior to performance of a notarial act is non-refundable if:
    - (1) the notarial act was completed; or
    - (2) in the case of a fee specified in Section 5-2(b) and after the notary public traveled to meet the principal or requester, if applicable:
      - (A) the notarial act was not completed at the principal's request;e
      - (B) the notarial act was prohibited by this [Act]; or
      - (C) the notary, acting with reasonable care, was unable to comply with a requirement of this [Act].

### Comment

Section 5-3 deals with the prepayment of fees and the non-refundable nature of prepaid fees in certain specified circumstances. The Section advances the interest of notaries public, a stated purpose of the Act (*see* § 1-2(4)), by addressing legitimate concerns notaries have about assuring payment for valuable services that have, or will have, in fact been performed. One possible concern arises if a notary performs a notarial act and the principal or requester for whom the notarization was performed may simply take the notarized record and depart without paying. Another arises when a notary expends considerable time, effort, and expense in traveling to perform a notarization but is denied payment when the notarial act is not completed without fault on the part of the notary. Or when the principal refuses to pay for notarial services that have been rendered due to a change of mind, dissatisfaction with the notarial act, or “buyer’s remorse.”

Subsection (a) permits a notary public or person acting for or on behalf of a notary to require payment of any notarial or ancillary fees prior to performance of notarial services. Prepayment of some or all costs or fees is customary practice in many commercial settings, for example, when residential or business tenants prepay first and last month’s rent or when buyers of

consumer goods prepay the purchase price before goods are manufactured and delivered. Likewise, the prepayment of fees is a valuable practice for notaries and others who provide notarial and ancillary services to protect them against non-payment for the rendition of their legitimate and valuable time and effort. A few jurisdictions expressly permit required prepayment of notarial and/or ancillary fees. (*See, e.g.*, MISS. ADMIN. CODE tit. 1, ch. 50, pt. 5, R. 50.9.4.A; MO. REV. STAT. ANN. § 486.690.1; and NEV. REV. STAT. ANN. § 240.100.2.)

In order to obtain prepayment of notarial and ancillary fees, the person charging and collecting the prepaid fee must comply with the other provisions of Chapter 5, providing advance notice of fees under Section 5-4, charging not more than maximum notarial fees under Section 5-2(a), collecting only specified ancillary fees under Section 5-2(b), and providing itemized receipts under Section 5-1(c).

Subsection (b) announces that prepaid notarial and ancillary fees are non-refundable under certain specified conditions. The same jurisdictions which have expressly allowed prepayment of fees have also provided for prepaid fees to be non-refundable. (*See, e.g.*, MISS. ADMIN. CODE tit. 1, ch. 50, pt. 5, R. 50.9.4.B; MO. REV. STAT. ANN. § 486.690.2; and NEV. REV. STAT. ANN. §



240.100.4.)

There are two predicates to prepaid fees being non-refundable. First, if travel is involved, the notary must have traveled to meet the principal or requester, thereby expending time, effort, and expenses in doing so. Second, the prepaid fees are non-refundable in cases identified in Paragraphs (1) and (2), as will be discussed below. Although this provision declares prepaid fees to be non-refundable, the party who has collected such fees could, of course, refund all or part of the fees if that party wishes to do so. This unstated option is in keeping with the general rule that notaries or persons acting for or on behalf of notaries are allowed to charge less than the maximum statutory notarial fees or to waive fees altogether.

Under Paragraph (1), the prepaid fees are non-refundable if the notarial act was completed. Under Paragraph (2), fees prepaid by a principal or requester are non-refundable if the notarization is not completed as the result of one of three identified circumstances. Of course, the failure to complete a notarial act cannot be the fault of the notary in any circumstance if fees are to be non-refundable. Given that, the three situations are: 1) the notarial act is not completed at the request of the principal or requester; 2) the notarial act is not completed because the notarial act is prohibited by the Act; or 3) the notarial act is not completed because the notary (acting with reasonable care) was unable to comply with a requirement of the Act.

#### **§ 5-4. Notice of Fees.**

A notary public or person acting for or on behalf of a notary who charges or collects any fee specified in Section 5-2 shall conspicuously display in the person's place of business, including the Internet and on any technology system, if applicable, or present to each principal or requester in advance of the performance of the notarial act, a written schedule of fees in English or a language understood by each principal and requester, in not smaller than 12-point type on any tangible record or in clear and conspicuous text on any electronic record.

#### **Comment**

This Section establishes an additional consumer protection rule. It requires either display of a sign containing the fee schedule in the place of business of the person charging a fee, or the display of fees on the Internet site or the technology system of the person charging a fee, or personal presentation of a written or electronic fee schedule to the principal or requester. More than one of these approaches may be employed.

Various expressed fee-posting provisions for notary and related services in physical locations where notarial and related services are provided can be found in some statutes and rules.

However, such laws usually apply to places of business and may not 1) apply to residential dwellings, 2) require notaries to carry and distribute fee schedules when traveling to perform notarizations, 3) cover ancillary services and fees, and 4) apply to technology system providers or notarial acts on electronic records. (*See, e.g.*, ALASKA STAT. § 44.50.062(4); ARIZ. REV. STAT. ANN. § 38-412; and NEV. REV. STAT. ANN. § 240.110.)

For settings where services are provided in one's home, or when traveling to perform notarizations, notaries and representatives of notaries who charge

for services should provide to consumers a fee schedule. (*See, e.g.*, OR. ADMIN. RULES § 160-100-0410 and S.C. CODE ANN. § 26-1-100(B).) Section 5-4 requires “conspicuous display” of a “written schedule” of fees, which, according to the rule of construction in Section 1-3(2), may be tangible or electronic. An oral statement of fees is insufficient, although a supplemental oral statement to draw attention to the tangible or electronic notice should satisfy the conspicuousness standard. A few states currently require a notice of fees to be provided in advance to consumers, without specifying that it must be in writing. (*See, e.g.*, GA. CODE ANN. § 45-17-11(d) and MICH. COMP. LAWS § 55.285(7).)

The written schedule of fees must be in the English-language (*see, e.g.*, MO.

REV. STAT. ANN. § 486.685.6 and N.C. GEN. STAT. § 10B-32) or a language understood by each principal and requester. The concern is that both individuals who speak English and foreign languages should be protected and not overcharged, and particularly those from foreign countries which utilize the civil law *notario publico*, who provides much more involved services and charges substantially higher fees than U.S. notaries. (*See* § 4-13(c), prohibiting use by notaries of the term *notario publico* or any equivalent non-English term in any writing.) Numerous jurisdictions have adopted comparable provisions. (*See* IOWA CODE ANN. § 9B.25(3); KAN. STAT. ANN. § 53-5a25(f); R.I. GEN. LAWS § 42-30.1-18(c); and TEX. GOV'T CODE § 406.017(a)(4).)

## Chapter 6 – Notarial Records

### Comment

General: This Chapter addressing notarial records, including journals of notarial acts and audio-visual recordings, was developed largely from the coverage of the same subjects in all past Model Acts — the UNA 1973 and MNA 1984 Sections 4-101 to 4-104, MNA 2002 and 2010 Chapters 7 and 20, and MENA 2017 Chapter 9. (*See also* RULONA § [19] and THE NOT. PUB. CODE OF PROF. RESP. (2020) VII.) The reason for a notarial record to be created and retained by the notary is to provide written evidence of the notary's official functions. Without a notarial record referencing and describing an official action of a notary, the only written evidence of such an action is the certificate of notarial act for the seven enumerated notarial acts identified in Sections 4-1(a)(1)-(7) and 7-3(a)-(g). If the certificate of notarial act is lost or destroyed, no written evidence of the notarization for those acts exists. The old cliché, “if it isn't written, it didn't happen,” is a fundamental principle and a key reason why written (and recorded) notarial records are so important.

Experts on notary law and practice have historically touted the value of journal record-keeping for the security of notarized records and for the protection of notaries public from liability for performing faulty notarial acts. Journals serve the interests of principals and

requesters, parties who rely upon those records, the public, government, law enforcement, the courts, and notaries themselves.

There are two different views of the meaning of “journal” in the context of notarial acts and as expressed by the definition in Section 2-12. That definition recognizes the point of view to the effect a notary may have more than one journal of notarial acts — such as a tangible journal for traditional paper-based notarizations and a separate electronic journal for notarizations on electronic records and involving the use of audio-visual communication — or more than one journal comprised of the separate bound volumes of tangible journal books. For instance, at least one state refers to “all records and journals” of a notary (ARIZ. REV. STAT. ANN. § 41-317.C). The definition of “journal” also allows for the other view that a notary has only one total journal or record for notarial acts the notary has ever performed, regardless of how many different bound books, pieces of paper, separate electronic entries, or various combinations exist. The drafters of this MNA concluded that it was unnecessary to resolve the question of which view to adopt, for it makes no substantive difference to notarial practice or to the meaning and application of this Act.

### § 6-1. Journal Requirements.

- (a) A notary public shall create, maintain, protect, and provide for lawful access a chronological journal of notarial acts.
- (b) The journal may be created and maintained on a tangible or an electronic medium.
- (c) A tangible journal of notarial acts shall be a permanently bound book with numbered pages.
- (d) An electronic journal of notarial acts shall comply with the requirements of Subsection (g).

- (e) A notary public shall complete a journal entry only at the time the notarial act is performed.
- (f) A notary public may maintain more than 1 active journal of notarial acts.
- (g) An electronic journal of notarial acts shall:
  - (1) be maintained on a storage device or online media;
  - (2) require a password or other secure means of authentication;
  - (3) be tamper-evident;
  - (4) create a duplicate record as a backup;
  - (5) produce records in an open format; and
  - (6) enable the notary public, the notary's personal representative, or the notary's guardian to comply with the requirements of this Chapter.
- (h) A notary public who keeps an electronic journal shall provide the authentication instructions to the [commissioning official] upon request.
- (i) For purposes of this Chapter, "open format" means platform independent, machine readable, and made available to the public without restrictions that would impede the reuse of the information.

### Comment

This Section requires notaries to keep and preserve notarial journal records of their official acts in connection with tangible paper notarial acts and notarizations on electronic records and those that involve the use of audio-visual communication. Many jurisdictions mandate that their notaries create and retain journal records of notarial acts on tangible and electronic records. (*See, e.g.*, ARIZ. REV. STAT. ANN. § 41-319.A; CAL. GOV'T CODE § 8206(a)(1); COLO. REV. STAT. ANN. § 24-21-519(1); D.C. CODE ANN. § 1-1231.18(a); HAW. REV. STAT. ANN. § 456-15(a); MONT. CODE ANN. § 1-5-618(2)(a); NEV. REV. STAT. ANN. § 240.120.1; N.J. STAT. ANN. § 52:7-10.18.a; 57 PA. CONS. STAT. ANN. § 319(a); and TEX. GOV'T CODE § 406.014(a).)

The Act does not permit any exception to the requirement of journal record-keeping of notarizations for attorney-notaries or notaries employed by law firms. (*But see* ARIZ. REV. STAT.

ANN. § 41-319.A, declaring that journal records which "violate the attorney-client privilege" are not public records, and thereby exempting them from public access, and MASS. GEN. LAWS ANN. ch. 222, § 22(f), exempting attorneys who are notaries and notaries employed by such attorney-notaries from the journal record-keeping requirement.)

Contrary to the policy of Section 6-1, several states mandate that notaries who perform notarial acts on electronic records or involving the use of audio-visual communication, or both, keep a journal, but do not require keeping one for traditional notarial acts. (*See, e.g.*, ALASKA STAT. § 44.50.078, ARK. CODE ANN. § 21-14-310(a)(1); KY. REV. STAT. § 423.389(1); MINN. STAT. ANN. § 358.645 Subd. 4; N.D. CENT. CODE § 44-06.1-16.1.1; OHIO REV. CODE ANN. § 147.65; OKLA. STAT. tit. 49, § 206.A; S.C. CODE § 26-2-90; TENN. CODE ANN. § 8-16-308(a); and UTAH CODE ANN. § 46-1-13.)

Subsection (a) directs a notary to “create, maintain, protect, and provide for lawful access ‘a’ chronological journal of notarial acts.” Those individual requirements are further described in coming provisions of this Chapter — namely, to create or keep the journal record (§§ 6-1(b)-(i), 6-2, and 6-3, maintain or retain the journal record (§§ 6-4(d), 6-4(f), 6-7(a), and 6-5), protect or secure the journal record (§§ 6-4 and 6-5), and provide access to the journal record (§ 6-6).

Subsection (a) also establishes the requirement of record-keeping to be created in “chronological” or temporal order. This is a common requirement among states with journal requirements. (*See, e.g.*, ARIZ. REV. STAT. ANN. § 41-319.A; MASS. GEN. LAWS ANN. ch. 222, § 22(a); and MO. REV. STAT. ANN. §§ 486.600.8 and 486.700.1.) Some other jurisdictions require chronological sequencing by implication from the procedure established for completing journal entries. (*See, e.g.*, D.C. CODE ANN. § 1-1231.18(b)(2); HAW. REV. STAT. ANN. §§ 456-15(b) and (c)(1); and MONT. CODE ANN. §§ 1-5-618(2)(b) and (3)(a).) This chronological aspect of recording journal entries must be read together with the mandates of Section 6-1(c) for a tangible journal to be “a permanently bound book with numbered pages,” Section 6-1(e) for the journal record to be created or completed “only at the time the notarial act is performed,” Section 6-2(a)(1) for each journal entry to note the “date and time of the notarial act,” and Section 9-3(a)(7) for the electronic technology system for notarial acts on electronic records to be tamper-evident.

Second, Subsection (a) mandates record-keeping “of notarial acts.” The phrase “notarial act” is defined by Section 2-13, in part, as “any official act that a notary public is authorized to perform under this Act.” The term means more than just the performance of

notarizations and notarizing of records; the phrase refers to all official actions of notaries. The phraseology used in some other Model Acts suggests this broader meaning. (*See* MENA 2017 § 9-1(d), defining “notarial acts” to include “any act” that a notary is authorized to perform.) The 1998 and 2020 *Notary Public Code of Professional Responsibility*, Guiding Principles VII and VIII, respectively, refer to “every notarial act.” Understood literally, as the phrase must be interpreted, “notarial act” means *any and all* notarial actions, functions, deeds, activities, or services, official in nature, which are performed by a notary public or notarial officer.

This construction of “notarial act” is inherently somewhat general in nature, rather than precise. A meaning of the phrase can be derived by combining the definitions of “notarial” and “act,” to wit, a deed or performance by a notary public in the exercise of his or her official capacity and power. (*See* BLACK’S LAW DICT. Rev. 4th Ed., 1968, at 42, 1209.) Similarly, it is a deed or thing done or executed by, or relating to, a notary public. (*See* WEBS. II NEW COLL. DICT., 2001, at 11, 748.) Numerous state journal provisions expressly require the recording of specified official notarial functions that do not involve creation of notarial certificates, thereby including non-notarial acts within the meaning of “notarial acts.” (*See, e.g.*, MASS. GEN. LAWS ANN. ch. 222, § 22(e); MISS. ADMIN. CODE tit. 1, ch. 50, pt. 5, R. 50.4.6.A.2; MO. REV. STAT. ANN. § 486.705.3; and ONEIDA NATION OF WIS. ONEIDA NOT. ACT tit. 1, § 114.4-2(c).)

Subsection (b) allows a notary to keep and maintain the journal record in either a tangible paper or an electronic format. Subsection (b) is meant to allow for the use of both mediums for the journal record, and not to restrict use to only one or the other of the two mediums. This opportunity constitutes a

major departure from the approach of other model and uniform laws. (*Cf.* MNA 2010 §§ 7-1(a) and (c); MNA 2017 § 9-2(a); and RULONA § [19(b)].) Several jurisdictions have enacted language identical or comparable to that of Subsection (b) and allow for use of a mixing of record-keeping mediums. (*See, e.g.*, COLO. REV. STAT. ANN. §§ 24-21-519(1) and (2)(a); MD. CODE ANN. (STATE GOV'T) §§ 18-219(b)(1) and (2); N.D. CENT. CODE §§ 44-06.1-16.1.1 and 2; OR. REV. STAT. § 194.300(2); and TEX. GOV'T CODE §§ 406.014(a) and (e).) Some states require that notarial acts on electronic records or involving the use of audio-visual communication, or both, must be recorded only in an electronic journal. (*See, e.g.*, ARK. CODE ANN. § 21-14-310(a)(1); IND. CODE ANN. § 33-42-17-8(a); and VA. CODE ANN. § 47.1-14.C.)

Subsection (c) focuses on tangible journals of notarial acts and provides that a tangible journal “shall be a permanently bound book with numbered pages.” In order to prevent clandestine addition to, or removal of entries or pages from, a tangible journal, the book or register is required to be both permanently bound (rather than unbound or loose-leaf) and have sequentially numbered pages. (*See, e.g.*, COLO. REV. STAT. ANN. § 24-21-519(2)(a); HAW. REV. STAT. ANN. § 456-15(b); and MO. REV. STAT. ANN. § 486.700.1.)

Subsection (d) is the companion provision to Subsection (c) related to electronic journals. The particulars of the features required of an electronic journal record are set out in detail in Subsection (g) and will be considered below.

Subsection (e) mandates the contemporaneous completion of the journal record at the time of the notarial act — not before or after the notarial ceremony or act. (*See, e.g.*, D.C. CODE ANN. § 1-1231.18(c) and HAW. REV. STAT. ANN. § 456-15(e).) The journal

record must be completed at the time of a notarization in order for principals to sign the journal entry. In addition, the entry must be completed at the time of notarization for principals to review the journal entry for accuracy if they wish to do so. It is impossible to complete a journal entry accurately and truthfully prior to a notarization because the facts about the notarization cannot be known with certainty. If the journal entry is not completed until sometime after the notarial act, the passage of time may cause the notary's memory of the circumstances to be incomplete or otherwise inaccurate.

Subsection (f), permitting a notary to “maintain more than 1 active journal of notarial acts,” represents a reversal from the approach of MNA 2010 Section 7-1, which allows the keeping of “only 1 active journal at the same time” and departs from several jurisdictions requiring the same. (*See, e.g.*, ARIZ. REV. STAT. ANN. § 41-319.A; CAL. GOV'T CODE § 8206(a)(1); HAW. REV. STAT. ANN. § 456-15(b); MD. CODE ANN. (STATE GOV'T) § 18-219(b)(2); MASS. GEN. LAWS ANN. ch. 222, § 22(b); MICH. COMP. LAWS § 55.286b(7); and MISS. CODE ANN. § 25-34-37(2).) The new policy accommodates both views of the possible meanings of the notarial journal in Section 2-12. It was thought necessary to change the provision to authorize notaries to maintain more than one active journal because, particularly in the electronic world, notaries public could conceivably use more than one technology system to perform notarial acts on electronic records or involving the use of audio-visual communication. Many of these systems create their own journal records as part of their service. Thus, flexibility in adapting to the needs of commerce was deemed necessary in modifying the 1-journal-at-a-time policy.

Subsection (g), regarding the required attributes of an electronic journal of notarial acts, is adapted principally from

MNA 2010 Section 20-2 and MENA 2017 Section 9-3(a). Paragraphs (1) and (2) set out two basic requirements for the electronic journal, to be on a storage device or online media and secured for access with a password or other means of authentication, such as by a username and/or a passcode. (*See* § 9-3(a)(5) and Comment.)

A key requirement stated in Paragraph (3) is that an electronic journal must be tamper-evident. This is consistent with the requirement in many jurisdictions. (*See, e.g.*, COLO. REV. STAT. ANN. § 24-21-519(2)(a); D.C. CODE ANN. § 1-1231.18(b)(2); MICH. COMP. LAWS § 55.286b(7); MONT. CODE ANN. § 1-5-618(2)(b); and OR. REV. STAT. § 194.300(2).) This requirement prevents alteration or tampering with completed journal entries.

Unlike the standard designs of tangible journals, Paragraph (4) implicitly requires the technology system used to create an electronic journal to be capable of creating a duplicate record as a backup in the event the original is lost or compromised. A backup of the electronic record must be continuously maintained in order to satisfy the requirement. The backup should be housed off-site away from the original electronic journal in order to protect it from hazards such as theft, vandalism, fire, flood, and other disasters which could claim both the original electronic journal and backup. Commonly, many state statutes governing electronic journals have required the creation of backup records. (*See, e.g.*, ARK. CODE ANN. § 21-14-310(b)(2); FLA. STAT. ANN. § 117.245(3)(b); NEB. REV. STAT. § 64-409(2)(b); NEV. ADMIN. CODE § 240.665.2; and VA. CODE ANN. § 47.1-14.C.)

Because the required audio-visual recording for a notarial act involving the use of audio-visual communication is a notarial record, it too must be backed up. (*See* § 6-3(c), *infra.*)

Paragraph (5) requires electronic journal records to be produced in an “open format.” (*See* § 6-1(i) and Comment, *infra.*)

Finally, Paragraph (6) provides that an electronic journal record must enable compliance with this Chapter related to notarial records by the notary, the notary’s guardian, and the notary’s personal representative. (*See* § 6-7(a) *infra.*) This general mandate implicates several specific electronic technology requirements for the creation, storage, security, and access of notarial records. It requires an electronic journal to enable the notary to capture and save an electronic signature. Also, it must be capable of accessing and copying specific journal entries if requests for such copies are made. Above all, it must facilitate the security of notarial records.

Subsection (h) requires a notary public who maintains an electronic journal to provide the access instructions to the commissioning official upon request for officially authorized purposes such as routine inspection, investigation of complaints, and disposition of the electronic journal upon expiration of the notary public commission or the notary’s adjudication of incompetence or death. Subsection (h) is derived from the accepted view that the commissioning official has a right to access and review the notary’s journal.

Subsection (i) relates to the “open format” mandate of Section 6-1(g)(5). The definition of “open format” regarding electronic journal record-keeping is included to assure that access to journal records by the public, parties who obtain subpoenas, and authorized government agents is not encumbered by proprietary file formats employed to create such records but allows the records to be accessible broadly across operating systems and software applications. The definition set out here appears in relevant federal standards. (*See* EXEC. OFC. OF

THE PRES., OPEN GOV'T DIR. MEMO. M-10-06, Dec. 8, 2009, at 2, par. 1(b).) The same open format is also required in Sections 6-6(g), regarding access to copies of journal entries and audio-

visual recordings, and 6-7(a), regarding the disposition of notarial records when the notary public commission ends, or the notary is adjudicated incompetent or dies.

### § 6-2. Journal Entries.

- (a) For every notarial act, a notary public shall note in the journal of notarial acts:
  - (1) the date and time of the notarial act;
  - (2) the type of notarial act;
  - (3) the type, title, or a description of the record or proceeding;
  - (4) the name and address of each principal or requester;
  - (5) the signature of each principal and required witness;
  - (6) the means by which the notary verified the identity of the principal or any credible witness, including a description of any credential relied upon;
  - (7) every fee charged under Section 5-2;
  - (8) the address or location where the notarization was performed; and
  - (9) the use of audio-visual communication, if applicable.
- (b) Subject to Subsection (c) and in addition to the information required by Subsection (a), a notary public may note in the journal of notarial acts any other information related to the notarial act that the notary deems important.
- (c) Except as authorized by Subsection (a), a notary public shall not note a full credential or Social Security number, date of birth, or other personally identifiable information in the journal of notarial acts.
- (d) A notary public shall note in the journal of notarial acts the circumstances for not performing or completing any notarial act.
- (e) A notary public shall create a journal entry in a tangible journal using permanent, photographically reproducible ink.
- (f) If a notary public discovers that an entry in the journal of notarial acts contains a mistake, omission, or any other error, the notary shall note the correction to the information in a subsequent dated entry that references the prior entry.

### Comment

Section 6-2 generally addresses the information to be recorded in a journal of notarial acts.

Subsection (a) details the specific entries required to be recorded in the journal for each notarial act. Most of the separate items enumerated in Subsection

(a) are currently required by the jurisdictions which mandate journal record-keeping. (*See, e.g.*, ARIZ. REV. STAT. ANN. § 41-319.A; CAL. GOV'T CODE § 8206(a)(2); COLO. REV. STAT. ANN. § 24-21-519(3); 57 PA. CONS. STAT. ANN. § 319(c); and TEX. GOV'T CODE §



406.014(a).) A few states have even included provisions for streamlining entries in the case of multiple notarial acts for the same individuals at the same time or within a prescribed time period. (See, e.g., ARIZ. REV. STAT. ANN. §§ 41-319.C and D; NEV. REV. STAT. ANN. §§ 240.120.2 and 3; and TEX. ADMIN. CODE § 87.51(d).) A few jurisdictions chose to omit the kind of list appearing in Subsection (a) and require only the keeping of a journal or “fair record” without specifying its format or contents. (See, e.g., D.C. MUNI. REGS. § 17-2407.1; CHEROKEE NATION TRIBAL CODE tit. 49, ch. 1, § 8; and WYO. STAT. ANN. §§ 32-3-118(d) and (e).)

An important change in Subsection (a) is the removal of the requirement for a thumbprint of the principal to be recorded in the journal, which appeared in the MNA 2002 (§ 7-2(a)[(6)]) and 2010 (§ 7-2(a)[(7)]), and MENA 2017 Section 9-4(a)(4) (bracketed language). Recording thumbprints in journals of notarial acts has been controversial, and their use has not been widely adopted. In some cases, obtaining thumbprints in journals by implication have been prohibited. (See TEX. ADMIN. CODE § 87.50(a)(3); *but see* CAL. GOV’T CODE § 8206(a)(2)(G).) Any biometric identifiers are prohibited to be captured or recorded in journals of notarial acts by Section 6-2(c) because they constitute “personally identifiable information.” (See §§ 2-21 and 6-2(c).)

Paragraph (1) requires noting the date and time of the notarial act. The date and time are essential to establish the chronological sequencing of journal entries, and those features can sometimes be relevant and important to address challenges to the validity of notarial acts.

Paragraph (2) mandates the notary to identify the type of notarial act. This entry will be either a type of notarial act (such as an acknowledgment or copy certification) or other official action (such as correction of a completed journal

entry or notarial certificate).

Paragraph (3) directs the notary to note the “type, title, or a description of the record [to be notarized] or proceeding.” Identifying the type or title of the record in the journal entry along with the other information required in the entry will greatly assist in connecting the principal and notary public to the record notarized.

Paragraph (4) requires notation of the name and address of each principal or requester. The name in both the journal entry and any related notarial certificate should be the same. The address included in the journal entry should be a current address.

Paragraph (5), mandating the handwritten or electronic signature of the principal and any required witness to be entered in the journal, is perhaps the most valuable item in the journal entry. The signature is evidence that the principal or required witness appeared in person before the notary public at the time of notarial act. (In accord, *see, e.g.*, CAL. GOV’T CODE § 806(a)(2)(C); D.C. CODE ANN. § 1-12311.18(c)(7); HAW. REV. STAT. ANN. § 456-15(e)(3); MONT. CODE ANN. § 1-5-618(3)(d); NEV. REV. STAT. ANN. § 240.120.1(d); and OR. REV. STAT. § 194.300(3)(f).) Many jurisdictions with journal requirements, however, do not require a signature as one of the mandated entries. (See, e.g., ALASKA STAT. § 44.50.078(c)(3); MISS. CODE ANN. § 25-34-37(3)(c); N.D. CENT. CODE § 44-06.1-16.1.1; and 57 PA. CONS. STAT. ANN. § 319(c).) While a person’s signature generally is considered “personally identifiable information” (*see* § 2-21), nevertheless contemplating the compelling policy of the journal to assist the notary in deterring forgery and fraud, the Act explicitly requires it to be recorded (*see* Subsection (c)).

Paragraph (6) directs the notary to note the method by which the principal and any credible witness was identified. Identification of the principal and any

credible witness remains at the foundation of the integrity of a notarial act and must be noted in the journal entry. The phrase “any credential” as used here must be construed as set out in Sections 4-4(a) and (b)(1).

Paragraph (7), by requiring the journal to record “every fee charged under Section 5-2,” thereby mandates noting notarial and ancillary fees in the journal. Many jurisdictions require notary fees to be noted in the journal. (*See, e.g.*, CAL. GOV’T CODE § 8206(a)(2)(F); COLO. REV. STAT. ANN. § 24-21-519(3)(g); D.C. CODE ANN. § 1-1231.18(c)(6); and KY. REV. STAT. ANN. § 423.380(3)(f).) Some jurisdictions require itemizing fees in the journal record. (*See, e.g.*, IND. CODE ANN. § 33-42-17-8(e)(7) and MISS. ADMIN. CODE tit. 1, ch. 50, pt. 5, R. 50.4.2.D.) One state only requires a notarial act to be noted in a journal if the notary or notary’s employer charges a fee. (*See* TENN. CODE ANN. §§ 8-21-1201(b) and (c).)

Paragraph (8) requires the inclusion in the journal of “the address where the notarization was performed.” The location (*i.e.*, the state) where a notarization is performed is critical to the jurisdictional authority of a notary to act officially. (*See* § 3-7 and Comment.)

Paragraph (9) requires the journal entry to include a statement that there was “use of audio-visual communication, if applicable.” The use of audio-visual communication technology in the performance of notarial acts constitutes a fundamental and distinctive feature of the notarial service that merits its notation. (*See* MD. CODE ANN. (STATE GOV’T) § 18-219(c)(2)(vii).)

Subsection (b) is a new provision. Most state, model, and uniform laws do not expressly mention additional or other information being added to the journal. (*But see* MISS. ADMIN. CODE tit. 1, ch. 50, pt. 5, R. 50.4.2.B and MONT. CODE ANN. § 1-5-618(4).) The recording of

additional or other information in a journal entry should be encouraged. The journal entry could indicate that the notary’s assessments of competence and voluntariness of the principal have been conducted (*see* §§ 4-3(a)(3) and (4)) or whether an oral oath or affirmation has been administered in connection with a verification on oath or affirmation (*see* NEV. REV. STAT. ANN. § 240.120.1(f)). The presence of changes in the record to be notarized (*see* HAW. REV. STAT. ANN. § 502-61), the number of pages, or whether the record was written in a foreign language (*see* MONT. CODE ANN. § 1-5-618(4) and ONEIDA NATION OF WIS. ONEIDA NOT. ACT tit. 1, § 114.4-2(a)(8)) could be noted as well. All incidental details about the parties or the circumstances could be recorded in the hope it will later help to trigger the notary’s better recollection of the notarial act (*see* MISS. ADMIN. CODE tit. 1, ch. 50, pt. 5, R. 50.4.2.B) provided no personally identifiable information is divulged (*see* Subsection (c), *infra*).

Subsection (c) limits the information from an identification credential that can be noted in the journal. It prohibits the notary from fully recording confidential identifier information about principals and others, including full Social Security numbers, driver’s license numbers, ID serial numbers, passport numbers, dates of birth, and “other personally identifiable information.” (*See* §§ 2-21 and Comment and 6-4(e).) This prohibition applies to “any credential relied upon” (Subsection (a)(6)). This provision is consistent with the notary’s general obligation to maintain the privacy and confidentiality of those individuals for whom notarial services are provided. Some states have adopted similar restrictions. (*See, e.g.*, MASS. GEN. LAWS ANN. ch. 222, § 22(d); MISS. ADMIN. CODE tit. 1, ch. 50, pt. 5, R. 50.4.2.C; MO. REV. STAT. ANN. § 486.705.2; MONT. CODE ANN. § 1-5-618(4); S.C. CODE ANN. § 26-2-90(B);

and TEX. ADMIN. CODE §§ 87.50(a) and 87.52(b).) Some states still require serial or identification numbers to be noted in the journal. (*See, e.g.*, CAL. GOV'T CODE §§ 8206(a)(2)(D) and (E); MD. CODE REGS. § 01.02.08.08.C; and MO. REV. STAT. ANN. § 486.705.1(6)(b).)

Instead of recording full credential information, the notary may satisfy this provision by recording a partial serial number (the last four digits) and the date of issue or expiration (month and year), provided the date is not a date of birth.

Subsection (d) announces that the notary public “shall note in the journal of notarial acts the circumstances for not performing or completing any notarial act.” This provision governs the recording of refusals to perform notarial acts (such as acknowledgments). Some jurisdictions mandate noting refusals to act in the journal. (*See, e.g.*, MASS. GEN. LAWS ANN. ch. 222, § 22(e); MO. REV. STAT. ANN. § 486.705.3 (a notary “may” record a refusal to act); and ONEIDA NATION OF WIS. ONEIDA NOT. ACT tit. 1, § 114.4-2(c).) A notary’s refusal to act is itself an official act and, therefore, must be recorded. The purposes to be achieved by noting refusals in the journal include protection of the notary from potential future claims for non-performance and assistance with future governmental investigations if fraud or criminal activity is suspected in connection with the refused matters. The “circumstances” which are to be recorded include the usual details (who, when, what) and especially the objective reason(s) for the refusal. (*See* § 4-7 and Comment.) The

notation is written to apply both to outright refusals in which notaries decline to act after requests for service have been made and before service has been started, and refusals to complete service which have been commenced but cannot be completed.

Subsection (e) is a new provision. It requires a tangible journal entry to be prepared in “permanent ink” that is “photographically reproducible.” These two new mandates are reasonable and necessary in order to provide for copying, longevity of usefulness, and inherent security of notarial records. The ink and copying requirements parallel similar rules elsewhere in the Act for the use of permanent, photographically reproducible ink in the creation of the notarial certificate, specifically including its signing and sealing by the notary. (*See* §§ 7-1(h), 8-1(a), 8-2(a) and 8-2(b).)

Subsection (f) is a new provision that permits notaries to correct errors and omissions in journal entries. Notaries are human, and humans can make mistakes. The procedure requires the creation of a “subsequent dated entry” in the journal to note the nature of the correction and for it necessarily to “reference the prior entry.” The procedure required by Subsection (f) ensures that the original entry with the error is retained with the new entry noting the correction, mistake, or omission. If a notary is requested to provide a photocopy or certified copy of the original entry containing the error or omission, the notary must provide copies of both the original and corrected entry. (*See* § 6-6 and Comment.)

### § 6-3. Audio-Visual Recording Requirements.

- (a) A notary public who performs notarial acts involving the use of audio-visual communication shall create, maintain, protect, and provide for lawful access an audio-visual recording of every such notarial act.
- (b) The audio-visual recording shall be in addition to the journal entry for the notarial act required by Section 6-1 and include:
  - (1) at the commencement of the recording, a recitation by the notary

- public of information sufficient to identify the notarial act; and
- (2) all actions and spoken words of the notary public and any individual involved in the notarial act.
- (c) The technology system used to produce an audio-visual recording shall enable the notary public, the notary's personal representative, or the notary's guardian to comply with the requirements of this Chapter.

### Comment

Section 6-3 mandates notaries to produce and preserve audio-visual recordings of notarizations performed by use of audio-video communication. Recordings of these technology-based notarial acts are required among the states that authorize notaries to perform them. (*See, e.g.*, ARK. CODE ANN. § 21-14-310(a)(1); IND. CODE ANN. § 33-42-17-3(f); IOWA CODE ANN. § 9B.14A.3.c; KY. REV. STAT. ANN. § 423.380(4); LA. REV. STAT. ANN. § 35:299.A.2; and N.H. REV. STAT. ANN. § 456-B:6-a.III(c).)

Under Subsection (a), a registered notary must “create, maintain, protect, and provide for lawful inspection an audio-visual recording of every” remotely performed notarial act just as the notary must do when keeping a journal of notarial acts (*see* § 6-1(a)). Subsection (a) does not literally mean that the notary must personally create or produce the audio-visual recording. Rather, the notary has the responsibility to exercise reasonable care to select the system provider and direct and supervise the making or production of the audio-visual recording. (*See* § 9-1, allowing a technology system provider to “facilitate the performance of a notarial act” under the direction of the notary.) A number of other provisions of the Act expressly allow notaries to have the ministerial assistance of, and delegate purely administrative functions to, agents in the conduct of the notarial office, including matters relating to record-keeping. (*See* §§ 3-11(a) and (c); 4-3(d)(4); 4-4(c)(1) and (e)(1); 5-1; 6-5(a), 8-3(a) and (b);

and 9-1.) Several jurisdictions have adopted provisions which expressly authorize notaries to designate or appoint individuals to make the actual audio-visual recording on their behalf. (*See, e.g.*, ARK. CODE ANN. § 21-14-309(a)(2)(C); HAW. REV. STAT. ANN. § 456-23(b)(3); and MD. CODE ANN. (STATE GOV'T) § 18-214(a)(3).)

Subsection (b) expressly provides that the making of an audio-visual recording does not substitute for, nor satisfy the requirements of, the journal entry for the notarization. Certain jurisdictions conflate the journal and audio-visual recording by stating that the latter is a part of the former. (*See, e.g.*, TENN. CODE ANN. § 8-16-308(a)(6) and TEX. GOV'T CODE § 406.108(a)(6). Both use the term “record” and not “journal,” but it is clear by the entries required that a journal is meant.) This Act carefully separates the journal and audio-visual recording from each other but is clear to also assert that both equally are notarial records.

The Subsection goes on to prescribe the two items comprising the contents of the required audio-visual recording. Paragraph (1) requires a recital by the notary identifying the notarial act to be performed. Paragraph (2) mandates the capturing on the recording of “all actions and spoken words of the notary and any individual involved in the notarial act.” This requirement is not meant to limit what is recorded. Rather, the audio-visual recording should include the words and activity of everyone present (the notary public, principal, observers,

witnesses, lawyers, and anyone else). The mere presence of an individual may be important, even if that person does not actively participate in the notarial ceremony. (*See* MONT. CODE ANN. § 1-5-618(1)(a), requiring the notary to make an audio-visual recording of the “entire communication”, and FLA. STAT. ANN. § 117.245(2)(f), requiring the online notary to “retain an uninterrupted and unedited copy of the recording of the audio-video communication in which an online

notarization is performed,” including “all of the actions and spoken words of the principal, notary public, and any required witness during the entire online notarization.”)

Subsection (c) addresses the technology system necessary to capture, preserve, and secure the audio-visual recording and directs the notary public to use a technology system in compliance with this Act’s Chapter 6. (*See, generally*, Chapter 9 and Comments.

#### **§ 6-4. Security of Notarial Records.**

- (a) A notary public’s notarial records are the exclusive property of the notary and shall be kept under the notary’s sole control.
- (b) A notary public shall safeguard all notarial records and surrender or destroy them only in compliance with this Chapter.
- (c) A notary public shall not allow any other notary or individual to use or create notarial records in the notary’s journal or technology system.
- (d) A notary public shall not surrender notarial records to an employer upon termination of employment or to any other person, except a law enforcement officer in the course of an official investigation, an officer of a court or other individual in response to a subpoena, or the [commissioning official] in response to an official notification.
- (e) A notary public shall not disclose, use, or sell any personally identifiable information that is collected and retained in a notarial record except as authorized by this Chapter.
- (f) A notary public shall retain and store all notarial records for at least 10 years.
- (g) Within 10 days after the journal or audio-visual recording of notarial acts is discovered to be stolen, lost, destroyed, compromised, or otherwise rendered unusable or unreadable, the notary public, after informing the appropriate law enforcement agency in the case of theft or vandalism, shall notify the [commissioning official] by any means providing a tangible or electronic receipt, and provide a copy or the identification number of any pertinent police report.
- (h) A notary public shall retain a copy of the notification required by Subsection (g) as a notarial record.

#### **Comment**

Section 6-4 addresses the critical concern of the security of notarial records. These records are the records of a commissioned public official, constitute

evidence of official notarial acts, and may contain confidential, proprietary, or personally identifiable information about principals and requesters. Proper security

measures are absolutely necessary.

The legal standard for maintaining and preserving the security of notarial records is reasonable care (*see* § 12-1(a) and Comment). That is, the notary must exercise reasonable care in the creation, maintenance, use, and preservation of, and granting access to, notarial records. (*See, e.g.*, ARK. CODE ANN. § 21-14-310(b)(1); NEB. REV. STAT. § 64-409(2)(a); and TEX. GOV'T CODE § 406.108(b)(1); *see also* OR. ADMIN. RULES § 160-100-0215(3)(a), requiring a vendor providing technology for notarial acts involving audio-visual communication to present “reasonable evidence” of its capability to provide pertinent services.)

Subsection (a) announces the basic legal rule that notarial records belong exclusively to the notary public. The notary is the commissioned public official who creates the records (or is responsible for their creation) and must exercise sole control of them. (*See* CAL. GOV'T CODE §§ 8206(a)(1) and (d); COLO. REV. STAT. ANN. § 24-21-519(4); and VA. CODE ANN. § 47.1-14.E.) The notary must protect and safeguard the notarial record both while it is being currently and actively used and while it is not in use. Occasional statements in state laws regarding control and security of the journal which seem to apply only when the journal is “not in use” are not really meant to limit the notary’s security obligations to those times. (*See, e.g.*, MASS. GEN. LAWS ANN. ch. 222, § 22(i) and N.C. GEN. STAT. § 10B-125(b).) Such statements simply recognize that at times the journal is being handled and entries are being created by the notary, while at other times the journal is dormant or inactively stored. By placing personal and legal responsibility upon the notary to control and thereby protect official records, the greatest level of security should be achieved while simultaneously allowing for their

continued use by the notary and access by members of the public. It is generally considered that “sole control” by the notary means that when the notary is not currently and actively using notarial records, they should be locked away in a room, cabinet, drawer, lockbox, or other storage area for which the notary possesses the only key, combination, or means of access. (*See, e.g.*, CAL. GOV'T CODE § 8206(a)(1) and COLO. REV. STAT. ANN. § 24-21-519(4).)

Subsection (b) requires the notary to “safeguard all notarial records.” (*See* MNA 2010 § 7-4(a).) Also, the notary must surrender or destroy notarial records only in compliance with this Chapter, meaning “by rule of law, by court order, or at the direction of the commissioning official” (MENA 2017 § 9-5(a); *see, e.g.*, MONT. CODE ANN. § 1-5-618(5)(a)). Notarial records must not ordinarily be surrendered to law enforcement or other government officials, although under appropriate circumstances those officers and officials may request to inspect or copy them in the presence of the notary. (*See* § 6-6(f) and Comment.)

Subsection (c) more specifically prohibits any other notary or individual from using the notary’s notarial records. The important points made here are to prevent two or more notaries from sharing the same journal and anyone besides the notary — notably the notary’s employer, supervisor, or coworker — from using the notary’s notarial records. (*See* MENA 2017 § 9-5(c) and MONT. CODE ANN. § 1-5-618(5)(b).) Stating these prohibitions separately is sensible because some might otherwise erroneously believe that the status of a commissioned notary would permit anyone holding such a commission, or anyone associated with the notary’s employment, to freely access and use the notary’s records. “Use” of notarial records includes handling, accessing, possessing, viewing, examining, altering, or supplementing

the records by any other notary or individual. The only permissible “use” available to anyone other than the notary is for that individual to request and receive a copy of a notarial record pursuant to the procedures established by Section 6-6.

Subsection (d), further emphasizing the safeguarding of notarial records mandated by Subsection (b), declares a notary “shall not surrender notarial records to an employer upon termination of employment.” (In accord, *see, e.g.*, CAL. GOV’T CODE § 8206(d); MASS. GEN. LAWS ch. 222, § 22(i); and MO. REV. STAT. ANN. § 486.715.2.) So many notaries serve in their official positions while simultaneously working for employers that this prohibition was included to make abundantly clear employers may not seize or obtain possession of the notary’s records upon termination of employment, even if the employer paid the costs of acquiring the record book or audio-visual recording technology. If the employer should wish to have its own copies of notarial records for its business records, the lawful way to do so is to make appropriate requests, or a standing request, for the employee-notary to supply copies of the notarial records pertaining to those company notarizations. (*See* § 6-6 and CAL. GOV’T CODE § 8206(d).) The drafters considered and rejected other possible approaches to the treatment of notarial records in workplace settings. (*See, e.g.*, COLO. REV. STAT. ANN. § 24-21-519(10)(a)(ii), authorizing a current or former notary to “leave the journal with the notary’s firm or employer in the regular course of business”; FLA. STAT. ANN. § 117.245(2), delegating the retention of audio-visual recordings to the remote online service provider; MONT. CODE ANN. § 1-5-618(5)(b), permitting an employer to “retain a copy of the journal of an employee who is a notary after the notary’s employment ceases if the journal contains records of notarial acts performed

within the scope of the notary’s employment”; OKLA. STAT. ANN. tit. 49, § 7, requiring a notary’s record of protests to remain with the bank; and OR. REV. STAT. § 194.300(10), allowing the employer upon agreement to retain the journal of a notary-employee.)

Additionally, consistent with Sections 6-4(b) and 6-6(f), Subsection (d) prohibits the notary from surrendering notarial records “to any other person,” with certain well-recognized exceptions for law enforcement, court officers, and commissioning officials — all when acting within the course of their official duties.

Subsection (e), as a central part of security, announces the prohibition of disclosure of confidential information contained in the notarial record, apart from the issue of access to the actual record itself. (*See* § 2-21 and Comment and THE NOT. PUB. CODE OF PROF. RESP. (2020) VIII.) Notaries, as public officials, professionals, and fiduciaries should not divulge any information whatsoever about their official actions to anyone other than to the principals and parties involved, their agents, and authorized government officials. No part of the rendering of notarial services should be the stuff of casual conversation, gossip, or disclosure. Here, the rule is that personally identifiable information must not “knowingly” be disclosed. This prohibition should be broadly construed to achieve the intended protection, namely, that any information which directly or indirectly identifies the principal, requester, or other person cannot be revealed. Thus, such information as the principal’s or requester’s name, signature, business or residential address, email address, phone number, date of birth, ID credential information, notarized record, and the like cannot be disclosed (unless pursuant to the enumerated exceptions). Pursuant to the express language of Subsection (e), notaries may not “sell” or “use” for personal gain

personally identifiable information learned or obtained in the course of their official functions.

Subsection (f) requires notarial records to be retained by a notary public (who continues to be commissioned) “for at least 10 years.” If the notary’s commission ends, the notarial records are to be transferred to the commissioning official or a designated repository pursuant to Section 6-7(a). The choice of language is critical, so that notarial records are safely kept minimally for a lengthy period with discretion residing in the notary to retain the records for a longer time or even indefinitely. Numerous jurisdictions use the phraseology “at least....” (*See, e.g.*, FLA. STAT. ANN. § 117.245(4); IOWA CODE ANN. § 9B-14A.6; MICH. COMP. LAWS § 55.313; MO. CODE OF STATE REGS. tit. 15, § 30-110.070(2)(B); NEB. REV. STAT. § 64-409(3); and 57 PA. CONS. STAT. ANN. § 306.1(e).) Instead, some state provisions have set a fixed time for record retention, without stating that the time is a minimum period or that the notary is permitted to retain the journal record beyond the fixed duration. (*See, e.g.*, ALASKA STAT. § 44.50.078(a); COLO. REV. STAT. ANN. § 24-21-519(1); HAW. REV. STAT. ANN. § 456-15(a); MD. CODE ANN. (STATE GOV’T) § 18-219(a)(2); and N.D. CENT. CODE § 44-06.1-16.1.) These provisions may be interpreted to suggest notarial records should be destroyed at the expiration of the fixed time period, and they certainly allow for destruction of the records at that time, unless the notary is directed to transmit the records elsewhere for storage. (*See also* MISS. ADMIN. CODE tit. 1, ch. 50, pt. 5, R. 50.4.7.A and B and NEV. REV. STAT. ANN. § 240.120.9.) In requiring notarial records to be retained for at least 10 years, Subsection (f) rejects those approaches. Notarial records may be needed for longer than 10 years. A mortgage may be effective for 30 years, while a power of attorney, trust, or

will may last or be effective for decades. For example, in one recent legal challenge to a real estate deed executed in 1994, the discovery that the notarization was allegedly faulty (that the signer was an imposter) or forged (that the notary falsified the notarial certificate) did not occur until 2018 when the relevant real property was next conveyed — some 24 years later. (*See Sanderson v. Torres*, No. RG18913393, Superior Court of California, Alameda County.)

Subsection (g) establishes a reporting obligation for the notary in the event a journal record or audio-visual recording of a notarial act is “stolen, lost, destroyed, or otherwise rendered unusable or unreadable.” A comparable provision is included in MNA 2010 Section 7-4(c) and MENA 2017 Section 9-5(e).

Subsection (f) is straightforward. Within 10 days after one of the listed events is discovered, the notary must inform the commissioning official. Many states have a comparable reporting requirement. (*See, e.g.*, ARIZ. REV. STAT. ANN. § 41-375.D; CAL. GOV’T CODE § 8206(b); D.C. CODE ANN. § 1-1231.18(d); HAW. REV. STAT. ANN. § 456-15(f); N.D. CENT. CODE § 44-06.1-16.1.4; OR. REV. STAT. § 194.300(5); and TEX. GOV’T CODE § 406.109(e).) If an enacting jurisdiction were to prefer a time limit other than the precise 10-day allowance specified in Subsection (g), some other time frame could be adopted, such as “promptly” or “immediately” upon discovery of the specified events.

In addition, as is customary and should be expected, the notary must provide the notification by a method which will provide “a tangible or electronic receipt” of its transmission, and in the case of theft or vandalism, notify law enforcement and provide a copy or serial number “of any pertinent police report” to the commissioning official. (*See, e.g.*, CAL. GOV’T CODE § 8206(b) and HAW. ADMIN. RULES § 5-11-18.)



Subsection (h) is a new provision. Consistent with the definition of “notarial record” (*see* § 2-16), it directs the notary to retain as part of the notary’s official records a copy of the notification required

to be sent to the commissioning official in Subsection (g). The copy would include the notification to a law enforcement agency of the loss of the journal or audio-visual recordings.

### § 6-5. Notarial Record Repositories.

- (a) A notary public may contract with a repository to store notarial records if the repository:
  - (1) [is approved by][registers with] the [commissioning official];
  - (2) enables the notary to retain sole control of the notarial records;
  - (3) allows the notary, the notary’s personal representative, or the notary’s guardian to comply with the requirements of this Chapter;
  - (4) transfers to the notary, the notary’s personal representative, or the notary’s guardian all notarial records if the contract is terminated; and
  - (5) complies with any rules adopted by the [commissioning official] under Section 1-7(4).
- (b) A notary public shall notify the [commissioning official] that the notary will be storing notarial records in a repository and include in the notification any information the [commissioning official] may require.
- (c) The [commissioning official] shall maintain a list of all [approved] [registered] repositories with which a notary public may store notarial records.

### Comment

Section 6-5 is a new section which is necessitated especially due to technology-based notarial acts, although the Section applies to both tangible and electronic notarial records. This Section allows a notary to delegate the notary’s record-storage obligation to a third-person repository. Several jurisdictions expressly allow notaries to contract with third-party custodians or repositories for the storage of notarial records. (*See, e.g.*, IOWA CODE ANN. § 9B.14A.6; MICH. COMP. LAWS § 55.286b(10); N.D. CENT. CODE § 44-06.1-16.1(6); OR. ADMIN. RULES § 160-100-0215(3); UTAH CODE ANN. § 46-1-15(2)(b); W.VA. CODE § 39-4-37(f); and WIS. STAT. ANN. § 140.145(6); *but see* FLA. STAT. ANN. § 117.245(2) and FLA. ADMIN. CODE §

1N-7.005(e), vesting the remote online notarization service provider and not the notary with this responsibility.)

Thus, an official notarial function is lawfully delegated to a non-official functionary, the records repository. The policy of authorizing repositories to hold notarial records stems from at least three considerations. First, the amount of online storage necessary to retain audio-visual recordings can be quite large and notaries may not be able to incur the ongoing fees to pay for this storage. Second, since notarial records must be retained for at least 10 years (*see* § 6-4(f) and Comment), many have expressed concern for the ongoing accessibility of notarial records if notaries resign or abandon their commissions. Third, it is more realistic for

repositories with expertise in storing and securing online assets and not the notary to provide retention of notarial records.

Subsection (a) establishes basic, reasonable, and expected standards for notarial records repositories. The standards are: 1) the repository must be [approved by][registered with] the commissioning official (Paragraph (1)), 2) the notary must retain sole control of the records (Paragraph (2)), 3) the repository must enable the notary, the notary's guardian, or the notary's personal representative to comply with the provisions of this Chapter (Paragraph (3)), 4) the repository must transfer the records to one of the above parties if the repository storage contract is terminated (Paragraph (4)), and 5) the repository must abide by all rules adopted by the commissioning official (Paragraph (5)). The Model Rules in Appendix I provide extensive rules for [approval][registration] of repositories (Model Rule 6-5.1), termination of [approval][registration] (Model Rule 6-5.2), the contract for repository services (Model Rule 6-5.3), and the storage and

security of records housed in a repository (Model Rule 6-5.4).

Subsection (b) directs the notary to advise the commissioning official that notarial records will be stored with an approved or registered repository. Further, the notary is directed to provide any other information that may be required by the commissioning official. Model Rule 6-5.5 in Appendix I provides for the notification required by this Subsection.

Subsection (c) directs commissioning officials to maintain a list of [approved] [registered] repositories for the storage of notarial records. In order to be of assistance to notaries and others, this required listing should be maintained on a "publicly accessible website," as is mandated for the maintenance of the official database of notaries public. (*See* § 3-8(a)). It is expected that the list of approved repositories will be of great utility to commissioning officials in screening storage depositories and notaries in exercising reasonable care in selecting repositories to store notarial records. (*See* § 12-1(a).)

## **§ 6-6. Copying and Examining of Notarial Records.**

- (a) A notary public shall provide a copy of a notarial record upon request to any individual only if the following requirements are satisfied:
  - (1) the individual specifies the month, year, name or type of record, and name of the principal or requester for the notarial act in a signed record; and
  - (2) the notary provides a copy of the notarial record specified and no other.
- (b) A notary public may certify the copy of a notarial record provided under Subsection (a).
- (c) A notary public may deny a request for a copy or certified copy of a notarial record if the notary public has a reasonable and explainable belief that an individual bears a criminal or harmful intent in requesting the copy or certified copy.
- (d) A notary public shall retain the notice required by Subsection (a)(1) as a notarial record.
- (e) An individual may appeal the denial of access under Subsection (c) to the [commissioning official] by following the procedure prescribed by Section 12-2 (relating to complaints).

- (f) Requested notarial records may be examined and copied by a law enforcement officer during an official investigation, subpoenaed by court order, or surrendered at the direction of the [commissioning official].
- (g) Copies of electronic journal entries and audio-visual recordings shall be in an open format.

### Comment

Section 6-6 deals with the subject of access to notarial records. Generally, the view is held that the journal record specifically is a public record, with the critical implication that it be therefore available for access by members of the public under prescribed circumstances. (*See, e.g.*, ARIZ. REV. STAT. ANN. § 41-319.A; NEV. REV. STAT. ANN. § 240.120.6(a); and TEX. GOV'T CODE § 406.014(b).) Many jurisdictions do not regulate public access to notarial records in their statutes and rules. This omission leaves notaries with no rules for granting access to notarial records and risks possible dangers to the safety of the records themselves and possible disclosure of legitimately confidential and personally identifiable information. Access to notarial records by the public cannot be left completely unbridled. Would-be identity thieves, stalkers, and other wrongdoers welcome such information. Notarial records must be protected against fishing expeditions, theft, and damage. Rather than leaving the matter unrestricted, Section 6-6 imposes focused and reasonable limitations for public access to notarial records for the protection of principals, requesters, and persons with legitimate interests in the information stored in the records.

Subsection (a) begins by preventing persons other than the notary public from providing copies of notarial records. An individual other than the notary is permitted only to receive a copy of a specific, requested notarial record “and no other” (Paragraph (2)) and only if the

request is granted by the notary. Members of the public are not permitted to handle notarial records by thumbing through pages in tangible journals or searching electronic notarial records at will. Some state laws allow “inspection” by members of the public, which suggests that people may handle, peruse, or manipulate the records. (*See, e.g.*, MISS. ADMIN. CODE tit. 1, ch. 50, pt. 5, R. 50.4.6.A, although “the person is shown only the entry or entries specified”; MONT. CODE ANN. § 1-5-618(6)(a), although “the notary does not surrender possession or control of the journal” and “the person is shown or given a copy of only the entry specified”; and VA. CODE ANN. § 47.1-14.C, referring to the “inspection” of an electronic record of electronic notarial acts.) “Inspection” of notarial records is not allowed under Section 6-6; only access to a copy of an entry or item is permitted. Several statutes and regulations, like Subsection (a), refer to the notary providing access to records only by providing a copy or certified copy of a requested entry or item from the record. (*See, e.g.*, ARIZ. REV. STAT. ANN. § 41-319.A; COLO. REV. STAT. ANN. § 24-21-519(5); and ONEIDA NATION OF WIS. ONEIDA NOT. ACT tit. 1, § 114.4-4(b).)

Paragraph (1) requires an individual seeking a notarial record to present a signed request specifying particulars about the pertinent notarial service including the name of the principal or requester, the month and year of the service, and the name or type of the

underlying record. This “signed” request may be electronic (*see* § 1-3(2)). Statutes and rules of several jurisdictions require written requests but differ somewhat regarding the information required in the request. (*See, e.g.*, CAL. GOV’T CODE § 8206(c); COLO. REV. STAT. ANN. § 24-21-519(5); MISS. ADMIN. CODE tit. 1, ch. 50, pt. 5, R. 50.4.6.A.2 and 3; and ONEIDA NATION OF WIS. ONEIDA NOT. ACT tit. 1, § 114.4-4(b).) As a practical matter, the information sought in a request for a copy of a notarial record is also needed by the notary to find a specific record. The signed request must be retained by the notary (*see* Subsection (d)).

A fee may be charged and collected for providing a copy of a notarial record, whether the copy is an ordinary, non-certified copy or a formal certified copy. Section 5-2(b) expressly allows charging and collecting an ancillary fee for a “notarial record copy” (a non-certified copy), and pursuant to Section 5-2(a)(6), charging and collecting a notarial fee for a “certified copy.” The policy of allowing a fee to be charged for copies or certified copies of notarial records is authorized by state laws. (*See, e.g.*, CAL. GOV’T CODE § 8206.5; COLO. REV. STAT. ANN. § 24-21-519(5); and TEX. GOV’T CODE § 406.014(c).)

Paragraph (2) limits the disclosure of information in a notarial record to the entry or item specified “and no other.” (*See* MISS. ADMIN. CODE tit. 1, ch. 50, pt. 5, R. 50.4.6.A.4 and MONT. CODE ANN. § 1-5-618(6)(a)(iii).) This restriction must be honored or else there would be no reason to insist upon a request for a particular notarial record in the first place and no appropriate protection of the confidentiality of other entries and items.

Subsection (b) provides that, if a copy of a notarial record is made by the notary for delivery to a requesting member of the public, the copy may be certified. Sometimes a certified copy

will be desired for formal uses. Even without the express permission of this Subsection, a notary has authority to issue certified copies of records under Sections 2-6 and 4-1(a)(6). (*See also* the notarial certificate form for a copy certification in Section 7-3(f).) Pursuant to Section 5-2(a)(6), a fee may be charged and collected for the making of a certified copy, and pursuant to Section 5-3(a), this fee may be required to be prepaid prior to performance of the copying and certification. (*See* NEV. REV. STAT. ANN. § 240.120.7 (upon request and payment of the fee for a certified copy, the notary shall provide such a certified copy of a journal entry).)

Subsection (c) allows a notary to deny a request for a copy or certified copy of a notarial record if there is a legitimate reason to do so. (*See* MNA 2010 § 7-3(b); MENA 2017 § 9-6(b); and MISS. ADMIN. CODE tit. 1, ch. 50, pt. 5, R. 50.4.6.B.) One reason for a refusal would be the failure to provide all required elements of the signed request, such as a signature or other specified information (the month and year of the notarial service, the name of the principal or requester, and the name or type of notarized record or underlying transaction) (§ 6-6(a)(1)). The other reason expressly stated is a notary’s “reasonable and explainable belief” that the requesting individual “bears a criminal or harmful intent” in making the request. (*See* MNA 2010 § 7-3(b) and MENA 2017 § 9-6(b).) The reason for the refusal must be “reasonable and explainable” or one that can be objectively articulated, and one based upon facts and circumstances, rather than upon mere suspicion or conjecture. (*See* HAW. REV. STAT. ANN. § 502-73, providing that required record books of acknowledgments “shall be open at all reasonable times to the inspection of any responsible person,” so that access could be refused to someone who is not “responsible.”)

The refusal to provide a requested copy must be recorded in an entry in the journal under Section 6-2(d). If the request is for a certified copy, the refusal must also be recorded in a journal entry. Because Subsection (d) mandates the retention of the written request for access “as a notarial record,” the notarial record would be incomplete if it does not provide information about the granting or refusing of the request. (*See also* § 6-2(d), requiring a “note” in the journal record of the “circumstances for not performing or completing any notarial act.”) The journal entry should include the basis for the “reasonable and explainable belief” that the individual requesting the copy “bears a criminal or harmful intent.”

There is a point of view in some quarters that a notary who has a concern a requester may harbor a criminal or harmful intent should be allowed to redact information from the copied notarial record in order to eliminate the concern and grant the request. For instance, perhaps the notary might redact the contact information, full legal name, and signature of the principal so that a suspected would-be identity thief would not have such information to help steal one’s identity. The Act does not authorize the notary to redact information. Redacting information from a copy of a notarial record would be at odds with the intended purpose of Section 6-6 to provide transparency of the public record in all but the most compelling situations. In addition, the Act implicitly prohibits redacting information from a copy of a requested notarial record, because the copy must be capable of being certified by a notary public pursuant to Section 6-6(b), and a certified copy is defined as “an accurate, exact, and complete copy” (§ 2-6). (For states that require redaction of information in journal records, *see* IND. ADMIN. CODE tit. 75, § 7-6-1(d) and TEX. ADMIN. CODE § 87.50(d), requiring

a notary who inadvertently recorded personally identifiable information that is expressly prohibited by law to be entered in the journal to redact the prohibited information before providing public copies or access.)

While the Act permits a notary to deny a request for a copy or certified copy of a notarial record, it also expressly provides the opportunity and procedure for appealing the denial to the commissioning official pursuant to Subsection (e). (*See* Subsection (e) and Comment, *infra*.)

Subsection (d) directs the notary public to retain the written request required under Subsection 6-6(a)(1) as a notarial record for at least 10 years pursuant to Section 6-4(f). This directive, when combined with the requirement that the notary must create a separate journal entry for the request for a copy of a notarial record (as discussed above), completes the procedure for preparing and preserving a full written record of a copy request and its disposition.

Subsection (e) provides expressly for the opportunity to appeal a notary’s refusal to grant an individual’s request to obtain a copy of a notarial record. This Act protects both the public interest in permitting public access to notarial records with appropriately limited and reasonable restrictions and the interests of persons seeking copies of notarial records by allowing access or appeals of refusals to grant access. If a person requesting a copy or certified copy of a notarial record is denied, the individual may file a complaint with the commissioning official under Section 12-2(a). If the appeal to the commissioning official fails, a further challenge to the refusal could be sought by filing a lawsuit.

Subsection (f) provides that notarial records may be subject to inspection, copying, and/or surrender during official proceedings or investigations by law enforcement, courts (by subpoenas), and commissioning officials. (*See* § 6-4(d)

and MNA 2010 § 7-3(c).) In this 2022 Act, the word “requested” was added to qualify the inspection. The notary public must require any official to request to inspect, copy, or have the records surrendered in writing, and the notary should retain a copy of any written request. Section 1-3(2) allows the request to be submitted in electronic form. (For comparable rules, *see, e.g.*, COLO. REV. STAT. ANN. § 24-21-519(6) (the Secretary of State may audit the notary’s journal of notarial acts “without restriction,” and upon written request from the Secretary the notary must surrender the journal to the Secretary); CAL. GOV’T CODE § 8205(b)(1); and MASS. GEN. LAWS ANN. ch. 222, §§ 22(g) and (h); *but see* HAW. REV. STAT. ANN. § 456-15(j), allowing

an audit or inspection of records to be made “at any time and without prior notice.”)

If the notary were to be advised that a notarial record had to be surrendered, the notary should make a copy of the original record before turning it over to the authorized party, so that the notary will have a backup in case it is needed before the notarial records are returned or if they are not returned.

Subsection (g) mandates that copies of electronic journal entries and any audio-visual recordings provided pursuant to Section 6-6 must be produced in an open format. This requirement is consistent with other provisions of this Chapter. (*See* §§ 6-1(g)(5) and (i), and 6-7(a) and Comments.)

### § 6-7. Disposition of Notarial Records.

- (a) Except as provided by Subsection (b) and subject to Section 6-4(f), on resignation, revocation, or expiration of a commission, or adjudication of incompetency or death of the notary public, the notary, or the notary’s guardian or personal representative in the event of the notary’s adjudication of incompetency or death, shall deliver all notarial records to the [office designated by the [commissioning official]][repository designated by the [commissioning official]] in an open format as soon as is reasonably practicable by any means providing a receipt, including certified mail and electronic transmission.
- (b) A notary public who intends to apply for a new commission need not comply with Subsection (a), provided the notary’s new commission is granted by the [commissioning official] within 90 days after expiration of the prior commission.

### Comment

Section 6-7 deals with the disposition of notarial records after the notary public commission ends for any reason (including the adjudication of incompetency or death of the notary). In almost all the jurisdictions which do not currently mandate notarial record-keeping for traditional notarizations on tangible records, former notaries are

allowed by the silence of the statutes and regulations to retain or destroy their voluntarily kept notarial records at will. The concern with this is that, once the notary’s commission ends and the individual who had been a notary is no longer a public official, public records ought no longer to be housed in a private individual’s custody and control or in the

estate of a deceased individual. Notarial records must be preserved and protected. They may be the subject of requests for access, photocopies, and certified copies. They may be needed in investigations of notarial acts and notary misconduct. The additional concern in the case of the latter reason is that there may be a heightened temptation on the part of former notaries to alter or destroy their records. Especially in the case of revocation of the notary commission, the former notary would have committed neglect of duty or wrongdoing in office and therefore may be an unreliable person to trust with the storage and protection of notarial records. (*See* OR. REV. STAT. §§ 194.300(6) and (7), requiring on expiration, resignation, or suspension of the commission, a notary must retain the journal, but within 30 days of revocation of the commission, the notary must transmit the journal to the Secretary of State.)

There are several additional practical and legal problems with allowing former notaries public to hold onto their notarial records. Former notaries may move and principals and requesters, relying parties, the public, and commissioning officials may not be able to contact them for access to needed information. Former notaries who possess voluntarily kept notarial records would have no continuing legal responsibility whatsoever to respond to requests for access to the records. If former notaries die or become incompetent, their notarial records may be lost or destroyed. Thus, under Section 6-7 when notaries' commissions end and they become private persons, there must be rules for the proper disposition of their notarial records.

Subsection (a) announces that the transmission of all notarial records to the commissioning official or a designated repository is triggered upon the resignation, revocation, or expiration of the notary commission without renewal,

or upon the adjudication of incompetency or death of the notary. All notarial records must be transmitted, including journals, audio-visual recordings, and all other papers and electronic notarial records, if any. The latter would include a copy of a notification of changes of information (§ 3-9(a)) or resignation of the registration to perform notarial acts on electronic records (§ 3-10(d)), itemized fee receipts (§ 5-1(c)), notice of a stolen, lost, destroyed, or compromised journal or audio-visual recording (§ 6-4(h)), and requests for access to notarial records (§ 6-6(d)) (including backups of electronic journal records and audio-visual recordings) (§§ 6-1(g)(4) and 6-3(a)).

Numerous jurisdictions have adopted provisions for transmission of notarial records to the commissioning official or another designated agency or repository in the event of a variety of eventualities which may occur to the notary or former notary. (*See, e.g.*, CAL. GOV'T CODE §§ 8209(a) and (b); COLO. REV. STAT. ANN. § 24-21-519(11); D.C. CODE ANN. §§ 1-1231.18(e) and (f); HAW. REV. STAT. ANN. § 456-15(h); HAW. ADMIN. RULES § 5-11-17(a)(3); and MD. CODE ANN. (STATE GOV'T) § 18-219(g)(1).)

If, pursuant to Section 3-10(d), the notary resigns only the registration to perform notarial acts on electronic records or involving the use of audio-visual communication and not the underlying notary commission, Section 6-7(a) is not triggered, and the records of technology-based notarial acts must remain under the control of and be secured by the notary.

Four other features of Subsection (a) should be noted. First, electronic notarial records, including audio-visual recordings, transmitted to the commissioning official or a designated repository must be delivered in an open format. (*See* § 6-1(g)(5) and Comment.) Second, the transmittal or delivery of notarial records to the commissioning official or

repository must be accomplished by a method which provides a receipt to confirm and evidence it, such as by messenger service, certified mail, or electronic transmission. Jurisdictions have enacted provisions which require the transmittal of journal records to be documented by a receipt. (*See, e.g.*, ARIZ. REV. STAT. ANN. § 41-317.B; MO. REV. STAT. ANN. § 486.715.3; and ONEIDA NATION OF WIS. ONEIDA NOT. ACT tit. 1, § 114.4-3(e).) Third, the parties responsible for the transmittal of notarial records under Section 6-7(a) are the notary, the notary's guardian (in the case of adjudication of incompetence of the notary), and the notary's personal representative (as provided in § 3-11). Several laws place the responsibility upon the notary and other individuals to undertake the proper transmittal or disposition of notarial records. (*See, e.g.*, MD. CODE ANN. (STATE GOV'T) § 18-219(g); N.D. CENT. CODE § 44-06.1-16.1.5; and OR. REV. STAT. § 194.300(8).) The procedure established for the designation and conduct of a personal representative under Section 3-11 should obviate the need for any other person to be involved in the disposition of notarial records in satisfaction of the purpose of Subsection (a). If, however, another individual comes into possession of a deceased notary public's notarial records, the individual should transmit the records to the commissioning official (*see* OR. REV. STAT. § 194.300(8)). Fourth, all records that are transmitted must be delivered "as soon as reasonably practicable," which is the same time frame employed in

Section 8-5(a) for the disablement of the official seal and technology system for producing the notary's electronic signature and seal. That phrase means "as soon as possible" or "promptly under the circumstances" or "with all deliberate speed." It was thought advisable to frame the policy of the timing in this way to allow for the realities of the situation that may arise, particularly in cases of the adjudication of incompetency or death of the notary. If a jurisdiction prefers to set a definite time limit on the prescribed disposition of notarial records under Subsection (a), such a specific time limit can readily be substituted.

Subsection (b) is a savings clause for notaries who are delayed in renewing their commissions. It prevents renewing notaries from having to needlessly transmit their notarial records to the commissioning official or a designated repository, only to then need to reacquire those records when their renewal commissions are issued. Notaries are required to keep, preserve, safeguard, and provide for lawful access to their notarial records for at least 10 years while they remain commissioned (*see* §§ 6-1(a), 6-4(a) and 6-4(f), and 6-6(a)). Subsection (b) should not be a pretext for delaying the proper disposition of notarial records for 90 days (assuming that 90 days is more than "as soon as is reasonably practicable"). That is, former notaries should not be permitted to claim they were waiting for 90 days to comply with the disposition procedure for notarial records while they considered whether to renew their commissions.



## Chapter 7 – Notarial Certificate

### Comment

General: This Chapter addresses the notarial certificate, which is the heart of a notarial act and as its name suggests contains in writing the facts as determined and carried out by the notary public.

Section 7-1 lays out general rules for notarial certificates, Section 7-2 states

that a notarial certificate is sufficient if it meets certain identified rules, Section 7-3 lists notarial certificate forms for the various notarial acts authorized by Section 4-1, and Section 7-4 provides the circumstances under which a notary public may correct a notarial certificate.

### § 7-1. Notarial Certificate Requirements.

- (a) A notary public shall complete a notarial certificate for every notarial act that contains:
  - (1) the jurisdiction within this [State] in which the notary is physically located while performing the notarial act;
  - (2) the date of the notarial act;
  - (3) the facts attested by the notary in performing the notarial act;
  - (4) the signature of the notary; and
  - (5) the official seal of the notary.
- (b) A notarial certificate shall contain the elements required by Subsection (a) on a single side of a record.
- (c) A notarial certificate shall be endorsed upon, securely attached to, or logically associated with the record requiring a notarial act.
- (d) A notarial certificate for a notarial act involving the use of audio-visual communication shall contain a statement that the notarial act was performed using audio-visual communication.
- (e) A notary public shall complete, sign, and affix or produce the notary's official seal on a notarial certificate only at the time the notarial act is performed.
- (f) A notarial certificate shall be worded and completed in a language that the notary public reads and understands.
- (g) A notary public shall not:
  - (1) execute a notarial certificate containing information known or reasonably believed by the notary to be false;
  - (2) sign, or affix or produce the official seal on, a notarial certificate that is otherwise incomplete; or
  - (3) provide, send, or transmit a notarial certificate containing the notary's signature or official seal to another individual for completion or attachment to a record outside the notary's presence.
- (h) A notary public shall type, print, affix, sign, or produce the information required by this Section on a tangible notarial certificate using permanent, photographically reproducible ink.

### Comment

Section 7-1 requires a notarial certificate to be completed for all notarial acts. (*See, e.g.*, COLO. REV. STAT. ANN. § 24-21-515(1) and N.M. ADMIN. CODE § 12.9.4.10.H (an electronic notarial certificate is required for a notarial act on an electronic record).)

Although numerous laws state broadly that notarial certificates must be prepared for “all” notarial acts, those laws have not meant literally what they say in regard to the extent of their application. That is, the laws have not applied to a notarization in which a record itself is not notarized — namely, the administration of an oath or affirmation (*see* § 7-3(d) and Comment).

The five essential elements of the notarial certificate are enumerated in Subsection (a). Paragraph (1) mandates the certificate must identify “the jurisdiction within this [State]” where the notary is located at the time of the notarization. Traditionally, both the state and county (or other subdivision, such as a city or parish) have been specified in a notarial certificate, because in early times notaries had authority only in the cities or counties where they were appointed. In modern times, it has been more important that the state is named because notaries typically have statewide jurisdiction. (*See State v. Haase*, 530 N.W.2d 617 (Neb. 1995) (“the power of a notary to perform notarial functions is limited to the jurisdiction in which the commission issued”).) Virtually every state has adopted provisions expressly granting statewide notarial jurisdiction (*see, e.g.*, GA. CODE ANN. § 45-17-9; N.H. REV. STAT. ANN. § 456-B:3.I(a); OHIO REV. CODE ANN. § 147.07; and OR. REV. STAT. § 194.255(1)).

Paragraph (2) provides the certificate must indicate the date of the notarial act. The proper date is always and only the date when the notarial ceremony is

conducted. (*See* THE NOT. PUB. CODE OF PROF. RESP. (2020) IV-B-2; RULONA § 15(a)(2).) The date of notarization may differ from the date on the record to be notarized and the date when the record was signed by the principal.

Paragraph (3) requires the certificate to include a statement of “the facts attested by the notary in performing the notarial act.” While this Subsection gives the notary latitude in describing these facts, Section 7-2 outlines what constitutes a “sufficient” certificate of notarial act, and the notarial certificate forms in Section 7-3 provide minimum “sufficient” facts that must be included in the certificate for each of the specified notarial acts.

Paragraph (4), requiring the notary’s signature and Paragraph (5), requiring affixation of the image of the official notarial seal, will be addressed in detail in Chapter 8.

It should be noted that a notary is not prohibited from including additional information in a notarial certificate. (*See* MISS. ADMIN. CODE tit. 1, ch. 50, pt. 5, R. 50.7.2 (a certificate may include “additional or other information” to satisfy “ethical or legal concerns, or the business needs of the parties”); *see also* the Comment to § 7-1(a)(3) *infra*.)

Subsection (b) is taken from the same requirement appearing in MNA 2010 Section 9-2(4). This provision demands that a notarial certificate must contain the required elements of the certificate “on a single side of a record,” thereby enhancing the integrity and security of the certificate. This provision lessens the risk of fraudulent substitution of portions of the certificate after its execution, especially since most often the notarial certificate appears at the end of a record and the signature and seal of the notary appear at the end of the certificate. (*See* N.C. GEN. STAT. § 10B-36(b) and VA. CODE ANN. § 47.1-15.4.)

Since the term “record” is used, Subsection (b) applies to notarizations on tangible and electronic records.

Subsection (b) must be read in conjunction with Subsection (c), which provides three methods to connect the notarial certificate and record. The certificate may be “endorsed upon, securely attached to, or logically associated with the record.” Numerous jurisdictions require notarial certificates to be part of or securely attached to tangible records. (See, e.g., CAL. GOV’T CODE § 805(a)(2); N.D. CENT. CODE § 44-06.1-14.6; and 57 PA. CONS. STAT. ANN. § 315(f)(1).) One state has declared that for a tangible record, “‘securely attached’ means stamped, stapled, grommeted, or otherwise permanently bound to the tangible document,” and “does not include the use of tape, paper clips, or binder clips” (MISS. ADMIN. CODE tit. 1, ch. 50, pt. 5, R. 50.7.3). A notarial certificate on an electronic record must be logically associated with the record to be notarized in a tamper-evident manner (see § 9-3(a)(7); see also D.C. CODE ANN. § 1-1231.14(f) and IOWA CODE ANN. § 9B.15.6).

This security standard is a critical one. “The certificate must be connected or attached to the instrument in such a way that there is no doubt that it belongs to the instrument for which it is intended” (*Bridges v. Union Cattle Co.*, 229 P. 805 (Okla. 1925)).

Subsection (d) mandates that when a notarial act involving audio-visual communication is conducted, the notarial certificate “shall contain a statement that the notarial act was performed using audio-visual communication.” Numerous jurisdictions have enacted a similar requirement. (See, e.g., TEX. GOV’T CODE § 406.110(d) and VA. CODE ANN. § 47.1-16.A.)

Subsection (e) mandates that a notarial certificate may be completed, signed, and sealed with an official seal

“only at the time the notarial act is performed.” (For jurisdictions with comparable provisions, see, e.g., IND. CODE ANN. § 33-42-9-12(a)(1); KY. REV. STAT. ANN. § 423.360(1)(a); see also ALASKA STAT. § 44.50.063(a)(2) (the official signature shall be affixed only at the time the notarial act is performed) and § 44.50.065(a)(2) (same for the official seal).) The contemporaneous completion of the notarial certificate also means the certificate must be completed and attached to or logically associated with the record in the presence of the principal (or requester if present). It also means the certificate cannot be signed, sealed, or completed before the notarial act has begun, and not sometime after the notarial act is finished and the principal or requester has departed from the notary’s presence. Otherwise, it would contain falsification(s). Completing a certificate sometime after the completed notarial act and after the departure of the principal (or requester if present for the notarization) risks inaccuracy due to the notary’s lapse of recall and denies the principal or requester the right to review the certificate for accuracy at a time when an error or omission could be immediately cured.

Subsection (f) mandates that the language of the certificate must be one “that the notary public reads and understands,” as is similarly required in MNA 2010 Section 9-1(c). (See, e.g., ARIZ. REV. STAT. ANN. § 41-264.A.6; ARK. CODE ANN. § 21-14-107(a)(3)(C); D.C. CODE ANN. § 1-1231.19(d)(4); see also ARK. CODE ANN. § 21-14-107(f)(1)(A); S.C. CODE ANN. § 26-1-90(M), requiring the notarial certificate to be in the English language; and CAL. GOV’T CODE § 8202(d), CAL. CIV. CODE § 1189(a)(3), requiring a jurat and acknowledgment certificate to be in the exact form as in the statute, that is, in English.) The drafters rejected the position that English should be the

required language of the notarial certificate, as there are many notaries learned and fluent in other languages, and also principals and requesters who do not read or understand English should be able to read the certificates for notarizations performed for them.

Subsection (g) lays out three prohibitions, each of which appears in MNA 2010 Section 5-8. First, Paragraph (1) prohibits the notary from certifying on a certificate “information known or believed by the notary to be false.” (For comparable provisions, *see, e.g.*, CAL. GOV’T CODE § 8214.1(l); GA. CODE ANN. § 45-17-8(d); MASS. GEN. LAWS ANN. ch. 222, § 16(d); and N.C. GEN. STAT. § 10B-22(a).) The belief referenced should be “a reasonable belief that can be articulated” (THE NOT. PUB. CODE OF PROF. RESP. (2020) IV-E-2). “Known” information would be based on the notary’s firsthand observation or experience, while “believed” information would be derived from other sources that the notary considers reliable.

Second, Paragraph (2) forbids the notary to “sign or affix or produce the official seal on a notarial certificate that is otherwise incomplete.” (For comparable provisions, *see, e.g.*, ALASKA STAT. § 44.50.062(3) and MASS. GEN. LAWS ANN. ch. 222, § 16(e).) If a notary signs and seals an incomplete certificate, an opportunity may be provided for an unscrupulous person to insert false information on the form.

Third, Paragraph (3) forbids the notary to “provide, send, or transmit a notarial certificate containing the notary’s signature and official seal to another individual for completion or attachment to a record outside the notary’s presence.”

(For jurisdictions with comparable provisions, *see, e.g.*, ARK. CODE ANN. § 21-14-107(f)(2)(D); FLA. STAT. ANN. § 117.107(3); and OHIO REV. CODE ANN. § 147.141(8).) This Paragraph reinforces the requirement of Subsection (e) that a notarial certificate must be completed and attached to or associated with a record at one time and in the presence of the notary and principal (or requester if present). The reason for the Paragraph (3) rule is quite simple. It would be too easy for a negligent or unscrupulous individual to attach a signed and sealed certificate on a record for which it was not intended. While this rule by itself does not guarantee against dishonest removal and fraudulent reattachment of a certificate to a different record, it assures the notary will not have abetted the unlawful act.

Subsection (h) provides that for notarial certificates on tangible records, “photographically reproducible ink” must be used to prepare and complete them. This requirement satisfies at least two integrity concerns, namely, that notarial certificates can be photocopied so parties can have direct and accurate evidence of their contents, and that the certificates will not be completed in pencil (which can more readily be erased and modified and become smeared or blurred). Many jurisdictions have comparable provisions requiring certificates to be prepared or completed in black, blue, or dark ink, or simply in ink, or in a permanent manner (or at least to be signed in ink by the notary or sealed in ink). (*See, e.g.*, MONT. ADMIN. CODE § 44.15-107(1)(b); NEV. REV. STAT. ANN. § 240.1655.1(c); N.Y. CONS. LAWS (EXEC. LAW) § 137; and TENN. CODE ANN. § 8-16-112.)

## § 7-2. Sufficiency of Notarial Certificate.

A notarial certificate is sufficient if it substantially meets the requirements of Section 7-1(a), Section 7-1(d), if applicable, and is in a form that:

- (1) is set forth for the notarial act in Section 7-3 (relating to notarial

- certificate forms);
- (2) is otherwise prescribed for the notarial act by the law of this [State];
  - (3) is permitted for the notarial act by the law of another state, provided it is consistent with this [Act]; or
  - (4) describes the actions of the notary public in such a manner as to meet the requirements of the notarial act.

### Comment

Section 7-2 begins by announcing the applicability of the substantial compliance doctrine to notarial certificates. Under the substantial compliance standard, the law does not require perfection in the performance of notarial acts, and imperfect notarial certificates may be approved and validated. The law should neither mandate nor permit minor variations from the “required” format or language of, and technical defects in, notarial certificates to invalidate notarial acts. Otherwise, the good intentions of notaries public, principals, and the parties who rely upon those notarizations would be frustrated. (*See, e.g., Larson v. Elsner*, 101 NW 307 (Minn. 1904); *Farm Bureau Finance v. Carney*, 605 P2d 509 (Idaho 1980); and *Gargan v. State*, 809 P2d 998 (Alaska App. 1991).) The vast majority of jurisdictions have enacted statutory provisions approving the substantial compliance doctrine specifically as it relates to the sufficiency of notarial certificates. (*See, e.g., ALA. CODE* § 35-4-29; *N.Y. CONS. LAWS (REAL PROPERTY LAW)* § 309-a(1); and *UTAH CODE ANN.* §§ 46-1-6.5(2)(b), (3), and (5); *see also* *ARK. CODE ANN.* §§ 18-12-208(b)(1)-(4).)

Section 7-2 sets out the several ways in which a notarial certificate will be regarded as sufficient or valid. The provision provides four alternative ways for accomplishing sufficiency. The most basic way to achieve sufficiency is for a notary to use a certificate in the form provided in Section 7-3 (Paragraph 1) or other state law (Paragraph 2). Notably, Paragraph (3) expressly allows for the use and recognition of a notarial certificate permitted under a “law or regulation of another state, provided it is consistent with this Chapter.” (*See* *MD. CODE ANN. (STATE GOV’T)* § 18-215(c)(3).) Paragraph (4) specifically recognizes the validity of a notarial certificate with wording that aptly characterizes and describes a notarial act but is not expressly prescribed by law — a standard in keeping with the substantial compliance doctrine incorporated into the language of each of the sample certificate forms contained in Section 7-3. Together, Paragraphs (3) and (4) virtually assure approval of the interstate use of notarial certificates as mandated in regard to interstate recognition of notarial acts in Section 10-2 of this Act.

### § 7-3. Notarial Certificate Forms.

- (a) A notary public may complete a notarial certificate in substantially the following form in taking an acknowledgment:  
 [State] of \_\_\_\_\_  
 [County] of \_\_\_\_\_  
 On \_\_\_\_\_ (date), \_\_\_\_\_ (name(s) of principal(s)), proved to me through satisfactory evidence of identity [or personally known to me], appeared before me ☐ physically or

☐ by means of audio-visual communication and in my presence acknowledged having signed the preceding or attached record.

\_\_\_\_\_ (signature and official seal of notary public)

- (b) A notary public may complete a notarial certificate in substantially the following form in executing a verification on oath or affirmation:

[State] of \_\_\_\_\_

[County] of \_\_\_\_\_

On \_\_\_\_\_ (date), \_\_\_\_\_ (name(s) of principal(s)), proved to me through satisfactory evidence of identity [or personally known to me], appeared before me ☐ physically or ☐ by means of audio-visual communication and in my presence signed the preceding or attached record and swore or affirmed to me that the contents of the record are true.

\_\_\_\_\_ (signature and official seal of notary public)

- (c) A notary public may complete a notarial certificate in substantially the following form in attesting to a signature witnessing:

[State] of \_\_\_\_\_

[County] of \_\_\_\_\_

On \_\_\_\_\_ (date), \_\_\_\_\_ (name(s) of principal(s)), proved to me through satisfactory evidence of identity [or personally known to me], appeared before me ☐ physically or ☐ by means of audio-visual communication and in my presence signed the preceding or attached record.

\_\_\_\_\_ (signature and official seal of notary public)

- (d) A notary public may complete a notarial certificate in substantially the following form in administering an oath or affirmation:

[State] of \_\_\_\_\_

[County] of \_\_\_\_\_

On \_\_\_\_\_ (date), \_\_\_\_\_ (name(s) of principal(s)), proved to me through satisfactory evidence of identity [or personally known to me], appeared before me ☐ physically or ☐ by means of audio-visual communication and in my presence swore or affirmed \_\_\_\_\_ (description of oath or affirmation).

\_\_\_\_\_ (signature and official seal of notary public)

- (e) A notary public may complete a notarial certificate in substantially the following form in performing a certification of life:

[State] of \_\_\_\_\_

[County] of \_\_\_\_\_

On \_\_\_\_\_ (date), I certify that \_\_\_\_\_ (name of principal), proved to me through satisfactory evidence of identity [or personally known to me], appeared before me ☐ physically or ☐ by means of audio-visual communication and was alive.

\_\_\_\_\_ (signature and official seal of notary public)

- (f) A notary public may complete a notarial certificate in substantially the following form in making a copy certification:  
 [State] of \_\_\_\_\_  
 [County] of \_\_\_\_\_  
 On \_\_\_\_\_ (date), I certify that the attached or logically associated record is an accurate, exact, and complete ☐ copy of a record, ☐ tangible copy of an electronic record, or ☐ copy of a notarial record in my custody.  
 \_\_\_\_\_ (signature and official seal of notary public)
- (g) A notary public may complete a notarial certificate in substantially the following form in issuing a verification of fact:  
 [State] of \_\_\_\_\_  
 [County] of \_\_\_\_\_  
 On \_\_\_\_\_ (date), I certify that I have reviewed \_\_\_\_\_ (title or description of public or vital record(s) or other legally accessible data) and verify that \_\_\_\_\_ (description of fact) is a fact as stated in the attached or logically associated record(s).  
 \_\_\_\_\_ (signature and official seal of notary public)

### Comment

Section 7-3 presents the various statutory certificate forms that contain several changes from the forms appearing in past Model Acts. Each notarial certificate form begins with the recital that “A notary public may complete a notarial certificate in substantially the following form....” Thus, the law does not demand conformity to the exact format and words of each certificate form, but rather substantial compliance with the legal requirements for the notarial act is the standard. The forms may be used for both traditional and technology-based acts. RULONA Section 16 provides short form certificates for several notarial acts, and the official Comment points out: “These certificates may be used for notarial acts performed on tangible as well as those performed with respect to electronic records.” Some jurisdictions have adopted separate forms for notarial acts involving audio-visual communication (*see, e.g.,* ALASKA ADMIN. CODE § 6

AAC 88.050; ARIZ. ADMIN. CODE §§ R2-12-1307.A and B; MONT. CODE ANN. §§ 1-5-610(9) and (10); and WASH. ADMIN. CODE §§ 308-30-320(1) and (2)).

Subsection (a) sets out the certificate form for an acknowledgment. The form is substantially different from versions of forms in the MNA 2002 and 2010 in two respects. First, it does not reference the principal acting in a representative capacity. In part because the acknowledgment is one of the oldest and most common types of notarial act, forms have been designed for individuals to make acknowledgments as representatives of corporations, limited liability companies, partnerships, limited partnerships, limited liability partnerships, and other entities, and as attorneys in fact, administrators, guardians, trustees, personal representatives, public officers, and other types of agents. (*See, e.g.,* CONN. GEN. STAT. ANN. § 1-34 and FLA. STAT. ANN. § 695.25). The drafters determined to create one form of

acknowledgment that simply requires the notary to certify the identity of the individual making the acknowledgment. This unburdens the acknowledgment from various complexities and the notary from being asked to certify the authority of principals to act in their purported representative capacities.

Second, the acknowledgment form in Subsection (a) does not refer to the principal's signing of the record for its intended purpose or freely or voluntarily. Historically, these two recitations were required to be included in certificates of acknowledgments in most states. (*See Poole v. Hyatt*, 689 A.2d 82 (Md. 1997), referring to "acknowledging to the notary that the instrument is being signed voluntarily and for the purpose contained therein.") The failure of certificates of acknowledgment to include the exact language of the statutes frequently caused refusals and costly legal challenges due to faulty technicalities of language. Often the outcomes were that form prevailed over substance, and non-conforming certificates were ultimately refused or invalidated.

Thus, the drafters determined that because every record is required to be voluntarily executed and carry out its stated purposes (*see* § 4-3(a)(4)), these two recitations are superfluous and therefore unnecessary in a certificate of acknowledgment. Their absence in no way diminishes the integrity of the notarial act. In fact, there are numerous examples of statutory acknowledgment certificates, particularly so-called "short form" certificates, which do not include references to either. (*See, e.g.*, CONN. GEN. STAT. ANN. § 1-62(1); IDAHO CODE § 51-116(1); KAN. STAT. ANN. § 53-5a09(a); and NEB. REV. STAT. § 64-206.1; *see also* HAW. REV. STAT. ANN. § 502-42 (it is not a ground for rejection or refusal to accept a certificate of acknowledgment that "fails to state that the person making the acknowledgment

stated or acknowledged that the instrument was executed freely or voluntarily by the person or as the person's free act and deed").)

Subsection (b) presents a notarial certificate form for a verification on oath or affirmation. The certificate wording emphasizes the principal's oath or affirmation, and signature must be one directed to "the truthfulness or accuracy of statements in a record" (*see* § 2-35).

Unlike an acknowledgment in which the principal may sign the record to be notarized some time prior to the notarial ceremony and then acknowledge the signature during the notarial ceremony, the certificate language for a verification on oath or affirmation dictates that the principal must actually sign, and swear to or affirm the truth of the substance of, the record to be notarized in the presence of the notary. The notarial certificate does not need to recite the text of the oath or affirmation that is administered. By contrast, under Subsection (d), for an oath or affirmation, the certificate form requires a written "description of oath or affirmation," which may be either the exact language of the oath or affirmation or a descriptive statement of its substance.

Subsection (c) sets out the notarial certificate form for a signature witnessing (*see* § 2-29 and Comment).

Subsection (d) presents a notarial certificate form to evidence the administration of an oath or affirmation (that is, an oath or affirmation which is not a part of the notarization of a record), as defined in Sections 2-18 and 2-2, respectively. For example, a notary has the authority to administer an oath or affirmation to an appointed or elected public official upon taking office, a witness in a school disciplinary hearing for a student, or in a non-judicial proceeding, such as a private arbitration of an employment or business dispute. In such a setting, there has historically been



no notarial certificate to evidence the administration of the oath or affirmation.

This Act consistently adopts the position that every notarization must be documented in writing by a notarial certificate. Curiously, some states appear to require a certificate for each notarial act, if indirectly, by requiring the affixation of an official seal which appears on a notarial certificate. (*See, e.g.*, HAW. REV. STAT. ANN. § 456-3 and TENN. CODE ANN. § 8-16-112.) Even the RULONA authorizes notaries public to administer oaths and affirmations (*see* RULONA § 2(4)), requires a notarial certificate to evidence every notarial act (*see* RULONA § 15(a)), and sets out notarial certificate forms which do not include a certificate for an oath or affirmation (*see* RULONA § 16). The same apparent contradiction can be found in the states which follow it. (*See, e.g.*, N.D. CENT. CODE §§ 44-06.1-01.5, 44-06.1-14.1, and 44-06.1-19 and OR. REV. STAT. §§ 194.280(1) and 194.285.) Other states follow along the same lines. (*See, e.g.*, N.J. STAT. ANN. § 41:1-7 and N.C. GEN. STAT. § 10B-23(a).)

The certificate form requires a “description of oath or affirmation” and not the exact language of the oath or affirmation to be included within the notarial certificate. If desired, the notary may include the exact words of the principal’s oath or affirmation in the certificate itself or on a record that is then attached to the notarial certificate.

The fact that in the case of an oath or affirmation there is no traditional record to be notarized cannot stand in the way of requiring a certificate to be executed for this notarial act. Similarly,

for a verification of fact as defined in Section 2-34, there is no traditional record to be notarized. (*See* § 7-3(g).)

Subsection (e) is a new provision that contains a certificate form for the notarial act of certification of life (*see* § 2-4 and Comment).

Subsection (f) provides a certificate form for a copy certification (*see* § 2-6 and Comment). When a copy certification is performed, the certificate must be securely attached to or logically associated with the actual copy or copies of the pertinent record(s) whether tangible or electronic.

Subsection (g) sets out the notarial certificate form for a verification of fact (*see* § 2-34 and Comment). When a verification of fact is performed, the notary public should, if it is reasonably practicable to do so, attach or associate the certificate form to copies of the records that support the verification of fact, so that persons who receive or rely upon the verification of fact have written evidence of the supporting material. Alternatively, the notary may provide sufficient details about the supporting materials to allow an interested party to know how to access and review the materials. Such detail could include the full citation to the materials and to the office or location where the materials are maintained. (*See* WAGANAKISING TRIBAL CODE OF LAW § 6.2408.F (a sample form for a verification of fact does not require the copies of reviewed materials to be attached but does require the materials to be identified along with the offices where they are located); *but see* MONT. CODE ANN. § 1-5-610(11) (containing no such requirements).)

#### **§ 7-4. Corrections to Notarial Certificate.**

A notary public may correct an error or omission in a notarial certificate only if:

- (1) the notary made the error or omission to be corrected;
- (2) the notary’s commission has not expired or been suspended or revoked at the time of the correction;

- (3) the original record and notarial certificate are returned to the notary;
- (4) the notary verifies the error by reference to the notarial record of the notarial act, the record itself, or other determinative written evidence;
- (5) the notary legibly makes, initials, and dates the correction; and
- (6) the notary adds a notation regarding the nature and date of the correction to the journal entry for the notarial act.

### Comment

Section 7-4 permits the correction of an error or omission in a notarial certificate. If notaries public are diligent in performing their duties, correction of a notarial certificate should be a highly unlikely occurrence. The arguments for the policy of allowing notaries to correct notarial certificates include: 1) The notary's completion of a certificate is mainly a clerical duty; 2) Fairness to the parties, who should not be penalized or inconvenienced by an error that was none of their making; 3) Verification of the error by the notary can be proved through the notary's records or other evidence.

Correcting a notarial certificate was nominally addressed in the MNA 1984 and 2002, and then treated more fully in the MNA 2010. The MNA 1984 and 2002 Section 7(a) required a notary public's commission expiration date to be included in the certificate of notarial act (as this Act's § 8-2(c)(3) does impliedly through the affixation of the official seal on the notarial certificate) but stated that "omission of that information may subsequently be corrected." Neither of these predecessor Model Acts provided a process for correcting the omission. That process was implemented more fully in MNA 2010 Section 9-3.

The vast majority of jurisdictions do not address this matter. Very few states expressly allow the correction of completed notarial certificates and only in limited circumstances. (*See, e.g.*, CHEROKEE NATION TRIBAL CODE tit. 49, ch. 2, § 118(A); OKLA. STAT. ANN. tit.

49, § 118.A; and MONT. CODE ANN. § 1-5-609(5)(a).) Following the MNA 1984, 2002, and 2010, a small number of jurisdictions allow the correction of a missing or illegible seal on a certificate of notarial act. (*See* ALASKA STAT. § 44.50.065(b); MO. REV. STAT. ANN. § 486.730.2; and ONEIDA NATION OF WIS. ONEIDA NOT. ACT tit. 1, § 114.4-7(b); *see also* MNA 1984 § 4-203(b) and MNA 2002 and 2010 § 8-3(b).)

Some states expressly prohibit the correction or amendment of completed notarial certificates by the notary. (*See, e.g.*, FLA. STAT. ANN. § 117.107(8); N.D. CENT. CODE § 47-19-38; and OHIO REV. CODE ANN. § 147.141(A)(12).) The main reason for this view is that the jurisdiction or authority of a notary over the substance of a particular notarial certificate ends when the notarial ceremony is concluded.

Correctable errors and omissions, although not defined, must be strictly limited to objective, factual matters that can be established by reference to contrary written information or information in the audio-video recording of a notarization (Paragraph 4). These may include such matters as missing, incorrect, or illegible official seals, names, signatures, dates, places of notarization, as well as misspellings.

There are six requirements for a proper correction of a notarial certificate: 1) Only the notary who performed the original certification is allowed to correct the certificate (Paragraph (1)). 2) Only if "the notary's commission has not

expired or been suspended or revoked at the time of the correction” may the notary make a correction (Paragraph (2)). It was thought unnecessary to place a time limit within which a correction must be accomplished, but the drafters clearly intended that the correction must be made while the notary has authority under a valid commission to perform notarial acts. 3) Only if the original record and certificate are returned to the notary may there be a correction (Paragraph (3)). 4) Only if the notary who made the error performs the prescribed verification procedure (which limits the resource material available for review by the notary to specified written records and audio-visual recordings) may a correction be performed (Paragraph (4)). 5) Only if the notary makes, initials, and dates the correction on the original notarial certificate may the correction be achieved (Paragraph (5)). 6) Only if “the notary adds a notation regarding the nature and date of the correction to the journal entry for the notarial act” may the correction be made (Paragraph (6)).

These six limitations prevent the notary from undertaking to correct a certificate in any other manner, such as solely by oral, telephonic, or audio-visual request, mail, email or text messaging, or preparation of a “substitute” certificate. Notably, there is no restriction in Section 7-4 on who may seek and obtain a correction of a notarial certificate. Presumably, the person requesting a correction will be an interested party (the principal, or a party relying on the notarization) and will be the person in possession of “the original record and notarial certificate” which must be returned to the notary for correction under Paragraph (3), but someone else (including the notary) could request and obtain a correction if the six stated requirements are satisfied.

Because the correction of a notarial certificate is an official action of a notary, as noted above, it must be recorded in an entry in the journal of notarial acts under Paragraph (6). (*See* MONT. CODE ANN. § 1-5-609(5)(c); *see also* § 6-2(b), *supra*.)

## Chapter 8 – Signature and Official Seal of Notary Public

### Comment

General: This Chapter which regulates the signature and official seal of the notary for both traditional and technology-based notarizations was developed primarily from the MNA 2010 Chapters 8 and 19, MENA 2017 Chapter 7, 2020 *Notary Public Code of Professional Responsibility*, Guiding Principle VI, and RULONA Sections 17 and 18. The signature and seal of the notary are critical to notarizations. The official seal is particularly valuable. It identifies a notarial certificate as official and authentic; it identifies the notary and provides evidence of the notary's authority; it identifies the notarial certificate and the record to which it is attached as the only legitimate original

records of those two elements of a notarial act; and it helps to deter and prevent fraud by making the forgery of a notarization more difficult than would be the case without its presence. When they appear on a notarial certificate, the signature and seal signify the officiality of the notary office and the notarial act. The longstanding tradition and worth of the official seal to the practice of notarization are of such consequence that the U.S. Supreme Court declared in the 1883 landmark notary decision *Pierce v. Indseth*, 106 US 546, 549: “[T]he court will take judicial notice of the seals of notaries public, for they are officers recognized by the commercial law of the world.”

### § 8-1. Notary Public Signature.

- (a) A notary public's signature on a tangible notarial certificate shall be signed in the likeness of the signature currently on file with the [commissioning official] using permanent, photographically reproducible ink.
- (b) A notary public's signature on an electronic notarial certificate may be a digital image that appears in the likeness of the notary's signature on file with the [commissioning official].

### Comment

Section 8-1 sets out the requirements for the notary public's signature on a notarial certificate. Several matters about the official notary signature appear elsewhere in or are implicit in other provisions of this Act and have not been repeated in Section 8-1. First, a signature of the notary public is required upon each notarial certificate for notarial acts on tangible and electronic records (*see* § 7-1(a)(4)).

Second, the old view of the meaning of an official notary public signature as exclusively a handwritten “John Hancock”

no longer applies. A broader and more enlightened understanding of “signing” and “signature” befits contemporary times and fosters the accessibility of the office of notary public to persons with physical disabilities that may prevent or hinder traditional handmade signing. The physical inability (and even the mere unwillingness) of an individual to create a traditional handwritten signature cannot be allowed to bar one from being a notary public. The Act accommodates principals with physical disabilities that impair signing by traditional means.

(*See, e.g.*, §§ 2-27, 2-28, and 4-5.) Notaries public themselves must be accorded the same rights and protections.

Likewise, under this Act, notaries public may use non-traditional, lawful forms of signature by preference, even though they are physically able to execute handwritten “John Hancocks.” Neither of the definitions of “sign” (*see* § 2-27) nor “signature” (*see* § 2-28) refer to any required physical ability standards or restrictions, and to the contrary each of those definitions focuses upon the choice to use or adopt a form or symbol to authenticate a record, even by a notary.

Unaddressed and unsettled in this Act is the question of whether a notary who is physically unable to sign may employ a trusted agent to assist in the execution or affixing of the notary’s signature while in the presence and with the approval of the notary in the same way a principal can (*see* § 4-5(b)). The Act certainly allows a notary to use an agent to create or manufacture an official seal (§ 8-3) or a technology system to produce an electronic signature (§ 9-1). Notaries are permitted by the Act to employ the assistance of technology providers (Chapter 9), record storage providers and custodians (§ 6-5), and notary fees collectors (§ 5-1), and are required to designate a personal representative to act on their behalf if they are adjudicated incompetent or are deceased (§ 3-11).

Provided that the notary complies with all requirements of the Act in performing a notarial act, the notary should be allowed to designate an agent to carry out the necessary physical tasks of affixing or attaching of the official signature to the notarized record.

Third, the notary’s signature may be executed upon, affixed to, or logically associated with the record to be notarized “only at the time the notarial act is performed” (§ 7-1(e)). The signature may not be executed upon, affixed to, or

associated with a certificate prior to the notarial ceremony nor after it has been completed.

Fourth, as suggested by the title of this Chapter — “Signature and Official Seal of Notary Public” — these two features go together, complement each other, and should appear near one another on the notarial certificate. (*See* § 8-2(a), directing the official seal to be placed “near the notary public’s signature on each notarial certificate.”)

Fifth, implicit in the concepts of the signature and official seal is the limitation that they may be produced or affixed only for official purposes. Section 4-11 expresses this with respect to the official seal. It also is used of the notary’s official title, which most often appears near the notary’s typed or printed name and signature.

Subsection (a) deals with the notary public’s signature on a tangible notarial certificate. It requires the notary’s signature to be “in the likeness of the signature currently on file” with the commissioning official, whatever form the official signature may take. The security of the signature is heightened if an exemplar of the signature is on file with the commissioning official because the commissioning official will be aware of the form of the signature whether it involves a traditional or non-traditional method of signing. (*See, e.g.*, D.C. MUNI. REGS., § 17-2404.1; HAW. REV. STAT. ANN. § 456-4(a); and OR. ADMIN. RULES §§ 160-100-0170(1)(b) and (3).)

The notary public must maintain possession and control of any signature stamp or mechanism or restrict access to the technology for generating the notary’s signature to appear upon a tangible record to deter and prevent forgery of notarial acts and fraud related signed records. (*See* § 12-1(a), imposing the general requirement on the notary to use reasonable care, and § 8-4(a), requiring a registered notary to protect

the technology system for affixing an electronic signature.)

Notaries should be allowed to choose how they will sign their official signatures. (*See* OR. ADMIN. RULES §§ 160-100-0170(1)(b) and (3), allowing the notary to change the signature on file with the Secretary of State.) Most certainly if a notary suffers a disability after commissioning, the notary can and should advise the commissioning official of the circumstances and change the exemplar signature that is on file. (*See, e.g.,* ARK. CODE ANN. § 21-14-202, allowing the use of a facsimile notary signature and seal after the required filing with the Secretary of State; FLA. STAT. ANN. § 117.107(2), requiring a notary with a disability in making a “written signature” first to give notice to the Department of State regarding using a facsimile signature stamp and provide an exemplar of it; and OHIO REV. CODE ANN. § 147.141(A)(7) (same).)

As a best practice, the notary should adopt a method of signing that allows the notary’s name to appear legibly on the notarial certificate, rather than just a symbol such as an “X.” The signed name of the notary should match the “notary public’s name exactly as stated on the commission,” that is required to be included in the official seal (§ 8-2(c)(1)). Due to the frequent inability to read the signatures of notaries, one state requires the typed or printed names of notaries (and signers) on real estate records to appear “immediately beneath or adjacent to their signatures” (R.I. GEN. LAWS § 34-11-1.1; *see also* MISS. ADMIN. CODE ANN. tit. 1, ch. 50, pt. 5, R.50.7.4).

Subsection (a) mandates the signing of a tangible notarial certificate “using permanent, photographically reproducible ink.” This mandate is required by Section

7-1(h) as well. The signature should not be readily erasable, for otherwise there might be tampering with and forgery of the signature. Several states require the notarial signature to be signed in ink. (*See, e.g.,* ARK. CODE ANN. § 21-14-107(a)(1); GA. CODE ANN. § 45-17-8.1(a); MONT. CODE ANN. § 1-5-616(1)(c); N.C. GEN. STAT. § 10B-35; and UTAH CODE ANN. § 46-1-16(7)(a).)

Subsection (b) addresses the notary’s electronic signature for notarial acts on electronic records. An electronic notarial certificate must be signed by the registered notary (§ 7-1(a)(4).) It may be any electronic sound, symbol, or process (§ 2-9), but the statute calls out an “electronic symbol” specifically. A “digital image” of the notary’s signature that is on file with the commissioning official may be used. A “digital image” may appear like a handwritten “John Hancock.” When completing an electronic notarial certificate, if the notary elects to adopt a digital image as the notary’s signature, the notary is required to affix that digital image appearing “in the likeness of the notary’s signature on file” with the commissioning official. (*See* N.C. ADMIN. CODE ANN. tit. 18, § 07C .0401(e), requiring “an image of the notary’s handwritten signature” to appear on any visual or printed electronic notarial certificate.)

One central feature of the signature of the notary on a paper or electronic notarial certificate is the need for the signature to be attributable to a particular notary. (*See, e.g.,* CODE tit. 1, ch. 50, pt. 5, R. 50.7.4; *see also* CAL. GOV’T CODE § 16.5(a)(1); COLO. CODE REGS. tit. 8, ch. 1505-11, R. 5.2.3(a)(2); MINN. STAT. ANN. § 358.645 Subd. 6(b); 57 PA. CONS. STAT. ANN. § 315(3)(i)(B); and VA. CODE ANN. § 47.1-16.B.)

## § 8-2. Official Seal.

- (a) Near the notary public’s signature on each notarial certificate, the notary shall affix or produce a legible and photographically

- reproducible official seal.
- (b) The official seal shall be affixed on a tangible notarial certificate by a rubber stamp in a rectangular shape not larger than 1 inch high by 2½ inches wide or a circular shape not larger than 2 inches in diameter using permanent ink or produced on an electronic notarial certificate using a technology system that complies with Chapter 9.
  - (c) The official seal shall include the following elements:
    - (1) the notary public's name exactly as stated on the notary's commission;
    - (2) the words "Notary Public" and "[State]";
    - (3) the notary public's commission identification number;
    - (4) the words "My commission expires (commission expiration date)"; and
    - (5) a border surrounding the required words.
  - (d) The official seal for a notarial act on an electronic record shall consist of the information required by Subsection (c) or be a digital image in the likeness or appearance of an official seal as prescribed by Subsection (b).
  - (e) A notary public may possess more than 1 official seal.
  - (f) A notary public may use an embossed seal impression in addition to but not in place of the official seal required by this Section for a notarial act on a tangible record.

### Comment

Section 8-2 sets out requirements for an official seal involving tangible and electronic records. Subsection (a) establishes four basic requirements for the official seal or stamp on or attached to a notarial certificate. First, "on each notarial certificate" there must be an official seal. The vast majority of jurisdictions (but not all of them) expressly require the affixation or production of the image of an official seal on notarial certificates for both tangible and electronic records. (*See, e.g.,* ALA. CODE § 36-20-72; GA. CODE ANN. § 45-17-6(a)(1); IDAHO CODE §§ 51-115(1) and (2); MASS. GEN. LAWS ANN. ch. 222, § 8(b); TEX. GOV'T CODE § 406.013(a); and UTAH CODE ANN. §§ 46-1-16(2)(a), (3)(c), and (8).) In some jurisdictions, the notary may be allowed to print or type the equivalent information contained in an official seal onto the

notarial certificate. (*See, e.g.,* MICH. COMP. LAWS § 55.282(2) and N.Y. CONS. LAWS (EXEC. LAW) § 137.)

Some states require official seals to appear on tangible notarial certificates, but do not require official seals on electronic certificates. (*See, e.g.,* COLO. REV. STAT. ANN. § 24-21-515(2) and MD. ANN. CODE (STATE GOV'T) §§ 18-215(b)(1) and (3).)

Second, the official seal must appear "near the notary public's signature." (*See* § 8-1 and Comment; *see e.g.,* FLA. STAT. ANN. § 117.05(4)(i) and OKLA. ADMIN. CODE § 655:25-5-2(c).) The clear suggestion from this Subsection is that the notary's signing of the certificate should precede the notary's sealing or stamping of the certificate. Many jurisdictional provisions direct the notary to place the seal impression "near the notary public's signature," suggesting that the signature

would need to be present before the official seal could be placed near it. (*See, e.g.*, FLA. STAT. ANN. §§ 117.05(4)(g) and (i); WYO. STAT. ANN. §§ 32-3-114(a)(v) and (vii). *See also* ARK. CODE ANN. §§ 16-47-107(a)-(c); D.C. CODE ANN. §§ 1-1231.15(1)-(5); NEB. REV. STAT. § 64-310(1); N.H. REV. STAT. ANN. § 456-B:7.I; N.C. GEN. STAT. § 10B-40(b)(6); and W.VA. CODE §§ 39-4-16(1)-(5) which refers first to the notary's signature and then the official seal.)

Third, the notary must produce a “legible” or clearly readable image of the official seal. The legibility issue relates to common issues with official seal impressions on paper records, such as their being stamped on top of other print or handwriting or being smeared or smudged, so that the text on the seal is unreadable. (*See, e.g.*, NEV. REV. STAT. ANN. § 240.040.4; OR. ADMIN. RULES §§ 160-100-0110(3) and 160-100-0130(2); and UTAH CODE ANN. § 46-1-16(5).) Because the substantial compliance doctrine is applied to determine the validity of notarial certificates, by implication the effect of the illegibility of the official seal will be judged by the same doctrine. (*See* § 7-2 and Comment; *see, e.g.*, MICH. COMP. LAWS § 55.287(4).)

Fourth, the notary must affix or produce a “photographically reproducible official seal” image on the notarial certificate. Many jurisdictions require the official seal or stamp to be in ink or photographically reproducible (or similar language). (*See, e.g.*, ARIZ. REV. STAT. ANN. § 41-266.2; ARK. CODE ANN. § 21-14-107(b)(1); MISS. CODE ANN. § 25-34-33(1)(b); and MONT. CODE ANN. § 1-5-616(2)(b).)

Subsection (b) begins by requiring the official seal on a tangible notarial certificate to a “rubber stamp” seal. This provision is meant to disallow the use of any other type of seal (such as a metal embosser or an adhesive paper label) as the official seal. The rubber ink-stamp

seal is preferred because its permanent ink protects against erasures and tampering and affords for high quality photographic copying. The requirement of rubber ink-stamp seals is a reversal of previous Model Acts, which allow for use of embosser and adhesive label seals. (*See* MNA 2002 § 8-2(e) and 2010 § 8-2(d) and Comment.) Some jurisdictions currently allow the use of embosser as the official seal (*see, e.g.*, ALASKA STAT. § 44.50.065(a); CAL. GOV'T CODE § 8207; and KAN. STAT. ANN. § 53-5a02(h)) or require it (*see* D.C. CODE ANN. § 1-1231.01(9)).

For electronic notarial certificates, the official seal must be produced on the certificate using a technology system that complies with Chapter 9. (*See also* § 8-2(d) and RULONA § 17, Comment, requiring the seal to be an electronic image attached to or logically associated with the electronic certificate.)

Subsection (b) also mandates certain formatting requirements for the official seal. Only rectangular or circular official seals are permitted. The statutes of numerous jurisdictions restrict the shape of the official seal or its border to either a rectangle, circle, or either of those two shapes. (*See, e.g.*, CAL. GOV'T CODE § 8207; COLO. REV. STAT. ANN. § 24-21-517(1)(a); N.D. CENT. CODE § 44-06.1-16.1; OHIO REV. CODE ANN. § 147.04; and TEX. GOV'T CODE § 406.013(b).) Requiring a specified format prevents notaries from possibly becoming too creative and unconventional in the appearance of this valuable traditional symbol of the notary public office.

Subsection (c) sets out the informational elements required to be included in the official seal and the required surrounding border. Each of the listed elements is included in similar fashion in MNA 2010 Section 8-3(a) (although the notary's business address, appearing in the 2010 Act, has been omitted). Electronic official seals must



include the same information, and these elements (except for the seal's border) are required in MNA 2010 Section 18-2(3) and MENA 2017 Section 7-3(a). The required elements are among those bits of information commonly required in official seals. (*See, e.g.*, CONN. GEN. STAT. ANN. § 3-94k (requirements for contents of the official seal, even though the use of a seal is not required); D.C. CODE ANN. § 1-1231.16(a)(1); KY. REV. STAT. ANN. § 423.370; N.H. REV. STAT. ANN. § 455:3; and S.D. CODIFIED LAWS § 18-1-3.)

Regarding Paragraph (4), the vast majority of jurisdictions require the notary public's commission expiration date to appear in the text of the official seal or stamp. The commission expiration date is critical, because when considered along with the date of the notarization it should confirm the current valid authority of the notary to perform a notarization. Some states which do not require the commission expiration date to appear in the official seal instead require that date to be written or typed onto the notarial certificate. (*See, e.g.*, MICH. COMP. LAWS §§ 55.287(2) and (3) and MD. CODE ANN. (STATE GOV'T) § 18-217(b).) The commission expiration date is so significant that some jurisdictions which require the official seal to include the notary's commission expiration date nevertheless separately mandate the commission expiration date to appear on the notarial certificate. (*See, e.g.*, ARK. CODE ANN. § 21-14-108(a)(1); IOWA CODE ANN. §§ 9B.15.1.e and 9B.17.1.a; N.D. CENT. CODE §§ 44-06.1-14.1.e and 44-06.1-15.1; and 57 PA. CONS. STAT. ANN. §§ 315(a)(3)(ii) and 317(1)(v).)

Subsection (d) deals with official seals on electronic records and is drawn from similar requirements appearing in MNA 2010 Sections 18-2(3), 19-1, and 19-3, MENA 2017 Section 7-3, and RULONA Section 17, Comment. It allows for two types of electronic seals, either

one that is a likeness or image of the standard inked seal impression appearing on tangible records or one that is a recital of the information required by Subsection (c). (*See, e.g.*, CAL. GOV'T CODE § 27391(e); IDAHO CODE § 31-2903(3); OKLA. STAT. ANN. tit. 49, § 5.B; TEX. GOV'T CODE § 406.013(d); and WIS. STAT. ANN. § 706.25(2)(c).) Some jurisdictions require an image in the likeness of a tangible official seal to appear on electronic notarial certificates or on any visual or printed representation of the certificate. (*See, e.g.*, MONT. ADMIN. CODE § 44.15.107; NEB. ADMIN. CODE tit. 433, §§ 7.007.05 and 7.007.06; N.C. ADMIN. CODE tit. 18, § 07C.0402(f); and WYO. STAT. ANN. § 32-3-114(a)(vii).)

Subsection (e) allows a notary to "possess more than 1 official seal." This provision constitutes a change in the position of MNA 2010 Section 8-4(d), allowing a seal vendor to "make or sell one and only one seal" to each notary. Some jurisdictions also restrict the notary to only one seal. (*See, e.g.*, MO. REV. STAT. ANN. § 486.735.3.) The change reflects the view that many notaries may wish to perform notarial acts on tangible records from more than one location or have a second official seal if the other seal malfunctions. If a notary were permitted to possess only a single official seal, moving the seal from place to place is not only inconvenient and could prevent the notary from performing notarizations if their one and only seal breaks, but also risks loss, damage, and theft of the seal. Notaries public who perform notarial acts on electronic records or involving the use of audio-visual communication may wish to perform notarizations using different technology systems and platforms and may thereby possess and use these technologies to produce more than one version of their electronic official seal.

Subsection (f) concerns the traditional metal embosser seal which,

when its two sides are pressed against paper, creates a raised or crimped impression of the contents of the official seal. It should be noted that at least one state prohibits a notary to “provide, keep, or use a seal embosser” (COLO. REV. STAT. ANN. § 24-21-517(2)). Some states still allow the use of a sole embosser seal, provided it leaves a photographically reproducible impression. (See, e.g., CAL. GOV’T CODE § 8207.) A few states allow the use of an embosser seal without requiring its impression to be photographically reproducible. (See OHIO REV. CODE ANN. § 147.04 and OKLA. STAT. ANN. tit. 49, § 5.A.)

Like Subsection (f), a small number of jurisdictions have enacted provisions governing the use of optional embosser seals as supplements to the affixation of

required ink-stamp seals. (See, e.g., FLA. STAT. ANN. § 117.05(3)(a) and UTAH CODE ANN. § 46-1-16(4).) The intention is to provide an added security feature to notarized records. An embosser seal pressed through two or more pages of a multi-page record simultaneously at identical places on the pages makes forgery of embosser seals or substitution of those pages quite difficult. (See OR. ADMIN. RULES § 160-100-0130(3).) In the international arena, many countries hold on to old notarial traditions, such as the use of old forms of seals, including embossers. Therefore, for tangible records moving across national borders, notaries in the U.S. may wish to use an added embosser seal to foster international recognition of notarizations on tangible records.

### **§ 8-3. Obtaining and Providing Official Seal.**

- (a) A notary public shall obtain, and a vendor of official seals shall provide, an official seal only in accordance with the requirements of this Chapter.
- (b) A person shall apply for a license to provide official seals on a form prescribed by the [commissioning official] and pay any fee established by the [commissioning official].
- (c) A notary public shall obtain an official seal only from a licensed vendor.
- (d) A licensed vendor that provides an official seal to a notary public shall:
  - (1) obtain from the notary a Certificate of Authorization to Purchase an Official Seal on a form prescribed by the [commissioning official];
  - (2) confirm the commission and mailing address of the notary through the database required by Section 3-8.
  - (3) mail or ship, return receipt requested, an official seal for use on tangible records only to a mailing address confirmed through the database required by Section 3-8;
  - (4) transmit an official seal for use on electronic records only using a secure means of delivery; and
  - (5) do each of the following:
    - (A) affix each official seal on the Certificate of Authorization to Purchase an Official Seal;
    - (B) mail or transmit the completed Certificate to the

- [commissioning official]; and
- (C) retain a tangible or electronic copy of the Certificate for at least [5] years.
- (e) A notary public who obtains an official seal as a result of a name change in accordance with Section 3-9 (relating to notification of changes) shall present a Certificate of Authorization to Purchase an Official Seal in the new name to a licensed vendor.
- (f) Any person who violates this Section shall be guilty of a [class of offense] for each violation, punishable upon conviction by a fine not exceeding [dollars] and civilly liable to parties injured by the individual's failure to comply with this Section.
- (g) The [commissioning official] may terminate a vendor's license to provide official seals for cause.

### Comment

Section 8-3 regulates the procedure for procuring and issuing official seals. This Section was adapted from MNA 2010 Section 8-4 and is consistent with the goal as stated by MNA 2017 Section 7-3(d), allowing only the notary to use the electronic official seal. Most jurisdictions do not have a comparable provision, the neglect of which can make it easier for wrongdoers to obtain fraudulent or forged seals. This Section imposes an appropriate measure of control over the issuance of official seals, as is generally in keeping with laws of the few states that have them. (*See, e.g.*, CAL. GOV'T CODE §§ 8207.2-8207.3; GA. CODE ANN. § 45-17-6(2)(b); MO. REV. STAT. ANN. § 486.735; N.D. CENT. CODE § 44-06.1-167.1; and OR. ADMIN. RULES § 160-100-0125.)

Subsection (a) sets the stage for the detailed procedure that follows in Sections 8-3(b)-(g) by declaring the basic obligation of notaries and official seal vendors to abide by the Chapter's rules.

Subsection (b) requires a would-be provider of official seals to apply with and be approved by the commissioning or regulating official of the jurisdiction. The vendor must apply for a license on a form prescribed by the commissioning

official and pay a license fee. These steps are set out in MNA 2010 Section 8-4(a), with new Subsection (b) changing and elevating the status of an official seal vendor to one who holds a "license," rather than to just a permit holder. (*See* CAL. GOV'T CODE §§ 8207.2(a), 8207.2(c), and 8207.3(b).)

Subsection (c) establishes the limitation upon a notary to obtain an official seal "only from a licensed official seal vendor." This Subsection, which creates a specific duty for the notary, is new to the MNA. (*Cf.* MNA 2002 and 2010 § 8-4.) The various provisions of Section 8-2, regulating the official seal itself, are particularly relevant to the full meaning and procedure of Subsection (b). When the subparts of Section 8-3 are read together, it is clear that both the notary and the licensed vendor must be familiar with and abide by the directives for the manufacture and procurement of the official seal(s), whether tangible or electronic, or both.

Subsection (d) creates the detailed procedure for a licensed vendor to produce and issue official seals. The Subsection sets out seven separate steps required of a licensed vendor. First, under Paragraph (1), the official seal vendor

must receive from the notary the prescribed Certificate of Authorization to Purchase an Official Seal form. (See CAL. GOV'T CODE §§ 8207.2(a), 8207.3(a), and 8207.3(b); N.D. CENT. CODE § 44-06.1-167.1; and OR. ADMIN. RULES § 160-100-0125.)

Second, under Paragraph (2), the official seal vendor must confirm the notary's current mailing address and active status in good standing by consulting the database created by the commissioning official pursuant to Section 3-8. (See § 3-8 and Comment and MO. REV. STAT. ANN. § 486.735.2(2).)

Third, under Paragraph (3), the official seal vendor must either mail or ship a tangible seal (return receipt requested), only to the mailing address of the notary as confirmed from the database search referred to in step 2. (See MNA 2010 § 8-4(c) and WAGANAKISING ODAWAK TRIBAL CODE OF LAW § 6.2407.D.3).)

Fourth, under Paragraph (4), the official seal vendor must "transmit an official seal for use on electronic records only using a secure means of delivery," as is consistent with the technology system requirements of Chapter 9.

Under Subsections (d)(5)(A)-(C), there are the three final steps required. Fifth, the official seal vendor must affix an image of the official seal on the Certificate of Authorization to Purchase an Official Seal form. This step creates a sample of the seal impression to be kept on file with the commissioning official. (See CAL. GOV'T CODE § 8207.3(d).) Sixth, the official seal vendor must mail or transmit the completed Certificate to the commissioning official. (See CAL. GOV'T CODE § 8207.3(d); MO. REV. STAT. ANN. § 486.735.4; and WAGANAKISING ODAWAK TRIBAL CODE OF LAW § 6.2407.D.5; *but see* N.D. CENT. CODE § 44-06.1-167.1, requiring the notary to return the certificate to the Secretary of State.) Thus, the commissioning official

will have an exemplar of the official seal impression from which to determine its compliance with the law. Seventh, the official seal vendor must retain a tangible or electronic copy of the completed Certificate form for at least [5] years, which is intended to match or exceed the duration of the notary's commission. (See MO. REV. STAT. ANN. § 486.735.4; *see also* Cal. Sec. of State, PROC. AND GUIDELINES FOR THE ISSUANCE OF NOT. PUB. SEALS § 4 and WAGANAKISING ODAWAK TRIBAL CODE OF LAW § 6.2407.D.5 (a vendor must retain a copy of the Certificate of Authorization to Purchase a Notary Seal and the notary commission for 6 years, which is the term of a tribal notary's commission).)

Subsection (e) addresses the not-uncommon circumstance of a notary public's change of name and its triggering of the need for a change in the notary's name on the official seal. This provision allows the notary to obtain a replacement official seal in the changed name. Pursuant to Section 3-9(b), the notary is allowed to continue serving as notary under the original name on the commission and official seal until such time as the commissioning official has been informed of the name change and a properly issued new official seal bearing the changed name has been received by the notary, at which time the notary must begin to use the changed name in performing notarial acts. (See ALASKA STAT. § 44.50.066(d) and TEX. ADMIN. CODE § 87.62(b).)

Subsection (f) declares a violation of Section 8-3 to constitute a criminal act and result in civil liability to any party injured by the violation. (See MNA 2010 § 8-4(g), regarding violations by official seal vendors, and CAL. GOV'T CODE § 8207.4(a), designating violations of the manufacture and sale of seals to be a civil violation for which a fine may be assessed; *see also* GA. CODE ANN. § 45-17-6(2)(b), declaring it to be "unlawful"

for any person who is not a notary to order or obtain an official seal, or for a person to supply an official seal to any person unless presented with a duplicate original of the notary commission.) The language of Subsection (f) broadly covers anyone who violates Section 8-3, and not just notaries and official seal vendors.

Subsection (g) announces the proviso that what a statute grants, a statute may

take away. The commissioning official may revoke or terminate the license of an official seal vendor for cause. Imposition of this sanction is a method to ensure that appropriate business standards and the requirements of the Act are followed. This provision does not bar other possible criminal and civil actions and sanctions against official seal vendors, as expressly allowed by Subsection (f) or otherwise.

#### **§ 8-4. Security of Technology System and Official Seal.**

- (a) A notary public who is registered shall keep in the notary's sole control all or any part of a technology system that is used to produce the notary's electronic signature.
- (b) The notary public's official seal is the exclusive property of the notary and shall be kept under the notary's sole control at all times.
- (c) A notary public shall not allow any other person to produce the notary's electronic signature or use the notary's official seal.
- (d) A notary public shall not surrender the official seal to an employer upon termination of employment or to any other person.
- (e) Within 10 days after the notary public's official seal or any part of a technology system that is used to produce the notary's electronic signature, if applicable, is discovered to be stolen, lost, damaged, destroyed, or compromised, the notary, after informing the appropriate law enforcement agency in the case of theft or vandalism, shall notify the [commissioning official] by any means providing a tangible or electronic receipt, and provide a copy of the identification number of any police report.
- (f) Upon receipt of the notice under Subsection (e), the [commissioning official] shall issue to the notary public a Certificate of Authorization to Purchase an Official Seal with which the notary may obtain a replacement official seal in accordance with Section 8-3.
- (g) A notary public shall retain a copy of the notification required by Subsection (e) as a notarial record.

#### **Comment**

Section 8-4 addresses issues regarding the security of the signature and official seal of the notary. It places responsibility for security of the notary's signature and official seal squarely with the notary.

Subsection (a) is intended to secure, and prevent the misuse of, the notary's electronic signature. This Subsection is

adapted from MENA 2017 Sections 7-2(b) and (c), and MNA 2010 Section 19-2. Misuse of the notary public's electronic signature might otherwise occur and be undetected if an imposter obtained the notary's access credentials to a technology system and affixed the notary's electronic signature to an

electronic notarial certificate. Therefore, the notary owes the specific duty to protect access to, and prevent another's use of, the technology system employed by the notary to create and produce the notary's electronic signature.

Subsection (b) announces that the official seal is the exclusive property of the notary public and must be kept in the notary's sole control "at all times." (*See* MNA 2010 § 8-2(c).) Some notary statutes say the official seal shall be kept secure and accessible only to the notary "when not in use." (*See, e.g.,* ALASKA STAT. § 44.50.064(c) and N.C. GEN. STAT. § 10B-126(b).) Several jurisdictions direct the notary to maintain exclusive control and security over the official seal without specifying when that duty applies, which in effect means all the time. (*See, e.g.,* ARK. CODE ANN. § 21-14-107(d); D.C. CODE ANN. § 1-1231.17(a); FLA. STAT. ANN. § 117.05(3)(b); IDAHO CODE § 51-118(3); N.C. GEN. STAT. ANN. § 10B-36(a); and N.D. CENT. CODE § 44-06.1-16.2.)

Recognizing the reality that a third-party provider will likely have developed and provided the technology system to create and attach or associate an electronic official seal to the record to be notarized, at least one state for remote notarizations has expressly allowed a notary to designate the third-party provider as "guardian over the electronic seal," so that the guardian may "store the seal in a secure manner" (UTAH CODE ANN. § 46-1-16(2)(d)).

The official seal belongs solely to the notary public regardless of who may have paid for it. The official seal is issued in the name of the notary (§ 8-2(c)(1)), and it is the notary who holds the notarial commission which authorizes the use of an official seal. "A notary public's official stamp is a public seal" (MD. CODE ANN. (STATE GOV'T) § 18-217(c)).

Subsection (c) underscores the key

point made by the previous two subsections, namely, that the technology for the electronic signature and official seal, and the official seal for use on tangible records (and possibly a signature stamp, if a notary uses one), belong to the notary public and must remain in the exclusive possession and control of the notary. Thus, the notary "shall not allow any other person to produce the notary's electronic signature or use the notary's official seal." (*See, e.g.,* FLA. STAT. ANN. § 117.05(3)(b); MASS. GEN. LAWS ANN. ch. 222, § 8(b); and N.M. ADMIN. CODE § 12.9.3.13.D.) The phrase "any other person" in Subsection (c) prohibits all other persons — including the notary's clients, family, friends, co-workers, and employers, as well as other notaries — from producing the notary's electronic signature or using the official seal.

Subsection (d) is an extension of the previous three subsections. It provides that those subsections apply to what is likely the most frequent source of their violation, the surrender of the notary's technology system and/or notary's official seal to the notary's employer upon termination of employment. (*See, e.g.,* ARK. CODE ANN. § 21-14-107(e); CAL. GOV'T CODE § 8207; and FLA. STAT. ANN. § 117.05(3)(b).) The notary, not the notary's employer, is the public official; the notary, not the notary's employer, owns the official seal; the notary, not the notary's employer, has the right to exclusive possession of the technology system to perform notarial acts. The notary's commission as a public official does not end with the termination of employment (unless coincidentally the date of expiration of the commission and the date of termination of employment are the same).

Subsection (d) also prohibits a notary public from surrendering the official seal to "any other person" upon the termination of employment, at the expiration or revocation of the notary commission, or

under any other circumstances. For instance, former notaries have been known to give away their expired official seals or sell them at yard sales, on online sites, at flea markets, and so forth. Notaries may not surrender their official seals, except in authorized instances and only to authorized officials. (*See* CAL. GOV'T CODE § 8214.8, requiring the official seal to be surrendered to the court if the notary is convicted of certain criminal offenses.)

Subsection (e) imposes a rule for timely written notification to the commissioning official (and in certain circumstances law enforcement) in the event the official seal or the technology system for producing the notary public's electronic signature is lost, stolen, compromised, or in any way rendered unusable for its intended purpose. (For comparable provisions, *see, e.g.*, GA. CODE ANN. § 45-17-14; IDAHO CODE § 51-118(4); IOWA CODE ANN. § 9B.18.2; and W. VA. CODE § 39-4-18(b).)

Subsection (e) imposes a 10-day limit for its notification obligation, but a jurisdiction might choose to substitute a different time frame. It also imposes a duty on the notary public to report any theft or vandalism of the official seal or technology system for producing the notary's electronic signature to the appropriate law enforcement agency. This obligation is imposed only upon the notary, and not upon the notary's guardian or personal representative or another individual knowingly in possession of the official seal or technology system. However, there is a possibility that a

guardian or personal representative for an adjudicated-incompetent or deceased notary, or another individual knowingly in possession of the notary's official seal or the technology system will discover pertinent theft, loss, damage, destruction, or compromise, and therefore should bear the same notification obligation (*see* § 8-5(a), *infra*).

Subsection (f) addresses the process to obtain a replacement official seal after it has been stolen, lost, destroyed, or compromised. That process requires the commissioning official to issue a Certificate of Authorization to Purchase an Official Seal form, as described in Section 8-3. MNA 2010 Section 8-2(e) sets out the same process for official seals used for notarial acts on tangible records. When obtaining a replacement official seal, while not formally required, the best practice would be to distinguish the replacement from the originally issued official seal (for example, by using a different type of border or typeface). The Certificate of Authorization to Purchase an Official Seal form for the replacement official seal will contain an exemplar impression of the replacement official seal that is then sent to the commissioning official. (*See* OKLA. ADMIN. CODE § 655:25-5-3(b).) It is possible that a lost or stolen official seal may be found and reacquired by the notary. (*See* OR. ADMIN. RULES §§ 160-100-0160(2)(d) and (3).) If the notary reacquires the missing official seal, the notary should inform the commissioning official of the date of its reacquisition (*see* OR. ADMIN. RULES §§ 160-100-0160(2)(d) and (3)).

### **§ 8-5. Disablement of Official Seal and Technology System.**

- (a) A notary public or former notary, or the notary's guardian or personal representative, if applicable, shall disable, destroy, or deface any official seal, and all or any part of any technology system that had been or is capable of being used to produce the notary's electronic signature or official seal, if applicable, as soon as is reasonably practicable when:

- (1) the notary's commission expires, or is resigned or revoked;
  - (2) the notary is adjudicated as incompetent; or
  - (3) the notary dies.
- (b) A former notary public whose previous commission and registration expired need not disable any technology system for producing the notary's electronic signature or official seal, if this individual, within [30] days after commission expiration, is recommissioned and reregistered, and obtains a new official seal in compliance with Section 8-3.

### Comment

Section 8-5 concerns the disabling or destruction of the official seal and/or the technology system for producing the notary's electronic signature and official seal when the notary's commissioning ends. A number of jurisdictional statutes have espoused the purpose to avoid "misuse" of official seals when commissions end (*see, e.g.*, ALASKA STAT. § 44.50.064(e); MO. REV. STAT. ANN. § 486.725.5; and WAGANAKISING ODAWAK TRIBAL CODE OF LAW § 6.2407.B.8) and others have provided for the disabling or destruction of the official seal under various circumstances (*see, e.g.*, CAL. GOV'T CODE § 8207; COLO. REV. STAT. ANN. § 24-21-518(a); and 57 PA. CONS. STAT. ANN. § 318(a)(3)). Other jurisdictions instead require tangible seals to be disposed of by transmitting them to designated government officials or agencies. (*See, e.g.*, HAW. REV. STAT. ANN. § 456-3; N.C. GEN. LAWS § 10B-36(d); and W.VA. CODE § 39-4-18(a).)

Section 8-5 is adapted from MNA 2010 Section 8-1(f), MENA 2017 Section 12-2(d), RULONA Section 18(a) (bracketed language), 2020 *Notary Public Code of Professional Responsibility* VI-B-3, and CAL. GOV'T CODE § 8207.

Under Subsection (a), if the notary's registration to perform notarial acts on electronic records or involving the use of audio-visual communication is resigned or revoked, the formerly registered notary must disable or destroy the

technology system for producing the notary's electronic seal and signature. It is possible that the notary could resign, or suffer revocation of, the registration without resignation or revocation of the underlying notarial commission — so that the tangible official seal would not be affected. In addition, if the notary's commission is resigned or revoked, the former notary is required to disable or destroy any tangible official seal. A resignation or revocation of the notary's commission would additionally effect a resignation or revocation of the notary's registration, if any, and all tangible official seals and technology systems for producing the notary's electronic signature and official seal would have to be properly disabled, destroyed, or rendered unusable.

Subsection (a) also provides that if a notary is adjudicated mentally incompetent or dies, the notary's guardian or personal representative must disable or destroy any traditional official seal and the portion of any technology system, if applicable, which had been used exclusively for the purpose of producing the notary's electronic signature and official seal in performing notarial acts. This duty is consistent with the procedure established for the notary to designate a personal representative pursuant to Section 3-11.

It should be noted, however, that the notary's adjudication of incompetency or death cannot guarantee the disablement of these tools by the triggering of



Sections 3-11(c) and 8-5(a). Logistical and other problems may interfere with the operation of those subsections. For instance, the official seal and signature tools may be housed or stored away from the notary's personal dwelling or property. Sections 3-11(c) and 8-5(a) do not grant the guardian or personal representative authority to enter upon the premises of other parties to carry out the subsections' directives. Such other parties may, or may not, be aware that the notary's official seal and signature tools are housed with them and may or may not be readily available or cooperative. An individual knowingly in possession of the adjudicated-incompetent or deceased notary's official seal or technology system should accept the legal duty to disable, destroy, or deface them or turn them over to appropriate government authorities for disposition. (*See, e.g.*, IDAHO CODE § 51-118(3); MONT. CODE ANN. § 1-5-617(2)(b); and W.VA. CODE § 39-4-18(a).)

Some jurisdictions have expressly provided for the disposition of the technology for producing the notary's electronic signature. (*See, e.g.*, N.C. GEN. STAT. § 10B-128(a).) The appropriate disposition of the official seal and signature technology under Section 8-5(a) must be accomplished "as soon as is reasonably practicable." (*See, e.g.*, N.C. GEN. LAWS § 10B-36(d).) An unspecified time frame was selected, rather than setting an exact one, to allow for some flexibility, particularly in the case of the adjudication of incompetency or death of the notary when it will be the guardian or personal representative of the notary

who will need to act. Numerous jurisdictions do not specify a time in which the final disposition of a tangible official seal must be accomplished. (*See, e.g.*, NEV. REV. STAT. ANN. § 240.051.1(b) and N.D. CENT. CODE § 44-06.1-16.2.)

Subsection (b) provides some flexibility for notaries public who renew their commissions and registrations in carrying out the responsibility of disabling or destroying a technology system. It addresses the situation in which a notary's commission and registration has expired and the notary intends to renew both. It was thought advisable to expect this possible realistic interruption in the commission and registration process (*see generally*, Chapter 3). The technology system used to create the notary's electronic signature and official seal can be maintained and, where necessary, the electronic official seal may be revised to reflect the new expiration date of the renewal of the notary's registration.

The time frame of [30] days is designed to allow each jurisdiction to select the appropriate time frame during which a notary may delay disabling or destroying the technology for producing the notary's electronic signature and official seal, although the drafters considered [30] days to be a suitable length of time. Once the registration has expired, the notary's authority to act ceases immediately. Subsection (b) does not extend the registration nor permit the previously registered notary to perform notarial acts on electronic records after the registration has expired and before a renewal of the registration is completed.

## Chapter 9 – Technology Systems

### Comment

General: This Chapter prescribes the rules and standards for technology systems that are used to facilitate the performance of notarial acts on electronic records, including those that use audio-visual communication. Although both the MNA 2002 and 2010 had chapters that addressed notarial acts on electronic records (Article III of both Acts) neither discussed the technology systems that would be required to perform them. MENA 2017 Chapter 4 was the first effort to do so. It had only three sections. The first, Section 4-1, enumerated specific requirements for an “electronic notarization system” and its provider. The other sections spoke to the notary not being liable for a system failure (§ 4-2) and when a notary must refuse to use a technology system (§ 4-3). Audio-visual communication and the specifics relating thereto appeared as a bracketed Chapter 5A. It had both general and specific guidance provisions.

The sections in this Chapter serve the same purpose as their MENA 2017 precursors. They, however, draw upon

more than two decades of advancements in the electronic transactions arena, including audio-visual communication, the requirements for which now appear as a separate section. (*See* § 9-4.) Thus, the drafters had the benefit of years of experience as to what issues needed to be addressed to ensure technology-based notarizations are secure and system users are protected. The drafters determined that the onus should be on technology system providers to demonstrate their systems meet the needed more rigid security standards. These higher standards will be a product of, *inter alia*, the rulemaking authority given to the commissioning official (*see* § 9-2), stricter system requirements (*see* § 9-3), exculpating system users from liability arising from system failures (*see* § 9-6), and the new obligation on system providers to protect personally identifiable information (*see* § 9-7). Understandably, the electronic universe continues to expand, and with that comes more sophisticated ways to intrude on the privacy of others.

### § 9-1. Authorized Use of Technology Systems.

Notwithstanding Section 8-4(a) through (c) (relating to the security of technology system and official seal), a technology system may facilitate the performance of a notarial act by producing the notary public’s electronic signature and official seal on an electronic notarial certificate under the direction of the notary.

### Comment

This Section serves as the enabling provision that allows an exception to the time-honored rule that a notarization is an act in which a notary, after proving the principal’s identity, signs her official signature and affixes her official seal to the notarial certificate. This provision is

consistent with other jurisdictions. (*See, e.g.,* FLA. STAT. ANN. § 11.255(1)(b).) Unlike a traditional paper-based notarial act, there needs to be a system whereby the signature and official seal can be electronically affixed to the notarial certificate, or in essence, “facilitate” the

notarization. (*See, e.g.*, 433 NEB. ADMIN. CODE ch. 8, § 007; 18 N.C. ADMIN. CODE § 7C.0402; ARIZ. ADMIN. CODE § R2-12-1206; and TENN. CODE ANN. § 8-16-309.) This Section addresses that need by authorizing the use of a technology system (*see* § 2-33, indicating such a system enables “a notary public to perform notarial acts on electronic records or involving the use of audio-visual communication”) to handle the task. In doing so, the drafters understood that the “system,” as opposed to the notary,

technically is completing the notarial act. As such, this raises the concern that the signature and official seal are no longer under the notary’s sole control, as it is the system that is applying them to the electronic record. Thus, the drafters provided the opening clause of the Section to make clear that those provisions of Section 8-4 (*viz.* §§ 8-4(a)-(c)) which address these “sole control” concerns in other settings, should not be an obstacle to the execution of technology-based notarial acts.

## **§ 9-2. [Approval][Registration] of Technology Systems.**

### **Option 1**

Before offering the services of a technology system, a technology system provider shall apply for approval of the provider’s system with the [commissioning official] in compliance with any rules and standards adopted by the [commissioning official].

### **Option 2**

Before offering the services of a technology system, a technology system provider shall register with the [commissioning official] and sign a self-certification confirming that the provider’s system complies with this [Act] and any rules adopted by the [commissioning official].

### **End of Options**

### **Comment**

This Section requires a notary public’s technology system to be [approved by][registered with] the commissioning official (or other authority indicated by the jurisdiction) before it can be put into use. The MENA 2017 defined “electronic notary system” (*see* § 2-7), but it merely referenced the different components thereof *i.e.*, applications, programs, hardware, and software technologies that allowed such systems to operate. MENA 2017 Section 2-10 also defined “enrollment” — a process for registering a notary to access, and presumably, use the system. The drafters took a different tack in this Act and provided two options which correspond to the bracketed choices of this Section.

The first option — Approval — requires a system provider to apply for approval of its technology system with the commissioning official. Under current law, many states require systems to be formally approved. (*See, e.g.*, CODE OF COLO. REGS. tit. 8, ch. 1505-11, R. 5.3; IND. CODE ANN. § 33-42-17-6(c)(1); MICH. COMP. LAWS § 55.286b(1); and WIS. ADMIN. CODE DFI-CCS 25.04.)

The brackets surrounding the words “commissioning official” indicate that the jurisdiction is free to designate some other person or office to oversee the process. Regardless of the title used, this person or department is charged with the responsibility to 1) adopt qualification rules and standards for technology systems, and then 2) determine whether

an applicant's system satisfies them, and if so, approve it.

The second option — Registration — requires a technology system provider to register and self-certify that its system complies with the prescribed requirements. (See, e.g., FLA. ADMIN. CODE § IN-7.005(2)(a); KY. ADMIN. CODE tit. 30, ch. 8, § 5(6)(a); and LA. ADMIN. CODE § 46:XLVI.144.)

The two options are quite different, and arguably provide different levels of protection to the public. Option 1 requires the system provider to get approval from the commissioning official that the system complies with the required rules and standards. The decision is made by a disinterested party who is a public officer. As such, that officer has both the duty and responsibility to evaluate whether the system meets the established requirements. Although such an officer must act fairly, she also is duty-bound to carefully follow the mandate under which she is operating: the officer's obligation to measure the technology system against all the required criteria to ensure that the notarizations made by that system comply with all the statutory requirements.

The second option, however, may not provide the same guarantees. It allows the system provider to register and "self-certify" that the system complies with the statutory requirements. This approach takes a giant leap of faith that all system

providers will make a rigorous analysis of their programs. Some might say it is problematic that all providers will make a close, detailed analysis of their systems even though the statute requires nothing less than that. It is possible that some system providers will take the self-certification process less seriously than others. If so, this could put some technology-based notarial acts at risk.

Some commissioning officials may prefer registration with self-certification over formal approval of technology systems if their offices have limited resources to approve technology systems.

The commissioning official could eliminate the concern that some self-certifiers will be less than rigorous in their "self-certifications" by promulgating detailed rules, for example, that the commissioning official will randomly audit the self-certifications of certain registered technology system providers to ensure they comply with the rules. The reality is that an improperly executed notarial act, or worse, a fraudulent one, can wreak havoc on many parties involved in the transaction to which the notarization relates. Moreover, the system provider may not have the wherewithal to cover all losses created by the faulty notarizations. Again, the rules, including sanctions, adopted by the commissioning official will play a significant role in making this second option palatable to some.

### § 9-3. Requirements for All Technology Systems.

- (a) A technology system that is used to perform notarial acts on electronic records and involving the use of audio-visual communication shall:
  - (1) comply with this [Act] and any rules and standards adopted by the [commissioning official] under Section 1-7(6);
  - (2) enroll only notaries public who have registered with the [commissioning official];
  - (3) when necessary and consistent with other applicable law, facilitate communication for a notary public or an individual who has a vision, hearing, or speech impairment;
  - (4) take reasonable steps to ensure that a notary public enrolled to

- use the technology system has the requisite knowledge to use it to perform notarial acts in compliance with this [Act] and any rules adopted by the [commissioning official];
- (5) require a password or other secure means of authentication;
  - (6) enable a notary public to produce the notary's electronic signature in a manner that attributes such signature to the notary and is capable of independent verification;
  - (7) render every notarial act on an electronic record tamper-evident; and
  - (8) enable the notary public, the notary's personal representative, or the notary's guardian to comply with the requirements of Chapter 6 (relating to notarial records).
- (b) For purposes of this Section:
- (1) "capable of independent verification" means that any person may confirm through the [commissioning official] that a notary public had authority at that time to perform notarial acts on electronic records or involving the use of audio-visual communication; and
  - (2) "enroll" means to approve a notary public to access and use a technology system.

### Comment

This Section details the minimum requirements for *all* technology systems, as the term is used in Section 9-1. "All" includes systems that produce an electronic signature and official seal that can be applied to an electronic record as part of either an "in person" interaction between the principal and notary, as well as one executed involving the use of "audio-visual communication." (*See* § 9-4 *infra*.)

Subsection (a) identifies requirements for a technology system. Although they are straightforward, each merits some discussion. Paragraph (1) provides a simple rule — the system must comply with both the mandates of the Act and "all rules and standards" adopted by the commissioning official. This requirement makes clear the commissioning official plays a dominant role in determining what systems both must and cannot do. By referencing the "commissioning official" the drafters are referencing not

the official as an individual, but rather the "office" itself. The expectation is that the official's administrative staff, which likely will include notary experts, lawyers, and others with knowledge of notarial practice, will be responsible for drafting the rules and guidance under the direction of the commissioning official. (*See, e.g.,* ARIZ. ADMIN. CODE § R2-12-1301 *et seq.* and OR. ADMIN. RULES § 160-100-0805.)

Paragraph (2) makes clear that the system can only enroll "registered" notaries public. Subsection (b) then defines "enroll" to mean "approve a notary public to access and use a technology system." The two subsections work together to make clear that only notaries approved by the commissioning official can be authorized to use a technology system.

Paragraph (3) requires the system be capable of accommodating individuals with disabilities as per applicable law.

This is consistent with the concept that notarial services need to be available to all who need them.

Paragraph (4) essentially requires the system provider to make reasonable efforts to enroll only notaries who are capable of using the system. This essentially imposes an obligation on the system provider to assess whether a system user has both the technical capability and understanding of how to use the system. At a minimum, this can be accomplished with a short, mandatory training session. This training could be presented live by a qualified staff member or with a pre-recorded video or as an online course. The more important question, however, may not be how the training is given, but what is in the training itself. Notaries have different technology skill levels. Some are very proficient with technology while others are not. It is unlikely this provision would be interpreted by the courts to mandate the provider certify a purchaser as either “qualified” or “capable” to use the system. On the other hand, it would not seem reasonable to allow a provider to just hand over a “user guide” and send the notary on her way. The drafters did not want to impose obligations on providers that would be difficult and costly to meet. On the other hand, prudence dictates that the system provider does more than just sell the product and leave the notary to her own devices. Whereas most notaries would make the effort to become thoroughly knowledgeable in the use of the technology system, it is the outliers who were the drafters’ primary concern. Since providers ultimately may bear some legal responsibility for system misuse (*see* § 9-6(b)), they likely will seek ways to reduce that exposure. Given that necessity is the mother of invention, there is no doubt system providers will find a way to meet minimize their financial risks. One

reasonable response is creating “user” training programs that are accessible to the notary upon enrollment. Any such program should include “hands on” training and ongoing access to qualified personnel for notaries who experience difficulties using the system after the training has been completed. It seems appropriate that the commissioning official set guidelines for addressing this important matter.

Paragraph (5) addresses the fact that the system provides access to personal and confidential information. Consequently, it is essential that only authorized individuals have access to it. Requiring a password or other secure authentication process will meet the security need. (For jurisdictions that require the same, *see* ARK. CODE ANN. § 21-14-306(d)(3); MO. REV. STAT. ANN. § 486.1200; NEB. REV. STAT. § 64-413; and TENN. CODE ANN. § 8-16-309.)

Paragraphs (6) and (7) address two simple but important, related concepts. Paragraph 6 requires the system to attribute the electronic signature to and independently identify the notary. Given that a notarial act can be executed remotely, it is essential that the person relying on it be able to satisfy herself that the record was notarized by someone authorized to do so. Under the UETA, “an electronic record or electronic signature is attributable to a person if it was the act of the person” (UETA § 9(a)). A technology system must be able to show that production of the notary’s signature was the notary’s act. (*See* VA. CODE ANN. § 47.1-16.A.)

Paragraph (7) imposes a tamper-evident requirement standard (*see* § 2-32) on all notarizations made on an electronic record or involving the use of audio-visual communication. (*See* IOWA CODE ANN. § 9B.20.1; N.D. CENT. CODE § 44.06.1-18.1; OR. REV. STAT. § 194.305(1); 57 PA. CONS. STAT. ANN. § 320(a); and WYO. STAT. ANN. § 39-4-

19(a)(x).) This is consistent with the overarching theme of the Act to ensure that those relying on technology-based notarizations can be comfortable the latter are reliable.

Paragraph (8) requires the system to allow notarial records to be maintained. This essentially means a journal of notarial acts, audio-visual recording, and any material peripheral to both can be

created and stored safely on the system. (*Accord*, NEB. REV. STAT. § 64-409 and TENN. CODE ANN. § 8-16-308(c).) Should a notary become unable to fulfill her duties, the Paragraph makes clear that the system will allow the same for the notary's personal representative or guardian.

Subsections (b)(1) and (2) are addressed in Subsection (a)(6) and (a)(2) above, respectively.

#### **§ 9-4. Requirements for Audio-Visual Communication.**

In addition to the requirements of this Chapter, a technology system used to perform notarial acts involving the use of audio-visual communication shall:

- (1) enable the notary public and any individual involved in the notarial act to communicate with one another in real time;
- (2) require an authentication procedure that is reasonably secure from unauthorized access for the notary public and any individual involved in the notarial act;
- (3) enable the notary public to verify the identity of the principal and any required witness in compliance with Section 4-4 and any rules adopted by the commissioning official;
- (4) provide reasonable certainty that the notary public and any individual involved in the notarial act are viewing the same electronic record and that all signatures, changes, and attachments, if any, to the electronic record are made in real time; and
- (5) be capable of enabling the notary to create the journal entry required by Section 6-1 and audio-visual recording required by Section 6-3.

#### **Comment**

Whereas Section 9-3 mandated requirements applicable to all technology systems, Section 9-4 identifies five specific functions that a technology system facilitating audio-visual communication system must be able to perform. These are in addition to the detailed system requirements imposed in the prior section. A number of these additional requirements are iterations of provisions found in MENA 2017 bracketed Section 5-1A. References to that act will be provided as is appropriate.

Paragraph (1) imposes a quite simple, but perhaps the most fundamental requirement, *viz.*, that the parties to the

notarization (*i.e.*, the notary and “any other individual involved in the notarial act”) be able to communicate with one another in real time. (*Accord*, ARIZ. ADMIN. CODE § R2-12-1306; COLO. REV. STAT. ANN. §§ 24-21-502(10.5) and 24-21-506(b); and WYO. STAT. ANN. §§ 32-3-111(k)(I) and 32-3-118.) Another “individual involved in the notarial act” could be a principal, a requester, or any other person who partook in or witnessed the notarization. “Real time,” as defined in Section 2-23, essentially requires the parties to be together uninterrupted during the complete execution of the notarial act. This Paragraph makes clear

that the parties must be able to communicate with one another during this uninterrupted time span. The latter is crucial to the notarization. Should either a visual or audio feature of the communication fail before or after the notarial act has commenced, the act cannot be completed until full vision and audio communication has been restored. (*See, e.g.*, ARIZ. ADMIN. CODE § R2-12-1306.A.) Although the Paragraph is silent on this point, good practice would dictate that if the communication was lost after the notarial process had already commenced, the notary would not continue with the original notarial act when the video or sound was restored. It is best that the process be started anew. Although rechecking identification of the parties may not be formally required, good practice would suggest that it is done. (*See, e.g.*, ARIZ. ADMIN. CODE § R2-12-1306.C.) Proceeding in this way will diminish the prospect of future challenges and establish the integrity of the remote notarial act.

Paragraph (2) essentially mandates that every individual involved in the notarization being executed via audio-visual communication use a reasonably secure authentication procedure to access the system. (*See, e.g.*, NEB. REV. STAT. § 64-411(3).) The goal is to ensure that no unauthorized person can unbeknownst to the other participants gain entry into the proceeding, whether for the purposes of disrupting the notarial act or gaining access to confidential, private, or “personally identifiable information” as defined in Section 2-21 that is to be protected by a technology system provider under penalty of liability subject to certain exceptions. (*See* §§ 9-7 (a) and (b).)

Every notarial act involving a principal requires the notary to verify that principal’s identity. Some notarial acts also require witnesses. Paragraph (3) dictates that the technology system

be able to verify identities in accordance with the dictates of Section 4-4, the general provision for proving identity. This process must be exercised carefully. Reviewing credentials through a video screen (a process known in some states as “remote presentation” (*see, e.g.*, OKLA. STAT. ANN. tit. 49, § 202.15) is not the same as having them in one’s hands. In-person notarizations allow the notary to feel the credential. A computer screen cannot duplicate this sensory function, which can be useful in identifying some types of credentials, *e.g.*, ones that are plastic or embossed, and the security features embedded in them.

Paragraph (4) raises a significant concern — that the notary and remote individual are viewing the same electronic record. The system must be capable of allowing the notary to make that determination. If it cannot, the notary must refuse to proceed. In a similar vein, the system must provide the notary the opportunity to be reasonably certain that all signatures, any changes to the records, and any attachments appended to the record are made in real time. Without this level of certainty, the notary should not proceed. Moreover, this Paragraph should serve to remind the notary that extra care must always be used when a notarization involves multiple principals and/or numerous records. Such transactions are difficult enough when all the parties and records are in the physical presence of the notary. Handling them remotely just adds another challenge that requires an extra dose of diligence.

Paragraph (5) informs the notary using audio-visual communication that the system must also be able to make an electronic journal entry and audio-visual recording as per the dictates of Sections 6-2 and 6-3, respectively. (*Accord*, N.H. REV. STAT. ANN. § 456-B:6-a.III(c); WYO. STAT. ANN. § 32-3-118 and LA. REV. STAT. ANN. § 35:629.)



**§ 9-5. Notification of System Use.**

A notary public shall notify the [commissioning official] of the date of initial use of each technology system within 10 days thereafter in a manner prescribed by the [commissioning official].

**Comment**

This provision imposes a reporting requirement on notaries who use technology systems. The notification to the commissioning official must be made within 10 days from the initial use of the system. The notification allows the commissioning official to monitor different systems as well as the notaries using them. Many jurisdictions require the reporting of system use prior to the notary's first such notarial act. (*Accord*, WIS. STAT. ANN. § 140.20(2) and OR. REV. STAT. § 194.345.) Since a notary could use more than one system to perform notarial acts, Section 9-5 requires notification upon the initial use of each new system on an ongoing basis as well.

The policy of requiring the reporting of new system use satisfies at least two specific needs. First, the commissioning official must know which systems a notary uses for the purpose of issuing authentications of the notary's electronic signature and official seal for notarized records destined for foreign countries pursuant to Chapter 11.

Second, knowing which system or systems are in use will enable the commissioning official to oversee and regulate the activities of Notaries and system providers. Should the official

receive complaints about the notary regarding any notarial acts performed on electronic records or involving the use of audio-visual communication, a review can be made as to the system in use at that time. If the cited notary is the only one against whom a complaint has been made, the official can direct remedial action against the notary following the requirements of Chapter 12 without interfering with other notaries using the system. If, however, the commissioning official has received similar complaints lodged against other notaries, the official can investigate whether the system is the common cause. If it is, the official might require the provider to cease operations until the problem is remedied. (*See* CODE OF COLO. REGS. tit. 8, ch. 1505-11, R. 5.3.9 and WIS. ADMIN. CODE DFI-CCS 25.04(5).) If a cause cannot be found quickly, the official can suspend use of that system until provider remedies the problem or terminate the provider's approval or registration if a violation warrants it. (*See* Model Rule 9-1.2, providing the rules for termination, in Appendix I.) In the first case, the official can notify all system users that the system will be unavailable for use until it is fixed.

**§ 9-6. Notary Not Liable for System Failure.**

- (a) A notary public who exercised reasonable care in selecting and using a technology system shall not be liable for any damages resulting from the system's failure to comply with the requirements of this [Act].
- (b) Any provision in a contract or agreement between the notary public and provider that attempts to waive the immunity conferred by Subsection (a) shall be null, void, and of no effect.

### Comment

Section 9-6 comes directly from Section 4-2 of the MENA 2017 and has been adopted in other notarial statutes, as well. (*See, e.g.*, 5 ILCS § 312/6A-102 (cont. enact. by 2021 P.A. 102-160, eff. Jan. 1, 2022).) The provision is essentially an exculpatory clause for damages resulting from a system's failure to comply with the requirements of the Act (*see* §§ 9-3 and 9-4). This means the notary is not liable for damages in a transaction in which the source of the harm was the technology system itself. Importantly, the protection only applies to damages flowing from the system's failure. A notary who negligently used the system (*e.g.*, did not follow the prescribed system instructions) remains liable for her actions, as user error as opposed to system failure caused the harm. Moreover, the Section does not apply to a notary who is careless in following correct notarial procedures, such as not properly verifying an imposter's identity or using the wrong notarial certificate. There, however, is an important exception to the exculpatory protection — that the notary exercise reasonable care in selecting and using the system.

The exception puts the onus on the notary public to use reasonable care when selecting the system. This begs the question: What constitutes reasonable care in such a situation? Is enrolling in a system from a well-known provider in and of itself enough to satisfy the standard? Conversely, does enrolling in a system from an unknown provider presume a lack of reasonable care? These two options likely sit near the opposite ends of the "reasonable care" spectrum, but the reasonability of either

of them likely could not be fairly determined without more information.

What does seem reasonable is for the notary public to make a preliminary investigation of the product as one would do before making any other important purchase. Checking industry reviews, contacting other notaries to learn of their satisfaction with the systems they use, and checking the commissioning official's website for any relevant information on point likely would be considered indicators of using reasonable care in making such a decision. One might think the commissioning official could maintain a roster of approved systems — and some, in fact, do (*see* § 9-8). But other commissioning officials prefer to maintain a neutral posture regarding recommending systems to notaries, which in their view will best enable it to objectively approve systems and handle complaints regarding system failures or related issues. Moreover, some matters involving creative ingenuity are best left unregulated.

Subsection (b) introduces a public policy position to prevent an unscrupulous technology system provider from taking advantage of the notary public. It involves a situation where the system provider seeks to have the notary take on the responsibility of system errors. For example, the licensing agreement between the notary and the provider could require the notary to waive her statutorily granted immunity from damages flowing from the system's failure to comply with requirements of the Act. Subsection (b) explicitly renders unenforceable any provision in such a licensing agreement which attempts to waive a notary's immunity to liability.

### § 9-7. Protection of Personally Identifiable Information.

- (a) Except as provided in Subsection (b), a technology system provider shall not disclose, use, or sell personally identifiable information

- obtained from providing services in connection with the performance of any notarial act.
- (b) Subsection (a) does not apply to the disclosure, use, or sale of personally identifiable information:
    - (1) upon written informed consent of the identified individual;
    - (2) to facilitate the performance of notarial acts of which the personally identifiable information is a part;
    - (3) as authorized by Sections 6-6 (relating to copying and examination of notarial records) and 6-7 (relating to disposition of notarial records);
    - (4) in accordance with any applicable federal, state, or local law;
    - (5) to detect or prevent fraud;
    - (6) to comply with a subpoena, court order, or lawful request from a law enforcement officer or regulatory agency;
    - (7) to administer or process the record that is the subject of the notarial act or any transaction of which the record is a part;
    - (8) in connection with a proposed or actual merger, sale, acquisition, transfer, or exchange of a technology system or the dissolution, insolvency, or cessation of the system provider; or
    - (9) to improve a technology system or the services provided by the technology system provider.
  - (c) A technology system provider is liable to any person for all damages proximately caused by a violation of this Section.

### Comment

In performing notarial acts, notaries public review principals' and requesters' records and credentials that contain confidential information. (*See* §§ 4-4(b)(1) and 6-4(e).) The Act identifies this material as "personally identifiable information" (PII) (*see* § 2-21 and Comment). Section 9-7 is of paramount importance to shield individuals from the disclosure of PII that can result in identity theft and the related life-ruining consequences that can flow therefrom, and safeguard those who are required to share PII in legitimate circumstances. This Act makes protecting PII one of its highest priorities for both notaries and technology system providers.

To that end, Subsection (a) asserts non-disclosure is the order of the day. That said, some situations involving the use of technology systems may require

the legitimate disclosure of PII to third parties, and Subsection (b) addresses those instances.

Subsection (a) establishes the rule that a technology system provider is prohibited from disclosing, using, or selling PII obtained from providing services in connection with the performance of any notarial act. The proscriptions, however, are subject to the exceptions identified in Subsection (b).

Several exceptions enumerated in Subsection (b) are borrowed from a Florida statute (FLA. STAT. ANN. § 117.295(8)), which in turn reflects federal laws. The exceptions noted by their respective paragraph numbers are: (1) with the individual's knowledgeable permission ("informed consent") (*see* 15 U.S.C. § 6802(e)(2)), (2) as needed for the notarial act, (3) as permitted to properly

copy, examine, or dispose of notarial records (*see* §§ 6-6 and 6-7), (4) as permitted by law (*see* 15 U.S.C. § 6802(e)(8)), and (6) to comply with a subpoena, court order, or other proper request from law enforcement (*see* 15 U.S.C. § 6802(e)(8)). Paragraphs (5) and (7), respectively, permit access to prevent fraud (*see* 15 U.S.C. § 6802(e)(3)(B)) or process a record that is a part of a transaction (*see* 15 U.S.C. § 6802(e)(1)). The last two exceptions address the needs of the technology provider. Paragraph (8) permits the disclosure incident to a change in ownership and as may be required pursuant to the provider

going out of business (*see* 15 U.S.C. § 6802(e)(7)). Paragraph (9) provides an exception if the system provider is improving their system.

Subsection (c) imposes liability on the system provider for any harm created by a violation of this Section. The drafters used the traditional notion of “proximate cause” as the basis for the system provider’s liability. Also notable is the fact that the damages clause is open-ended to include “all” damages resulting from the violation of the Section. Therefore, this could include a wide range of tort-based claims as well as ones for business losses.

### **§ 9-8. List of [Approved][Registered] Technology Systems.**

The [commissioning official] shall maintain a list of all [approved] [registered] providers whose technology systems may be used by a notary public to perform notarial acts on electronic records or involving the use of audio-visual communication.

#### **Comment**

This provision serves a routine, but important, regulatory function. It establishes a roster of technology system providers that are [approved][registered] for use in the state. This will provide notaries public interested in executing such notarizations a valuable resource for identifying a technology system that can be used if a client requests a notarization requiring the same. The drafters bracketed “approved” and “registered” to acknowledge that states will either “approve” or “register” technology systems. (*See* § 9-2 and Comment.) This will allow terminology consistency within the state irrespective of how it references the authorized system. The provision applies to both a technology system needed to perform a

notarial act on an electronic record, and one used for executing a notarial act using audio-visual communication.

Although having a list of approved electronic systems is useful in and of itself, it serves an even more important goal — protecting the public. Notaries have a level of security that the notarial acts they perform are with [approved] [registered] technology system providers. This, in turn, allows them to inform their clients that the notarizations are being executed on a state-approved or registered system. Incidentally, satisfying this requirement may in itself constitute the “reasonable care” a notary needs to avoid liability for damages caused by a technology system’s failure under Section 9-6(a).

## Chapter 10 – Recognition of Notarial Acts

### Comment

General: This Chapter deals with the recognition of notarial acts in the United States and was developed from materials on the same topics in MNA 2010 Chapter 11 and MENA 2017 Section 6-3. Generally, recognition of notarial acts has been viewed as sound public policy and law for hundreds of years, commencing with this country's colonial period. It fosters efficient business, interstate, and international commerce, harmony, and uniformity of practice among our units of government, and international cooperation. From the late 1890s on, the Uniform Law Commission formulated a series of uniform acts which mandate recognition of notarial acts (*See*, UNIF. ACKS. ACT §§ 3-6 (1892); UNIF. FOR. ACKS. ACT §§ 1-3 (1914); UNIF. ACK. ACT §§ 1-4 and 10 (1939; amended 1960); UNIF. RECOG. OF ACKS. ACT §§ 1-2 and 4 (1968); UNIF. LAW NOT. ACTS §§ 3-6 (1982); and

RULONA §§ 10-14 (2010; amended 2018, 2021).) Moreover, from an even earlier time, the framers of the U.S. Constitution, in Article IV, § 1, provided that "Full Faith and Credit shall be given in each State to the public acts, records, and judicial proceedings of every other State," which has been widely considered to apply to notarial acts and records.

Accordingly, in addition to providing for recognition of notarial acts performed by a state's own notarial officers, including notaries public (*see* § 10-1, *infra.*), the Act generally requires cross-border recognition of notarial acts, provided that certain basic conditions are met. In this modern age of technology, notarial acts on electronic records and involving the use of audio-visual communication are also accorded intrastate and cross-border recognition upon satisfaction of comparable conditions. (*See* MENA 2017 § 6-3.)

### § 10-1. Notarial Acts of This [State].

- (a) A notarial act may be performed within this [State] by the following individuals:
  - (1) a notary public of this [State];
  - (2) a judge, clerk, or deputy clerk of any court of this [State]; [or]
  - (3) [designation[s] of other officer[s]; or
  - (4)] any other individual authorized to perform a specific notarial act by the law of this [State].
- (b) The signature, title, and, if required by law, official seal of an individual authorized by Subsection (a) to perform a notarial act are prima facie evidence that the signature and seal are genuine and that the individual holds the indicated title, and, except in the case of Subsection (a)[(4)], conclusively establishes the authority of a holder of that title to perform a notarial act.

### Comment

Section 10-1 is similar to the language of MNA 2010 Section 11-1, with one difference to be noted below. (*See also* RULONA § 10.) Most

jurisdictions have enacted provisions recognizing the notarizations performed in their states by their own designated notarial officers. (*See, e.g.*, FLA. STAT. ANN. § 92.50(1); MINN. STAT. ANN. § 358.60; and MO. REV. STAT. ANN. § 486.775.1.)

Subsection (a) identifies the officials authorized to perform notarial acts in the enacting state.

Subsection (b) announces that the appearance on a notarial certificate of the signature, title, and seal (if required) of the individual authorized to perform a notarial act self-proves the genuineness of those features and “that the individual holds the indicated title” to the level of prima facie evidence. There is a further statement that the combination of those features “conclusively establishes the authority of a holder of that title to perform a notarial act” (the latter result which therefore cannot be rebutted by other evidence), with the exception of one specific kind of notarial official left out of the conclusiveness result. That is, one who is not granted general notarial powers, but is instead an “individual authorized to perform a specific notarial act by the law” is not accorded the same conclusive authority to perform the notarial act in question. Such authority would have to be proved. This further statement about conclusiveness of authority does not appear in MNA 2010 Section 11-1(b).

This Act’s Subsections 10-1(a) and (b) and RULONA Sections 10(a) and (b)

treat the subject in somewhat the same manner, but there are fine distinctions. RULONA Section 10(a)(3) notes that licensed attorneys in some states are granted notarial powers, and Section 10(b) does not make reference to the official seal or stamp as contributing to the prima facie status of the title of the notarial officer. Next, RULONA Section 10(c) adds language to give the self-proving consequence broader application by conclusively establishing the authority of certain identified individuals to perform notarial acts on the basis of only the individual’s signature and title. Curiously, as in Section 10(b), RULONA Section 10(c) does not include the notarial seal or stamp as a feature relevant to the self-proving result, although RULONA Section 14 does accord weight to the “official stamp” of a foreign individual in that law’s provision on recognition of a foreign notarial act, and in RULONA Section 15(b) “an official stamp must be affixed to or embossed on the certificate” when the notarial act is performed on a tangible record. Yet historically, the official seal of a notary public has always rightly been accorded substantial weight. The U.S. Supreme Court, in a case involving a notarization from a foreign country, announced that it “will take judicial notice of the seals of notaries public, for they are officers recognized by the commercial law of the world.” (*Pierce v. Indseth*, 106 US 546, 549 (1883).)

## § 10-2. Notarial Acts of Other States.

- (a) A notarial act has the same effect under the law of this [State] as if performed by a notarial officer of this [State] if performed within or under the authority, and in compliance with the law, of another state by any of the following individuals:
  - (1) a notary public of that state;
  - (2) a judge, clerk, or deputy clerk of a court of that state; or
  - (3) any other individual authorized by the law of that state to perform the notarial act.
- (b) The signature, title, and, if required by law, official seal of an

individual whose authority to perform a notarial act is recognized by Subsection (a) are prima facie evidence that the signature and official seal are genuine and that the individual holds the indicated title, and, except in the case of Subsection (a)(3), conclusively establishes the authority of a holder of that title to perform a notarial act.

### Comment

Section 10-2 mandates interstate recognition of notarial acts. Interstate recognition of notarizations is critical to interstate commerce and the working of the legal systems across the country. Virtually every jurisdiction has enacted such a provision, often based upon one of the Uniform Law Commission's uniform acts. (*See, e.g.*, ALASKA STAT. §§ 09.63.050(1) and (2); ARIZ. REV. STAT. ANN. § 41-259; ARK. CODE ANN. § 16-47-210; CAL. CIV. CODE § 1182; CONN. GEN. STAT. ANN. §§ 1-37 and 1-57; OKLA. STAT. ANN. tit. 49, § 115; and TENN. CODE ANN. § 66-22-102.)

Subsection (a) identifies the individuals who perform a notarial act in another state that is accorded recognition in the home state, and includes a fundamental requirement not expressly stated in MNA 2010 Section 11-2 nor RULONA Section 11. That is, in order for a notarization performed in one state to be recognized in another, the notarization must be lawful in the state where it is performed. This is the law, even if not expressly stated in a statute. The law should not allow notarizations with material or substantial faults or illegal features to be approved elsewhere when such defective notarizations would not be approved in the very places where they are performed. Some state laws do expressly require "compliance with the manner and form prescribed by the law of the place of execution" or require the notarial certificate to be "in a form prescribed by the laws or regulations in the place" of performance (or comparable language). (*See, e.g.*, ARK. CODE ANN. §

16-47-210; HAW. REV. STAT. ANN. § 502-45; and S.D. CODIFIED LAWS § 18-5-15; *see also* VA. CODE ANN. § 47.1-13.1.B; and *Apsey v. Memorial Hospital*, 730 NW2d 695 (Mich. 2007).)

This same standard of compliance with the law of the place where the notarization is performed must be satisfied for cross-border recognition of notarizations under Sections 10-3, 4, and 5 as well (*but see* N.H. REV. STAT. ANN. §§ 477:4 and 5, requiring acknowledgments taken outside the U.S. by certain U.S. federal officials, U.S. notaries public, and New Hampshire officials to be "in the form required by law for acknowledgments taken within" New Hampshire in order to be recognized in New Hampshire).

There is a commonly held view that Subsection (a) reflects the interstate recognition of notarial acts as already mandated by the Full Faith and Credit Clause of the U.S. Constitution (quoted above), and thus Section 10-2 should be unnecessary. Some states have expressed their views on this matter. (*See, e.g.*, 5 ILCS § 312/3-106 (the state's sample form certificate of notarial authority provides "full faith and credit is and ought to be given to this notary's official attestations"); *see also* S.D. CODIFIED LAWS § 18-1-10). *See* Michael Closen, "The Public Official Role of the Notary," 31 J. MARSHALL L. REV. 651, 694-697, discussing interstate recognition of notarial acts under the "Full Faith and Credit Clause"; *but see Apsey v. Memorial Hospital*, 730 NW2d 695 (Mich. 2007), about an initial refusal of sister state

recognition in a case involving a difference in notarial procedure between states.

Because the U.S. Supreme Court has never squarely ruled on the matter, uniform and model acts and state statutes have regularly addressed the interstate recognition issue.

Subsection (b) sets out the self-proving features of the notarial certificate

to be created in a sister state, which taken together result in *prima facie* evidence that the signature, required official seal, and title genuinely and conclusively establish the authority of notaries public, judges, and clerks and deputy clerks of courts to perform the notarial act. As discussed above, RULONA Section 11 differs in the same respects.

### **§ 10-3. Notarial Acts of Federally Recognized Indian Tribe.**

- (a) A notarial act has the same effect under the law of this [State] as if performed by a notarial officer of this [State] if performed within the jurisdiction or under the authority, and in compliance with the law, of a federally recognized Indian tribe by any of the following individuals:
  - (1) a notary public of the tribe;
  - (2) a judge, clerk, or deputy clerk of a court of the tribe; or
  - (3) any other individual authorized by the law of the tribe to perform the notarial act.
- (b) The signature, title, and, if required by law, official seal of an individual whose authority to perform a notarial act is recognized by Subsection (a) are *prima facie* evidence that the signature and official seal are genuine and that the individual holds the indicated title, and, except in the case of Subsection (a)(3), conclusively establishes the authority of a holder of that title to perform a notarial act.

#### **Comment**

This is a new provision mandating recognition of notarizations performed by notarial officers of federally recognized Indian tribes. Such a provision does not appear in MNA 2010 Chapter 11, although MNA 2017 Section 6-3(a)(4) provides for recognition of an “electronic notarial act” performed by “a notary public or notarial officer under authority of ... a tribal government recognized by the United States.” This Section 10-3 tracks closely RULONA Section 12. RULONA Section 12 did not appear in prior Uniform Law Commission uniform acts but was new to the 2010 RULONA.

Some federally recognized tribes have adopted notary statutes or codes.

(*See, e.g.,* CHEROKEE NATION TRIBAL CODE tit. 49, chs. 1, 2; ONEIDA NATION OF WIS. ONEIDA NOT. ACT tit. 1, ch. 114; and WAGANAKISING ODAWAK TRIBAL CODE OF LAW §§ 6.2401-6.2414.)

Following the RULONA, several jurisdictions in the U.S. have enacted provisions for recognition of notarial acts performed under the authority of a federally recognized Indian tribe. (*See, e.g.,* COLO. REV. STAT. ANN. § 24-21-512; MICH. COMP. LAWS § 55.285a(2); MINN. STAT. ANN. § 358.62; and MONT. CODE ANN. § 1-5-606.)

Subsection (a) requires the tribal notary or notarial officer to perform the notarial acts either “within the jurisdiction or under the authority” of a



federally recognized tribe. (*See, e.g.*, ONEIDA NATION OF WIS. ONEIDA NOT. ACT tit. 1, § 114.2-4 (jurisdiction restricted to notarial acts performed within “the exterior boundaries of the reservation”) and WAGANAKISING ODAWAK TRIBAL CODE OF LAW § 6.2404.E (tribal notaries “may perform notarial acts in any part of the Little Traverse Bay Bands of Odawa Indians’ reservation”).) Subsection (a) also recognizes the official acts of tribal notarial officers performed “under the authority” of the tribe (perhaps including a notarization performed at an off-reservation tribal owned or operated facility or at a tribal function). It should be pointed out that RULONA Section 12(a) and some state statutes require a tribal notarial officer to act both “under the authority and in the jurisdiction of a federally recognized Indian tribe” in order for a notarization to be entitled to recognition. (*See, e.g.*, COLO. REV. STAT. ANN. § 24-21-512(1); MD. CODE ANN. (STATE GOV’T) § 18-211(a); 57 PA. CONS. STAT. ANN. § 311(a); and WASH. REV. CODE ANN. § 43.45.199(1).).

In parity with the other notarial act recognition provisions in this Act, recognition of a tribal notarial act requires it to be “in compliance with the law,” which means the law of the particular tribe. It is contemplated that, before a notarial act by a tribal notarial officer can be performed, a tribe will have adopted its own notary statutes or regulations. (*See* RULONA § 12(a), Comment, referring to notarial acts “authorized by the law of the Indian tribe.”)

The subject of recognition of notarial acts of federally recognized Indian tribe notaries and notarial officers has its complexities, although the general approach to grant recognition is appropriate. Currently, the states with specific recognition provisions related to federally recognized tribal notarizations have adopted Chapter 12 of the RULONA. There appears to be no standard practice

among the tribes in regard to appointment of notaries public and establishment of tribal laws or rules to govern the performance of notarizations, as the tribal provisions on these issues vary markedly. Alternatively, for tribal jurisdictions which are viewed to be sovereign nations, recognition provisions regarding foreign country notarizations might be applied. (*See* § 10-5 and RULONA § 14.)

Subsection (b) follows the same format as in both Sections 10-2 and 10-4 related to the notarial acts of notarial officers to whom recognition is accorded, the self-proving results, *prima facie* evidence, and conclusive evidence of the authority of the officer.

It should be noted that an individual may be commissioned as a notary public by the state and separately appointed or commissioned a tribal notary or acquire notarial authority through one’s tribal office. (*See* RULONA § 12(a), Comment, citing the example of an attorney who is a notarial officer by reason of holding a tribal office, and who might otherwise be granted a notary commission by the state.) A tribe may understandably prefer that its notarial activities and those of its members be conducted by its tribal notaries and notarial officers acting in those roles, rather than acting as state-commissioned notaries.

If a question arises as to the authority of a tribal notary public, particularly a tribal notary other than those officials specifically designated in Subsection (a), such authority could be established by a certificate of authority. (*See* RULONA § 12(c), Comment, noting that a “clerk’s certificate” or other certification is acceptable as proof of the authority of a tribal notary.) The Oneida Notary Act includes a provision authorizing the Tribal Secretary to issue certificates of authority and a sample of the form (§§ 114.8-1 and 8-2).

**§ 10-4. Notarial Acts of United States.**

- (a) A notarial act has the same effect under the law of this [State] as if performed by a notarial officer of this [State] if performed anywhere by any of the following individuals under the authority of and in compliance with the law of the United States:
  - (1) a judge, clerk, or deputy clerk of a court;
  - (2) an individual authorized under federal law to perform notarial acts in military service or under the authority of military service;
  - (3) an individual designated by the United States Department of State to perform notarial acts overseas; or
  - (4) any other individual authorized by federal law to perform notarial acts.
- (b) The signature, title, and, if required by law, official seal of an individual whose authority to perform a notarial act is recognized by Subsection (a) are prima facie evidence that the signature and official seal are genuine, that the individual holds the indicated title, and, except in the case of Subsection (a)(4), conclusively establishes the authority of a holder of that title to perform a notarial act.

**Comment**

This Section mandates recognition of notarial acts performed by certain federal officers (including military officers) and was drawn from the almost identical provision appearing in MNA 2010 Section 11-3. Also, MENA 2017 Section 6-3(a)(2) provides for the recognition of an “electronic notarial act” “performed by a notary public or notarial officer under authority of ... the government of the United States,” and is followed by the standard self-proving features in its Sections 6-3(b) and (c). The comparable provision granting recognition to notarial acts of federal officers in the RULONA is Section 13, although there are minor differences in language from this Act’s Section 10-4. Numerous jurisdictions have adopted provisions on recognition of notarial acts under federal authority or federal law. (*See, e.g.*, ALA. CODE § 35-4-26; ARK. CODE ANN. § 16-47-204; CONN. GEN. STAT. ANN. § 1-57(3); and D.C. CODE ANN. § 1-1231.12.) As well, numerous jurisdictions have adopted specific

provisions for recognition of notarial acts performed by United States military officers either as part of more expansive laws on recognition of notarial acts performed by federal officials (*see* RULONA § 13(a)(2)), or separately. (*See, e.g.*, CAL. CIV. CODE § 1183.5; FLA. STAT. ANN. § 92.51; and HAW. REV. STAT. ANN. § 502-47(b).) Some jurisdictions have even provided a sample form to facilitate recognition of a notarial act by a military officer. (*See, e.g.*, ARK. CODE ANN. § 16-47-213; CAL. CIV. CODE § 1183.5; and CONN. GEN. STAT. ANN. § 1-38.)

Paragraph (2) allows for recognition of a notarial act of an individual “in military service or under the authority of military service.” Paragraph (3) grants recognition to notarial acts by designated State Department individuals authorized only “to perform notarial acts overseas.” These provisions borrow from the comparable RULONA provisions (*see, e.g.*, MD. CODE ANN. (STATE GOV’T) § 18-212(a)(3) and N.D. CENT. CODE § 44-

06.1-12.1.c; *see also* VA. CODE ANN. § 47.1-13.1.A.3, referencing U.S. foreign service officers, consular agents, and others authorized by the U.S. Department of State).

Subsection (b) parallels the same evidentiary consequences resulting in prima facie or conclusive outcomes for notarial acts as are provided in Sections 10-2(b) and 10-3(b).

#### **§ 10-5. Notarial Acts of Foreign State.**

- (a) A notarial act has the same effect under the law of this [State] as if performed by a notarial officer of this [State] if performed within the jurisdiction or under the authority, and in compliance with the law, of a foreign state or its constituent units, or a multi-national or international organization by any of the following individuals:
  - (1) a notary public or other notarial officer;
  - (2) a judge, clerk, or deputy clerk of a court of record; or
  - (3) any other individual authorized by the law of that jurisdiction to perform the notarial act.
- (b) The signature and, if required by law, official seal of an individual whose authority to perform a notarial act is recognized by Subsection (a) are prima facie evidence that the signature and official seal are genuine, that the individual holds the indicated title, and, except in the case of Subsection (a)(3), conclusively establishes the authority of a holder of that title to perform a notarial act.
- (c) The authority of an officer to perform a notarial act is conclusively established if the title of the office and indication of authority to perform notarial acts appears either in a digest of foreign law or a list customarily used as a source for that information.
- (d) An apostille in the form prescribed by the Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents of October 5, 1961, and issued by a foreign state party to the Convention conclusively establishes that the signature and, if required by law, official seal of the notarial officer referenced in the apostille are genuine and that the individual holds the indicated office.
- (e) A certificate of authority or authentication executed by a consular officer designated by the United States Department of State stationed overseas, or a certificate of authority or authentication executed in the United States by a foreign official authorized to execute the certificate conclusively establishes that the signature and, if required by law, official seal of the notarial officer referenced in the certificate are genuine and that the individual holds the indicated office.

#### **Comment**

Section 10-5 mandates international recognition of notarial acts, in language similar to that of MNA 2010 Section 11-4. As well, MENA 2017 Section 6-

3(a)(3) provides for the recognition of an “electronic notarial act” “performed by a notary public or notarial officer under authority of ... the government of a

foreign nation.” The recognition of a notarial act originating in a foreign nation is included in RULONA Section 14. Virtually every U.S. state and territory has adopted provisions on recognition of notarial acts by foreign country notarial officers (and some recognize notarial acts by notarial officials of multi-national and international organizations). (*See, e.g.*, ALA. CODE § 35-4-26; KY. REV. STAT. ANN. § 423.350; LA. REV. STAT. ANN. § 35:9; and OHIO REV. CODE ANN. § 147.52.)

The sweep of Section 10-5 is broad considering the differences among the nations of the world in regard to relevant concerns about the knowledge, training, integrity, and independence of their notaries, the procedures involved in the notarization process, and the meaning and nature of their notarial acts. However, there is hardly a practicable way to statutorily differentiate among foreign countries in regard to the grant of recognition of notarial acts performed by foreign notaries public. Section 10-5 applies to notarial acts performed “within the jurisdiction” and “under the authority” of “a foreign nation or its constituent units or a multi-national or international organization,” reflecting RULONA Section 14(b). A new addition (as with the other provisions in this Chapter on cross-border recognition) expressly demands “compliance with the law” of the place of performance of the notarial act. Some states have done likewise, although compliance with the law of the place of performance of the notarial act would be required even in the absence of such a statutory reference to it. (*See, e.g.*, HAW. REV. STAT. ANN. § 502-47(a)(3) and N.C. GEN. STAT. §§

10B-20(f) and 10B-40(e); *see also* ALASKA STAT. § 09.63.080(2) (for the recognition of notarizations generally).)

Like the other sections of Chapter 10, Subsection (a) sets out the list of individuals covered by the Section. In turn, Subsection (b) allows certain notarial certificates to be self-proving. It grants prima facie evidentiary status to notarial authority resulting from the signature, official seal, and title of the listed individuals, and grants conclusive evidentiary status to notarial authority resulting from those elements in the case of notaries, notarial officers, judges, and clerks and deputy clerks of court.

Subsections (c), (d), and (e) are nearly identical to the language of MNA 2010 Sections 11-4(c), (d), and (e). These three provisions set out three separate methods to conclusively establish the authority of a notarial officer referenced under Subsection (a), namely, under Subsection (c) by reference to a digest of foreign law or list customarily used to authenticate notarial authority, under Subsection (d) by receipt of an apostille issued pursuant to the Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents of October 5, 1961, or under Subsection (e) by receipt of a certificate of authority executed by a specified U.S. consular officer stationed overseas or by an authorized foreign official serving in the U.S. All of the subsections of Section 10-5, which borrow from the RULONA (*see* RULONA §§ 14(c), (e), and (f)), work together to ensure that notarial acts properly performed in other foreign countries and states will be duly recognized in U.S. jurisdictions that adopt this Act.

## Chapter 11 – Authentication of Notarial Acts

### Comment

General: Whereas Chapter 10 dealt with the recognition of notarial acts within or destined for the United States, this Chapter deals with the approval or recognition in foreign countries of notarizations originating in the states and territories of the United States and how U.S. jurisdictions can facilitate such approval. Consistent with the Act, Chapter 11 applies to authentication of notarial acts on paper and electronic records.

The “authentication” addressed is of the authority of notaries public or notarial officers to perform notarial acts. Rather than referring expressly to the “authority” of a notary or notarial officer to perform a notarial act, some laws refer to the authentication of the official seal and/or signature of a notary (*see, e.g.*, MO. REV. STAT. ANN. § 486.770.1; R.I. GEN. LAWS § 42-30.1-20; and S.C. CODE ANN. § 26-1-200; *see also* NEB. REV. STAT. §§ 64-312 and 64-415, relating to notaries public who perform notarial acts on electronic records or involving the

use of audio-visual communication, certification of “a notary public’s commission” (*see, e.g.*, N.M. STAT. ANN. § 14-12A-22), or certification of “the official character” of a notary (*see, e.g.*, HAW. REV. STAT. ANN. § 456-4(a) and N.Y. CONS. LAWS (EXEC. LAW) § 132).

Jurisdictions have placed the duty for providing authentication of notaries public and notarial officers in various government officials among which are county or court clerks and notary commissioning officials. (*See, e.g.*, ARIZ. REV. STAT. ANN. §§ 41-325.A.1, and 2; GA. CODE ANN. §§ 45-17-19(a)(1) and (2); 5 ILCS § 312/3-106; IND. CODE ANN. § 33-42-15-1(b); and MASS. GEN. LAWS ANN. ch. 183, § 42(16).)

State statutes may also vest authority in the Secretary of State or other state officials to adopt rules to carry out the provisions on certification of notarial authority. (*See, e.g.*, NEV. REV. STAT. ANN. § 240.1657.5.)

### § 11-1. Form of Evidence.

On a notarized record sent to a jurisdiction outside the United States, evidence of the authority or authenticity of the signature and official seal of a notarial officer of this [State] shall be in the form of:

- (1) an apostille prescribed by the Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents of October 5, 1961, if executed or produced in the territory of a foreign state party to the Convention; or
- (2) a certificate of authority or authentication as required by the law of the foreign state in which the record is to be used, if that foreign state is not a party to Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents of October 5, 1961.

### Comment

Section 11-1 begins by limiting the prescribed authentication procedures to

use exclusively for a “notarized record sent to a foreign state”. It provides for

two alternative methods by which the authority of a notary public or notarial officer may be proved. Paragraph (1) authorizes the use of an apostille as prescribed by the Hague Convention, if the notarized record is being sent to a foreign state or nation that is a party to the Convention.

Several state laws provide for the issuance of apostilles. (*See, e.g.*, MO. REV. STAT. ANN. § 486.770.1; MONT. CODE ANN. § 1-5-631(1); and NEB. REV. STAT. § 64-202(3).) It was thought unnecessary to include a form of the apostille in the Act for two reasons. First, the government officials who prepare the apostille are familiar with the required form. Second, the apostille form must comply exactly with the Convention's specifications. (*See* GA. CODE ANN. § 45-17-19(a)(2). The apostille must be "in the exact form prescribed by the Hague Convention".)

Paragraph (2) authorizes the second way of authenticating notarial authority, issuance of a certificate of authority or authenticity. Many states have enacted comparable provisions providing for such certificates. (*See, e.g.*, 5 ILCS § 312/3-106; MO. REV. STAT. ANN. § 486.770.2; NEB. REV. STAT. §§ 64-312 and 64-415 (certificates of authority for notarial acts on electronic records and involving the use of audio-visual communication); and VA. CODE ANN. § 47.1-11.1.A (for notarial acts on electronic records).)

No form for a certificate of authority or authenticity is included here because as Paragraph (2) clarifies, the form of the certificate of authority or authenticity is dictated by the law of the foreign state

itself. Nevertheless, several jurisdictions have adopted and published forms in their statutes (*see, e.g.*, MASS. GEN. LAWS ANN. ch. 183, § 42(16); NEB. REV. STAT. §§ 64-313(1) and 64-415(2) (for notarial acts on electronic records and involving the use of audio-visual communication); N.C. GEN. STAT. § 10B-137(a) (for notarial acts on electronic records); and ONEIDA NATION OF WIS. ONEIDA NOT. ACT tit. 1, § 114.8-2).

Some states have adopted separate laws or rules regarding the certification of authority or authenticity for notarial acts on electronic records and/or involving the use of audio-visual communication. These laws and rules expressly reference "electronic evidence of the authenticity of the official signature and seal of an electronic notary" or employ comparable language. (*See, e.g.*, MO. REV. STAT. ANN. § 486.970; NEB. REV. STAT. §§ 64-312, 64-313, and 64-415; NEV. REV. STAT. ANN. § 240.205; and S.C. CODE ANN. § 26-2-170.)

Implicit in the confirmation of notarial authority for a notarial act involving an electronic record is the assurance that the certificate of authority or authenticity is processed by electronic means, properly attached to or logically associated with the electronic record containing the notarial act and protected by the same security features required for the notarial act itself, particularly tamper-evident technology. (*See* NAT'L ASSOC. SEC. OF STATE, "NASS SUPPORT FOR THE REVISED NATIONAL ELECTRONIC NOTARIZATION STANDARDS" (adopted 2006; reaffirmed 2016; amended and readopted 2018); *see also* MO. REV. STAT. ANN. § 486.970.2.)

### **§ 11-2. Prohibition.**

The [commissioning official/competent authority] shall not issue an apostille or a certificate of authority or authenticity if the [commissioning official/competent authority] reasonably believes the record may be used for any fraudulent, criminal, unlawful, or improper purpose.

### Comment

Section 11-2 is a new provision that does not appear in either the MNA 2010 or MENA 2017. It sets out the grounds upon which the official asked to issue an apostille or certify the authority of a notary public or notarial officer must refuse to do so. Inclusion of this new Section was prompted in part by concerns that some individuals have attempted to misuse apostilles and certificates of authority for other than their sole legitimate purpose of authenticating notarial authority.

The grounds for a refusal to issue an apostille or certificate of authority are the official's reasonable belief that the notarized "record may be used for any fraudulent, criminal, unlawful, or improper purpose." (*See, e.g.*, MONT. CODE ANN. § 1-5-631(3); NEV. REV. STAT. ANN. §

240.1657.2(b); and S.C. CODE ANN. § 26-1-230(A).) Other specific bases for limitations or refusals to issue apostilles or certificates of authority are set out in some state laws. (*See, e.g.*, IND. CODE ANN. § 33-42-15-1(c); NEV. REV. STAT. ANN. §§ 240.1657.1(a) and (c); S.C. CODE ANN. § 26-1-230(C); and WYO. STAT. ANN. § 32-3-110(d).) The objective standard of requiring the authenticating officer in charge to "reasonably believe" there is a basis to refuse to certify notarial authority means that the officer must be able to cite to a factual matter in the record or from other reliable sources and to articulate substantial objective reasons for the belief. Mere suspicion, disagreement with the substance of the notarized record, and unsubstantiated doubt are not enough to warrant refusal.

### § 11-3. Fees.

The [commissioning official/competent authority] may charge [dollars] for issuing an apostille or certificate of authority or authenticity.

### Comment

Section 11-3 allows for the charging of fees for the issuance of an apostille or a certificate of authority or authenticity, as is provided for in many state statutes. (*See, e.g.*, IND. CODE ANN. § 33-42-15-2(a); MO. REV. STAT. ANN. § 486.770.4; NEB. REV. STAT. §§ 64-313(2) and 64-415(3) (for certificates of authority for notarial acts on electronic records and involving audio-visual communication, respectively); N.Y. CONS. LAWS (EXEC. LAW) § 132; N.C. GEN. STAT. § 10B-137(b) (for certification of the authority of an electronic notary public); and R.I. GEN. LAWS § 42-30.1-20.)

The maximum fees currently set in various state statutes for issuance of apostilles and certificates of authority

are modest sums. At least one state has authorized the setting of a "reasonable fee" for issuance of an apostille or a certificate of authority or authenticity. (*See* S.C. CODE ANN. § 26-1-220.) The specific fee to be charged is bracketed. The drafters thought it wise to allow jurisdictions to set their own fees. Certainly, this provision with minor changes could be reconstructed to allow the fees to be set by the issuing authority or through administrative rule, thereby eliminating the need for occasional revisiting and revision of statutory fee amounts. Similarly, any associated services and costs for "expedited" preparation or "overnight-return" service, and the like may be assessed.

## Chapter 12 – Liability, Sanctions, and Remedies

### Comment

General: This Chapter integrates into one place the three related subjects of liability, sanctions, and remedies. As is the case throughout the Act, the provisions of this Chapter apply to notaries public who are commissioned to perform notarial acts on traditional paper records and notaries who are both commissioned and registered to perform official acts on paper and electronic records and those involving the use of audio-visual communication. It addresses issues that apply not only to notaries, but also employers of notaries and sureties of notary public bonds, and persons who are not notaries.

### § 12-1 Liability of Notary Public, Surety, and Employer.

- (a) A notary public shall exercise reasonable care in the performance of notarial acts.
- (b) A notary public is liable to any person for all damages resulting from the notary's official misconduct.
- (c) A surety for a notary public's bond is liable to any person for all damages caused that person which result from the notary's official misconduct, but in any case, a surety's aggregate liability shall not exceed the dollar amount of the bond or of any remaining bond funds that have not been disbursed to other claimants.
- (d) An employer of a notary public is liable to any person for all damages resulting from the notary's official misconduct during the course of employment, but only if the employer directed, expected, encouraged, approved, or tolerated the notary's official misconduct either in the particular notarization or, impliedly, by the employer's previous action in at least one other notarization involving any notary employed by the employer.
- (e) Recovery of damages under this Section does not require that the notary public's official misconduct be either the sole or principal proximate cause of the damages.
- (f) An employer of a notary public is liable to the notary for:
  - (1) all damages recovered from, and costs sustained by, the notary as a result of any violation of this [Act] by the notary that was performed under threat of the employer, if the threat, including demotion or dismissal, was made in reference to the particular notarization or, impliedly, by the employer's previous action in at least one other notarization involving any notary employed by the employer; and
  - (2) all damages and costs caused the notary by demotion, dismissal, or other action resulting from the notary's refusal to engage in a violation of this [Act] or official misconduct.
- (g) For purposes of this Chapter, "official misconduct" means a notary



public’s performance of any act prohibited, or failure to perform any act or duty mandated, by this [Act] or by any other law of this [State].

### Comment

Subsection (a) requires a notary public to “exercise reasonable care in the performance of notarial acts.” (*Accord*, VA. CODE ANN. § 47.1-14.A; *see also* THE NOT. PUB. CODE PROF. RESP. (2020) Guiding Principle V.) This standard is the law, either directly or indirectly by statutes or common law court decisions virtually everywhere but has not heretofore been stated so directly in model or uniform acts.

In early U.S. history there was some nominal support for the view that notaries public, due to their status as commissioned public officials, should be exempt or immune from civil tort liability for negligence. (*See May v. Jones*, 14 S.E. 552 (Ga. 1891).) However, that view did not prevail. Instead, the common law almost everywhere became firmly that notaries are obligated to use reasonable care and will have liability for their failure to exercise reasonable care or for their negligence.

Most notary statutes do not use the terms “reasonable care” or “negligence” when speaking of the liability of notaries. Instead, many statutes indirectly require notaries to exercise reasonable care or suffer civil liability if they negligently or intentionally cause financial damage while discharging their notarial office. For instance, many statutes require notaries to hold a surety bond for the purpose of compensating those injured by a notary’s faulty performance. (*See, e.g.*, RULONA § 21(d): “If a notary public violates law with respect to notaries public in this state, the surety or issuing entity [for the notary assurance] is liable under the assurance.” *See also* ALASKA STAT. §§ 44.50.034(a) and 44.50.160, stating the bond covers the “neglect” of the notary; FLA. STAT. ANN. §

117.01(7)(a), stating the bond is for “due discharge of the office” and payable to “any individual harmed as a result of breach of duty by the notary public”; and MO. REV. STAT. ANN. § 486.615.1, providing the bond is payable “upon the notary’s official misconduct.”) Numerous notary bond provisions are conditioned “upon the faithful performance” of notarial acts in conformance with the law, or comparable language. (*See, e.g.*, ALA. CODE § 36-20-71(a); S.D. CODIFIED LAWS § 18-1-2; and TENN. CODE ANN. § 8-6-104.)

Statutes also indirectly conclude that notaries must exercise reasonable care by announcing the converse proposition, namely that notaries have liability for the consequences of their negligence or neglect in the performance of their official duties. (*See, e.g.*, ALASKA STAT. § 44.50.160 and CAL. GOV’T CODE § 8214.)

Many miscellaneous statutory and regulatory provisions direct notaries to use reasonable care, act reasonably, or employ reasonableness concerning notarial duties. (*See* §§ 6-6(c) and 8-5(a); *see also* ARK. CODE ANN. §§ 21-6-309(a)(1) and 21-14-308(a)(1); D.C. CODE ANN. § 1-1231.23(b); HAW. REV. STAT. ANN. § 502-73; IND. CODE ANN. § 33-42-14-1(e); OHIO REV. CODE ANN. § 147.08(D); IDAHO ADMIN. CODE § 34.07.01.015.02; NEB. REV. STAT. § 64-409(2)(a); NEV. REV. STAT. ANN. § 240.150.3; and TEX. ADMIN. CODE § 87.31(21).)

Finally, Subsection (a) is consistent with many court opinions that address the civil liability of notaries public and have referred to the legal duty of notaries to exercise reasonable care (or “reasonable diligence”) or to avoid negligence in the performance of their duties. (*See, e.g.*,

*Meyers v. Meyers*, 503 P.2d 59 (Wash. 1972); *Iselin-Jefferson Financial v. United California Bank*, 549 P.2d 142 (Cal. 1976); *Independence Leasing Corp. v. Aquino*, 506 N.Y.S.2d 1003 (Erie County 1986); *City Consumer Services Inc. v. Metcalf*, 775 P.2d 1065 (Ariz. 1989); and *First Bank of Childersburg v. Florey*, 676 So.2d 324 (Ala. Civ. App. 1996); see also *Vancura v. Katris*, 238 Ill.2d 352 (2010).)

Subsection (b) establishes the personal liability of a notary public “for all damages resulting from the notary’s official misconduct.” This is the law virtually everywhere. (See, e.g., COLO. REV. STAT. ANN. §§ 24-21-531(1) and (2); CONN. GEN. STAT. ANN. § 3-941(a); 5 ILCS § 312/7-101; MICH. COMP. LAWS § 55.297(1); MO. REV. STAT. ANN. § 486.805.1; and UTAH CODE ANN. § 46-1-18(1).)

Several jurisdictions do not make reference at all to notary liability for civil damages. However, many jurisdictions following the RULONA have implicitly endorsed the concept of personal liability of notaries by expressly stating that a commission of a notary does not provide immunity for the notary. (See, e.g., COLO. REV. STAT. ANN. § 24-21-521(7); D.C. CODE ANN. § 1-1231.19(h); KY. REV. STAT. ANN. § 423.390(9); MINN. STAT. ANN. § 359.01 Subd. 6; and R.I. GEN. LAWS § 42-30.1-15(h).)

The phrase “for all damages” in Subsection (b) is intentionally broad because it needs to be. In the context of notarial practice, the monetary injuries resulting from a faulty notarization may be direct or indirect and may impact parties who rely upon, or are affected by, a notarized record. The damages must be actual, identifiable damages. Several statutory provisions direct recovery against the notary “for all damages.” (See, e.g., CAL. GOV’T CODE § 8214; HAW. REV. STAT. ANN. § 456-6(b); 5 ILCS § 312/7-101; and NEV. REV. STAT.

ANN. § 240.150.1.) Damages may be suffered in connection with notarial acts and for other matters such as failure to secure official seals and unauthorized disclosure of confidential information. If financial consequences are reasonably foreseeable, recovery for damages should be allowed. For instance, the invalidation or disruption of a transaction due to a faulty notarization may result in loss of profits and/or in expenses incurred. Other amounts may also be recoverable in a notary liability case, such as interest, stenographic and copy costs, investigator and expert witness fees, court costs, attorney fees, and punitive damages. (See OR. REV. STAT. § 194.405(a), allowing for recovery of court costs, attorney fees, and punitive damages in the case of notary liability.)

Subsection (b) permits recovery for all damages “resulting from” the notary’s official misconduct. The phrase “resulting from” is synonymous with “proximate cause.” (See § 12-1(e) and Comment.)

Subsection (b) does not bar a notary from obtaining a surety bond or errors and omissions (notary malpractice) insurance, which may pay some or all damages sustained by the injured party. (See COLO. REV. STAT. ANN. § 24-21-531(3), declaring that a notary has “the right to obtain a surety bond or insurance on a voluntary basis to provide coverage for liability.”) It should also be noted that the liability of a notary for all damages does not mean that a claimant has an unlimited time to initiate a claim for recovery. This Act does not adopt a statutory period of limitations for actions to be filed for damages against notaries, sureties of the notary’s bond, or employers of notaries under Sections 12-1(b), (c), or (d). Few jurisdictions have adopted a specific statute of limitations specifically for such causes of action. (See, e.g., CAL. CODE CIV. PROC. § 338(f); KAN. STAT. ANN. § 53-5a22; OKLA. STAT. ANN. tit. 49, § 10; and OR. REV. STAT. § 194.405(4).)

A statute of limitations will begin to run when the cause of action accrues, that is, when it becomes known or is discovered, and if the cause of action has been concealed, many jurisdictions will extend the cause of action for a longer period. The period of 10 years required by the Act for the preservation and safekeeping of notarial records has been selected, in part, to assure such records are available before the statute of limitations will have expired. (*See* § 6-4(f).) A statute of limitations does not and would not limit the amount or kind of damages, but only the amount of time within which to file a cause of action for recovery of damages.

Subsection (c) establishes the liability of the surety on a notary public's bond. Section 3-5 requires a notary to maintain a bond for each commission term. Among jurisdictions which require notaries to be bonded, some have adopted comparable provisions. (*See, e.g.,* CAL. GOV'T CODE §§ 8212 and 8214; D.C. CODE ANN. § 1-1231.19(e); FLA. STAT. ANN. § 117.01(7)(a); 5 ILCS § 312/7-101; KY. REV. STAT. ANN. § 423.390(5); MO. REV. STAT. ANN. § 486.805.2; S.D. CODIFIED LAWS § 18-1-2; and WASH. REV. CODE ANN. § 42.45.200(4).) Notary bonds cover both negligent and intentional misconduct, although statutes often do not expressly say so. (*See* RULONA § 21(d) and HAW. REV. STAT. ANN. § 456-6(b).)

Subsection (c) makes clear that there is a limitation on the dollar amount of liability of the surety on a notary bond, *i.e.*, the face amount of the bond. (*See* UTAH CODE ANN. § 46-1-18(2)(b).) The limitation "in any case [is that] a surety's aggregate liability shall not exceed the dollar amount of the bond or of any remaining bond funds that have not been disbursed to other claimants." (*Accord,* MO. REV. STAT. ANN. § 486.805.3 and UTAH CODE ANN. § 46-1-18(2)(a).) If the amount of the bond has been exhausted, the notary must obtain a new

bond. (*See* § 3-5(e).) Few state laws describe the details of this procedure the way Subsection (c) does. (*See, e.g.,* ALASKA STAT. § 44.50.034; ARIZ. REV. STAT. ANN. § 41-315; FLA. STAT. ANN. §§ 117.01(7)(a) and (8); 5 ILCS § 312/7-101; and IND. CODE ANN. §§ 33-42-12-1(c)(4), (5), (d), and (e).)

Subsection (d) establishes the liability of an employer of a notary public to any person "for all damages resulting from the notary's official misconduct" under certain specified and limited circumstances. A comparable provision appears in MNA 2010 Section 13-1(c), MNA 2002 Sections 12-1(c) and (d), MNA 1984 Sections 6-101(c) and (d), and UNA 1973 Section 6-102, although the successive versions expanded the provision to what it is today. Several jurisdictions have enacted a variety of provisions recognizing employer liability, with some broadening the application of liability presented in Subsection (d) and others narrowing it. (*See, e.g.,* CONN. GEN. STAT. ANN. § 3-941(b); FLA. STAT. ANN. § 117.05(6); 5 ILCS § 312/7-102; MICH. COMP. LAWS §§ 55.297(1)(a) and (b); MO. REV. STAT. ANN. § 486.805.3; NEV. REV. STAT. ANN. § 240.150.2; UTAH CODE ANN. § 46-1-18(2)(c); VA. CODE ANN. § 47.1-27; and W.VA. CODE § 39-4-32(b).) Of the states cited above, the Connecticut and Missouri provisions are the most similar in scope to Subsection (d). One state has enacted a provision allowing the commissioning official to assess a civil penalty of not more than \$2,000 against an employer of a notary for each willful violation of the statute and neglect of duty by the notary. (*See* NEV. REV. STAT. ANN. §§ 240.150.2 and 4.) However, most jurisdictions have adopted no statutory provision expressly approving employer vicarious liability for employee-notary misconduct.

In the absence of a statutory provision on the matter, there is possible liability under the general common law agency

doctrine of employer liability for damage caused by an employee-notary while acting within the scope of employment. An injured party might assert employer liability under the common law agency doctrine. The common law doctrine is broader (and results in liability of the employer much more often) than is the narrower basis for recovery under Subsection (d) (which results in liability of the employer much less frequently).

There are three elements to employer liability for the notary's official misconduct under Subsection (d). These elements result in a kind of vicarious liability of the employer for the official misconduct of the employee-notary that is not no-fault liability, because of the requirement of the employer's contribution to the misconduct, as discussed below.

Subsection 12-1(d) imposes liability upon an employer of a notary only if the employer has been somewhat culpable in contributing to the notary's wrongdoing — only if the employer has “directed, expected, encouraged, approved, or tolerated” the wrongdoing. The simultaneous tension between the notary as an independent public servant and a private employee warrants the approach adopted in Subsection (d). It was thought to be unfair to always hold the employer accountable for the employee-notary's misbehavior. So, if employers of notaries are guilty of some fault contributing to notarial misconduct, they will have liability for the resulting financial injuries if all three elements required by Subsection (d) are present.

First, the notary's official misconduct must occur “during the course of employment.” Basically, the employee-notary must be on duty for the employer, where the notary is supposed or allowed to be serving the employer's interests by performing notarial services. (*See* 5 ILCS § 312/7-102(a); NEV. REV. STAT. ANN. § 240.150.2.(a); VA. CODE ANN. § 47.1-27.1; and W.VA. CODE § 39-4-32(b)(1).)

Second, the employer must direct, expect, encourage, approve, or tolerate the notary's official misconduct. (*See, e.g.,* MO. REV. STAT. ANN. § 486.805.3 and WAGANAKISING ODAWAK TRIBAL CODE OF LAW § 6.2411.A.3.) This element requires the employer to have knowingly or intentionally contributed to the cause of, or have facilitated and permitted, the employee-notary's official misconduct. This element may be proved by the active conduct of the employer or the employer's failure to object to the present or previous notarial misconduct. (*See* CONN. GEN. STAT. ANN. § 3-941(b); 5 ILCS § 312/7-102(b); NEV. REV. STAT. ANN. § 240.150.2(a); ONEIDA NATION OF WIS. ONEIDA NOT. ACT tit. 1, § 114.6-1(c); UTAH CODE ANN. § 46-1-18(2)(c)(ii); VA. CODE ANN. § 47.1-27.2; and W.VA. CODE § 39-4-32(b)(2).)

Third, in further explanation of the second element, the employer's directing, expecting, encouraging, approving, or tolerating of the notary's official misconduct must occur regarding the “particular notarization” involved, or “impliedly, by the employer's previous action in at least one other notarization involving any notary employed by the employer.” Requiring this element to be present assures the employer's awareness of and consent to the notary's misconduct, and thus to the employer's responsibility in the present instance of misconduct. Past improper action or inaction by an employer regarding notarial misconduct will carry forward to later notarial misconduct. The theory is that an employee-notary may reasonably rely on the employer's past action or inaction as a guide to the faulty performance of a notarial act in the present, regardless of whether the previous misconduct was performed by a different employee-notary. It would be inappropriate to allow an employer to escape liability because a different employee-notary is the one who relied upon past employer

practice and performed an improper act in the present case. However, some employer liability provisions are restricted to the employer's awareness or knowledge of, and consent, allowance, or acquiescence to, the misconduct pertinent only to the instant case. (*See* 5 ILCS § 312/7-102(b); NEV. REV. STAT. ANN. § 240.150.2(b); UTAH CODE ANN. § 46-1-18(2)(c)(ii); and VA. CODE ANN. § 47.1-27.2.)

Finally, Subsection (d) does not preclude common law causes of action in a suit by a claimant against the notary's employer for the employer's own direct negligence in hiring, supervising, or directing the conduct of the employee-notary. Recovery is allowed for "all damages" suffered as the result of the notary's official misconduct, as is also allowed under Sections 12-1(b) and (c).

Subsection (e) addresses the issue of proximate cause as a required element to be established in order for a party to recover monetary damages due to a notary's official misconduct. Damages "proximately caused" by a notary public's conduct are damages "resulting from" the notary's official misconduct as required for recovery in Subsection (b). The two phrases are synonymous. Most of the jurisdictions' notary liability provisions recite that the notary is liable for damages "proximately caused" by the notary's misconduct or employ variations on the phrase "proximate cause." (*See, e.g.,* COLO. REV. STAT. ANN. § 24-21-531(2); CONN. GEN. STAT. ANN. § 3-941(a); MO. REV. STAT. ANN. § 486.805.1; UTAH CODE ANN. § 46-1-18(1); VA. CODE ANN. § 47.1-26; and W.VA. CODE § 39-4-32(a). *But see* CAL. GOV'T CODE § 8214, referring to the person "injured" by notary neglect or misconduct, and 5 ILCS §§ 312/7-101 and 103, referring to the "cause" of damages.)

Pursuant to Subsection (e), the notary's official misconduct need not be the "sole or principal proximate cause of the damages" in order for recovery to be

obtained. Instead, recovery requires the notary's neglect or misconduct to be a substantial, contributing, and reasonably foreseeable cause of the financial injury to a party if that party is to prevail. Presumed or speculative damage will not be allowed. Thus, the notary's misconduct may be a part of a chain of causes of financial injury and a proximate cause of the damage. However, an insignificant or inconsequential factor is not actionable. Nor is a remote, unlikely, and surprising consequence actionable. This Subsection announces the doctrine in the negative, stating recovery "does not require" that the notary's conduct be either the sole or principal proximate cause of financial injury.

Under the proximate cause doctrine, each case seeking damages for notarial misconduct and alleging proximate cause is unique, and its outcome will depend upon the particular circumstances involved. Subsection (e) is generally consistent with the numerous legal cases that have considered the issue of proximate cause in the notarial setting. (*See, e.g., Commonwealth v. American Surety Company*, 149 A.2d 515 (Pa. Super. 1959); *McDonald v. Plumb*, 12 Cal.App.3d 374 (1970); *Iselin-Jefferson Financial v. United California Bank*, 549 P.2d 142 (Cal. 1976); and *Ameriseal of North East Florida v. Leiffer*, 673 So.2d 68 (Fla. App. 1996).)

Occasionally, notary negligence will in fact be the sole or principal cause of damages. For instance, especially in cases involving faulty performance of notarizations due to notaries' negligence (for example, in defective or insufficient completion of notarial certificates), notary negligence will readily be found to be the sole or principal cause of damages. However, often a notary's role in the events which result in financial damages in connection with the notarization of a record is a part of a chain of causes, rather than the sole or

primary cause. To illustrate, in a case of fraud intentionally orchestrated by a wrongdoer, a faulty notarial act performed by a notary (whether done negligently or intentionally) of an already-fraudulent record will constitute a part of both the fraudulent scheme and the resulting financial injury to the victim of the fraud. Whether the notary's misconduct will constitute a "proximate cause" of the financial damages will turn on consideration of the full, relevant circumstances.

It should be noted that the proximate cause doctrine of Subsection (e) also applies in cases involving claims against sureties of notary bonds under Subsection (c) and employers of notaries under Subsection (d). That is, a predicate to the legal responsibility of a notary's surety or employer for damages is the notary's official misconduct having been a contributing proximate cause of the financial injury to the party seeking recovery. (*See Ameriseal of North East Florida v. Leiffer*, 673 So.2d 68 (Fla. App. 1996).)

Subsection (f), establishing the civil liability of the employer of a notary to the notary for all damages and costs caused by the employer in specified circumstances, is derived from the similar provision first appearing in MNA 1984 Section 6-101(d). (*See, e.g.,* CONN. GEN. STAT. ANN. § 3-941(c); MO. REV. STAT. ANN. § 486.805.4; ONEIDA NATION OF WIS. ONEIDA NOT. ACT tit. 1, § 114.6-1(d); and WAGANAKISING ODAWAK TRIBAL CODE OF LAW § 6.2411.A.4; *see also* OR. REV. STAT. § 194.405(3).)

This provision recognizes that one of the most common indirect causes of violations of notarial law arises from the notary's employment setting, where the employer of the notary threatens or coerces the notary to take shortcuts to notarial procedure, grant waivers of required procedure to favored clientele, or otherwise violate the Act. The

Comment to MNA 2010, Section 13-1(d) concludes that "usually" the employee-notary will submit to serious employer coercion and threats of employment penalties, such as demotion or the loss of one's job.

If the employee-notary submits to the employer's threats and coercion, Paragraph (1) serves to protect and reimburse the notary for the notary's payment of damages and costs to claimants that is caused by the employer's improper dictates. Under Paragraph (1), recovery may be had due to the employer's threat or coercion "made in reference to the particular notarization or, impliedly, by the employer's previous action in at least one other notarization involving any notary employed by the employer." (*See* CONN. GEN. STAT. ANN. § 3-941(c); MO. REV. STAT. ANN. § 486.805.4. *Cf.* OR. REV. STAT. § 194.405(3), providing the employer's coercive threat must be made "in reference to the particular notarial act that was the subject of the action" for which damages were awarded against the notary.)

Nothing in this Section relieves the notary from the responsibility to fully abide by the Act or exculpates the notary from liability for damages caused by the notary's violation of the Act, as prescribed and demanded by Subsections 12-1(a) and (b). Legally, the employee-notary is required to resist threats and coercion from the notary's employer to influence the notary to violate notarial law. However, the reality is that in some, and perhaps many, instances employee-notaries will submit to the employer's threats and coercion. In such cases, both the employee-notary and the employer of the notary will have liability under Subsections 12-1(b) and (d). If damages are recovered from the notary, the notary should be indemnified by the employer, because in such situations the employer is the primary source or cause of the

violation of the Act which leads to injury and recovery of damages from the notary. This indemnification may include the amount paid from a notary's bond and reimbursed by the notary to the surety.

Further, indemnification includes the sums expended by the notary and directly associated with recovery of damages from the notary, such as court costs, legal fees, etc. As the Comment to MNA 2010 Section 13-1(d) posits, "the notary should be indemnified by the employer for any costs imposed upon the notary for following the employer's dictates." The employee-notary is entitled to be made whole pursuant to the directive in Paragraph (1) to reimburse "all damages recovered from, and costs sustained by, the notary." This also is consistent with the spirit of the remedy provided for the situation addressed in Paragraph (2), in which the notary resists the employer and suffers financial consequences.

Paragraph (2) contemplates the circumstances in which an employee-notary resists the improper threats and coercion from the employer and suffers "demotion, dismissal, or other action resulting from the notary's refusal to perform" an unlawful notarial act or official misconduct. (*Accord*, CONN. GEN. STAT. ANN. § 3-941(c) and MO. REV. STAT. ANN. § 486.805.4. *But see* OR. REV. STAT. § 194.405(3), which does not include a provision like Paragraph (2).)

The Paragraph allows the notary to recover "all damages and costs caused" by the employer's retaliatory misconduct. The provision is written broadly to apply to recovery of damages for employment penalties (such as demotion, reduction of wages or salary, or firing), as well as for any other improper punitive action that is undertaken by the notary's employer (such as issuance of an adverse evaluation of the employee-notary to prospective employers). In appropriate circumstances, "all damages" should include punitive damages. The deterrent

purpose of this remedy is to give real teeth to the proscription against employer threats and coercion to obtain unlawful notarial acts. A provision like Paragraph (2) is especially worthwhile to encourage notaries to resist a coercive threat to engage in misconduct and further deter employers from engaging in threats to employee-notaries in the first place and deter employers from retaliating against employee-notaries if the threats are resisted.

It should be noted that in addition to the remedies provided to the notary against the employer under Subsection (f), the employee-notary may also participate and assist in the investigation and prosecution of the employer for the crime of improper influence of a notary as described in Section 12-9. Several jurisdictions have enacted provisions criminalizing such improper influencing to obtain acts in violation of notarial law. (*See* § 12-9 and Comment.)

Subsection (g) defines the phrase "official misconduct," as it is defined in MNA 2010 Section 2-12(1) to include both malfeasance and nonfeasance. The definition is written to include both negligent and intentional or knowing conduct by the notary. (*See, e.g.*, 5 ILCS § 312/7-105; IND. CODE ANN. § 39-4-32(d); S.C. CODE ANN. § 26-1-5(12); and UTAH CODE ANN. § 46-1-2(14); *cf.* FLA. STAT. ANN. § 838.022, noting "corrupt intent" and classifying an offense as a third-degree felony.)

Consistent with the purposes of the Act as set out in Section 1-2 and with the intention to promote the integrity of notarial acts in general, the including of both negligent and intentional misconduct within the general meaning of official misconduct was deemed appropriate.

In the criminal law context, most jurisdictions criminalize offenses involving only the heightened mental state of intentional, knowing, or willful misconduct. Thus, the mental state of

negligence or recklessness would not suffice to constitute a crime. Although jurisdictions have statutes and rules defining official misconduct in a variety of ways, those provisions must be read carefully to ascertain the required mental state for official misconduct in the context of civil, administrative, or criminal law. Some jurisdictions, as this Act has done, require the heightened mental state of intentional, knowing, or willful misconduct for the crime of official misconduct, but allow a lesser

mental state such as negligence or recklessness for civil and administrative liability. (*See* §§ 12-1(g), 12-3(a)(5), and 12-5(b); *see also* COLO. REV. STAT. ANN. § 24-21-531(1), defining official misconduct as knowing and willful misconduct and declaring it to be a crime, and 5 ILCS § 312/7-104 and 7-105, criminalizing knowing and willful official notary misconduct as a Class A misdemeanor and negligent or reckless official notary misconduct as a Class B misdemeanor.)

### **§ 12-2. Complaints.**

- (a) An individual who has reason to believe that a notary public has violated this [Act] may file a complaint with the [commissioning official].
- (b) A complaint against a notary public that is filed with the [commissioning official] shall:
  - (1) be in writing on a form prescribed by the [commissioning official];
  - (2) state the notary's name and commission identification number, if known;
  - (3) set forth in reasonable detail the nature of the action or violation of this [Act] and cite the relevant provision, if known, that the notary is alleged to have violated;
  - (4) include a copy of any record containing the notarial act that is the subject of the complaint, if any;
  - (5) contain any additional information the [commissioning official] may require; and
  - (6) be dated and signed under penalty of perjury by the individual filing the complaint.
- (c) The [commissioning official] shall publish the complaint form required by Subsection (b) on the [commissioning official's] website.
- (d) The [commissioning official] may initiate a complaint against a notary public for cause.
- (e) Resignation or expiration of a commission shall neither terminate nor preclude an investigation into the notary public's conduct by the [commissioning official], who may pursue the investigation to a conclusion, whereupon the findings and conclusions shall be made a matter of public record.

### **Comment**

Sections 12-2 to 12-5 address administrative disciplinary procedures



and sanctions. Numerous jurisdictions have set out detailed procedures for the filing of complaints, conduct of administrative investigations, hearings, and appeals, and imposition of remedial administrative actions or sanctions. (*See, e.g.*, ALASKA STAT. §§ 44.50.068, 44.50.072(a), and 44.50.072(c)(4); CAL. NOT. PUB. DISCIPLINARY GUIDELINES (Secretary of State 2012); D.C. CODE ANN. § 1-1231.22; D.C. MUNI. REGS. §§ 17-2407.1 and 17-2410.1 to 2411.7; HAW. ADMIN. RULES §§ 5-1-39 and 5-11-51 to 55; 5 ILCS § 312/7-108; IND. CODE ANN. § 33-42-13-1; IND. ADMIN. CODE tit. 75, §§ 7-4-1 and 7-4-2; KY. ADMIN. CODE tit. 30, ch. 8, § 8; MO. CODE OF STATE REGS. tit. 15, §§ 3-100.010, 015, 020, 030, 040, 050, 060, 070, and 080; OHIO REV. CODE ANN. § 147.032; OHIO ADMIN. CODE §§ 111:6-6 and 6-7; and TEX. ADMIN. CODE §§ 87.30 to 35.) The procedures required by the Act are meant to fully satisfy due process standards, as should be expected. (*See* CAL. NOT. PUB. DISCIPLINARY GUIDELINES (Secretary of State 2012), at 1: “the disciplinary guidelines contained herein are intended to facilitate due process.”)

Section 12-2, relating to the procedure for pursuing a formal complaint against a notary, is a new provision that does not appear in prior Model Acts or the RULONA. Nor does such a provision appear in most state notary statutes or rules. The provisions of Section 12-2 make disciplinary practice uniform and comparable to the way in which civil and criminal cases are generally initiated handled. It was thought necessary to include this Section to formalize the procedure, assure users of notarial services and the public that notaries will be held accountable for their official actions and will perform official services honestly and accurately, and assure notaries they will be treated consistently, transparently, and fairly if allegations of misconduct should be

raised against them.

Subsection (a) authorizes any individual to lodge a formal complaint against a notary. Numerous statutes and rules include references to a “complaint” to be filed against a commissioned or registered notary. (*See, e.g.*, ALASKA STAT. § 44.50.068(b); ARK. CODE ANN. § 21-14-112(b); FLA. STAT. ANN. §§ 117.01(4)(b) and (c); KY. ADMIN. CODE tit. 30, ch. 8, §§ 8(4) and (5); MICH. COMP. LAWS § 55.300; OHIO ADMIN. CODE § 111:6-6; TEX. ADMIN. CODE § 87.32; and W.VA. CODE § 39-4-35.) In some notary statutes and rules, rather than referring to a “complaint,” there is reference to a “notice” to be provided to a notary. Such notice is the functional equivalent of a complaint in that it is to be a formal record providing the recital of the detailed facts and allegations against a notary and issued and endorsed by an identified official or agency, such as the commissioning official. (*See, e.g.*, D.C. MUNI. REGS. §§ 2410.2 and 2410.3; HAW. ADMIN. RULES § 5-11-52; and MO. CODE OF STATE REGS. tit. 15, §§ 30-100.010(1) and 30-100.020(1), the latter referring to both a “complaint” and “notice” in the same provision.) Such a complaint or notice is to be filed with the commissioning official or other designated officer or agency, or the commissioning official may initiate a formal complaint against a notary under Subsection (d). The filing of a formal complaint is a basic and necessary early step in a thorough, fair, and legitimate disciplinary process, for it will be served upon and provide the notary with notice of the facts and allegations being asserted against him or her.

Subsection (b) establishes six specific requirements for disciplinary complaints. Paragraph (1) requires a complaint to be placed in writing by the complainant. (*See, e.g.*, ARK. CODE ANN. § 21-14-112(b); KY. ADMIN. CODE tit. 30, ch. 8, § 8(5); and TEX. ADMIN. CODE

§ 87.32(b).) This step is necessary to formalize the disciplinary process. The complaint will provide the answers to the usual questions about the “who, what, when, where, and why” regarding the allegations of the complaint. Paragraph (1) also requires the complaint form to be “prescribed by the commissioning official.”

Paragraph (2) requires a complaint to identify the name and commission number of the notary, if those facts are known to the complainant. (In accord, *see* OHIO ADMIN. CODE §§ 111: 6-6(a) and (b).)

Paragraph (3) requires a complaint to “set forth in reasonable detail the nature of the action or violation” which is the basis for the complaint, along with citation to the pertinent provision(s) of the Act alleged to have been violated if that information is known to the complainant. (In accord, *see* IND. ADMIN. CODE tit. 75, § 7-4-1(b)(5) and MICH. COMP. LAWS § 55.300(2)(c).)

Paragraph (4) requires a complaint to include “a copy of any record containing the notarial act that is the subject of the complaint, if any.” (In accord, *see* IND. ADMIN. CODE tit. 75, § 7-4-1(b)(6) and TEX. ADMIN. CODE § 87.32(b)(6).) The copy sought here might include the tangible or electronic notarial certificate, an audio-visual recording, a journal entry, and a fee receipt. This step should provide objective support for or contradiction of the allegations in the complaint. It should be noted that a complainant, who must submit a copy of any notarized record as part of the complaint process, ought to determine the extent of possible public disclosure which may accompany the filing of the complaint. Notarized records may contain proprietary, confidential, or personally identifiable information that the complainant may not want to be publicly accessible. A complainant may wish to ask the commissioning official to take steps to

protect such interests (perhaps by redacting confidential and proprietary information or by sealing portions of the filings). The commissioning official, under the official’s rulemaking authority, should provide procedures for protection of such legitimate privacy interests.

Paragraph (5) requires a complaint to include “any additional information the commissioning official may require.” It allows the commissioning official discretion to require further information, perhaps including proof of the identity of the complainant, contact information for the complainant, names and contact information of witnesses, and written witness statements. (For instance, *see* IND. ADMIN. CODE tit. 75, §§ 7-4-1(b)(3) and (4), requiring the complaint to include contact information for the complainant, and whether the notary was “performing a remote notarial act.”)

Paragraph (6) requires a complaint to “be dated and signed under penalty of perjury” by the complainant. (In partial accord, *see, e.g.*, ARK. CODE ANN. § 21-14-112(b), providing the complaint must be signed, but not dated or signed under penalty of perjury.) The drafters did not impose a requirement that a complaint be subscribed and sworn to or affirmed before a notary public as is required in some jurisdictions (*see, e.g.*, TEX. ADMIN. CODE § 87.32(c)). It was thought that simply signing the complaint under penalty of perjury would be sufficient and not discourage the public with legitimate reasons from filing complaints.

Subsection (c) requires the commissioning official to publish the complaint form on the official’s website in order to make this required form more readily available.

Subsection (d) authorizes the commissioning official to “initiate a complaint against a notary public for cause.” (In accord, *see* OR. ADMIN. RULES § 160-100-0430(2) TEX. ADMIN. CODE § 87.32(d); and W.VA. CODE § 39-

4-35(a)(1).) It may happen that, apart from a formal complaint having been filed by an individual against a notary, the commissioning official will otherwise become aware of reliable information and evidence of misconduct by a notary. Information might come from a wide variety of sources, perhaps from routine or random inspection of journal records of notaries (*see* § 6-6(f)), submission of records for authentication (*see* Chapter 11) that contain notary errors, and even from notaries self-reporting incidents of misconduct. Section 1-2(1), the very first stated purpose of this Act, states the Act was published “to promote, serve, and protect the public interest.” Thus, the commissioning or regulating official, as the supervisor or notaries, must have the prerogative to commence a disciplinary proceeding against a notary for cause.

Subsection (e) announces that resignation or expiration of the notary public’s commission “shall neither terminate nor preclude an investigation into the notary’s conduct” and authorizes the commissioning official to pursue the investigation to a conclusion. (In accord, *see, e.g.*, CAL. GOV’T CODE § 8214.4; CONN. GEN. STAT. ANN. § 3-94m(b); MO. REV. STAT. ANN. § 486.810.4; and N.C. GEN. STAT. § 10B-60(h).) The point of this Subsection is that investigation and determination of findings regarding alleged notary misconduct should be undertaken and completed, so that if the accused notary has committed misconduct the notary’s record will include the findings and will be available if the individual seeks commissioning,

registration, or renewal in the future.

Under Subsection (e), once the investigation is concluded, its findings “shall be made a matter of public record.” A few jurisdictions have included this requirement. (*See, e.g.*, MO. REV. STAT. ANN. § 486.810.4 and NEV. REV. STAT. ANN. § 240.150.5(b); *see also* N.C. GEN. STAT. § 10B-60(h).) A few jurisdictions authorize their commissioning officials to publish a list of those notary commissions which have been suspended or revoked. (*See, e.g.*, MO. REV. STAT. ANN. § 486.820.) These provisions establish a fundamental protection against the ability of a notary to thwart a disciplinary investigation and proceeding and hide from an adverse finding. The public record of findings and sanctions should include posting or publication on the commissioning official’s website or database of notaries. (*See* § 3-8(a)(3), requiring a database of notaries on a publicly accessible website, which must describe “any action taken against the commission of a notary”; *see also* MONT. CODE ANN. § 1-5-627(3) and OHIO REV. CODE ANN. § 147.051.)

Subsection (e) should also be considered along with Section 12-10, which announces that the sanctions specifically included in this Chapter “do not preclude other sanctions and remedies provided by law.” Neither a notary’s resignation of the commission or registration, nor the expiration of the notary’s commission or registration, will prevent an injured party from pursuing recovery against the notary for actions committed while the notary was commissioned or registered.

### § 12-3. Remedial Actions for Misconduct.

- (a) The [commissioning official] may deny, suspend, or revoke a commission or registration for:
  - (1) submission of an application for a commission or registration that contains a material misstatement or omission of fact;
  - (2) the conviction or plea of admission or nolo contendere of the

- applicant or notary public to a felony, or any crime involving fraud, dishonesty, or deceit, but in no case may a commission be issued to the applicant within 5 years after such conviction or plea;
- (3) a finding against or admission of liability by the applicant or notary public in a civil lawsuit based on the applicant's or notary's deceit or official misconduct;
  - (4) the revocation, suspension, restriction, or denial of either a commission or professional license by this [State] or any other state, but in no case may a commission be issued to the applicant within 5 years after such action;
  - (5) a finding that the applicant or notary public had engaged in official misconduct, whether or not action against the commission of the notary resulted; or
  - (6) failure of an applicant or notary public to respond to or cooperate with a request for information or an investigation by the [commissioning official].
- (b) The [commissioning official] shall revoke the commission of any notary public who fails to maintain:
- (1) a residence or regular place of work or business in this [State]; or
  - (2) status as a legal resident of the United States.
- (c) If [the commissioning official] commences a disciplinary action against the commission of a notary public or a notary informs the [commissioning official] of commencement of an action under Subsection (a) as required by Section 3-9(a)(5) (relating to notification of changes), the [commissioning official] may suspend the commission of the notary and seek an injunction to enjoin the notary from performing notarial acts until final adjudication of the action.
- (d) The [commissioning official] may take any of the following additional actions against a notary public who has committed official misconduct:
- (1) deliver a written warning to cease official misconduct;
  - (2) issue a written admonition that may be attached to the notary's file;
  - (3) require the notary to take a remedial educational course;
  - (4) seek a court injunction to enjoin the notary from committing further official misconduct;
  - (5) impose a civil penalty pursuant to Section 12-4; or
  - (6) refer any evidence of the possible commission of a criminal act to a public prosecutor.
- (e) Any revocation, resignation, expiration, or suspension of the commission of a notary public terminates or suspends the notary's registration, if applicable.
- (f) Any revocation or suspension of the registration of a notary public terminates or suspends the notary's commission.

### Comment

Section 12-3 establishes the bases for denial or sanctioning of a notary public commission and registration and the several remedial administrative actions or sanctions which may be imposed upon an applicant for a notary commission or registration, or a notary or former notary.

Subsection (a) sets out the grounds upon which remedial actions or sanctions may be based due to misconduct by applicants for notary commissions and commissioned notaries. Paragraph (1) concerns the application for a notary commission or registration to perform notarial acts on electronic records or involving the use of audio-visual communication. If the applicant makes a material misstatement or omission of fact in a commission or registration application, and if such material fault is discovered by the commissioning official before the commission or registration is issued, the commission or registration may be denied. (*See, e.g.*, GA. CODE ANN. § 45-17-15(a)(3); KY. REV. STAT. ANN. § 423.395(1)(b); MASS. GEN. LAWS ANN. ch. 222, § 13(b); OR. REV. STAT. § 194.340(1)(b); and VA. CODE ANN. § 47.1-23.1.) If the application containing the material misstatement or omission of fact is for registration, and if the registration is denied because of such a fault, the notary's commission may be suspended or revoked. If a material misstatement or omission is not discovered until after the commission or registration is issued, the commission or registration may be suspended or revoked when the fault is discovered. In that latter scenario, if the notary public has been issued both a commission and registration, both may be suspended or revoked. Several jurisdictions authorize the commissioning official to deny, suspend, or revoke a commission or registration due to a material misstatement

or omission in the pertinent application, or similar cause.

Paragraph (1) provides that the misstatement or omission must be "material" to warrant denial, suspension, or revocation. In determining whether a misstatement or omission is material, the commissioning official should consider whether the misstatement or omission is consequential to the applicant's qualifications and the approval of the application. (*See* COLO. REV. STAT. ANN. § 24-21-523(1)(b); GA. CODE ANN. § 45-17-15(a)(3); and N.C. GEN. STAT. § 10B-5(b)(8).) The commissioning official also should consider whether the misstatement or omission appears to have been intentional or negligent (rather than merely innocently done). More serious carelessness in the preparation of the application may be another matter. The cause of the misstatement or omission is relevant to the issue of materiality because diligence and integrity are critical attributes necessary to the performance of notarial acts. (*See* KY. REV. STAT. ANN. § 423.395(1) and MONT. CODE ANN. § 1-5-621(1).)

Paragraph (2) authorizes the commissioning official to deny an application or sanction a notary as the result of a conviction, plea of guilt, admission, or plea of *nolo contendere* to either a felony or any crime involving fraud, dishonesty, or deceit. Several jurisdictions have adopted comparable provisions. (*See, e.g.*, KY. REV. STAT. ANN. § 423.395(1)(c); MASS. GEN. LAWS ANN. ch. 222, § 13(b)(i); N.C. GEN. STAT. § 10B-5(d)(2); and VT. STAT. ANN. tit. 26, § 5342(a)(3).)

One state, Michigan, automatically revokes the notary commission if the notary is convicted of a felony or multiple specified misdemeanors within certain time frames. (MICH. COMP. LAWS §§ 55.301(1) and (2).)

Paragraph (2) authorizes the commissioning official to exercise discretion in considering an applicant's criminal history. Because the notary public occupies a position of public trust and serves as a fiduciary of the public, the crimes within the purview of this Paragraph reflect badly upon the applicant or notary and must be carefully considered. The criminal matters identified are so serious that the provision directs in no case may a commission be issued to the applicant or notary within 5 years after such conviction or plea. The mandatory waiting period creates an exception to and removes the discretion which the commissioning official otherwise possesses under Paragraph (a). (See MICH. COMP. LAWS §§ 55.301(3) and (5), and N.C. GEN. STAT. § 10B-5(d)(4), both imposing a 10-year waiting period for various crimes.)

Paragraph (3) authorizes the commissioning official to deny an application to an applicant or sanction a notary as the result of a finding or admission of liability in a civil lawsuit based upon the applicant's or notary's deceit or official misconduct. (See, e.g., KY. REV. STAT. ANN. § 423.395(1)(d); MASS. GEN. LAWS ANN. ch. 222, § 13(b)(v); N.J. STAT. ANN. § 52:7-10.4.a(2); and VT. STAT. ANN. tit. 26, § 5342(a)(4).)

Pursuant to Paragraph (4), the commissioning official may deny an application or sanction a notary if that individual has had a notary commission or professional license denied, revoked, suspended, or restricted in the state or another U.S. jurisdiction. This provision is to be coupled with Section 3-1(a)(8), which requires an applicant for a commission to list any actions taken against a professional license issued by any state. (See § 3-1(a)(8).) Paragraph (4) has the potential to affect a sizable number of applicants for notary commissions and notaries because so

many professionals must be licensed (including lawyers, some paralegals, private investigators, real estate brokers, certified public accountants, certain finance professionals, schoolteachers, insurance brokers, medical professionals, architects and engineers, process servers, and others). Many professionals seek to obtain notary commissions, and numerous licensees will have been or will be sanctioned.

Paragraph (4), like Paragraph (2), also creates an exception. That is, it requires the commissioning official to deny, revoke, or suspend a notary commission or registration if the individual in question has had a notary commission or professional license denied, restricted, suspended, or revoked in either the state or any other jurisdiction within the previous 5 years. This mandate is an exception to the discretion which "may" generally be exercised by the commissioning official under Subsection (a). The mandate is appropriate because of the similarity of the notary commission sought and the commission or license previously denied or sanctioned, and because the denial or sanction of a previous commission or license is a serious matter reflecting quite negatively on the applicant's or notary's pertinent qualifications.

As pertains to the revocation of a notary commission, some jurisdictions more narrowly require an individual who has had a notary commission revoked or "removed" only in that jurisdiction to wait for a specified period of time before applying for a new commission. (See, e.g., VA. CODE ANN. § 47.1-25 (20 years); ARK. CODE ANN. § 21-14-112(d) (10 years); IND. CODE ANN. §§ 33-42-13-3(j) and (l) (5 years); and KAN. STAT. ANN. § 53-5a24(b) (4 years).) A few states prohibit an individual from ever applying for or receiving a notary commission if the individual has had a notary commission revoked by that state.

(*See* COLO. REV. STAT. ANN. § 24-21-523(6) and OHIO REV. CODE ANN. § 147.032(D); *see also* IND. CODE ANN. § 33-42-13-1(a)(2), granting discretion to the commissioning official to “refuse a subsequent commission.”)

Paragraph (5) allows for denial of an application or sanctioning of a notary for a finding that the applicant or notary engaged in official misconduct. This provision is derived from MNA 2010 Section 3-1(c)(5) and RULONA Sections 23(a)(5) and (7). (In accord, *see, e.g.*, 5 ILCS § 312/7-108(e)(1), (3), and (4); KY. REV. STAT. ANN. §§ 423.395(1)(e) and (g), not using the phrase “official misconduct”; and MASS. GEN. LAWS ANN. ch. 222, §§ 13(b)(vii) and 26; *see also* § 2-1(g) and Comment.)

Paragraph (6) allows for denial of an application or sanctioning of a notary for an applicant’s or notary’s failure to cooperate with a request for information from or official investigation by the commissioning official. (*See, e.g.*, ARIZ. REV. STAT. ANN. § 41-271.A.12; FLA. STAT. ANN. § 117.01(4)(c); MICH. COMP. LAWS §§ 55.295(1)(a) and (2); NEV. REV. STAT. ANN. § 240.150.3; and WIS. ADMIN. CODE § DFI-CCS 25.07(3)(f).)

Subsection (b) expressly requires a notary public who has been issued a commission to maintain residency or a workplace in the jurisdiction and maintain legal residency in the U.S. during the term of the commission. (*See* §§ 3-1(a)(2) and (3); in accord, *see, e.g.*, IND. CODE ANN. § 33-42-12-3(d) and UTAH CODE ANN. § 46-1-3(7).) An individual cannot satisfy the residency requirements, obtain a commission, then lose one or the other, and still retain the commission.

Paragraph (1) announces that the notary public commission shall be revoked if the notary fails to maintain a residence or regular place of work or business in the jurisdiction. (In accord, *see, e.g.*, ALASKA STAT. § 44.50.068(a)(3);

GA. CODE ANN. § 45-17-15(a)(4); and MO. REV. STAT. ANN. §§ 486.790.2 and 810.2(1).)

Paragraph (2) announces that the notary public commission shall be revoked if the notary fails to maintain status as a legal resident of the U.S. (*See* § 3-1(a)(3); in accord, *see, e.g.*, ARIZ. REV. STAT. § 41-269.B.2 and MO. REV. STAT. ANN. § 486.810.2(2).)

Subsection (c) authorizes the commissioning official to temporarily suspend a notary’s commission pending the outcome of a disciplinary proceeding or if a notary informs the commissioning official of commencement of a proceeding under Subsection (a). In the case of the latter, the notary is obligated to inform the commissioning official of the commencement of a proceeding under Section 3-9(a)(5). The commissioning official is given the discretion whether to impose the temporary suspension. A temporary suspension will permit the commissioning official to consider the full circumstances, including the severity of the allegations, likelihood the allegations will be established, and possible risks involved in not temporarily restricting the notary’s authority to continue to perform notarial acts. (*See* KY. ADMIN. CODE tit. 30, ch. 8, § 8(7) (among six factors to be considered in determining “appropriate disciplinary action” against a notary are the nature and severity of the acts or violations, actual or potential harm to the public, and prior disciplinary record of the notary).) If the commissioning official deems it advisable to obtain a court order to enjoin the notary from performing notarial acts during the pendency of the discipline proceeding, the official may seek such a court-ordered injunction.

Because the process of investigating and hearing allegations of notary misconduct will take time to conduct and conclude, the broad authority of commissioning officials to set rules and

conduct discipline proceedings may include the authority to issue a temporary suspension or restriction upon the commission of an accused notary during those administrative proceedings, especially if the circumstances are potentially serious enough to warrant it. Most notary statutes and regulations expressly or impliedly authorize the commissioning official to condition or restrict the notary's commission. (*See, e.g.,* CAL. GOV'T CODE § 8222(a); NEV. REV. STAT. ANN. § 240.150.7; and VA. CODE ANN. § 47.1-24.F.)

Subsection (d) grants discretion to the commissioning official to take additional or specified remedial actions other than denial, suspension, or revocation of the notary commission or registration against a notary who has committed official misconduct as defined in Section 12-1(g). Technically, some of the listed remedial actions or sanctions may be imposed on a former notary as well because the notary commission will have been resigned or revoked before the remedial action or sanction has been imposed.

Some of the listed remedial actions or sanctions of Subsection (d) are included in, or allowed by, MNA 2010 Section 13-4, MENA 2017 Section 13-1, and RULONA Section 23(a). Each of the remedial actions or sanctions addressed is utilized in the disciplinary practices of at least some jurisdictions, either under the authority of their statutes, regulations, or administrative procedures acts. Or, by implication under the commissioning official's broad discretion to implement and enforce the notary statute, other conditions or restrictions may be imposed on a notary. (*See* RULONA § 23(a), granting authority to the commissioning official to "impose a condition on a commission as a notary public" for misconduct of the notary and TEX. ADMIN. CODE § 87.34(a)(2)(F), authorizing the Secretary of State to

"take such other [disciplinary] action as the secretary deems appropriate.")

Paragraph (1) authorizes the commissioning official to deliver a written warning to the offending notary. (*See* 5 ILCS § 312/7-108(e) and TEX. ADMIN. CODE § 87.34(a)(2)(A), providing that the commissioning official may require the notary "to enter into an agreement to ... not engage in any further misconduct.") A warning is the commissioning official's way of attempting to enjoin or deter the notary from committing further official misconduct. The provision allows the commissioning official to formally advise a notary to stop activity constituting official misconduct as a possible precursor to the imposition of more serious sanctions, and possibly legal action to obtain a court-ordered injunction to stop the misconduct, in the event the notary does not cease the wrongdoing. In an appropriate case, a warning to cease misconduct may be taken in conjunction with the official admonition set out in Paragraph (2), discussed below.

Paragraph (2) authorizes the commissioning official to issue a written admonition or reprimand to a notary, which may become part of the notary's official file. (In accord, *see, e.g.,* COLO. REV. STAT. ANN. § 24-21-523(4); *see also* ALASKA STAT. § 44.50.068(a); MICH. COMP. LAWS § 55.300a(1)(e); and TEX. ADMIN. CODE § 87.34(a)(1).) An official admonition is the least serious of the remedial actions. In an appropriate case, admonishing the notary may be issued in conjunction with the warning to cease official misconduct set out in Paragraph (1).

Paragraph (3) authorizes the commissioning official to require a notary who has committed official misconduct to take and complete a "remedial education course." A small number of jurisdictions expressly allow their commissioning officials to mandate remedial education for sanctioned



notaries. (*See, e.g.*, ARIZ. REV. STAT. ANN. § 41-270.A; MONT. CODE ANN. § 1-5-621(2); and TEX. ADMIN. CODE § 87.34.) The content and format for such a course is not described in this Paragraph, but it is expected that the substance of the course will cover “notarial laws, procedures, and practices” and be at least [4] hours pursuant to Section 3-3(a).

Paragraph (4) establishes the legal standing and authorization of the commissioning official to seek a court injunction enjoining a notary from committing further official misconduct. (In general accord, *see, e.g.*, CAL. GOV’T CODE § 8222(a); MICH. COMP. LAWS § 55.305(1); and N.C. GEN. STAT. § 10B-60(i).) Court injunctions like the ones envisioned here are typically limited to cases of significance and urgency wherein irreparable harm will result unless injunctions are issued. A notary continuing misconduct may well satisfy the injunction standard. At least one state authorizes its commissioning official to have emergency power to immediately suspend the commission of a notary upon written notice by certified mail “if the situation is deemed to have a serious unlawful effect on the general public,” with the notary entitled thereafter to a hearing and determination as soon as “practicable.” (*See* MO. REV. STAT. ANN. § 486.815.1.)

Paragraph (5) authorizes the commissioning official to impose a civil penalty upon a notary public who violates the Act. (*See, e.g.*, CAL. GOV’T CODE § 8214.15; MASS. GEN. LAWS ANN. ch. 222, § 18(a); and MICH. COMP. LAWS §§ 55.300a(1)(c), (d), and (f).) Pursuant to Section 12-4, the commissioning official has discretion to apply civil penalties to various gradations of offenses.

Paragraph (6) announces the commissioning official has authority to “refer any evidence of possible commission of a criminal act to a public

prosecutor.” (*See* 5 ILCS § 312/7-108(f)(4); MICH. COMP. LAWS § 55.297; OR. REV. STAT. § 194.415(1); 57 PA. CONS. STAT. ANN. § 323(e); and W.VA. CODE § 39-4-35(a)(4).) This provision represents more than simply a reminder of the general opportunity all persons have to report a possible crime to prosecutors. It constitutes an encouragement for commissioning officials to report possible criminal activity, for crimes by notaries warrant criminal sanctioning. In the context of notarial matters, commissioning officials will likely be more familiar with the various crimes associated with notarial practice than police and prosecutors. (*See* the several crimes created by this Act’s §§ 12-6, 12-7, 12-8, and 12-9.) Thus, commissioning officials may be able to assist prosecutors in recognizing, investigating, and prosecuting criminal activity.

Subsection (e) applies to persons who hold both a notary commission to perform traditional notarial acts and a registration to perform notarial acts on electronic records or involving the use of audio-visual communication. It announces that “any revocation, resignation, expiration, or suspension of the commission” of a notary “terminates or suspends the notary’s registration.” (In accord, *see* ARK. CODE ANN. § 21-14-311(a)(1); *see also* MNA 2010 § 16-3.) A notarial commission is an entitlement separate from a registration (*See* § 3-2(a); *see also* D.C. CODE ANN. § 1-1231.19(i) and IND. CODE ANN. §§ 33-42-17-2(a) and (d)(2).) Although the notary’s commission and registration are separate entitlements, the registration is dependent upon the commission. (*See* § 3-2(a) and (b); in general accord, *see, e.g.*, KY. ADMIN. CODE tit. 30, ch. 8, § 8(6) and MO. REV. STAT. ANN. § 486.990.1.) Subsection (e) should be read in conjunction with Subsection (f).

Subsection (f), like Subsection (e), applies to persons who hold both a notary

commission and registration. Subsection (f) announces that “any revocation or suspension of the registration of a notary public terminates or suspends the notary commission.” As explained in the Comment to Subsection (e), the notary commission and registration are two separate entitlements, and but for this provision, the revocation or suspension of the registration would not have to work a revocation or suspension of the underlying notary commission. (*See* TEX. ADMIN. CODE § 87.34(b), allowing the Secretary of State discretion to revoke only the online notary public commission (without revoking the traditional notary

commission), or to revoke both commissions; *see also* MO. REV. STAT. ANN. § 486.990.2 (“A notary’s decision to terminate registration as an electronic notary shall not automatically terminate the underlying commission of the notary.”)) However, it was thought appropriate in this Act to have the two entitlements treated in tandem, because any basis for revoking or suspending the registration would also reflect negatively on the individual’s integrity, diligence, or qualifications to serve as a commissioned notary. Subsection (f) should be read in conjunction with Subsection (e).

#### § 12-4. Civil Penalty.

- (a) The [commissioning official] may impose a civil penalty not to exceed [dollars] for a violation of this [Act].
- (b) A civil penalty collected pursuant to this Section shall be used by the [commissioning official] to defray the costs of investigations and the imposition of civil penalties to enforce this [Act].

#### Comment

Section 12-4 is new to the Act. It authorizes the commissioning official to impose a civil penalty as an additional remedial action taken against a notary public for violations of the Act. (*See* § 12-3(d)(5) and Comment.)

In theory, under Subsection (a) any violation of the Act may be punished, but it is expected the commissioning official will apply the remedy only to those violations which clearly warrant it. (*See* ARIZ. REV. STAT. ANN. § 41-274, levying a civil penalty of not more than \$1,000 for a violation of the unauthorized practice of immigration and nationality law, and NRS § 240.085.3(c), authorizing a maximum civil penalty of \$2,000 for each violation of foreign language advertising laws.) Supporting this view is the language that the amount of the civil penalty is “not to exceed” the prescribed amount which is bracketed to

allow the enacting jurisdiction to set the amount. Thus, the commissioning official has discretion to punish certain offenses rather than others, and to apply the civil penalty to differing gradations of offenses. For example, a negligent violation of a certain provision might command a lesser civil penalty than a willful one. (*See* CAL GOV’T CODE §§ 8214.1(d), 8214.15(a), and 8214.15(b), setting a \$1,500 civil penalty for a willful failure of a notary public to “discharge fully and faithfully any of the duties or responsibilities required of a notary public” and a \$750 civil penalty for a negligent violation.)

Subsection (b) provides that any civil penalties collected must be used to defray the costs of the commissioning official in enforcing the Act, both in investigating and levying civil penalties. (*See* CAL GOV’T CODE § 8214.15(d).)

**§ 12-5. Administrative Adjudications; Hearings; Appeals.**

- (a) If the [commissioning official] determines that a complaint under Section 12-2 alleges sufficient facts to constitute good cause for action against the commission of a notary public, the [commissioning official] shall notify the notary in writing of the same.
- (b) The notary public against whom a complaint has been filed shall have the right to a hearing, and the proceeding shall be conducted in accordance with [the [State's] administrative procedures act or other rules established by the [commissioning official]].
- (c) The [commissioning official] shall inform the complainant and notary public in writing of the [commissioning official's] findings within [30] days of the conclusion of any investigation or administrative adjudication.
- (d) Prior to taking action against the commission or registration of a notary public in accordance with Section 12-3, the [commissioning official] shall inform the notary of the basis for the action and that the action will take effect on a particular date unless before that date an appeal is filed with the [administrative body hearing appeal].
- (e) A notary public or an applicant for a commission or registration against whom any action has been taken may file an appeal in proper form with the [administrative body hearing the appeal] within [30] days after such action has been taken.
- (f) Notwithstanding Subsection (e), an applicant may not appeal denial of a commission when the [commissioning official] within 5 years prior to the application has:
  - (1) denied or revoked any previous application, commission, or registration of the applicant; or
  - (2) made a finding under Section 12-2(e) that grounds for revocation of the applicant's commission existed.
- (g) A notary public whose commission has been revoked shall comply with:
  - (1) Section 6-7(a) (relating to disposition of notarial records); and
  - (2) Section 8-5(a) (relating to disablement of official seal and technology system).

**Comment**

Section 12-5, which is new to the Act, sets out procedures governing disciplinary proceedings undertaken against a notary public after the filing of the complaint described in Section 12-2. Section 12-5 is intended to provide advance notice to a notary before a conclusive finding has been reached

warranting discipline, inform the notary of the facts and allegations of the complaint against the notary which constitute the possible bases for discipline, and advise the notary of the opportunities to take part in any investigation and hearing regarding the disciplinary complaint and of the right to

an appeal of an adverse finding and the procedure for commencing such an appeal.

Section 12-5 assures due process protection to a notary against whom administrative discipline is pursued, for the notary will enjoy the full rights to transparency in the disciplinary process and the opportunities to participate in that process, such as the rights to be represented by legal counsel, present evidence, receive a fair hearing, and have the opportunity to appeal. These due process protections are embodied in state administrative procedures acts or comparable administrative agency provisions. Many of these protections are expressly designated to be adhered to by state notary statutes and regulations. (*See, e.g.*, ALASKA STAT. §§ 44.50.072(a) and (c)(4); CAL. GOV'T CODE § 8220; 57 PA. CONS. STAT. ANN. § 323(b); and VA. CODE ANN. § 47.1-24.A.)

Once a complaint has been filed, the administrative disciplinary process should require an investigation of the complaint to be made. Many disciplinary provisions in state statutes and rules make reference to such an "investigation" conducted by the commissioning official. (*See, e.g.*, ARK. CODE ANN. § 21-14-112(b); IND. CODE ANN. § 33-42-13-1(b); N.C. GEN. STAT. § 10B-60(g); and 57 PA. CONS. STAT. ANN. § 323(d).) The investigation may include a request to the notary to provide pertinent information or respond to the allegations of the complaint. A notary may be asked by the commissioning official to produce information from the notary's records, such as copies of journal entries. (*See* § 6-6(f).) Some jurisdictions require or ask the notary to respond in writing to a complaint or requests for information during disciplinary investigations. (*See, e.g.*, IND. ADMIN. CODE tit. 75, §§ 7-4-2(b) and (c); MICH. COMP. LAWS §§ 55.295(a) and (b); and TEX. ADMIN. CODE § 87.31(28).)

Subsection (a) establishes that, once the commissioning official has considered

the complaint prescribed under Section 12-2 and determined "good cause for action against the notary" exists, the next step is to inform the notary in writing of the commissioning official's conclusion to proceed. The right to notice of the allegations against a notary is a fundamental due process right. (In general accord, *see, e.g.*, COLO. REV. STAT. ANN. § 24-21-523(3); IND. CODE ANN. § 33-42-13-1(d); KY. ADMIN. CODE tit. 30, ch. 8, § 8(8); MINN. STAT. ANN. § 358.70 Subd. 3; and TEX. GOV'T CODE § 406.009(b).) This notice must include a copy of the complaint. (*See* ALASKA STAT. § 44.50.068(d) and OR. ADMIN. RULES §§ 160-100-0430(3) and (5)(b).)

If a formal complaint has been made against a notary and is determined to set out a prima facie case for discipline, part of the investigation should include an invitation or a request to that notary to provide pertinent information or respond to the allegations of the complaint. Some jurisdictions require the notary to respond in writing. (*See* IND. ADMIN. CODE tit. 75, §§ 7-4-2(b) and (c), and MICH. COMP. LAWS §§ 55.295(1)(a) and (b).)

Subsection (b) guarantees the right of a notary to a hearing. The right to a hearing during an administrative disciplinary process is a fundamental right expressly and generally accorded to notaries. (*See, e.g.*, CAL. GOV'T CODE § 8214.3; GA. CODE ANN. §§ 45-17-2.3 and 45-17-15(b); HAW. ADMIN. RULES §§ 5-11-52 and 5-11-53; MINN. STAT. ANN. § 358.70 Subd. 3; MONT. CODE ANN. § 1-5-621(4); and 57 PA. CONS. STAT. ANN. § 323(d)(2).) The hearing envisioned here may be an initial hearing before the commissioning official makes a determination about possible discipline (but after determination that the complaint appears to state a prima facie case for discipline) or may be a hearing (sometimes characterized as an appeal) after the commissioning official has determined that discipline is warranted.

Subsection (b) contemplates that the procedures for the conduct of disciplinary hearings will have been determined by each jurisdiction's administrative procedures act or rules promulgated by the commissioning official. Numerous jurisdictions expressly reference application of their administrative procedure acts to notary discipline proceedings. (*See, e.g.*, ALASKA STAT. §§ 44.50.072(a) and (c)(4); CAL. GOV'T CODE § 8220; 57 PA. CONS. STAT. ANN. § 323(b); and TEX. ADMIN. CODE § 87.30.)

A hearing must accord to the notary fundamental due process rights, including the right to have reasonable time to prepare for the hearing, have the hearing conducted in a timely manner, be present, be represented by counsel, examine witnesses, and present evidence. (*See* MO. CODE OF STATE REGS. §§ 30-100.060(1)(A) and (D)(2); OHIO ADMIN. CODE § 111:6-7(C); and TEX. ADMIN. CODE § 87.30.)

Subsection (b) grants a notary public the right to a hearing, but it does not grant this right to the complainant (if the commissioning official concludes the complaint is without merit). It also does not compel a hearing to be conducted if the notary concedes to the allegations of the complaint and any proposed remedial action(s). It may be the case that the notary will admit to the allegations of the complaint but will seek a hearing regarding the issue of appropriate remedial action(s).

Subsection (c) assures the timely decision within [30] days by way of "findings" from the commissioning official regarding the allegations of the complaint either after the conclusion of the investigation (if the decision is in favor of the notary and to decline to conduct an administrative hearing), or after the conclusion of a disciplinary hearing against a notary. Findings are distinguishable from remedial actions. The commissioning official is required to inform both the complainant and notary

in writing of the official's findings, which in the case of an adjudicatory hearing and adverse finding against the notary does not include any remedial action to be taken (as remedial action is treated separately under Subsection (d)). The drafters thought that the commonly prescribed and bracketed [30]-day time limit is an appropriate time frame for the commissioning official to render such findings, but a jurisdiction may substitute some other specific time limit or a "reasonable time."

Subsection (d) guarantees the right to an appeal to a notary public against whose commission or registration a remedial action or sanction is to be taken under Section 12-3, "unless before that date an appeal is filed." (In accord, *see* MO. REV. STAT. ANN. § 486.810.3.). The filing of an appeal will have the effect of delaying the remedial action pending the resolution of the appeal. This Subsection is intended to allow an additional protection to the notary. If instead, a notary chooses to wait until after the remedial action has become effective, the notary may appeal pursuant to Subsection (e). Although both Subsections (d) and (e) deal with the right to appeal, they differ from one another in key respects, as will be addressed below.

Under the accepted view of due process, the right to an appeal of an adverse decision constitutes a fundamental legal right in a wide range of settings, including notary discipline and remedial actions. Numerous jurisdictions provide for some form of appeal process to a notary or former notary who has received an adverse disciplinary finding. (*See, e.g.*, GA. CODE ANN. §§ 45-17-2.3(c) and 45-17-15(b); MO. CODE OF STATE REGS. § 30-100.080; OR. ADMIN. RULES § 16-100-0620; and TEX. GOV'T CODE §§ 406.009(b) and (c).)

Subsection (e) creates a right of appeal after adverse action has already been taken either against an applicant for

a notary commission or registration, or against a notary public. It differs from Subsection (d) which applies only to commissioned or registered notaries and only to appeals prior to the actual taking of action against the commission or registration. As to applicants for a notary commission or registration, Subsection (e) would allow an applicant to appeal from the denial of a commission or registration.

Subsection (e) also grants appeal rights to notaries. If an applicant for a commission or registration is alleged to have committed misconduct in the application process, the notary is subject to possible disciplinary and remedial action retroactively for that misconduct when the misconduct is discovered later. If a commissioned or registered notary commits alleged misconduct after the commission or registration is issued, the notary is subject to disciplinary and remedial action for that misconduct. In either case, after adverse action has been taken, the notary may file an appeal. This Subsection allows for appeal after the rendering of a remedial action, whereas an appeal under Subsection (d) must be pursued before remedial action is taken.

Subsection (e) is not intended to allow a notary to appeal the same remedial action twice — that is, both before and after remedial action is taken. An unsuccessful appeal prior to the taking of effect of remedial action under Subsection (d), much like the legal doctrine of *res judicata*, will bar an appeal after remedial action has been rendered under Subsection (e).

Subsection (f) prohibits appeals of

denials of notary commission applications in certain limited instances during a 5-year waiting period, in part to be consistent with Section 12-2(e). The purpose of this Subsection is to prevent repeated efforts of denied applicants or sanctioned former notaries to apply to obtain notary commissions.

Subsection (g) is a new provision that is intended to reinforce the requirements already included in the Act relating to the protection from possible loss, destruction, or misuse of notarial records and from possible misuse of official seals and technology systems. It should be remembered that pursuant to Section 12-3(e) the revocation of the notary public's commission works a revocation of the notary's registration, if any, and pursuant to Section 12-3(f) a revocation of the notary's registration works a revocation of the notary's commission.

Under Paragraph (1), upon revocation of the notary public's commission, the now former notary is required to deliver all notarial records to the commissioning official or a designated repository pursuant to Section 6-7(a). (*See* ARK. CODE ANN. §§ 21-14-112(c)(1) and (2) and OR. ADMIN. RULES § 160-100-0330(1).)

Under Paragraph (2), upon revocation of the notary public's commission, the now former notary is required to disable, destroy, or deface any official seal and all or any part of any technology system that is capable of producing the notary's electronic signature or seal pursuant to Section 8-5(a). (*See* ARK. CODE ANN. § 21-14-112(c)(3) and OR. ADMIN. RULES § 160-100-0330(2).)

## § 12-6. Criminal Sanctions.

- [(a)] A notary public is guilty of a [class of offense], punishable upon conviction by either a fine not exceeding [dollars], imprisonment for not more than [term of imprisonment], or both, for knowingly violating:
- (1) Section 4-3(a)(1) (relating to personal appearance before the notary);

- (2) Section 4-4 (relating to verification of identity by the notary); or
  - (3) Section 7-1(g)(1) (relating to a false notarial certificate executed by the notary).
- [(b) A notary public is guilty of a [class of offense], punishable upon conviction by either a fine not exceeding [dollars], imprisonment for not more than [term of imprisonment], or both, for knowingly committing official misconduct.]

### Comment

Section 12-6 creates four specific crimes that a notary public may commit. This Section does not set specific criminal sanctions, but instead leaves to each jurisdiction the determination of whether a violation should constitute a felony, misdemeanor, or other type of offense. Appropriate fines and terms of incarceration would correspond to the designated status of the violation of the Section.

Subsection (a) creates three crimes that may be committed by a notary for violating specific provisions of this Act. A violation of Subsection (a) may occur only if the violation is “knowingly,” intentionally, or willfully committed, meaning that the notary knows the procedural requirement and that it is unlawful to violate it, and nevertheless undertakes the misconduct. The violations identified in Subsection (a) represent three of the most common and serious violations of statutory notarization requirements.

Paragraph (1) criminalizes violation of the notary’s obligation under Section 4-3(a)(1) to require the personal appearance of the principal during the notarization procedure or ceremony. (See N.C. GEN. STAT. § 10B-60(c)(1);

S.C. CODE ANN. §§ 26-1-160(B)(1) and (2); and S.D. CODIFIED LAWS § 18-1-11.)

Paragraph (2) criminalizes violation of the notary’s obligation under Section 4-4 to properly verify the identity of the principal with reasonable certainty during the notarization procedure or ceremony. (See N.C. GEN. STAT. § 10B-60(c)(3) and S.C. CODE ANN. §§ 26-1-160(B)(3) and (4).)

Paragraph (3) criminalizes violation of the notary’s obligation under Section 7-1(g)(1) not to create or execute a false or incomplete notarial certificate. (In accord, see CAL. GOV’T CODE § 6203(a); GA. CODE ANN. § 45-17-20(a); and S.C. CODE ANN. § 26-1-160(B)(5); see also N.C. GEN. STAT. § 10B-60(d).)

[Subsection (b), which is bracketed, creates the crime of “official misconduct.” (See § 12-1(g) and Comment.) This offense requires “knowingly committing official misconduct.” (In accord, see COLO. REV. STAT. ANN. § 24-21-531(1); 5 ILCS § 312/7-105; VA. CODE ANN. § 47.1-28.A; and W.VA. CODE § 39-4-33(a).) It should be noted that the crime of “official misconduct” overlaps the three offenses in Sections 12-5(a)(1), (2), and (3).]

### § 12-7. Impersonation.

Any individual not a notary public who knowingly acts as or otherwise impersonates a notary is guilty of a [class of offense], punishable upon conviction by a fine not exceeding [dollars] or imprisonment for not more than [term of imprisonment], or both.

### Comment

Section 12-7, creating the crime of impersonation of a notary public, originated in the original UNA 1973 (§ 6-203), and has appeared in every Model Act since. (*See* §§ 6-301 (1984), 13-1 (2002), 14-1 (2010), and MENA 2017 14-1.) There have been many cases of fraud and identity theft perpetrated in part by individuals impersonating notaries and performing forged notarizations. Many state notary laws declare impersonation of a notary to constitute a crime. (*See, e.g.*, ARIZ. REV. STAT. ANN. §§ 13-2406 and 41-333; FLA. STAT. ANN. § 117.05(7); GA. CODE ANN. § 45-17-5(c); S.C. CODE ANN. §§ 26-1-160(A)(1), (2), (3), and (C); VA. CODE ANN. § 47.1-29; and VT. STAT. ANN. tit. 26, §§ 5345(a), (b), and (d).)

Impersonation under Section 12-7 has three key parts. First, the wrongdoer must not be a notary public. The wrongdoer might be someone who has never been a notary or might be a former notary who is no longer commissioned to perform notarial acts. (*See* ALA. CODE § 36-20-75; MASS. GEN. LAWS ANN. ch. 222, § 9; S.D. CODIFIED LAWS §§ 18-1-12 and 12.1; and TENN. CODE ANN. § 8-6-120.) If a notary's commission expires and that individual, unaware that he or she is no longer a notary, continues to perform notarial acts, there is no willful or intentional impersonation. (*But see* S.C. CODE ANN. § 26-1-160(A)(2), which criminalizes acting after expiration of the notary commission without requiring the action to be knowingly done, while S.C. CODE ANN. § 26-1-160(C) penalizes impersonation more broadly.)

Second, the impersonation must be “knowingly” committed. The offenses described in Sections 12-7, 12-8, and 12-9 require the offender to commit the offense “knowingly.” (*See, e.g.*, N.C. GEN. STAT. § 10B-60(e); *see also* ARIZ. REV. STAT. ANN. § 41-333; FLA. STAT.

ANN. § 117.05(6); and W.VA. CODE § 39-4-33(b).)

Knowing impersonation may be evidenced by facts that prove the imposter planned, created, or carried out the misrepresentation. Mere negligence does not merit criminal charging and sanctioning under Section 12-7. It should be noted, however, that a law that creates the crime of impersonation of a notary public might not expressly require the offense to be “knowingly” committed and might criminalize conduct with a lesser mental state than knowing, willful, or intentional wrongdoing. (*See* CAL. GOV'T CODE § 8227.1(a) and S.D. CODIFIED LAWS §§ 18-1-12 and 12.1.)

Third, the wrongdoer must act as or hold himself or herself out as a notary public. (*See* CAL. GOV'T CODE § 8227.1(a) and W.VA. CODE § 39-4-33(b).) Use of the title notary public would be part of the illegal conduct. An imposter might use advertising as the method of the misrepresentation (*see* CAL. GOV'T CODE § 8227.1(b)), acquire a forged notary public commission certificate to induce the principal to obtain a forged notarization, or pilfer an official seal or journal of notarial acts from an actual notary or obtain a forged official seal and journal as part of the wrongdoer's misrepresentation. Or an employer or co-worker of a notary might misappropriate the absent notary's official seal and journal to forge a notarial act while the notary is away.

Under Section 12-7, an imposter would not have to actually perform an alleged notarization in order to commit the crime of impersonation of a notary. However, a jurisdiction may require the imposter to perform a false notarial act to commit a crime. (*See* N.C. GEN. STAT. § 10B-60(e); S.C. CODE ANN. §§ 26-1-160(A)(2) and (3); and S.D. CODIFIED LAWS §§ 18-1-12 and 12.1.)



### § 12-8. Wrongful Possession or Destruction.

Except as provided by Section 3-11 (relating to the duties of a personal representative) any individual who knowingly obtains, conceals, defaces, or destroys the official seal or notarial records of a notary public is guilty of a [class of offense], punishable upon conviction by either a fine not exceeding [dollars], imprisonment for not more than [term of imprisonment], or both.

#### Comment

Section 12-8 creates the crime of wrongful possession or destruction of a notary public's official seal and notarial records. This Section originated in the UNA 1973 Section 6-204 and has appeared in every Model Act since. (*See* §§ 6-302 (1984), 13-2 (2002), 14-2 (2010 and MENA 2017).) This Section has broad state statutory support. (*See, e.g.,* CAL. GOV'T CODE § 8221(a); 5 ILCS § 312/7-107; MONT. CODE ANN. §§ 1-5-632(a) and (c); NEV. REV. STAT. ANN. § 240.145; and N.C. GEN. STAT. § 10B-60(f).)

This offense can be committed by "any individual" who violates the provision. (In accord, *see, e.g.,* CAL. GOV'T CODE § 8221(a); FLA. STAT. ANN. § 117.05(3)(d); 5 ILCS § 312/7-107; and N.C. GEN. STAT. § 10B-60(e).) The offense can be committed if a tangible official seal or notarial record (journal or audio-visual recording), or the technology for producing electronic official seals or notarial records, is illegally obtained, concealed, defaced, or destroyed. (*See* the definition of "official seal" in Section 2-19, "notarial record" in Section 2-16, and "journal" in Section

2-12, all which apply to either physical or electronic official seals, notarial records, and journals.) A notary or former notary may commit the offense of destroying notarial records, which are required to be maintained and preserved and eventually transmitted to the commissioning official or a designated repository for safekeeping. (*See* §§ 6-4, 6-5, and 6-7.)

The wrongdoer must act knowingly, intentionally, or willfully for the offense to be committed, as is required for the commission of all the crimes created by Sections 12-7, 12-8, and 12-9. That is, the wrongdoer must know that the action of obtaining, concealing, defacing, or destroying the official seal or notarial records is illegal, that he or she is dealing with an official seal or notarial record or the technology to produce the official seal or notarial record, and that his or her action would cause the crimes under this Section. (*But see* 5 ILCS § 312/7-107, which criminalizes "unlawful" possession without requiring any other mental state.) Negligence that results in those specified consequences is insufficient under Section 12-8 to constitute the required mental state of "knowing."

### § 12-9. Improper Influence.

Any individual who knowingly solicits, coerces, or in any way influences a notary public to commit official misconduct is guilty of a [class of offense], punishable upon conviction by either a fine not exceeding [dollars], imprisonment for not more than [term of imprisonment], or both.

#### Comment

Section 12-9 establishes the crime of influencing a notary public to commit

official misconduct. It first appeared in MNA 1984 Section 6-303 and has appeared in each successive Act. (*See* § 13-3 (2002), § 14-3 (2010), and § 14-1 (MENA 2017).). The provision is reflected in the statutes of several jurisdictions. (*See* CAL. GOV'T CODE § 2225; N.C. GEN. STAT. § 10B-60(j); and S.C. CODE ANN. § 26-1-160(E); *see also* UTAH CODE ANN. § 46-1-18(3(b) and VA. CODE ANN. § 47.1-28.B, which more narrowly criminalize the conduct of an employer for soliciting an employee-notary to violate a provision of notary law.)

For an offender to violate Section 12-9, the offender's actions must be a material or substantial part of the reason for the notary's misconduct. (*See* N.C. GEN. STAT. § 10B-60(j) and S.C. CODE

ANN. § 26-1-160(E), requiring the influence on a notary to be "material.") The offense can be committed by "any individual" — including the notary's employer, supervisor, co-worker, fellow notary, friend, family member, or other person.

The offender must "knowingly" commit the offense for there to be a crime and conviction, as is also required of the other crimes set out in Sections 12-7 and 12-8. (In accord, *see* CAL. GOV'T CODE § 8225(a); N.C. GEN. STAT. § 10B-60(j); and S.C. CODE ANN. § 26-1-160(E).) The wrongdoer must know or understand that the action or omission requested is illegal and intend to obtain the unlawful action or omission by the notary. Unknowing or negligent actions do not satisfy the required mental state for a crime under this Section.

### **§ 12-10. Additional Remedies or Sanctions Not Precluded.**

The sanctions of this Chapter do not preclude other sanctions and remedies provided by law.

#### **Comment**

Section 12-10 announces that sanctions specified in Chapter 12 "do not preclude other sanctions and remedies provided by law." (*See* RULONA § 23(c); MNA 2010 § 14-4; and MENA 2017 § 14-3.) This provision is commonly found in statutes regulating notaries and

notarial acts. (*See, e.g.*, IDAHO CODE § 51-119(5); IND. CODE ANN. § 33-42-13-1(e); KY. REV. STAT. ANN. § 423.395(2); MINN. STAT. ANN. § 358.70 Subd. 4; MO. REV. STAT. ANN. § 486.825; MONT. CODE ANN. § 1-5-621(5); OR. REV. STAT. § 194.340(3); and W.VA. CODE § 39-4-21(c).)

### **Appendix I: Model Notary Act Model Rules**

In years past, certain jurisdictions had adopted rules for its notary public statutes at various times (*see, e.g.*, CAL. CODE REGS. tit. 2, div. 7, ch. 8 and N.C. ADMIN. CODE tit. 18, ch. 7), but this was the exception rather than the rule. By and large, legislation was the primary vehicle for establishing rules, standards, and procedures for notaries public and notarial acts.

As a result, prior Model Acts, except for the MENA 2017 noted below, were published without a grant of rulemaking authority. The MNA 2010, however, did authorize the commissioning official to “promulgate and enforce any policies and procedures necessary for the administration of [Article III; Electronic Notary]” (MNA 2020 § 26-1) without indicating whether the policies and procedures were to be established informally or formally through an official rulemaking process.

The one exception was the MENA 2017 which authorized the commissioning official to promulgate rules to implement the entire Act and required the commissioning official to adopt rules specifically for the verification of identity of remote principals appearing by means of audio-visual communication for a notarial act if the jurisdiction enacted bracketed Section [5A-5]). (MENA 2017 §§ 15-1 and [15-2].) The drafters determined this rulemaking authority was appropriate given the rapid advancement of technology that made notarial acts involving electronic records possible and to relieve legislatures from having to revise the statutes when technology changed.

The MENA 2017 was published during a decade that witnessed an explosion in rulemaking, with no fewer than thirty-six jurisdictions adopting rules or regulations, some multiple times. Most, but not all, of the adoptions have been in response to remote online notarization or RULONA enactments.

Reflecting this increased regulatory activity, the Model Notary Act of 2022 grants the commissioning official rulemaking authority. Section 1-7 is the main rulemaking provision. It confers broad authority to issue rules for the entire Act but lists seven particular matters for which rules may be issued. Other MNA 2022 sections reinforce this authority. (*See* §§ 3-2(a), 4-2(a), 4-4(c)(1), and 6-5(a)(5).)

With the decision to authorize rulemaking in this MNA 2022, the drafters thought it necessary and expedient to provide guidance to jurisdictions enacting Act by proposing Model Rules to implement Section 1-7, the main rulemaking provision of the Act. Those rules follow in this Appendix I.

The Model Rules and Explanatory Notes were drafted by the staff of the National Notary Association, drawing upon its decades of experience in notary public education and examinations, verification of identity, the issuance of official seals, and technology, the main subjects that comprise the Section 1-7 rulemaking provision. For ease of reference, the Model Rules which follow are assigned section numbers that correspond with the sections of the Act in which they appear.

### Section 3-3. Course and Examination

#### Rule 3-3.1. Course Specifications and Requirements.

- (a) Each applicant for a commission as a notary public shall satisfactorily complete a course of instruction of [4] hours that covers [statutes codifying MNA 2022] and prepares the applicant to take the examination prescribed by Rule 3-3.2.
- (b) Each applicant for registration to perform notarial acts on electronic records or involving the use of audio-visual communication shall successfully complete a course of instruction of [2] hours that covers [statutes codifying MNA 2022] that pertain to the performance of notarial acts on electronic records or involving the use of audio-visual communication.
- (c) An educational course may be delivered as:
  - (1) a live classroom course;
  - (2) a synchronous eLearning course; or
  - (3) an asynchronous eLearning course.
- (d) A notary public who has successfully completed an educational course required by Subsection (a) one time may complete a different educational course of [4] hours on advanced notarial practices and principles, provided that at least [1] hour of the course is a review of [statutes codifying MNA 2022] that prepares the applicant to take the examination prescribed by Rule 3-3.2.
- (e) The courses required by this Rule shall be administered and provided by [the [commissioning official] or an entity approved by the [commissioning official]] [or] [providers approved by the [commissioning official]].
- (f) For purposes of this Section:
  - (1) “synchronous eLearning course” means a course delivered online with coursework sessions that are set according to a schedule in real time, or a live classroom course delivered by audio-visual communication.
  - (2) “asynchronous eLearning course” means a pre-programmed or pre-recorded online course that learners complete at their own pace and schedule.

#### Explanatory Note

Rule 3-3.1 implements MNA Section 3-3. A course of instruction for notaries public seeking a notary commission and registering to perform notarial acts on electronic records or involving the use of audio-visual communication is mandated. The Rule covers several matters related

to the administration of the courses: the course content (Subsections (a), (b), (d)), delivery (Subsection (c)), and provider or providers (Subsection (e)). Terms used exclusively in Rule 3-3.1 are defined in Subsection (f).

Subsection (e) offers several options

adopting jurisdictions may consider regarding the providers of courses of instruction. First, the commissioning official may provide the course itself or through an entity approved by the commissioning official. Nevada is an example of this option. A variation of this model is North Carolina. The North Carolina Secretary of State provides the course through trainers certified by the Secretary. Second, a commissioning official may designate a single education provider to create and deliver the course. Indiana is an example of this second option. Third, a state may choose to

allow individuals to select a course provider from among several approved providers that submit courses to the commissioning official for approval. Pennsylvania is an example of this option. Fourth, the commissioning official (itself or through an approved entity) or providers with approved courses may deliver the courses. This option may be attractive to an adopting jurisdiction that wants to provide a course to applicants without a fee while also approving the courses of multiple providers in the marketplace. Wyoming is an example of this option.

### **Rule 3-3.2. Notary Public Examination.**

- (a) Each applicant for a commission as a notary public shall successfully pass an examination as required by this Rule.
- (b) Each applicant for registration to perform notarial acts on electronic records or involving the use of audio-visual communication shall successfully pass an examination as required by this Rule.

#### **Option 1**

- (c) The examinations required by this Section shall be developed by the [commissioning official] or an entity approved by the [commissioning official] and administered and proctored at a physical location or computer testing site.

#### **Option 2**

- (c) The examinations required by this Section shall be developed by the [commissioning official] or an entity approved by the [commissioning official] and delivered online.

#### **Option 3**

- (c) The examinations required by this Section shall be developed by the [[commissioning official] or an entity approved by the [commissioning official]] [or] [course providers approved by the [commissioning official]] and administered at the end of the eLearning course required by Rule 3-3.1.

#### **End of Options**

- (d) The examination shall consist of 30 multiple-choice questions containing four possible answers for each question.
- (e) A passing score on the examination is [80] percent.
- (f) An applicant who fails the examination may retake another examination not sooner than [14] days following the failed attempt.
- [(g) The [commissioning official] may charge an examination retake fee of [dollars] for each successive examination attempt.]

### Explanatory Note

Rule 3-3.2 provides specifications for the notary public examination. Three options are provided for the development and administration of the examination. The first option is for the commissioning official or an entity approved by the commissioning official to develop and administer the examination as an in-person proctored exam at a physical location or computer testing facility. California, Hawaii, Louisiana, and New York administer their exams at a physical location, while Pennsylvania administers their exam at a computer testing facility or using a proctored process online.

The second option is for the commissioning official or an entity approved by the commissioning official to develop the exam and administer it online. For example, the exam may be administered at a dedicated website hosted by the commissioning official or within the online notary public commission application system deployed by the commissioning official. Montana has adopted this option.

The third option requires an approved provider to create and administer the examination as part of the approved education course. Ohio has adopted this option.

#### **[Rule 3-3.3. Approval of Course Providers and Courses.]**

- (a) A person may apply to be approved as a course provider by satisfying the following requirements:
  - (1) completing an application on a form prescribed by the [commissioning official];
  - (2) providing a photocopy of the provider's most recent business license issued by this [State]; and
  - (3) providing the content of any course [and examination] to be approved in a format as prescribed by Subsection (d)[.]; and
  - (4) paying a nonrefundable license application fee of [dollars].]
- (b) A person who applies to be approved as a course provider shall name an agent for service of process.
- (c) Within [30] days of any of the following, an approved course provider shall notify the [commissioning official]:
  - (1) a change of any information provided on the application for approval; and
  - (2) a change of the provider's agent for service of process or any change of the agent's contact information.
- (d) For each course submitted for approval, a provider shall submit to the [commissioning official]:
  - (1) for live classroom and synchronous eLearning courses:
    - (A) a course outline or script of sufficient length for the [commissioning official] to determine that all subjects required to be taught in the course are sufficiently covered;
    - (B) learner materials such as a workbook and presentation slides;
    - (C) a sample proof of completion that will be provided to

- learners who satisfactorily complete the course; and
- (D) a sample roster and sign-in sheet to be used during the course.
- (2) For asynchronous eLearning courses:
  - (A) the pre-programmed course content in the form of a storyboard, script, or other format of sufficient length for the [commissioning official] to determine that all subjects required to be taught in the course are sufficiently covered; [and]
  - (B) learner materials such as a workbook[.]; and
  - (C) the examination for the course that complies with the requirements of Rule 3-3.2.]
- (e) An educational course shall be approved for a period of [2] years.
- (f) A course provider shall resubmit an approved course for reapproval for any of the following reasons:
  - (1) a course approval has expired;
  - (2) the laws relating to notaries public change; [and]
  - (3) the provider proposes to make a substantive change to the content of the course[.]; and
  - (4) the provider proposes to change the examination of the course.

#### **Explanatory Note**

Rule 3-3.3 provides the qualifications and process for approval of course providers. Rule 3-3.3 is bracketed because it depends on which option for administering and providing the course under Rule 3-3.1 is selected. States that choose to use an approved provider or providers should implement this Rule. States that select a sole provider should follow any [State] procurement or bid

award process. Subsection (a) states the general requirements for approval, while Subsection (d) states the requirements for the approval of courses. Since the law of the [State] may change from time to time or other circumstances may warrant a revision of an approved course, Subsection (f) addresses the situations that would require a course to be updated and reapproved.]

### **Section 3-8. Database of Notaries Public**

#### **Rule 3-8.1. Database Requirements.**

The database of notaries public required by [statute codifying MNA § 3-8] shall contain only the following information from each notary's commission and, if applicable, registration:

- (1) the first and last name of each notary;
- (2) any full middle name, middle initial, or last name suffix provided by the notary on the notary's application for a commission;
- (3) The notary's commission identification number;
- (4) the notary's commission and, if applicable, registration commencement and expiration dates; [and]

- (5) [the name of the notary’s county of residence or principal place of work or employment; and
- (6)] the date and final adjudication of any administrative or disciplinary action taken against the notary, if applicable.

#### **Explanatory Note**

Rule 3-8.1 specifies the information that is to be displayed in the record of a notary public appearing in the commissioning official’s online database. The information displayed in the database is a valuable resource for the public, licensed official seal vendors, and [approved][registered] technology system providers. To protect the privacy of the notary public, only the authorized

information may be displayed. The displayed information is sufficient to verify the official record of the notary public’s commission or registration, as required by [statute codifying MNA § 3-8].

[Paragraph (5) is bracketed to provide an option for adopting states that commission notaries public by counties or allow nonresidents to be commissioned as notaries public.]

### **Section 4-4. Verification of Identity**

#### **Rule 4-4.1. Definitions.**

- (a) “Biometric identifier” means a retina or iris scan, fingerprint, voiceprint, scan of hand or face geometry, or any other physiological, biological, or behavioral characteristic used to identify an individual.
- (b) “Identity assessment” means an identity verification that is based on a set of questions formulated from public or private data sources for which the principal has not provided a prior answer.
- (c) “Public key certificate” means an electronic credential which is used to identify an individual who signed an electronic record with the certificate.

#### **Explanatory Note**

Rule 4-4.1 defines terms used in for the rules in this Section. Rules for biometric identifiers, identity assessments, and public key certificates are found in Rules 4-4.6, 4-4.5, and 4-4.7, respectively. The definition of “biometric identifier” lists several identifiers currently in use

and may include additional identifiers not mentioned, including the dynamics or characteristics of an individual’s signature, DNA matching, keystroke dynamics, etc. Biometric identifiers may include an individual’s physiological, biological, or behavioral characteristics.

#### **Rule 4-4.2. Electronic Credential.**

For purposes of [statute codifying MNA § 4-4(b)(1)(A)], an “electronic driver’s license or nondriver identification” includes an electronic driver’s license or nondriver identification that is issued by a state and conforms to the International Organization for Standardization and International



Electrotechnical Commission Final Draft International Standard (ISO/IEC JTC1/SC37) 18013-5 — Personal Identification — ISO-Compliant Driving License — Part 5: Mobile Driving License (mDL) Application.

#### Explanatory Note

An electronic or “mobile” driver’s license (mDL) or nondriver’s ID (mID) is permitted by the Act and Rule 4-4.2 if it conforms to the international standard recently approved in the Fall, 2021, by the International Organization for Standardization and International Electrotechnical Commission.

#### Rule 4-4.3. Factors of Identity Verification.

A factor of identity verification satisfying [statute codifying MNA § 4-4(c)(1)] includes any of the following:

- (1) an unexpired credential as described in [statute codifying MNA § 4-4(b)(1)] that is validated by a government or third party in compliance with Rule 4-4.4;
- (2) an identity assessment that complies with Rule 4-4.5;
- (3) an authenticator issued at or equivalent to Authentication Assurance Level 2 as most currently defined by the National Institute of Standards and Technology Special Publication 800-63-3, and any updates thereto;
- (4) a biometric identifier that complies with Rule 4-4.6;
- (5) a public key certificate that complies with Rule 4-4.7; or
- (6) any other identity verification that complies with a rule under this [Section].

#### Explanatory Note

[Statute codifying MNA § 4-4(c)(1)] requires two distinct factors of identity verification to be used to identify a principal, remotely located principal, or credible witness. The factors required by [statute codifying MNA § 4-4(c)(1)] must be one of three: something an individual “knows,” “has,” or “is” (*see* MNA § 4-4(e)(2)). This Rule lists six possible

factors.

Paragraph (1) is an example of something an individual “has,” Paragraph (2), something an individual “knows,” and Paragraph (4), something an individual “is.” The list is not meant to be exhaustive, but any additional factor must be addressed in and comply with a rule under this Section (Paragraph (6)).

#### Rule 4-4.4. Credential Validation.

- (a) A credential validation satisfying Rule 4-4.3(1) shall:
  - (1) be performed on a credential authorized by [statute codifying MNA § 4-4(b)(1)] that is capable of being validated by an identity service provider using commercially sound methods and practices or a government agency that is the issuing source of the credential;

- (2) require the scan of the credential to be made at the time of the notarial act and uploaded to the technology system by the individual during the single session during which the notarial act involving audio-visual communication, if applicable, is performed;
  - (3) allow the notary public to visually compare the individual's credential to the visual appearance of the individual appearing before the notary using audio-visual communication in real time, if applicable;
  - (4) delete any personally identifiable information and the scans of the credential from the technology system, if applicable, once the credential validation is completed;
  - (5) return the result of the credential validation to the notary public; and
  - (6) provide a transaction identification number that is unique to the credential validation.
- (b) A notary public may recover the cost of the credential validation in accordance with [statute codifying MNA § 5-2(b)].
  - (c) A notary public shall record the result and transaction identification number of the credential validation in the notary's tangible or electronic journal entry of the notarial act.
  - (d) A provider offering credential validation shall comply with [statute codifying MNA § 9-7].

### Explanatory Note

Rule 4-4.4 provides the requirements for a credential validation to satisfy an identity verification (*see, e.g.*, ARK. CODE ANN. § 21-14-309(b)(1)(C)(ii); MICH. COMP. LAWS § 55.285(6)(d); and WASH. ADMIN. CODE § 308-30-300(1).) A credential validation satisfies the verification factor of something one “has.”

Subsection (a)(1) requires a third-party service or the government agency that issued the credential to validate the credential (*see* IOWA ADMIN. CODE §§ 721-43.9(2)b and c(2)2; and NEB. REV. STAT. § 64-402(2)).

If the credential validation is performed as part of a notarial act involving the use of audio-visual communication, it is imperative that the credential be scanned, uploaded into the technology system, and validated during

the single session for the notarial act (Subsection (a)(2); *see* COLO. SECRETARY OF STATE PROVIDER PROTOCOLS § 1.1.5.1 and LA. ADMIN. CODE § 46:XLVI.144.D.2.f). A pre-generated scanned image of the driver's license that was made before the single session commenced could provide an opportunity for fraud. If the credential validation is part of a notarial act performed in the notary public's physical presence, the scan, uploading, and validation of the credential will be performed at that time. The validation result must be recorded in the notary public's journal for the notarial act (Subsection (c); *see* COLO. SECRETARY OF STATE PROVIDER PROTOCOLS § 1.1.2.4.).

Subsection (b) authorizes a notary public to recover the cost of a credential

validation in accordance with [statute codifying MNA § 5-2(b)]. [Statute codifying MNA § 4-4] authorizes a notary to use two factors of identity verification in performing a notarial act in the notary's physical presence on a

paper or electronic record. Subsection (b) has in mind such cases in which a technology system is not used for performing the notarial act and the notary must bear the direct cost of the credential validation.

#### **Rule 4-4.5. Identity Assessment.**

- (a) An identity assessment satisfying the requirement of Rule 4-4.3(2) shall:
  - (1) contain a series of 5 random multiple-choice questions with a minimum of 5 choices each;
  - (2) require a score of 80 percent or higher to pass;
  - (3) require the individual to answer all questions in 2 minutes or less;
  - (4) allow any individual who fails the assessment to take a second assessment once within 24 hours with the same notary public but with at least 2 new questions not presented in the first assessment;
  - (5) return as part of the assessment a “pass” or “fail” score to the notary public; and
  - (6) produce a transaction identification number that is unique to the identity assessment.
- (b) A provider that offers an identity assessment shall ensure that:
  - (1) only the individual whose identity is being verified is shown the questions and answers; and
  - (2) the assessment is protected in an encrypted session.
- (c) A notary public may recover the cost of the identity assessment in accordance with [statute codifying MNA § 5-2(b)].
- (d) A notary public shall record the result and transaction identification number of the identity assessment in the notary's tangible or electronic journal entry of the notarial act.
- (e) A provider offering an identity assessment shall comply with [statute codifying MNA § 9-7].

#### **Explanatory Note**

Model Rule 4-4.5 provides standards for an identity assessment or “knowledge-based authentication” as it is commonly known. An identity assessment satisfies the identity verification factor of something one “knows,” in this case answers to questions based on the individual's credit and life history drawn from public or private data sources (*see e.g.*, FLA.

STAT. ANN. § 117.201(7); IDAHO ADMIN. CODE § 34.07.01 Rule 013.02; MINN. STAT. ANN. § 358.645 Subd. 1(h); and TEX. ADMIN. CODE § 87.70(b)).

Subsection (a) places guardrails around the identity assessment (*see, e.g.*, MINN. STAT. ANN. § 358.645 Subd. 5(1); TENN. ADMIN. CODE § 1360-07-03-.05(3); and WASH. ADMIN. CODE § 308-30-300(3)). A “pass” or “fail” result

must be communicated to the notary public (Paragraph (4)). The result then must be entered in the notary's journal (Subsection e)). These provisions will discourage an impostor from attempting to successfully answer the questions.

Subsection (b) protects the information relating to the identity assessment. Only the individual taking

the assessment may see the questions and answers (Paragraph (1); *see* KY. ADMIN. CODE tit. 30, ch. 8, § 5(b)(8)).

As is the case with Model Rule 4-4.4(b), Subsection (c) authorizes a notary public to recover the cost of an identity assessment for a notarial act performed in the notary's physical presence. (*See* MNA § 4-4(b)(3).)

#### **Rule 4-4.6. Biometric Verification.**

- (a) A service or process that verifies a biometric identifier shall use commercially sound methods and practices to verify the biometric identifier of an individual involved in the notarial act.
- (b) An identity provider that verifies a biometric identifier satisfying the requirement of Rule 4-4.3(4) shall:
  - (1) inform the individual whose identity is being verified in writing that a biometric identifier is being collected and analyzed only for the purpose of an identity verification for the notarial act involving the individual;
  - (2) if the biometric identifier is being stored, inform the individual whose biometric is being verified in writing of the specific purpose and length of time of storage;
  - (3) obtain the written consent and release of the individual whose biometric identifier is being verified prior to performing the biometric verification;
  - (4) return the result of the biometric verification to the notary public; and
  - (5) produce a transaction identification number that is unique to the biometric verification.
- (c) A provider that offers biometric verification shall ensure the verification is protected in an encrypted session.
- (d) A notary public may recover the cost of the biometric verification in accordance with [statute codifying MNA § 5-2(b)].
- (e) A notary public shall record the result and transaction identification number of the biometric verification in the notary's tangible or electronic journal entry of the notarial act.
- (f) A provider offering biometric identifier verification shall comply with [statute codifying MNA § 9-7].

#### **Explanatory Note**

Rule 4-4.6 sets rules for biometric identifiers. A biometric identifier is an example of an identity verification factor of something one "is," — a biological,

physiological, or behavioral trait that is unique to an individual (*see* FLA. STAT. ANN. § 117.201(7); LA. REV. STAT. ANN. § 35:622.A(3)(b); MO. CODE OF STATE

REGS. § 30-110.030(1)(A)3; MINN. STAT. ANN. § 358.645 Subd. 1(h); MONT. CODE ANN. § 1-5-602(11)(b); N.J. ADMIN. CODE § 17:50-1.14(g)3.ii.(2); and UTAH CODE ANN. § 46-1-2(19)(a)(ii)(B)).

Subsection (b) is based on the Illinois Biometric Information Privacy

Act (*see* 740 ILCS § 14 *et seq.*).

Subsection (d), like Rule 4-4.4(b) and 4-4.5(c) before it, authorizes a notary public to recover the cost of an identity assessment for a notarial act performed in the notary's physical presence. (*See* MNA § 4-4(b)(3).)

#### **Rule 4-4.7. Public Key Certificate.**

- (a) A public key certificate satisfying the requirement of Rule 4-4.3(5) shall:
  - (1) conform to the International Telecommunication Union ITU-T X.509 v3 standard, and any updates thereto;
  - (2) be issued at or equivalent to the [second] or higher Authentication Assurance Level (AAL), as most currently defined by the United States National Institute of Standards and Technology, and any updates thereto; and
  - (3) be capable of validation in real time at the time of the notarial act on an electronic record or involving the use of audio-visual communication.
- (b) For every public key certificate, a technology system shall be capable of validating:
  - (1) the type of certificate;
  - (2) the certification authority that issued the certificate;
  - (3) the name or identity of the individual to whom the certificate was issued;
  - (4) the operational period of the certificate; and
  - (5) the date and time of signing by the principal.
- (c) A notary public shall record the information returned by the validation check required by Subsection (b) in the notary's tangible or electronic journal entry of the notarial act.
- (d) A notary public shall not perform a notarial act on an electronic record or involving the use of communication technology if the principal's public key certificate fails the validation check required by Subsection (b).

#### **Explanatory Note**

Rule 4-4.7 authorizes an individual to use a public key certificate as a factor of identity verification (*see* COLO. REV. STAT. ANN. § 24-21-514.5(6)(II)(B); IND. CODE ANN. § 33-42-17-5(3)(C); KY. REV. STAT. ANN. § 423.330(3)(b)2; MONT. CODE ANN. § 1-5-603(12)(c); N.J. ADMIN. CODE § 17:50-1.14(g)3.ii.(3); and WYO.

STAT. ANN. § 32-3-102(a)(xxxi)(B)). A public key certificate satisfies the identity verification factor of something one "has."

Subsection (a) announces a public key certificate must conform to existing technical standards (Paragraphs (1) and (2)). Paragraph (2) allows an individual to present a valid public key certificate

issued at or equivalent to the [second] or higher Authentication Assurance Level, as currently specified by the United States National Institute of Standards and Technology (“NIST”). The current NIST standard is NIST Special Publication 800-63-3. Paragraph (3) requires real-time validation of the public key certificate.

### **Section 6-5. Notarial Record Repositories**

#### **Rule 6-5.1. [Approval][Registration] Requirements.**

- (a) A repository shall [be approved by][register with] the [commissioning official] before offering services to store notarial records.
- (b) A person may apply for [approval][registration] as a repository by satisfying the following requirements:
  - (1) completing an application on a form prescribed by the [commissioning official];
  - (2) providing a photocopy of the repository’s most recent business license issued by this [State];
  - (3) obtaining a surety bond in the sum of [\$50,000] issued by a corporate surety or insurance company licensed to do business in this [State] that is renewed on a continuation basis every [2] years; and
  - (4) [demonstrating][signing and submitting a self-certification confirming] that its environment at minimum employs and enforces industry-standard security and compliance best practices, including but not limited to the following:
    - (A) encryption of all data at rest and in transit;
    - (B) continuous vulnerability management;
    - (C) secure encrypted backups shipped offsite;
    - (D) strict control of administrator privileges and least rights access control;
    - (E) maintenance and analysis of access logs;
    - (F) malware defenses;
    - (G) strict limitation of network ports and protocols;
    - (H) industry-standard environment hardening;
    - (I) multi-factor authorization;
    - (J) documented and regularly tested incident management and disaster recovery procedures; and
    - (K) regular penetration testing and remediation; [and]
  - (5) [submitting][signing and submitting a self-certification of] the most recent audit of its security and compliance policies and procedures conducted and certified by a qualified third party to the [commissioning official][.];and
  - (6) paying a nonrefundable license application fee of [dollars].]
- (c) A person who applies for [approval][registration] as a repository shall name an agent for service of process.
- (d) A repository provider shall [submit annually][sign and submit

- annually a self-certification confirming the passing of] the audit required by Section (b)(5) to the [commissioning official].
- (e) A repository provider may submit amendments to cure a deficient application or an application for reconsideration following denial of the repository provider's application by the [commissioning official].
  - (f) Within [30] days of any of the following, a repository provider shall notify the [commissioning official]:
    - (1) renewal or change of surety of a repository provider's surety bond;
    - (2) a change of any information provided on the application for [approval][registration];
    - (3) a change of the repository provider's agent for service of process or any change of the agent's contact information; and
    - (4) the provider ceases to provide the [approved][registered] repository to notaries public of this [State].
  - (g) A repository provider shall comply with [statute codifying MNA § 9-7].
  - (h) For purposes of this Section, "repository" means a third person that offers a service to store a notary public's notarial records in accordance with this Rule.

#### Explanatory Note

Model Rule 6-5.1 provides rules for [approval][registration] of a notarial record repository. An adopting state may choose either to approve or register repositories.

Subsection (b) states the requirements for [approval][registration]. Paragraph (3) requires a \$50,000 surety bond because a repository is protecting notarial records that could contain personally identifiable information, the disclosure of which could injure a principal, credible witness, or other individual involved in the

notarial act. Paragraph (4) provides requirements for a repository's storage environment (*see* COLO. SECRETARY OF STATE PROVIDER PROTOCOLS § 1.5). Paragraph (5) requires [submission][a signed self-certification] of an annual audit.

Subsection (e) provides a rule for a repository provider to cure a deficient application.

Subsection (f) provides minimum notification requirements.

#### **Rule 6-5.2. Termination of [Approval][Registration].**

- (a) The [commissioning official] may terminate a repository provider's [approval][registration] for any of the following:
  - (1) a finding that the repository failed to comply with the [Act] and this [Section];
  - (2) a finding that the repository provider violated [statute codifying MNA § 9-7];
  - (3) failure to maintain the surety bond required by Rule 6-5.1(b)(3);
  - (4) failure to [produce or pass][self-certify to the passing of] the annual audit required by Rule 6-5.1(b)(5);

- (5) failure to comply with Rule 6-5.1(f); and
- (6) a finding against or admission of liability by the repository provider in a civil lawsuit for failure to comply with the [Act] or this [Section].
- (b) A repository provider may appeal a termination of [approval][registration] by submitting a timely appeal in accordance with [the [State's] administrative procedures act or other rules established by the [commissioning official]].

#### **Explanatory Note**

Rule 6-5.2 provides several grounds for termination of a repository provider's [approval][registration] and the process for a provider to appeal a termination by the commissioning official.

Subsection (a) states six grounds for termination of [approval][registration]. These grounds also will apply to the providers of technology systems under Rule 9-1.2.

#### **Rule 6-5.3. Repository Contract.**

- (a) Before storing a notary public's notarial records, a repository provider shall execute a contract with the notary.
- (b) The contract for notarial record repository services shall include the following:
  - (1) the term of the contract;
  - (2) the fee for storage of records;
  - (3) a provision that substantially states in the event the contract is terminated by either party, the notary public's notarial records will be available for access and retrieval by the notary, the notary's personal representative, or the notary's guardian for at least [1] year;
  - (4) the provider's privacy policy; and
  - (5) the provider's breach notification policy.

#### **Explanatory Note**

Model Rule 6-5.3 provides the rules for the contract between a repository and notary public.

[Statute codifying MNA § 6-5(a)(3)] requires notarial records to be transferred back to the notary public or the notary's personal representative or guardian in

the event the contract is terminated. Paragraph (3) of Subsection (b) requires the contract to specify that the appropriate individual may obtain these records for at least [1] year after the contract is terminated. Adopting states may specify a shorter or longer period, if desired.

#### **Rule 6-5.4. Storage, Access, and Security of Notarial Records.**

- (a) A notary public, or, in the event of the notary's death or adjudication of incompetency, the notary's personal representative or guardian, may select one or more repositories [approved by][registered with]



- the [commissioning official] with which to store the notary's notarial records.
- (b) The notarial records of a notary public that are stored in a repository are the exclusive property of the notary.
  - (c) Only the notary public whose notarial records are stored in a repository, the notary's personal representative, or the notary's guardian may access and provide copies of the records pursuant to Section 6-6 of the [Act] during the term of the notary's commission.
  - (d) Upon resignation, expiration without renewal, suspension, or revocation of the notary public's commission, or the death or adjudication of incompetency of the notary, the [commissioning official] [repository [approved by]][registered with] the commissioning official] shall perform the duties required under Section 6-6 of the [Act].
  - (e) A repository shall not duplicate any notarial records stored in the repository except for the purpose of making backups in accordance with commercially sound methods and practices.
  - (f) A repository shall not alter or extract any notarial records stored in the repository.
  - (g) A notary public who stores backups of journals and audio-visual recordings of notarial acts at minimum shall:
    - (1) follow cyber-security best practices on all the notary's personal and business-related computers and mobile devices;
    - (2) employ up-to-date malware protection;
    - (3) employ email and web browser security protections recommended by the vendors of these systems;
    - (4) ensure operating systems and applications on all the notary's personal and business-related computers and mobile devices are set to automatically download and install the latest system and application updates; and
    - (5) change passwords on all the notary's personal and business-related computers, mobile devices, and websites and applications every 90 days.

### Explanatory Note

Model Rule 6-5.4 provides additional rules for the storage, use, and security of notarial records.

Subsection (a) authorizes a notary or the notary's personal representative or guardian, if needed, to select one or more repositories to store notarial records.

Subsection (b) clarifies that those notarial records stored in a repository remain under the exclusive control of the

notary as [statute codifying MNA § 6-4(a)] prescribes. A repository only stores notarial records. It generally has no authority to permit access to or provide copies of the records except at the direction of the notary public and the authority granted by Subsection (d).

Subsection (c) specifies the access rights to notarial records stored in a repository.

Subsection (d) provides a crucial clarification in the event of termination of the notary's commission or the notary's death or adjudication of incompetency. When the notary's commission terminates, whether by resignation, revocation, or expiration without recommissioning, the now former notary no longer would be responsible for fielding requests to provide copies and certified copies of notarial records. In the event of the notary's death or adjudication of incompetency, the notary no longer can provide copies and certified copies of notarial records under Section 6-6 of the Act. Subsection (d) provides two options for fulfilling these ongoing requests. The commissioning official or the repository housing the notary's notarial records must perform

the duties under Section 6-6 of the Act. An adopting jurisdiction may select the option best suited for it. Whichever is selected, the party now responsible for fulfilling these requests must comply with all of the requirements of Section 6-6 of the Act, including retaining signed requests for copies of notarial records.

Subsection (e) prohibits a repository from making duplicates of a notary's notarial records, and Subsection (f) prohibits a repository provider from altering or extracting the records.

Subsection (g) requires the notary public to follow security best practices when storing backups of notarial records on the notary's personal equipment, since the notary will be interacting with notarial record data over the open Internet.

#### **Rule 6-5.5. Notification of Use of Repository.**

A notary public who utilizes a repository to store notarial records shall provide the following information in the notification required by [statute codifying MNA § 6-5(b)]:

- (1) the notary's name, commission identification number, and commission expiration date;
- (2) the name of the repository storing the notary's notarial records;
- (3) the commencement date of storage with the repository;
- (4) the term of storage with the repository;
- (5) the date of the earliest notarial record stored in the repository; and
- (6) the type of notarial records stored, whether tangible journals, electronic journals, or audio-visual recordings of notarial acts involving audio-visual communication, or a combination of all three.

#### **Explanatory Note**

Model Rule 6-5.5 implements [statute codifying MNA § 6-5(b)], which requires a notary public to notify the commissioning official when the notary

utilizes a repository. The notification ensures the commissioning official will know where the notary's notarial records are stored at all times.

### **Section 8-3. Procurement of Official Seal**

#### **Rule 8-3.1. Certificate of Authorization Form.**

- (a) A Certification of Authorization to Purchase an Official Seal form that satisfies the requirements of [statute codifying MNA § 1-7(5)] shall include the following information in the order specified:

- (1) “[Commissioning Official]” and “State of [State]” at the top of the form;
  - (2) “Certification of Authorization to Purchase an Official Seal”;
  - (3) a statement that includes the following information:
    - (A) “A commission as a notary public has been issued to [name of notary public]”;
    - (B) the notary public’s commission identification number; and
    - (C) the commencement and expiration dates of the notary public’s commission.
  - (4) the signature of the [commissioning official];
  - (5) the name and license number of the licensed official seal vendor; and
  - (6) 2 numbered spaces with sufficient room to affix an imprint of the official seal or seals manufactured.
- (b) A notary public may purchase no more than 2 official seals with each Certificate of Authorization to Purchase an Official Seal form.
  - (c) A tangible Certificate of Authorization to Purchase an Official Seal form shall be printed on security paper or transmitted as an electronic record that is electronically signed by the [commissioning official] using a public key certificate that complies with Rule 4-4.7.
  - (d) A licensed official seal vendor shall neither accept a photocopy or facsimile of an original tangible Certificate of Authorization to Purchase an Official Seal form nor an electronic Certificate form that has not been signed with the [commissioning official’s] public key certificate.
  - (e) A licensed official seal vendor who accepts an electronic Certificate of Authorization to Purchase an Official Seal form from a notary public shall transmit the completed Certificate to the [commissioning official] by [email at \_\_\_\_\_ (insert email address)] [or] [uploading the Certificate to the [commissioning official’s] portal at \_\_\_\_\_ (insert Uniform Resource Locator (URL))].

### Explanatory Note

Model Rule 8-3.1 provides requirements for the Certificate of Authorization to Purchase an Official Seal form that a notary public is required to submit to a licensed vendor of official seals for the purpose of purchasing an official seal. The requirements for the form are patterned after the “Certificate of Authorization to Manufacture Notary Public Seals” form issued by the California Secretary of State.

Subsection (b) allows no more than

2 official seals to be obtained per Certificate. If a notary wishes to purchase a third or additional official seal, the notary must obtain another Certificate.

Subsection (c) emphasizes the security of the form. If printed in a tangible form, security paper must be used. If issued in electronic form, the Certificate must be signed by the commissioning official using a public key certificate. This ensures the certificate came from the commissioning official.

**Rule 8-3.2. Vendor License Requirements.**

- (a) A person may apply to be licensed as an official seal vendor by satisfying the following requirements:
  - (1) completing an application on a form prescribed by the [commissioning official];
  - (2) providing a photocopy of the vendor's most recent business license issued by this [State];
  - (3) obtaining a surety bond in the sum of [\$50,000] issued by a corporate surety or insurance company licensed to do business in this [State] that is renewed on a continuation basis every [2] years; [and]
  - (4) providing samples of official seals produced by the vendor for use on tangible and electronic records[.]; and
  - (5) paying a nonrefundable license application fee of [dollars].]
- (b) A person who applies to be licensed as an official seal vendor shall name an agent for service of process.
- (c) An official seal vendor may submit amendments to cure a deficient application or an application for reconsideration following denial of the vendor's application by the [commissioning official].
- (d) Within [30] days of any of the following, a licensed official seal vendor shall notify the [commissioning official]:
  - (1) renewal or change of surety of a vendor's surety bond;
  - (2) a change of any information provided on the application for licensure; and
  - (3) a change of the vendor's agent for service of process or any change of the agent's contact information.

**Explanatory Note**

Model Rule 8-3.2 provides requirements for an official seal vendor license. The requirements resemble the requirements for providers of repositories (Rule 6-5.1) and technology systems (Rule 9-1.1). Paragraph (3) of Subsection (a) requires a vendor to maintain a \$50,000 surety bond to protect the public who may be financially damaged by the

improper issuance of an official seal. It is meant to impress upon the vendor that an official notary public seal wields great authority when affixed to notarized records and must not be treated as any ordinary seal.

Subsection (d) provides minimum notification requirements for a vendor's changes in status.

**Rule 8-3.3. Termination of Vendor License.**

- (a) The [commissioning official] may terminate an official seal vendor's license for any of the following:
  - (1) a violation of the [Act] or this [Section];
  - (2) failure to maintain the surety bond required by Rule 8-3.2(a)(3);
  - (3) failure to comply with Rule 8-3.2(d); and

- (4) a finding against or admission of liability by the vendor in a civil lawsuit for failure to comply with the [Act] or this [Section].
- (b) A licensed official seal vendor may appeal a termination of approval by submitting a timely appeal in accordance with [the [State's] administrative procedures act or other rules established by the [commissioning official]].

### Explanatory Note

Model Rule 8-3.3, which implements [statute codifying RULONA § 27(a)(5)], provides grounds for termination of an official seal vendor's license and the process for appealing a termination. The grounds for termination in Rule 8-3.3 parallel the grounds for termination of [approval][registration] of notarial record repositories (Rule 6-5.2) and technology systems and providers (Rule 9-1.2).

## Section 9-1. Technology Systems

### Rule 9-1.1. [Approval][Registration] Requirements.

- (a) A provider may apply for [approval][registration] of the provider's technology system by satisfying the following requirements:
  - (1) completing an application on a form prescribed by the [commissioning official];
  - (2) providing a photocopy of the provider's most recent business license issued by this [State];
  - (3) obtaining a surety bond in the sum of [\$150,000] issued by a corporate surety or insurance company licensed to do business in this [State] that is renewed on a continuation basis every [2] years;
  - (4) obtaining and maintaining an errors and omissions insurance policy in the amount of [\$250,000];
  - (5) [demonstrating][signing and submitting a self-certification confirming] that its environment at minimum employs and enforces the industry-standard security and compliance best practices prescribed in Rule 6-5.1(b)(4);
  - (6) [submitting][signing and submitting a self-certification of] the most recent audit of its security and compliance policies and procedures conducted and certified by a qualified third party to the [commissioning official]; [and]
  - (7) [demonstrating][signing and submitting a self-certification confirming] that the provider's technology system complies with the [Act] and this [Section][.]; [and]
  - (8) paying a nonrefundable license application fee of [dollars].]
- (b) A provider who applies for [approval][registration] of the provider's technology system shall name an agent for service of process.
- (c) The [commissioning official] may require the provider of a

technology system to submit additional information to satisfy the [commissioning official] that the provider's system complies with the [Act] and this [Section], including:

- (1) the provider's privacy policy;
  - (2) the provider's breach notification protocols; and
  - (3) any contracts with other entities providing identity verification, notarial record repository, tamper-evident technologies, or any other services for executing notarial acts using the provider's system.
- (d) A technology system provider may submit amendments to cure a deficient application or an application for reconsideration following denial of the provider's application by the [commissioning official].
- (e) [An approved][A registered] provider shall [submit annually][sign and submit annually a self-certification confirming the passing of] the audit required by Rule 9-1.1(a)(6) to the [commissioning official].
- (f) Within [30] days of any of the following, a provider of a technology system shall notify the [commissioning official]:
- (1) renewal or change of surety of a provider's surety bond or errors and omissions insurance policy;
  - (2) a change of any information provided on the application for [approval][registration];
  - (3) a material change to the technology system that affects compliance with the [Act] and this [Section];
  - (4) a change of the provider's agent for service of process or any change of the agent's contact information;
  - (5) a finding that the technology system provider has violated the terms of its system [approval][registration] in another state; and
  - (6) the provider ceases to provide the [approved][registered] technology to notaries public of this [State].
- (g) A technology system provider shall comply with [statute codifying MNA § 9-7].

### Explanatory Note

Rule 9-1.1 states the requirements for [approval][registration] of technology systems.

A higher surety bond than for notarial record repositories (Rule 6-5.1(b)(3)) and official seal providers (Rule 8-3.2(a)(3)) is required. Also required is an additional \$250,000 errors and omissions insurance policy because a system that violates the [Act] and this Section could result in financial damages to those who use and rely on the system

(Subsections (a)(3) and (a)(4)). The drafters thought this additional form of financial responsibility was warranted.

Subsection (d) provides a means for curing a deficient application submitted to the commissioning official or applying for reconsideration after denial of an application.

Subsection (f) imposes minimum notification requirements on a system provider should the provider's status or information change.

**Rule 9-1.2. Termination of [Approval][Registration].**

- (a) The [commissioning official] may terminate a technology system provider's [approval][registration] for any of the following:
  - (1) a finding that the technology system failed to comply with the [Act] and this [Section].
  - (2) a material change of the technology system that results in the system being out of compliance with the provider's [approval] [registration];
  - (3) a finding that the technology system provider violated [statute codifying MNA § 9-7];
  - (4) failure to maintain the surety bond or errors and omissions insurance required by Rule 9-1.1(a)(3) and 9-1.1(a)(4);
  - (5) failure to comply with Rule 9-1.1(e);
  - (6) failure to comply with Rule 9-1.1(f); and
  - (7) a finding against or admission of liability by the technology system provider in a civil lawsuit for failure to comply with the [Act] or this [Section].
- (b) A technology system provider may appeal a termination of [approval][registration] by submitting a timely appeal in accordance with [the [State's] administrative procedures act or other rules established by the [commissioning official]].

**Explanatory Note**

Rule 9-1.2 provides grounds for termination of a technology system provider's [approval][registration] and a process to appeal a termination. (See the rules for repositories (Rule 6-5.2) and licensed official seal vendors (Rule 8-3.3).)

Paragraph (2) of Subsection (a) does

not apply to system maintenance releases, but if new or materially different features are added or replaced, the commissioning official could pursue termination. The provider could cure a termination by submitting a new application following the procedures in Rule 9-1.1.

**Rule 9-1.3. Complaints.**

- (a) Any individual may file a complaint against a technology system or notarial record repository provider.
- (b) A complaint shall include the following information:
  - (1) the complainant's name;
  - (2) the complainant's address;
  - (3) the date of notarization giving rise to the complaint;
  - (4) the name of the technology system or repository provider;
  - (5) a description of the incident giving rise to the complaint in sufficient detail;
  - (6) the citation of any statute, administrative rule, or other law of this [State] the complainant alleges the technology system or repository provider to have violated, if known;

- (7) a declaration signed under penalty of perjury that the information provided on the complaint form is true to the best of the complainant's knowledge and belief; and
- (8) the complainant's signature and date of signing.

#### **Explanatory Note**

Model Rule 9-1.3 prescribes the contents of the complaint form for filing a complaint against a technology system or notarial record repository provider. The complaint must allege that the technology system or repository provider violated a statute or rule related to notarial acts or the requirements for system or repository providers. For example, a technology system may not have allowed the notary public to verify the identity of a remotely located principal according to the law. In this case, the notary public, the remotely located principal, or a party relying on the notarial act could file a complaint.

### **Section 12-2. Complaints Against Notary Public**

#### **Rule 12-2.1. Form and Contents of Complaint.**

- (a) A complaint form that satisfies the requirements of [statute codifying MNA § 12-2(b)(1)] shall include the following information:
  - (1) the complainant's name;
  - (2) the complainant's address;
  - (3) the date of the notarization giving rise to the complaint;
  - (4) the name of the notary public;
  - (5) the notary's commission identification number, if known;
  - (6) the notary's commission expiration date, if known;
  - (7) a space for the complainant to enter a description of the incident and notarial act giving rise to the complaint in sufficient detail;
  - (8) the citation of any law of this [State] the complainant alleges the notary public to have violated, if known;
  - (9) a declaration signed under penalty of perjury that the information provided on the complaint form is true to the best of the complainant's knowledge and belief; and
  - (10) the complainant's signature and date of signing.
- (b) The complainant may submit with the complaint a copy of the record containing the notarial act and any other written evidence, including a written statement of a witness to the notarization.

#### **Explanatory Note**

Model Rule 12-2.1 prescribes the contents of the form to file a complaint against a notary public for violating a statute or rule related to notarial acts. The requirements are straightforward. The rule encourages a complainant to provide as much specific information regarding the violation as is known.



## Appendix II: Revised Uniform Law on Notarial Acts Model Rules

The primary purpose of the Model Notary Act is to be enacted as legislation to supplement or replace a jurisdiction's existing notary public statutes. Nonetheless, its breadth, detail and structure lend themselves to adoption as a set of administrative rules. Indeed, the MNA is particularly suited to be adapted as an implementing set of administrative rules or regulations for jurisdictions which have enacted the Revised Uniform Law on Notarial Acts.

Section 27 of the RULONA authorizes the commissioning officer or agency to publish rules to implement the RULONA broadly and more specifically with respect to particular matters. These include:

- “prescribing the manner of performing notarial acts regarding tangible and electronic records”;
- ensuring “that any change to or tampering with a record bearing a certificate of a notarial act is self-evident”;
- ensuring “integrity in the creation, transmittal, storage, or authentication of electronic records or signatures”; and
- preventing “fraud or mistake in the performance of notarial acts”.

Chapter 14A also authorizes the commissioning officer or agency to adopt rules regarding the performance of notarial acts involving remotely located individuals.

Appendix II presents a model for implementing the MNA 2022 as a set of rules or regulations under the RULONA. It takes applicable chapters and sections from the MNA and the Model Rules and organizes them in a regulatory format.

In most cases the text of the MNA provisions and Model Rules may be used without significant redrafting. To assist in this process, the rules in Appendix II are written using terminology adopted by the RULONA in place of the MNA language. Below are examples of terms used in the MNA and how they are worded in the rules to implement the RULONA:

MNA	RULONA
Bond	Assurance
Audio-visual communication	Communication technology
Real time	Simultaneously by sight and sound
Official seal	Official stamp
Identity verification	Identity proofing
In the presence of	Appear personally
Notarial acts on electronic records	Notarial acts with respect to electronic records
Notarial certificate	Certificate of notarial act
Registration	Notification
Technology system	Tamper-evident technology

A final adjustment was to ensure that certain provisions in the Rules were drafted to apply more broadly to notarial officers or more narrowly to notaries public as the case may be. For example, many of the rules taken from the MNA were originally drafted to apply to notaries, but in Appendix III are broadened to apply to all notarial officers. And, since under the RULONA only notaries public are authorized to notarize electronic records and perform notarial acts for remotely located individuals, rules in Appendix III are written to apply more narrowly to notaries public.

## **Chapter 1. Implementation**

### **Rule 1.1. Authority.**

Chapters 1-10 of this [title of administrative code] are authorized by [statutes codifying RULONA Sections 14A and 27].

### **Rule 1.2. Scope.**

These rules implement [statutes codifying the RULONA].

### **Explanatory Note**

<p>Rule 1.2 restates the scope of the rules as set forth in [statutes codifying RULONA §§ 27 and 14A]. The former provision vests the commissioning officer or agency with authority to adopt rules</p>	<p>for the entire [Act]. (See [statute codifying RULONA § 27(a)].) The latter authorizes the commissioning officer or agency to adopt rules related to notarial acts for remotely located individuals.</p>
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### **Rule 1.3. Implementation Date.**

Chapters 1-10 of this [title of administrative code or other regulatory citation] were adopted on [\_\_\_\_\_].

## **Chapter 2. Definitions**

### **Rule 2.1. Terms Used in These Rules.**

- (a) “Act” means [the official name of the RULONA codified in statute].
- (b) “Appear personally” means:
  - (1) the notarial officer is physically close enough to see, hear, communicate with, and receive identification credentials from any individual involved in the notarial act; or
  - (2) the notary public and any individual involved in the notarial act are able to interact simultaneously with one another by sight and sound using communication technology;
- (c) “Notarial record” means a [journal required by [statute codifying RULONA § [19]] or] recording of a notarial act required by [statute codifying RULONA Chapter 14A], or any other record that pertains to the notary public’s office or actions;
- (d) “Open format” means platform independent, machine readable, and

- made available to the public without restrictions that would impede the reuse of the information;
- (e) “Personally identifiable information” means information that:
    - (1) identifies an individual;
    - (2) is not available from any public record or other public source; and
    - (3) includes a photograph, Social Security or credential number, address, phone number, or any identifier, descriptor, or indicator that when used in combination with other information identifies an individual.
  - (f) “Principal” means an individual who appears personally before a notarial officer for:
    - (1) an acknowledgment;
    - (2) a verification on oath or affirmation;
    - (3) a signature witnessing; or
    - (4) an oath or affirmation.
  - (g) “Requester” means an individual who asks the notarial officer to perform a copy certification.
  - (h) “Tamper-evident technology” means a set of applications, programs, hardware, software, or other technologies designed to enable a notary public to perform notarial acts with respect to electronic records or for remotely located individuals which display evidence of any changes made to an electronic record.

### Explanatory Note

Rule 2.1 defines key terms used in these Rules. Subsection (b) defines “appear personally.” [Statute codifying RULONA § 6] requires an individual to appear personally before the notarial officer if the notarial act relates to a statement made in or a signature executed on a record. “Appear personally,” however, is not defined. Subsection (b) provides a definition of this term based upon MNA Section 2-11.

Subsection (c) defines “notarial record.” The term is defined by MNA Section 2-16 and refers primarily to the recordings of notarial acts performed for remotely located individuals (*see* [statute codifying RULONA § 14A]).

[A state that has enacted RULONA Section [19] may include the bracketed language clarifying that the journal also is a notarial record.]

Subsection (d) defines “open format.” This definition will pertain to audio-visual recordings of notarial acts for remotely located individuals [and journals] in Chapter 8.

Subsection (e) defines “personally identifiable information” based on MNA Section 2-21.

Subsection (f) defines “principal.” The definition is based on MNA Section 2-22. Since, however, the [Act] does not authorize a notarial officer to perform a certification of life (*see* MNA § 2-4 and [statute codifying RULONA § 2(5)]), it was omitted from the definition.

Subsection (g) defines “requester.” The definition is based on MNA Section 2-26. Since, however, the [Act] does not authorize a notarial officer to perform a verification of fact (*see* MNA § 2-34 and [statute codifying RULONA § 2(5)]), it

was omitted from the definition.

Subsection (h) defines “tamper-evident technology.” The [Act] does not use the MNA term “technology system.”

Instead, it uses the term “tamper-evident technology,” but the term is not defined.

The term is defined here using the MNA definitions found in § 2-32 and § 2-33.

### **Chapter 3. Commission to Perform Notarial Acts**

#### **Rule 3.1. Background Check.**

- (a) To assist the [commissioning officer or agency] in determining whether an applicant for a commission as a notary public has been convicted of a felony or crime involving fraud, dishonesty, or deceit under [statute codifying RULONA § 23(a)(3)], an applicant shall submit to a background check of possible criminal offenses that would disqualify the applicant from performing the duties of a notary public.
- (b) Information required by this Rule shall be used by the [commissioning officer or agency] and designated [State] employees only for the purpose of performing official duties under the [Act] and these Rules and shall not be disclosed to any person other than:
  - (1) a government agent acting in an official capacity and authorized to obtain such information;
  - (2) an individual authorized by court order; or
  - (3) the applicant or the applicant’s authorized agent.

#### **Explanatory Note**

Subsection (a) implements the authority granted by [statute codifying RULONA § 27(a)] by requiring applicants for a notary public commission to submit to a background check. It also is consistent with [statute codifying § 23(a)(3)] which grants the commissioning officer or agency the authority to deny, refuse to renew, revoke, suspend, or impose a

condition on a notary public commission for conviction of any felony or a crime involving fraud, dishonesty, or deceit. MNA Section 3-1(a)(7) is the source of the background check required by this Rule.

Subsection (b) protects the information disclosed in the background check from unauthorized use.

#### **[Rule 3.2. Course of Instruction and Examination.**

Within 6 months of applying for a commission as a notary public, every applicant shall satisfactorily complete a course of study approved by the [commissioning officer or agency] of at least [4] hours and pass an examination of the course.

#### **Explanatory Note**

Rule 3.2 is optional because RULONA Section [22] is bracketed. It is based on MNA Section 3-3(a). A state that

has enacted [statute codifying RULONA § [22(b)]] may consider adopting Rule 3.2. The length of the course is bracketed,

but the drafters believed [4] hours is sufficient time for the course content and objectives to be satisfied. Adopting jurisdictions may choose to lengthen it.]

**[Rule 3.3. Course Specifications and Requirements.]**

**[Rule 3.4. Notary Public Examination.]**

**[Rule 3.5. Qualifications and Approval of Course Providers and Courses.]**

***Drafting Note***

*Here insert Model Rules 3-3.1, 3-3.2, and 3-3.3 (relating to course specifications and requirements, notary public examination, and approval of course providers and courses) in Appendix I as Rules 3.3, 3.4, and 3.5, respectively. These Model Rules can be incorporated into Chapter 3 virtually as is. See the Explanatory Notes for these Model Rules.*

**[Explanatory Note]**

Rules 3.3, 3.4, and 3.5 are optional because RULONA Section [22] related to the course of study and examination is bracketed. A state that has enacted [statute codifying RULONA § [22(b)] may consider adopting these rules.]

**[Rule 3.6. Notary Public Assurance.]**

- (a) The assurance of a notary public shall cover all notarial acts authorized by the [Act].
- (b) The [commissioning officer or agency] shall immediately notify a notary public whose assurance has been exhausted by claims paid out by the surety or other entity that the notary's commission is immediately suspended until:
  - (1) a new assurance is obtained by the notary; and
  - (2) the [commissioning officer or agency] has concluded any action taken against the commission of the notary under [statute codifying RULONA § 23].

**Explanatory Note**

Rule 3.6. is based on MNA Sections 3-5(c), (d), and (e). Rule 3.6 is optional because the provisions related to the assurance of a notary public in RULONA Section 21[(d)] are bracketed. A state that has enacted these provisions may consider adopting Rule 3.6.

While RULONA Section 21[(d)] states that the assurance must cover "acts" performed during the term of the

notary public's commission, Subsection (a) clarifies that the assurance covers all notarial acts the notary performs. This includes notarial acts on tangible or electronic records and those involving remotely located individuals.

Subsection (b) clarifies the part of [statute codifying RULONA § 21[(d)]] emphasizing that a notary may perform notarial acts only during the period in

which a valid assurance is on file with the commissioning officer or agency. An exhausted assurance is not a “valid” assurance. Thus, the notary’s commission is immediately suspended until a new assurance in the full amount is obtained.]

**Rule 3.7. Notary Public Changes of Information and Status.**

- (a) Within 10 days a notary public shall notify the [commissioning officer or agency] of any of the following in a manner prescribed by the [commissioning officer or agency] and include in the notification all information the [commissioning officer or agency] may require:
  - (1) a change of the notary’s residence, business, or mailing address;
  - (2) a change of name by court order or marriage;
  - (3) any change to the information submitted in notifying the [commissioning officer or agency] that the notary public will be performing notarial acts with respect to electronic records or involving remotely located individuals;
  - (4) a conviction of a felony or a crime involving fraud, dishonesty, or deceit; and
  - (5) a finding against, or admission of liability by, the applicant or notary in any legal proceeding or administrative action based on the applicant’s or notary’s fraud, dishonesty, or deceit.
- (b) A notary public who notifies the [commissioning officer or agency] of a name change as required by Subsection (a)(2) shall use the new name in performing notarial acts only upon completion of the following steps:
  - (1) the notary has delivered or electronically transmitted the notice required by Subsection (a)(2);
  - (2) the [commissioning officer or agency] has confirmed reception of the notice; and
  - (3) the notary has obtained a new stamping device or official stamp in compliance with Rule 10-2 bearing the new name exactly as in the confirmation.

**Explanatory Note**

The [Act] has no equivalent section to Rule 3.7 but does require an applicant for a notary public commission to comply with and provide the information established by the commissioning officer or agency necessary to be granted a commission (*see* [statute codifying RULONA § 21(a)]).

Subsection (a), which is based on MNA Section 3-9, requires a notary to self-report several changes of information that would commonly be required in an

application for a commission. The commissioning officer or agency must be kept apprised of the notary’s whereabouts for the officer or agency to contact the notary in the future. Also, updates to certain information (conviction of a felony or crime or a finding against or admission of liability by the notary public) directly affect the notary’s ongoing qualifications to retain the commission. Reporting a name change affects how the notary executes notarial acts after the

change is effective. The self-reporting of this information will be used by the commissioning officer or agency in updating the database entry for the notary required by [statute codifying RULONA § 24].

Subsection (b) provides rules for obtaining a new stamping device or official stamp and signing the new name in the performance of notarial acts. (*See* Chapter 10 for rules related to approval of official stamp vendors.

**Rule 3.8. Designation of Personal Representative.**

- (a) An applicant for a commission as a notary public shall designate a personal representative to carry out the requirements of this Rule.
- (b) A notary public shall inform the notary's personal representative of all the following:
  - (1) the location of all the notary's stamping devices, official stamps, and notarial records;
  - (2) if the notary has notified the [commissioning officer or agency] that the notary will be performing notarial acts with respect to electronic records or for remotely located individuals, the tamper-evident technology providers used to perform these notarial acts;
  - (3) any repositories used to store notarial records, if applicable; and
  - (4) the personal representative's responsibilities required by this Rule.
- (c) As soon as is reasonably practicable after the death or adjudication of incompetency of the notary public, the notary's personal representative shall:
  - (1) notify the [commissioning officer or agency] of the death or adjudication in writing;
  - (2) notify any tamper-evident technology system providers the notary had used to perform notarial acts with respect to electronic records or remotely located individuals or notarial record repository providers the notary had used to store notarial records, if applicable, of the death or adjudication;
  - (3) dispose of any notarial records in compliance with [statute codifying RULONA §§14A(k) [and [19(g)]]]; and
  - (4) destroy or deface all stamping devices and official stamps in compliance with [statute codifying RULONA § 18(a)].
- (d) A personal representative shall use any information disclosed by the notary public under Subsection (b) only for the purposes of carrying out the requirements of this Rule.

**Explanatory Note**

The [Act] references the duties of a notary public's personal representative in [statutes codifying RULONA §§ 14A(k), 18, and [19(g)]]. It assumes a

notary will have designated such an individual, but this is rarely considered prior to the time of need. This Rule, which implements MNA Section 3-11 in

substance and is tailored to the specific requirements for personal representatives under the [Act], prepares for such an eventuality.

## Chapter 4. Notification Requirements

### Rule 4.1. Notification of [Commissioning Officer or Agency].

- (a) A notary public who notifies the [commissioning officer or agency] that the notary will be performing notarial acts with respect to electronic records or remotely located individuals as required by [statutes codifying RULONA §§ 14A and 20(a)] shall submit the notification with the name that appears on the notary's commission.
- (b) A notary public shall provide the notification required by Subsection (a) for each commission term before performing notarial acts with respect to electronic records or remotely located individuals.
- (c) An individual may apply for a commission as a notary public and provide the notification required by Subsection (a) at the same time.

#### Explanatory Note

The [Act] authorizes notaries public only and not all notarial officers to perform notarial acts with respect to electronic records and remotely located individuals (*see* [statute codifying RULONA §§ 14A and 20]). Thus, the language of Rule 4.1 and any other rule in this Appendix relating to electronic records or remotely located individuals are intentionally drafted with the notary in mind.

Rule 4.1, which is based on MNA

Section 3-2, expands on matters that [statute codifying RULONA § 14A and 20(a)] imply. Subsection (a) requires a notary to use the name appearing on the notary's commission in the notification. Subsection (b) requires the notification to be made for each commission term. Subsection (c) gives notary commission applicants the flexibility to notify the commissioning officer or agency at the same time they apply for a first-time or renewal commission.

### [Rule 4.2. Course of Instruction and Examination.

- (a) Before submitting the notification required by Rule 4.1, an individual shall:
  - (1) complete a course of study of [2] hours approved by the [commissioning officer or agency] and
  - (2) pass an examination based on the course.
- (b) The content of the course shall include notarial laws, procedures, and practices related to notarial acts with respect to electronic records and remotely located individuals.

#### Explanatory Note

Rule 4.2 is optional because the provisions in the RULONA related to the course of instruction and examination

are bracketed (*see* RULONA § [22]). Rule 4.2 requires a notary public to take a course and pass an examination before



submitting the notification to the commissioning officer or agency that the notary will be performing notarial acts with respect to electronic records or for remotely located individuals. A state

considering whether to require a course or examination, or both, should carefully consider the benefits. (*See* MNA Section 3-3[b] on which this Rule is based and its Comment.))

#### **Rule 4.3. Term of Notification.**

The term in which a notary public may perform notarial acts with respect to electronic records and remotely located individuals shall begin on the notification starting date set by the [commissioning officer or agency] and end on the expiration date of the notary's current commission.

#### **Explanatory Note**

Rule 4.3 is based on MNA Section 3-7(c) and delineates the term of a notary public's authorization to perform notarial acts with respect to electronic records or remotely located individuals. It establishes the effective date set by the commissioning

officer or agency. The Rule sets the effective date as the date on which the notification was approved. The Rule clarifies that the expiration date of the authority granted is the expiration date of the notary's commission.

#### **Rule 4.4. Ongoing Notification.**

A notary public shall notify the [commissioning officer or agency] of the date of initial use of any additional tamper-evident technology system not previously reported within 10 days.

#### **Explanatory Note**

[Statute codifying RULONA § 20(b)] requires a notary public to notify the commissioning officer or agency of the notary's intent to notarize electronic records and indicate the tamper-evident technology the notary intends to use. It

does not require the notary to report any additional technologies the notary may want to use on an ongoing basis after the initial notification is submitted. Rule 4.4, which is based on MNA Section 9-5, requires a notary to do so.

#### **Rule 4.5. Approval or Rejection of Notification Application.**

- (a) Upon the applicant's fulfillment of the requirements for notification, the [commissioning officer or agency] shall approve the notification.
- (b) The [commissioning officer or agency] may reject a notification application if the applicant fails to comply with this Chapter.

#### **Explanatory Note**

Rule 4.5 directs the commissioning officer or agency to approve the application for notification of any notary public or applicant who meets the

qualifications prescribed in Chapter 4. Subsection (a) reflects MNA Section 3-6(a) while Subsection (b) reflects MNA Section 3-2(a).

**Rule 4.6. Database of Notaries Public.**

In addition to the requirements of [statute codifying RULONA § 24], the electronic database of notaries public maintained by the [commissioning officer or agency] shall describe every action taken against the commission of a notary.

**Explanatory Note**

Both MNA Section 3-8 and [statute codifying RULONA § 24] require the commissioning officer or agency to create a database of notaries public. MNA Section 3-8, however, additionally requires the database to include any action taken against a notary. Rule 4.6 adds this substantive provision from MNA Section 3-8(a)(3) since these actions speak directly to the authority of a notary to perform notarial acts (*see* [statute codifying RULONA § 24(1)]).

**Rule 4.7. Database Requirements.*****Drafting Note***

*Here insert Model Rule 3-8.1 (relating to database requirements) in Appendix I.*

**Explanatory Note**

Rule 4.7, which is based on Model Rule 3-8.1, specifies the information to be listed in the entry for each notary public in the commissioning officer's or agency's online database. The Rule is designed to protect the privacy of notaries by requiring only the information necessary for the public good to be included.

**Chapter 5. Standards for Notarial Acts****Rule 5.1. Driver's License and Nondriver Identification.**

For purposes of [statute codifying RULONA § 7(b)(1)(A)], "driver's license" and "government issued nondriver identification card" includes an electronic driver's license or nondriver identification that is issued by a state and conforms to the International Organization for Standardization and International Electrotechnical Commission Final Draft International Standard (ISO/IED FDIS) 18013-5 — Personal Identification — ISO-Compliant Driving License — Part 5: Mobile Driving License (mDL) Application.

**Explanatory Note**

One innovation of the Model Notary Act of 2022 is the authorization for notaries public to accept electronic driver's and nondriver identification. In recent months, several states have enacted statutes authorizing individuals to carry electronic identification credentials. In late 2021, the International Organization for Standardization and International Electrotechnical Commission published

a final standard on these “mDLs” and “mIDs.” The purpose of this Rule is to clarify that an electronic driver’s license or nondriver identification issued by a state which conforms to this final

published Standard meets the RULONA standard for satisfactory evidence of the identity of an individual for whom a notarial act is performed under [statute codifying RULONA § 7(b)(1)(A)].

### **Rule 5.2. Disqualifications.**

- (a) A notarial officer or officer’s spouse [or civil partner] has a direct beneficial interest with respect to the record involving a notarial act under [statute codifying RULONA § 4(b)] if:
  - (1) either will receive as a direct result any commission, fee, advantage, right, title, interest, cash, property, or other consideration other than the maximum fees authorized for the performance of the notarial act under [statute providing the maximum fees of a notary public].
  - (2) the notarial officer is an attorney or professional who has rendered services associated with a record or transaction requiring a notarial act for a fee other than the maximum fee for the notarial act.
- (b) Notwithstanding Subsection (a), a notarial officer is not disqualified for:
  - (1) accepting a fee for services performed as a signing agent if payment of that fee is not contingent upon the signing or notarization of any record; or
  - (2) receiving a salary and payment of expenses for services rendered under [statutes codifying the RULONA] from an employer for whom the officer performs notarial acts in the course of employment.

### **Explanatory Note**

[Statute codifying RULONA § 4(b)] disqualifies a notarial officer from performing notarial acts involving the officer or the officer’s spouse [or civil partner] and declares that notarial acts performed with a disqualifying interest to be voidable. The [Act], however, does not define the term “direct beneficial interest.” Rule 5.2 assists notarial officers

in understanding when their impartiality as a notary public or notarial officer is jeopardized.

Subsection (a) provides additional grounds that constitute a direct beneficial interest.

Subsection (b) provides exceptions to the direct beneficial interest rule. Both are taken from MNA Section 4-6(b).

### **Rule 5.3. Copy Certifications.**

For purposes of [statute codifying RULONA §§ 4(c) and 5(d)], a “record” or “item” that is certified as a copy shall not include a public or vital record, certified copies of which may be obtained from an official source other than a notarial officer.

### Explanatory Note

Rule 5.3 is based on MNA Section 4-3(b). It clarifies that a record which is copy-certified by a notarial officer cannot be a public or vital record. It should be noted, however, that this restriction does not apply to a publicly recordable real property record, such as a mortgage or

property deed, which has yet to be recorded. Under [statute codifying RULONA § 4(c)], a tangible copy of an electronic mortgage or deed of trust that has been executed and acknowledged before a notarial officer could be certified as a true copy by the officer.

### Rule 5.4. Refusal of Services.

- (a) For purposes of [statute codifying RULONA § 8(a)]:
  - (1) “competent” means the principal reasonably appears in possession of the mental capacity to understand the nature and consequences of the notarial act; and
  - (2) “knowingly and voluntarily made” means the principal reasonably appears to be acting without coercion, duress, or undue influence exerted by another individual.
- (b) A notarial officer shall not refuse to perform a notarial act based on an individual’s race, nationality, ethnicity, citizenship, immigration status, advanced age, gender, gender identity, sexual orientation, religion, politics, lifestyle, disability, or on any disagreement with the statements in or purposes of a record.

### Explanatory Note

Subsection (a) implements the authorization for a rule to prevent fraud in performing notarial acts (*see* [statute codifying RULONA § 27(a)(5)]) by defining “competent” in [statute codifying RULONA § 8(a)(1)] and “knowingly and voluntarily made” in [statute codifying RULONA § 8(a)(2)]. These definitions, which are based on MNA Section 4-3(e), can assist the notarial officer in determining whether to refuse to perform

a notarial act for an individual presenting to the officer for either of these two reasons.

Subsection (b) implements [statute codifying RULONA § 8(b)] by providing a specific example of one federal or state law that prohibits a notarial officer from refusing to perform a notarial act. A notarial officer may not refuse to perform a notarial act for any class protected by anti-discrimination laws.

### Rule 5.5. Standard of Care.

A notarial officer shall exercise reasonable care in performing notarial acts.

### Explanatory Note

Rule 5.5 finds its basis in the authorization for a rule to prevent fraud or mistake in performing notarial acts

under [statute codifying RULONA § 27(a)(5)]. The care of a notarial officer in performing notarial acts as a similarly

prudent notarial officer acting in similar circumstances will go a long way in preventing both. This Rule is based on MNA Section 12-1(a).

**Rule 5.6. Unauthorized Practice of Law.**

- (a) For purposes of [statute codifying RULONA § 25(a)(1)], “practice law” means to draft, complete, or select a record requiring a notarial act for a principal or requester, or assist this individual in understanding the record or a transaction requiring a notarial act.
- (b) Subsection (a) does not prohibit a notarial officer from describing the requirements of a notarial act or providing samples of short form certificates of notarial acts authorized by the [Act] to assist that individual determine the type of notarial act or certificate to be used.

**Explanatory Note**

As a “model” act, the MNA enumerates the activities that generally constitute the unauthorized practice of law (MNA § 4-12). These include giving legal advice and drafting records which the [Act] specifically mentions in [statute codifying RULONA § 25(a)(1)].

Subsection (a) applies MNA Section 4-12. Section 4-12 provides that the practice of law additionally involves the notary public selecting, completing, and

helping clients understand records involving a notarial act.

Subsection (b) clarifies that the practice of law does not involve a notary public defining or describing the requirements of a notarial act or merely showing a customer samples of short form notarial certificates authorized by [statute codifying RULONA § 16], provided the customer decides which one to use.

**Rule 5.7. Improper Records.**

- (a) A notarial officer shall not perform a notarial act on a record that requires a principal’s signature if the record is missing information or pages.
- (b) A notarial officer shall not authenticate a photograph.
- (c) A notarial officer shall not authenticate the accuracy or completeness of a translation.

**Explanatory Note**

The authority for Rule 5.7 is found in [statutes codifying RULONA §§ 27(a)(1) and 27(a)(5)].

Subsection (a) prevents fraud by prohibiting a record that requires a principal’s signature from being notarized if it is not complete. Missing pages or blank spaces provide an unscrupulous person the opportunity to insert pages or

information after principal executed the record.

The prohibitions in Subsections (b) and (c) identify activities that are not authorized by the [Act]. If performed, they would represent an expansion of the notarial officer’s authority not expressly granted. Rule 5.7 is based on MNA Section 4-9.

**Rule 5.8. Unauthorized Use of Title, Official Stamp.**

A notary public shall not use, or knowingly authorize the use of, the title notary public or official stamp to endorse, promote, denounce, or oppose any product, service, contest, candidate, or other offering, or for any other purpose than performing notarial acts.

**Explanatory Note**

[Statutes codifying RULONA §§ 15 and 17] require a notary public to affix an official stamp to authenticate the notary's signature and the certifications made in the certificate of notarial act. No other use of the notary's official stamp is authorized or permitted — whether commercial, political, or for any other purpose. The notary public office must be neutral, independent, and respected.

Rule 5.8 is designed to provide examples of unauthorized uses of the notary's official stamp and title. Use of the notary's official stamp and title in these ways would mislead the public as to the extent of a notary's powers and authority and convey a governmental imprimatur or tacit endorsement of the cause, no matter how important. Rule 5.8 is based on MNA Section 4-11.

**Chapter 6. Tamper-Evident Technologies****Rule 6.1. Requirements for All Technologies and Providers.**

- (a) A tamper-evident technology used to perform notarial acts with respect to electronic records and remotely located individuals shall:
  - (1) comply with the [Act] and any rules and standards adopted by the [commissioning officer or agency] under [statutes codifying RULONA Sections 14A and 27];
  - (2) enroll only notaries public who have notified the [commissioning officer or agency] that they will be performing such acts in accordance with [statute codifying RULONA §§ 14A and 20];
  - (3) take reasonable steps to ensure that a notary public enrolled to use the technology system has the requisite knowledge to use it to perform notarial acts in compliance with the [Act] and these Rules;
  - (4) require a password or other secure means of authentication to access the system;
  - (5) enable a notary public to affix the notary's electronic signature in a manner that attributes such signature to the notary and is capable of independent verification;
  - (6) render every notarial act with respect to an electronic record tamper-evident; and
  - (7) enable the notary public or the notary's personal representative to comply with the requirements of [statute[s] codifying RULONA Section[s] 14A[ and [19]]].
- (b) For purposes of this Section:
  - (1) "capable of independent verification" means that any

interested person may confirm through the [commissioning officer or agency] that a notary public had authority at that time to perform notarial acts with respect to electronic records or remotely located individuals; and

- (2) “enroll” means to approve a notary public to access and use a tamper-evident technology.

#### **Explanatory Note**

Rule 6.1 is authorized by [statute codifying RULONA § 27(a)(1)] because it prescribes the manner of performing notarial acts regarding electronic records. MNA Chapter 9 requires any technology system used to perform a notarial act with respect to electronic records to meet certain performance standards delineated in the Chapter.

The standards of MNA Section 9-3

have been incorporated into Subsection (a) largely intact. The provisions apply to any system or provider who provides a tamper-evident technology to perform notarial acts with respect to electronic records or remotely located individuals.

Subsection (b) carries over in substance the MNA definitions of “capable of independent verification” and “enroll” (*see* MNA § 9-3(b)).

#### **Rule 6.2. Notary Public Not Liable for Technology Failure.**

- (a) A notary public who exercised reasonable care in selecting and using a tamper-evident technology shall not be liable for any damages resulting from the technology’s failure to comply with the requirements of the [Act].
- (b) Any provision in a contract or agreement between the notary public and provider that attempts to waive the immunity conferred by Subsection (a) shall be null, void, and of no effect.

#### **Explanatory Note**

Rule 6.2 substantially reflects MNA Section 9-6. This Rule further applies the reasonable care standard of Rule 5.5.

Subsection (a) protects a notary public from liability resulting from any failure of a tamper-evident technology to

comply with the legal requirements if the notary selected and used the technology with reasonable care.

Subsection (b) nullifies any contract between a technology provider and notary that would waive this immunity.

#### **Rule 6.3. Refusal to Use Tamper-Evident Technology.**

A notary public shall refuse a request to perform a notarial act with respect to an electronic record or a remotely located individual if the notary has a reasonable belief that a tamper-evident technology does not meet the requirements set forth in the [Act] and these Rules.

#### **Explanatory Note**

MNA Section 4-7(c) is the basis for

Rule 6.3. The Rule requires a notary

public to refuse to perform a notarial act using a tamper-evident technology if the notary has a reasonable belief that the technology does not meet the requirements of the [Act]. The notary's authorization to refuse a notarial act on these grounds is consistent with [statute codifying RULONA § 8(b)]. Even though [approval]

[registration] of system providers will provide a degree of confidence that a provider's system complies with the [Act] and these Rules, the notary has a duty to understand the system and decide if it meets all legal requirements for a notarial act on electronic records or involving remotely located individuals.

**Rule 6.4. [Approval][Registration] Requirements.**

**Rule 6.5. Termination of [Approval][Registration].**

**Rule 6.6. Complaints.**

***Drafting Note***

*Here insert Model Rules 9-1.1, 9-1.2, and 9-1.3 (relating to [approval] [registration] and termination of, and complaints against, technology system providers) in Appendix I as Rules 6.4, 6.5, and 6.6, respectively. Occurrences of "technology system" in the Model Rules should be changed to "tamper-evident technology" here. See the Explanatory Notes for these Model Rules.*

**Explanatory Note**

The RULONA authorizes the commissioning officer or agency to adopt rules and standards for the approval of providers of communication technology (see [statute codifying RULONA § 14A(m)(3)]). It also provides the same rulemaking authority for providers of tamper-evident technologies (see [statute

codifying RULONA § 20(b)]). The Drafting Note above specifies the Model Rules in Appendix I that may be implemented here for the purpose of granting the necessary [approvals] [registrations], providing oversight, and handling complaints filed against system providers.

**Rule 6.7. List of Tamper Evident Technology Systems.**

The [commissioning officer or agency] shall maintain a list of all [approved] [registered] providers whose tamper-evident technology systems may be used by a notary public in performing notarial acts with respect to electronic records or remotely located individuals.

**Explanatory Note**

The RULONA does not require the [commissioning officer or agency] to maintain a current list of tamper-evident technologies for use by notaries public.

MNA Section 9-8 is the basis for Rule 6.7. Such a list will benefit notaries since they may not know where to look for these technologies. The list may also



provide the supporting [approval] that notaries can evaluate one provider  
[registration] applications and records so over another.

## Chapter 7. Notarial Acts for Remotely Located Individuals

### Rule 7.1. Definitions.

In this Chapter:

- (1) “biometric identifier” means a retina or iris scan, fingerprint, voiceprint, scan of hand or face geometry, or any other physiological, biological, or behavioral characteristic used to identify an individual;
- (2) “identity assessment” means an identity verification that is based on a set of questions formulated from public or private data sources for which the principal has not provided a prior answer; and
- (3) “public key certificate” means an electronic credential which is used to identify an individual who signed an electronic record with the certificate.

#### Explanatory Note

Rule 7.1 defines certain types of “identity proofing” (*see* [statute enacting RULONA § 14A(a)(3)]) that will be described in the rules which follow for verifying the identity of remotely located individuals when using communication technology. The definitions are based on Model Rule 4-4.1 in Appendix I.

### Rule 7.2. Types of Identity Proofing.

Identity proofing as defined by [statute codifying RULONA § 14A(a)(3)] includes any of the following:

- (1) a credential as described in [statute codifying RULONA § 7(b)(1)] that is validated by a government or third party in compliance with Rule 7.3;
- (2) an identity assessment that complies with Rule 7.4;
- (3) an authenticator issued at or equivalent to Authentication Assurance Level 2 as most currently defined by the National Institute of Standards and Technology Special Publication 800-63-3, and any updates thereto;
- (4) a biometric identifier that complies with Rule 7.5;
- (5) a public key certificate that complies with Rule 7.6; or
- (6) any other identity verification that complies with a rule under this Chapter.

#### Explanatory Note

Rule 7.2 follows Model Rule 4-4.3 (*see* Appendix I). Whereas the MNA requires “at least two different factors of identity verification” (MNA § 4-4(c)(1)), the [Act] requires “at least two different types of identity proofing” ([statute codifying RULONA § 14A(c)(1)(C)]). Six specific forms of identity

proofing are identified in Rule 7.2. All except for Paragraph (3) are currently reflected in state statutes or rules for notarial acts involving remotely located individuals. (See the citations to statutes in the Explanatory Notes to Model Rules

4-4.4, 4-4.5, 4-4.6, and 4-4.7.)

A biometric identifier is considered a type of identity proofing in Rule 7.2(4) because the Comment to RULONA Section 14A(a)(3) suggests it is a form of identity proofing.

### **Rule 7.3. Credential Validation.**

#### ***Drafting Note***

*Here insert Model Rule 4-4.4(a) (relating to credential validation) in Appendix I. A state that has enacted RULONA Section [19] may also consider adopting Model Rule 4-4.4(c).*

#### **Explanatory Note**

Rule 7.3 largely follows Model Rule 4-4.4 in Appendix I. Credential validation satisfies a “type” of identity proofing. (See Comment to Model Rule 4-4.4 in Appendix I, above.) The authority for

this Rule is found in [statute codifying RULONA § 14A(m)(3)].

[Subsection (c) is optional because the RULONA journal requirement is bracketed. (See RULONA § [19].)]

### **Rule 7.4. Identity Assessment.**

#### ***Drafting Note***

*Here insert Model Rule 4-4.5(a) and (b) (relating to identity assessment) in Appendix I. A state that has enacted RULONA Section [19] may also consider adopting Model Rule 4-4.5(d).*

#### **Explanatory Note**

Rule 7.4 follows Model Rule 4-4.5 in Appendix I. It provides standards for an identity assessment, a “type” of identity proofing (see the Comment to RULONA § 14A(a)(3).) An identity assessment is a common type of identity proofing used to identify remotely located

individuals for notarial acts using communication technology. The authority for this Rule 7.4 is found in [statute codifying RULONA § 14A(m)(3)].

[Subsection (d) is optional because the RULONA journal requirement is bracketed (See RULONA [§ 19]).]

### **Rule 7.5. Biometric Verification.**

#### ***Drafting Note***

*Here insert Model Rule 4-4.6(a), (b), and (c) (relating to biometric verification) in Appendix I.*

### Explanatory Note

Rule 7.5 follows Model Rule 4-4.6 in Appendix I. It sets standards for biometric identifiers. (*See* the Comment to RULONA § 14A(a)(3) and Comment to Model Rule 4-4.6 in Appendix I, above).

The authority for this Rule is found in [statute codifying RULONA § 14A(m)(3)].

[Subsection (e) is optional because the RULONA journal requirement is bracketed (*See* RULONA § [19]).]

### Rule 7.6. Public Key Certificate.

#### Drafting Note

*Here insert Model Rule 4-4.7(a), (b), and (c) (relating to public key certificate) in Appendix I. A state that has enacted RULONA Section [19] may also consider adopting Model Rule 4-4.7(c).*

### Explanatory Note

Rule 7.6 follows Model Rule 4-4.7 in Appendix I. It sets standards for public key certificates, another acceptable “type” of identity proofing (*see* Comment to Model Rule 4-4.7 in Appendix I, above). The authority for this Rule 7.6 is found

in [statute codifying RULONA § 14A(m)(3)].

[Subsection (c) is optional for those states that have enacted the RULONA journal requirement. (*See* RULONA § [19].)]

### Rule 7.7. Notary Public Requirements.

A notary public shall perform a notarial act with respect to remotely located individuals only if the notary:

- (1) is physically present within this [State] at the time the notarial act is performed;
- (2) executes the notarial act in a single continuous session;
- (3) uses communication technology that complies with the requirements of Rule 7.8;
- (4) [confirms that any record requiring a signature, if applicable, is in electronic form;]
- [(5)] is satisfied that the notary and any individual involved in the notarial act are simultaneously viewing the same electronic record, and that all signatures and any changes and attachments to the electronic record[, if applicable,] are made in real time;
- [(6)] is satisfied that the quality of the audio-visual communication is sufficient to make the determinations required for the notarial act under the [statutes codifying the RULONA] and any other law of this [State]; and
- [(7)] identifies in the notarial certificate the jurisdiction within this [State] in which the notary is physically located while performing the notarial act.

### Explanatory Note

Rule 7.7 is adapted from MNA Section 4-3(d).

[It should be noted that the drafters bracketed Paragraph (4) and a portion of the language of Paragraph (5) requiring electronic records and signatures to be used in performing notarial acts with respect to remotely located individuals. This is due to the 2021 Amendments to

RULONA Section 14A authorizing notarial acts for remotely located individuals on tangible records. While the drafters hold a different view on this policy, an adopting jurisdiction may choose to chart its course on this matter, particularly if it enacted the 2021 bracketed amendments in [statute codifying RULONA § 14A-[(e)-(g)].]

### Rule 7.8. Communication Technology.

Communication technology that is used to perform notarial acts involving remotely located individuals shall:

- (1) enable the notary public and any individual involved in the notarial act to communicate with each other simultaneously by sight and sound;
- (2) require an authentication procedure that is reasonably secure from unauthorized access for the notary public and any individual involved in the notarial act;
- (3) enable the notary public to verify the identity of the principal and any required witness in compliance with [statute codifying RULONA § 14A] and these Rules;
- (4) provide reasonable certainty that the notary public and any individual involved in the notarial act are viewing the same electronic record and that all signatures, changes, and attachments, if any, to the electronic record are made in real time; and
- (5) be capable of creating the audio-visual recording required by [statute codifying RULONA § 14A].

### Explanatory Note

Rule 7.8 provides five minimum performance standards that apply to the communication technology that a notary public uses to perform notarial acts for remotely located individuals. These

standards are broadly reflected in state notary laws and rules. Rule 7.8 is based on MNA Section 9-4. The authority for this Rule is found in [statute codifying RULONA § 14A(m)(3)].

## Chapter 8. Audiovisual Recordings [and Journals]

### Prefatory Note

Chapter 8 contains rules for audio-visual recordings [and journals]. The journal provisions are bracketed because

RULONA Section [19] is bracketed. A state that has enacted RULONA Section [19] may consider adding them its rules

because Section [19] contains only journals of notarial acts and both the minimum standards and rules for MNA and Model Rules fill in the gaps.]

**Rule 8.1. Recording of Communication Technology.**

- (a) The audio-visual recording created by a notary public or person acting on behalf of the notary under [statute codifying RULONA § 14A(c)(3)] [shall be in addition to the journal entry for the notarial act required by [statute codifying RULONA § [19]] and] shall include:
  - (1) at the commencement of the recording, a recitation by the notary public of information sufficient to identify the notarial act; and
  - (2) all actions and spoken words of the notary public and any individual involved in the notarial act.
- (b) The communication technology used to produce the audio-visual recording shall enable the notary public, the notary's personal representative, or the notary's guardian to comply with the requirements of the [Act] and these Rules.

**Explanatory Note**

[Statute codifying RULONA § 14A(c)(3)] does not provide any rules related to the contents of the audio-visual recording of a notarial act for a remotely located individual. Rule 8.1, which follows certain provisions of MNA Section 6-3, provides baseline rules for these recordings. The authority for this Rule is found in [statute codifying RULONA § 14A(m)(4)].

[A portion of the language related to the journal of notarial acts in Subsection (a) is bracketed because RULONA § [19] is bracketed. Jurisdictions that have enacted RULONA Section [19] may consider adopting this language. In addition, they should ensure the bracketed pointer reference to the statute codifying RULONA Section [19] is included as well.]

**Rule 8.2. Security of Audio-Visual Recordings.**

- (a) The audio-visual recordings of notarial acts involving remotely located individuals are the exclusive property of the notary public and shall be kept under the notary's sole control.
- (b) A notary public shall safeguard the notary's audio-visual recordings and surrender or destroy them only in compliance with this Chapter.
- (c) A notary public shall not allow the notary's audio-visual recordings to be used by any other notary or individual.
- (d) A notary public shall not surrender the notary's audio-visual recordings to an employer upon termination of employment or to any other person, except a law enforcement officer in the course of an official investigation, an officer of a court or other person in response to a subpoena, or the [commissioning officer or agency] in response to an official notification.
- (e) A notary public shall not disclose, use, or sell any personally

identifiable information that is collected and retained in an audio-visual recording of a notarial act with respect to a remotely located individual except as authorized by this Chapter.

- (f) For purposes of this Rule, “sole control” means being in the direct physical custody of the notary public or safeguarded by the notary with a password or other secure means of authentication.

#### **Explanatory Note**

[Statute codifying RULONA § 14A(m)(4)] authorizes the commissioning officer or agency to adopt rules establishing standards for audio-visual recordings for notarial acts involving remotely located individuals. Arguably, these rules should include the security of audio-visual recordings and appropriate boundaries for the personally identifiable information stored in them. Rule 8.2

substantially reflects MNA Sections 6-4(a) through (c). These provisions are designed to promote the preservation, security, exclusive use, and retention of audio-visual recordings of notarial acts for remotely located individuals.

The definition of “sole control” in Subsection (f) is taken from MNA Section 2-30. Since the term appears only here, it was not added to Rule 2.1.

#### **Rule 8.3. Copying and Examining of Audio-Visual Recordings.**

- (a) A notary public shall provide a copy of any audio-visual recording upon request to any individual only if the following requirements are satisfied:
  - (1) the individual specifies the month, year, name or type of record, and name of the principal or requester for whom the notarial act was performed in a signed record; and
  - (2) the notary provides a copy of the audio-visual recording specified and no other.
- (b) A notary public may certify the copy of an audio-visual recording provided under Subsection (a).
- (c) A notary public may deny a request for a copy or certified copy of an audio-visual recording if the notary has a reasonable and explainable belief that an individual bears a criminal or harmful intent in requesting the copy or certified copy.
- (d) A notary public shall retain the notice required by Subsection (a)(1) as a notarial record.
- (e) Requested audio-visual recordings may be examined and copied by a law enforcement officer during an official investigation, subpoenaed by court order, or surrendered at the direction of the [commissioning officer or agency].
- (f) Copies of audio-visual recordings shall be in an open format.

#### **Explanatory Note**

[Statute codifying RULONA § 14A] does not address making audio-visual

recordings of notarial acts for remotely located individuals available to the public, the courts, law enforcement, or the commissioning officer or agency. However, [statute codifying RULONA § 14A(m)(4)] authorizes the adoption of rules establishing standards and a retention

period for these audio-visual recordings. Therefore, rules relating to access of audio-visual recordings are in scope of the rulemaking provision in [statute codifying RULONA § 14A(m)(4)], and Rule 8.3 provides reasonable rules for access based on MNA Section 6-6.

#### **Rule 8.4. Notification of Use of Repository.**

A notary public shall notify the [commissioning officer or agency] that the notary will be storing [journals of notarial acts and] audio-visual recordings in a repository as authorized by [statute[s] codifying RULONA Section[s] 14A(k)[and [19(f)]]] and include in the notification any information the [commissioning officer or agency] may require.

#### **Explanatory Note**

While [statute codifying RULONA § 14A(k)] authorizes recordings of notarial acts involving remotely located individuals to be stored in a repository, it does not prescribe rules for notifying the commissioning officer or agency that the records are being stored in one. This is a

notable omission. Rule 8.4, which draws from MNA Section 6-5(b), contains such a notification requirement. [A state that has enacted RULONA Section [19] may consider adopting the bracketed language authorizing journals of notarial acts to be stored in repositories as well.]

#### **Rule 8.5. [Approval][Registration] Requirements.**

#### **Rule 8.6. Termination of [Approval][Registration].**

#### **Rule 8.7. Repository Contract.**

#### **Rule 8.8. Storage, Access, and Security of Notarial Records.**

#### **Rule 8.9. Notification of Use of Repository.**

#### ***Drafting Note***

*Here insert Model Rules 6-5.1, 6-5.2, 6-5.3, 6-5.4, and 6-5.5 (relating to [approval][registration] requirements, termination, contract, storage, access, and security, and notification of use of notarial record repositories) in Appendix I as Rules 8.5, 8.6, 8.7, 8.8, and 8.9, respectively. These Model Rules can be incorporated into Chapter 8 virtually as is.*

#### **Explanatory Note**

The [Act] does not provide rules for regulating repositories of notarial records

but [statute codifying RULONA § 14A(m)(4)] authorizes the adoption of

standards for audio-visual recordings. the purpose of granting the necessary Model Rules 6-5.1, 6-5.2, 6-5.3, 6-5.4, [approvals][registrations] and providing and 6-5.5 in Appendix I may be used for appropriate oversight of repositories.

**Rule 8.10. List of Repositories.**

The [commissioning officer or agency] shall maintain a list of all [approved] [registered] repositories with which a notary public may store notarial records.

**Explanatory Note**

The [Act] does not require the use by notaries public, but the utility of [commissioning officer or agency] to such a requirement is indisputable. MNA maintain a current list of repositories for Section 6-5(c) is the basis for Rule 8.10.

**Rule 8.11. Complaints.**

Rule 6.6 shall apply to any complaint filed against a repository provider.

**Explanatory Note**

Rule 8.11 clarifies that any complaint submitting complaints against tamper- filed against a repository provider must evident technology systems specified in follow the rules and procedures for Rule 6.6.

**[Rule 8.12. Requirements of Electronic Journal.**

- (a) An electronic journal of notarial acts shall:
  - (1) be maintained on a storage device or online media;
  - (2) require a password or other secure means of authentication;
  - (3) be tamper-evident;
  - (4) create a duplicate record as a backup;
  - (5) produce records in an open format; and
  - (6) enable the notary public, the notary's personal representative, or the notary's guardian to comply with the requirements of this Chapter.
- (b) A notary public who keeps an electronic journal authorized by this Rule shall provide the authentication instructions to the [commissioning officer or agency] upon request.

**Explanatory Note**

Rule 8.12 provides rules for electronic backup copy of the electronic journal journals based on MNA Section 6-1(g). (Paragraph (4)), and format in which Subsection (a) provides format rules. copies of entries in the electronic journal It addresses the device or media on are to be made accessible (Paragraph which records are to be kept (Paragraph (5)). If the data in a notary public's (1)), authentication to an electronic electronic journal ever needed to be journal (Paragraph (2)), tamper-evidence shared, the data must be created in an of the electronic journal (Paragraph (3)), "open format" as defined in Rule 2.1(d).]



**[Rule 8.13. Journal Entries.**

- (a) Subject to Subsection (b) and in addition to the information required by [statute codifying RULONA § [19(c)]], a notary public may chronicle in the journal of notarial acts any other information related to the notarial act that the notary deems important.
- (b) Except as authorized under [statute codifying RULONA § [19(c)]], a notary public shall not chronicle a full credential or Social Security number, date of birth, or other personally identifiable information in the journal of notarial acts.
- (c) A notary public shall chronicle in the journal of notarial acts the circumstances for not performing or completing any notarial act.
- (d) A notary public shall create a journal entry in a tangible journal using permanent, photographically reproducible ink.
- (e) If a notary public discovers that an entry in the journal of notarial acts contains a mistake, omission, or any other error, the notary shall make a notation of corrections to the information in a subsequent dated entry that references the prior entry.

**Explanatory Note**

[Statute codifying RULONA § [19(c)]] requires certain information that must be chronicled in a journal entry. Rule 8.13 contains additional rules related to the information recorded in a journal based on MNA Section 6-2.

Many of these provisions reflect practical considerations. While notaries public must be careful not to record any personally identifiable information in the journal of notarial acts (Subsection (b)), they are permitted to add information that they deem important but is not required to

support the steps they took to execute the notarial act in conformance with the requirements of the [Act] (Subsection (a)). They also must record an entry for any refusal to perform a notarial act (Subsection (c)) and make corrections to entries discovered later to contain errors (Subsection (e)). Requiring notaries to chronicle entries in a tangible journal using only permanent, photographically reproducible ink preserves the record of the notarial act should it ever be needed later (Subsection d)).]

**[Rule 8.14. Security of Journal.**

Rule 8.2 shall apply to the notary public's journal of notarial acts.

**Explanatory Note**

Rule 8.14 clarifies that the rules related to the security of audio-visual recordings in Rule 8.2 apply equally to the journal of notarial acts. By including the bracketed language in the definition of

the term "notarial record" in Rule 2.1(c) both audio-visual recordings and journals of notarial acts are considered notarial records, and thus Rule 8.2 would apply to both.]

**[Rule 8.15. Copying and Examining of Journal.**

Rule 8.3 shall apply to the notary public's journal of notarial acts.

### Explanatory Note

Rule 8.15 fills a void in [statute enacting RULONA [§ 19]] by clarifying that journal entries may be appropriately shared. Rule 8.4 looks to Rule 7.11 for providing minimum rules for these situations. As discussed in the Explanatory Note to Rule 2.1(c), by including the bracketed language in the definition of the term “notarial record” in Rule 2.1(c) both audio-visual recordings and journals of notarial acts are considered notarial records, and thus the same access rules of Rule 8.13 that apply to recordings must apply to journals of notarial acts.]

## Chapter 9. Certificate of Notarial Act

### Rule 9.1. Certificate on Single Side of Record.

A certificate of notarial act shall contain the elements required by [statute codifying RULONA § 15(a)] on a single side of a record.

### Explanatory Note

Rule 9.1, which draws from MNA Section 7-1(b), is intended to prevent fraud with respect to notarial acts (*see* [statute codifying RULONA § 27(a)(5)]). If part of a certificate of notarial act spanned 2 pages of a record, it would be easy for an unscrupulous individual to replace the page of the record containing the notary public’s official seal and signature with a forgery.

### Rule 9.2. Language of Certificate.

A certificate of notarial act shall be worded and completed in a language that the notarial officer reads and understands.

### Explanatory Note

Rule 9.2 is a commonsense requirement intended to prevent fraud and mistake in performing notarial acts in [statute codifying RULONA § 27(a)(1)] based on MNA Section 7-1(f). A notarial officer is responsible for the recitations she makes in a certificate of notarial act. Thus, it is imperative that the officer be able to read and understand the wording.

### Rule 9.3. Certificate Prohibitions.

With respect to the completion of a certificate of notarial act, a notarial officer shall not:

- (1) execute a certificate of notarial act containing information known or reasonably believed by the officer to be false;
- (2) sign, or affix or produce the official stamp on, a certificate of notarial act that is otherwise incomplete; or
- (3) provide, send, or transmit a certificate of notarial act containing the officer’s signature or official stamp to another individual for completion or attachment to a record outside the officer’s presence.

### Explanatory Note

Rule 9.3 is intended to prevent fraud with respect to notarial acts (*see* [statute codifying RULONA § 27(a)(5)]) related to a certificate of notarial act by addressing three different risks. Each risk poses a threat to the integrity of the notarial act evidence by the notarial certificate. Rule 9.3 is based on MNA Section 7-1(g).

### Rule 9.4. Photographically Reproducible Certificate.

A notarial officer shall type, print, affix, sign, or produce the information required by [statute codifying RULONA §§ 15(a) and (b)] on a tangible certificate of notarial act using permanent, photographically reproducible ink.

### Explanatory Note

[Statute codifying RULONA § 17(2)] requires the official stamp to be capable of being copied together with the record to which it is affixed or attached but does not require the same for the certificate of notarial act. Rule 9.4, which is based on MNA Section 7-1(h), remedies this by requiring a tangible certificate of notarial act to be completed using permanent, photographically reproducible ink.

### Rule 9.5. Corrections to Certificate.

A notarial officer may correct an error or omission in a certificate of notarial act only if:

- (1) the officer made the error or omission to be corrected;
- (2) the officer's authority to perform notarial acts is valid at the time of the correction;
- (3) the original record and certificate of notarial act are returned to the officer;
- (4) the officer verifies the error by reference to [the journal entry for the notarial act,] the audio-visual recording of the notarial act, if applicable, the record itself, or other determinative written evidence; [and]
- (5) the officer legibly makes, initials, and dates the correction[.]; and
- (6) the officer adds a notation regarding the nature and date of the correction to the journal entry for the notarial act.]

### Explanatory Note

Rule 9.5 is intended to prevent mistake in the performance of a notarial act ([*see* statute codifying RULONA § 27(a)(5)]) based on MNA Section 7-4. [Portions of Rule 9.5 are optional for those states that have enacted the bracketed RULONA Section [19] provisions related to the journal.]

## Chapter 10. Notary Public Signature and Official Stamp

### Rule 10.1. Notary Public Signature.

- (a) A notary public's signature on a tangible certificate of notarial act

shall be signed in the likeness of the signature currently on file with the [commissioning officer or agency] using permanent, photographically reproducible ink.

- (b) The notary public's signature on an electronic certificate of notarial act may be a digital image that appears in the likeness of the notary's signature on file with the [commissioning officer or agency].

### **Explanatory Note**

Rule 10.1 provides additional rules for the notary public's signature on both tangible and electronic records. These provisions are based on MNA Section 8-1. It aims to prevent fraud with respect to notarial acts on tangible records (*see* [statute codifying RULONA §§ 27(a)(2) and (a)(5)]).

In requiring the notary public's signature to be signed in permanent, photographically reproducible ink, Subsection (a) aims to make any change to or tampering with a record bearing a notarial act evident.

Subsection (b) provides a rule for

the appearance of the notary public's electronic signature. While the definition of "electronic signature" in [statute codifying RULONA § 2(3)] does not require an electronic signature to take on a certain "appearance" to be legally valid, an adopting state may wish adopt Subsection (b) for the purpose of identifying a notary's electronic signature when issuing an apostille or certificate of authentication for a notarized record destined abroad and making electronic records more accessible to principals who are familiar with signing tangible records with handwritten signatures.

### **Rule 10.2. Procurement of Stamping Device or Official Stamp.**

- (a) A notary public shall obtain, and a vendor of stamping devices and official stamps shall provide, a stamping device or official stamp only in accordance with the requirements of this Section.
- (b) A person shall apply for a license to provide stamping devices and official stamps on a form prescribed by the [commissioning officer or agency] and pay any fee established by the [commissioning officer or agency].
- (c) A notary public shall obtain a stamping device or official stamp only from a licensed official stamp vendor.
- (d) A licensed vendor who provides a stamping device or official stamp to a notary public shall:
  - (1) obtain from the notary a Certificate of Authorization to Purchase Stamping Device or Official Stamp on a form prescribed by the [commissioning officer or agency];
  - (2) confirm the mailing address and commission of the notary through the database established by the [commissioning officer or agency] under [statute codifying RULONA § 24];
  - (3) mail or ship, return receipt requested, a stamping device for use on tangible records only to a mailing address confirmed through the database established by the [commissioning officer

- or agency] under [statute codifying RULONA § 24];
- (4) transmit a stamping device or official stamp for use on electronic records only using a secure means of delivery; and
- (5) do each of the following:
  - (A) affix each official stamp on the Certificate of Authorization to Purchase Stamping Device or Official Stamp;
  - (B) mail or transmit the completed Certificate to the [commissioning officer or agency]; and
  - (C) retain a tangible or electronic copy of the Certificate for at least [5] years.
- (e) A notary public who obtains a new stamping device or official stamp as a result of a name change in accordance with Rule 3.7 shall present a copy of the confirmation of the notary's name change from the [commissioning officer or agency] to a licensed vendor.

### **Explanatory Note**

Under the [Act], the terms “stamping device” and “official stamp” have different meanings. A “stamping device” is term to describe the tool that is used to affix an “official stamp” on a tangible or electronic record. (See [statute codifying RULONA § 2(13)].) An “official stamp” is the term used to denote the “physical” or “electronic” image of the notary public’s commission information affixed or embossed by, or attached with, the stamping device. (See [statute codifying RULONA § 2(8)].)

In the electronic world, the sharp distinctions between the meanings of these terms are blurred. One can purchase an official electronic stamp without the tool used to affix it. Vendors today provide electronic “official stamps” (official stamp images) to notaries public for use with tamper-evident technology systems (which are essentially “stamping devices”) and tamper-evident technology

providers also create the electronic “official stamp” to be affixed using their systems. Given this market reality, Rule 10.2 provides rules for the obtaining and providing of both physical stamping devices for use with tangible records and electronic stamping devices and official stamps for use with electronic records.

The provisions on the stamping device and official stamp in [statutes codifying RULONA §§ 17 and 18] do not specify a process by which a stamping device or official stamp is procured. Rule 10.2, which is drawn from MNA Section 8-3, provides a secure process to do this. The authority for Rule 10.2 lies in the broad rulemaking authorization for the entire RULONA under ([statute enacting RULONA § 27(a)]) and the narrower and specific authorization to prevent fraud in the performance of notarial acts under ([statute enacting RULONA § 27(a)(5)]).

### **Rule 10.3. Stamping Device or Official Stamp Form.**

#### ***Drafting Note***

*Here insert Model Rule 8-3.1 (relating to certificate of authorization form) in Appendix I. Occurrences of “official seal” in the Model Rule should*

*be changed to “stamping device” and “official stamp” here as appropriate.*

#### **Explanatory Note**

Rule 10.3 adopts Model Rule 8-3.1 in Appendix I for the Certificate of Authorization to Purchase an Official Seal form. The Rule 10.3 seeks to prevent fraud or mistake in the performance of notarial acts (*see* [statute codifying RULONA § 27(a)(5)]). Frauds involving notary public official stamps and stamping devices have plagued several states in recent years. This more than justifies a process for the secure issuance of these tools as provided in the Rule.

#### **Rule 10.4. Licensed Vendor Requirements.**

##### ***Drafting Note***

*Here insert Model Rule 8-3.2 (relating to vendor license requirements) in Appendix I. Occurrences of “official seal” in the Model Rule should be changed to “stamping device” and “official stamp” here as appropriate.*

#### **Explanatory Note**

Rule 10.4 lists the requirements for stamp vendors based on Model Rule 8-3.2 in Appendix I. licensure of stamping devices and official

#### **Rule 10.5. Termination of Vendor’s License.**

##### ***Drafting Note***

*Here insert Model Rule 8-3.3 (relating to termination of vendor license) in Appendix I. Occurrences of “official seal” in the Model Rule should be changed to “stamping device” and “official stamp” here as appropriate.*

#### **Explanatory Note**

Rule 10.5 provides grounds for termination of a stamping device or official stamp vendor’s license and the process for a vendor to appeal a termination based on Model Rule 8-3.3 in Appendix I.

### Appendix III: Major Model Notary Act Adoptions

Either by legislation, administrative rule, or gubernatorial executive order, the vast majority of U.S. states and territorial jurisdictions have adopted provisions of the National Notary Association's Model Notary Act (MNA) in one or more of its 1973, 1984, 2002, and 2010 versions, or the 2017 Model Electronic Notarization Act (MENA). (The 1973 version was titled the Uniform Notary Act (UNA).) The following 16 jurisdictions are among those that have adopted substantive portions of the MENA, MNA, or UNA:

<b>American Samoa</b>	2002 MNA by legislative enactment.
<b>California</b>	1973 UNA by legislative enactment. This landmark bill included requirements for journal signatures and for fingerprinting of commission applicants.
<b>Guam</b>	1984 MNA by legislative enactment. Spearheaded by Guam's Attorney General, the Act was codified into statute virtually verbatim and <i>in toto</i> .
<b>Illinois</b>	2017 MENA by legislative enactment.
<b>Massachusetts</b>	2002 MNA by governor's executive order. This was the first instance in modern times of a governor establishing comprehensive rules of conduct for notaries public. 2010 MNA by legislative enactment.
<b>Mississippi</b>	2002 MNA by administrative rule, the first such administrative rule adoption of the MNA.
<b>Missouri</b>	1973 UNA and 2010 MNA by legislative enactment.
<b>Montana</b>	2017 MENA by legislative enactment.
<b>New Mexico</b>	2002 MNA by legislative enactment.
<b>North Carolina</b>	2002 MNA by legislative enactment. The new law was the first to enact provisions for the notarization of both paper and electronic records.
<b>Northern Marianas</b>	1984 MNA by legislative enactment. The Pacific Island Commonwealth embraced the Act virtually verbatim and <i>in toto</i> .

<b>Rhode Island</b>	2002 MNA by governor's executive order in collaboration with the secretary of state to create a code of conduct for notaries.
<b>South Carolina</b>	2010 MNA Articles I and II by legislative enactment. 2017 MNA by legislative enactment.
<b>Virginia</b>	2002 MNA by legislative enactment. Spearheaded by Virginia's Secretary of the Commonwealth, the bill drew from Articles I, II, and III.
<b>West Virginia</b>	1973 UNA by legislative enactment. It was one of the very first comprehensive revisions and modernizations of notary public statutes in the 20th century. 2010 MNA Article III by administrative rule.
<b>Wyoming</b>	2010 MNA Articles I, II by statute.

The following two federally recognized Indian tribes have enacted past Model Notary Acts into their tribal codes:

<b>Little Traverse Bay Bands of Odawa Indians of Michigan</b>	2002 MNA Articles I, II by statute.
<b>Oneida Tribe of Indians of Wisconsin</b>	2010 MNA Articles I, II by statute.





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