

EVIDENTIARY REQUIREMENTS FOR ELECTRONIC NOTARIZATION AND THE LEGALIZATION OF CERTIFIED ELECTRONIC DOCUMENTS

By

Timothy S. Reiniger, Esq.*

Note. Notaries have long been critical components in authenticating documents. If a document has been notarized, it is “self-authenticated” under Rule 902, Federal Rules of Evidence. No witness or other extrinsic evidence is necessary to provide the authentication foundation. The document comes directly into evidence, where the opposing party can challenge its authenticity with controverting evidence.

In the traditional physical realm, notaries confirmed the identities of signers, their intent to be bound by the document to be signed, and the completeness of the document to be signed. After witnessing the act of signing, or the affirmation of a signature, they provided the notarial act of attesting to the signature by applying their seal and other official information to the physical document. The act of the notary proved identity, intent, and the genuineness of the entire record at the time of signing. The notary made an official record of the date. As for continuing integrity of the information in the document, the notarial system then depended, like the rest of society, on the physical nature of the artifact to preserve the integrity of the document that had been notarized. One of the keys to the system was a physical seal, also an artifact of sorts that could be traced to the notary.

But how can such a process work in a digital world? If you are signing

*Executive Director of the National Notary Association and member of the California and New Hampshire Bars. The author hereby acknowledges and thanks William A. Anderson of the National Notary Association for his invaluable assistance with the preparation of this appendix.

Reprinted with permission from *Foundations of Digital Evidence*, available for purchase from: <http://apps.americanbar.org/abastore/index.cfm?section=main&fm=Product.AddToCart&pid=5450053> 2008© by the American Bar Association. All rights reserved. This information or any or portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar

Association.

something electronically, as a notary might do in an electronic transaction dealing with digital information, how do we know it was really the notary who signed something? How does the notary prove his own identity? And when one cannot apply a physical seal, what does one do? How can there be an assurance of integrity, as the electronic document being signed and notarized might thereafter be edited?

As Tim Reiniger points out here, because the notarial act itself is self-proving, electronic documents authenticated by the notarial act require that the electronic notarial seal information, and electronic notarial certificate be attached to or logically associated with the underlying document in such a manner that the identity of the notary can be independently verified -- and any alterations to the signatures or document contents rendered evident.

*Accordingly, the notarial profession has now embarked on devising a **economic** regime that allows people dealing with digital evidence to conduct strong tests of identity, (including the identity of the notary), integrity of information (of both the document itself, and the information on the document from the notary) and information about the time of notarization. Thus identity, integrity and time, as the three main components of authenticity, can be handled in a fashion that will allow strong tests, or strong proof, in the future should questions arise.*

BACKGROUND ON NOTARIES AND THEIR LEGAL AUTHORITY

In General

1. Evidentiary Function of the Notary. For both paper and electronic documents, the essential function of the notary¹ is to attest the genuineness of writings

¹ Throughout this chapter, the term “notary” shall be used to mean “notary public.”

electronic database or retrieval system without the express written consent of the American Bar Association.

and acts of execution and, thereby, to authenticate documents for purposes of admissibility and proof in court proceedings as well as for public recording purposes.²

The notary's official witnessing act attributes a signature and document to a particular individual by formally attesting the signer's identity and intent, denoting the complete and original document, and protecting against forgery.³ Because the notarial act under seal is self-proving, documents authenticated in this manner are rendered self authenticating and admissible in court on their face.⁴ Proof of execution before a notary is required by federal and state laws for many important legal documents including property deeds, advance health care directives, and powers of attorney.

2. Authentication by Seal. Under the Federal Rules of Evidence and the evidence rules of nearly every state, notarized documents *under seal* are admitted without further proof.⁵ Specifically, FED. R. EVID. 902(1) requires that documents under seal of a

² See generally MICHAEL L. CLOSEN, ET AL., NOTARY LAW AND PRACTICE: CASES AND MATERIALS (Nat'l Notary Ass'n 1997) and CHARLES N. FAERBER, 2007-2008 U.S. NOTARY REFERENCE MANUAL (Nat'l Notary Ass'n 2007). ³ Specific information concerning the various state requirements for the notary to attest the signer's identity and intent as well as the integrity of the executed document is available at <<http://www.nationalnotary.org/commission>>.

⁴ See generally EDWARD W. CLEARY, MCCORMACK ON EVIDENCE § 228 (3RD ed. 1984). ⁵ The following state rules of evidence incorporate in whole or in part FED R. EVID. 902 (1), (2), and (8) rendering as self-authenticating a document under a notary public's seal of office as well as a document accompanied by a certificate of acknowledgment: ALA. R. EVID. 902 (Loislaw 2007); ALASKA R. EVID. 902 (Loislaw 2007); ARIZ. R. EVID. 902 (Loislaw 2007); ARK. R. EVID. 902 (Loislaw 2007); COLO. R. EVID. 902 (Loislaw 2007); DEL. UNIF. R. EVID. 902 (Loislaw 2007); FLA. ANN. STAT. § 90.902(1)(a) (LexisNexis 2007)(acknowledgment act provision not included); HAW. R. EVID. 902 (Loislaw 2007); IDAHO R. EVID. 902 (Loislaw 2007); IND. R. EVID. 902 (Loislaw 2007); IOWA R. EVID. 902 (Loislaw 2007); KY. R. EVID. 5-902 (Loislaw 2007); LA. CODE EVID. ANN. ART. 902 (Loislaw 2007); ME. R. EVID. 902 (Loislaw 2007); MD. R. 5-902 (Loislaw 2007); MICH. R. EVID. 902 (Loislaw 2007); MINN. R. EVID. 902 (Loislaw 2007); MISS. R. EVID. 902 (Loislaw 2007); MONT. R. EVID. 902 (Loislaw 2007); NEB. REV. STAT. § 27-902 (LexisNexis 2007); N.H. R. EVID. 902 (Loislaw 2007); N.J. R. EVID. 902 (Loislaw 2007); N.M. R. EVID. 902 (Loislaw 2007); N.C. GEN. STAT. §8C-9-902 (Loislaw 2007); N.D. R.

[art&pid=5450053](#) 2008© by the American Bar Association. All rights reserved. This information or any or portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

public officer be treated as self-authenticating. The evidentiary effect of self authentication is to create a rebuttable presumption of document authenticity and permit admissibility.⁶ The notarial certificate, to which the seal is affixed, provides *prima facie* or presumptive evidence of the due execution of the document and attribution of the principal.⁷ In addition to removing the need for a testifying witness, self-authentication

EVID. 902 (Loislaw 2007); OHIO R. EVID. 902 (Loislaw 2007); OKLA. STAT. TIT. 12 § 2902 (Loislaw 2007); OR. R. EVID. 902 (Loislaw 2007); PA. R. EVID. 902 (Loislaw 2007); R.I. R. EVID. 902 (Loislaw 2007); S.C. R. EVID. 902 (Loislaw 2007); S.D. R. EVID. 19-17-2 AND 19-17-9 (Loislaw 2007); TENN. R. EVID. 902 (Loislaw 2007); TEX. R. EVID. 902 (Loislaw 2007); UTAH R. EVID. 902 (Loislaw 1996); VT. R. EVID. 902 (Loislaw 1983); WASH. R. EVID. 902 (Loislaw 1996); W.VA. R. EVID. 902 (Loislaw 2007); WIS. STAT. § 909.02 (Loislaw 2007); WYO. R. EVID. 902 (Loislaw 2007). *See also* CAL. EVID. CODE § 1451 and § 1452(f) (LexisNexis 2007).

⁶ CLEARY, *supra* note 4, at 700; *see also* PAUL R. RICE, ELECTRONIC EVIDENCE LAW AND PRACTICE at 248, 249 (American Bar Association 2005).

⁷ *See, e.g.*, CAL. EVID. CODE § 1451 (LexisNexis 2007) (a certificate of acknowledgment or proof of a writing other than a will is prima facie evidence of the facts recited in the certificate and the signatures contained in the underlying document); COLO. REV. STAT. § 38-35-101(2) (LexisNexis 2006) (prima facie evidence of proper execution of deed); IND. CODE ANN. § 32-21-9-2 and § 33-42-2-6 (LexisNexis 2007) (certificate under seal is prima facie evidence of due execution); LA. CIV. CODE PROC. ART. 1836 (LexisNexis 2006) (prima facie proof of due execution); MICH. COMP. LAWS § 55.307(1) (LexisNexis 2007); MO. ANN. STAT. § 490.410 (LexisNexis 2007) (prima facie evidence of due execution of deed); N.J. STAT. ANN. § 2A:82-17 (LexisNexis 2007) (prima facie evidence of due execution); N.Y. CONS. LAWS § 137 Exec. (LexisNexis 2007) (presumptive evidence of facts in certificate); 21 P. S. § 46 (LexisNexis 2006) (certificate under seal is presumptive evidence of facts in certificate); UTAH CODE ANN. § 78-25-7 (LexisNexis 2006) (prima facie evidence of due execution); WASH. REV. CODE ANN. § 64.08.050 (LexisNexis 2007) (certificate under seal is prima facie evidence of due execution); WIS. STAT. ANN. § 134.01(4)(c) (LexisNexis 2006) (presumptive evidence facts in certificate); and WYO. STAT. ANN. § 32-1-104(a) (LexisNexis 2006) (presumptive evidence of facts in certificate). *See also*, UTAH CODE ANN. § 69-1-4 (LexisNexis 2006) and WASH. REV. CODE ANN. § 5.52.050 (LexisNexis 2007) (electronically transmitted instrument under seal is prima facie proof of due execution of the original). *See also*, *Briggs v. Glass*, 420 So.2d 46, 47 (Ala. 1982); *Fares v. Morrison*, 54 Cal.App.2d 773, 775 (1942); *Westmoreland v. Tallent*, 274 Ga. 172, 174 (2001); *Curtis v. Curtis*, 75 N.E.2d 881 (Ill. 1949); *Valeriano-Cruz v. Neth*, 14 Neb.App. 855, 861 (2006); *Smith v. Smith*, 44 A.D.3d 1081 (NY 3d Dept 2007); *Limor v. Fleet*

Reprinted with permission from *Foundations of Digital Evidence*, available for purchase from: <http://apps.americanbar.org/abastore/index.cfm?section=main&fm=Product.AddToCart&pid=5450053>. 2008© by the American Bar Association. All rights reserved. This information or any or portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

also shifts to the opposing party the burden of going forward with evidence on the issue.⁸

Authentication of a document under seal involves the inference of three items: (1) the notary is who he or she claims to be; (2) the seal is genuine; and (3) the seal was affixed by the named notary.⁹ With respect to the first inference, because the notary is a “public

officer,” the notarial seal authenticates a document without the need for extrinsic evidence to prove the genuineness of the notary’s identity and officer status.¹⁰ The

notarial seal thus provides prima facie proof of the individual’s capacity as a notary.¹¹

With respect to the second and third inferences, the seal and official capacity to use the seal are presumed genuine because any forgery of the seal is fairly easy to detect.¹² When

a notary has attempted to authenticate a document merely with a signature, FED. R.

EVID. 902(2) requires that the notary’s signature and official capacity, in turn, be certified by a higher jurisdictional public officer who possesses a seal of office. This

Mortgage Group (In re Marsh), 12 S.W.3d 449, 453 (Tenn. 2000); and *Mortgage Associates, Inc. v. Hendricks*, 51 Wis.2d 579 (1971).

⁸ See *supra* note 6; FED. R. EVID. 301. However, in some states, the presumption of due execution can be defeated only by clear and convincing evidence to the contrary. See, e.g., *In Re: Adoption of X.J.A.*, 284 Kan. 853 (2007); *Thompson v. Shell Western E&P Inc.*, 607 So.2d 37, 40 (Miss. 1992); *Dencer v. Erb*, 142 N.J. Eq. 422, 426 (Ch. 1948); *Chianese v. Meier*, 285 A.D.2d 314, 320, 729 N.Y.S.2d 460, 466 (1st Dept 2001); *Wayt v. Urbigkit*, 157 P.3d 1057, 1061 (Wy. 2007).

⁹ 7 JOHN WIGMORE, EVIDENCE § 2161 (1978).

¹⁰ *Pierce v. Indseth*, 106 U.S. 546, 549; 1 S. Ct. 418 (1883) (“the Court will take judicial notice of the seals of notaries public for they are officers recognized by the commercial law of the world”).

¹¹ See *Limor v. Fleet Mortgage Group (In re Marsh)*, 12 S.W.3d at 453 (affixation of the seal is prima facie proof of official character or that the notary is a notary). Idaho courts take judicial notice of the seals of notaries public (IDAHO CODE § 9-101[7]) (Loislaw 2007). See *infra* note 328 for a listing of states that presume a notary’s official character without further proof as long as the office title is indicated in some way. ¹² WIGMORE, *supra* note 9. California presumes a seal to be genuine and its use authorized if it purports to be the seal of a notary public within any state of the United States (CAL.

EVID. CODE § 1452[f]) (LexisNexis 2007).

Reprinted with permission from *Foundations of Digital Evidence*, available for purchase from: <http://apps.americanbar.org/abastore/index.cfm?section=main&fm=Product.AddToCart&pid=5450053> 2008© by the American Bar Association. All rights reserved. This information or any or portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

higher level seal must then be affixed to effect self-authentication of the document. The drafters of the Federal Rules of Evidence recognized that the risk of forgery is reduced by the requirement of authentication by a public officer who possesses and affixes a seal.¹³

Similarly, acknowledgment act certificates are self-authenticating pursuant to FED. R. EVID. 902(8) and the rules of evidence of nearly every state. In states that grant non-notaries the power to take acknowledgments, this rule treats documents as self authenticating even where a seal is not required.¹⁴

3. E-Document Authenticity Standard. Authenticity of executed electronic documents requires proof of origin (identity of the signer), signer intent to execute or adopt the writing, and content integrity (whether the document has been altered).¹⁵ A critical part of the authentication inquiry is whether safeguards have been implemented to assure the continuing accuracy and integrity of the originally created record.¹⁶

Concerning electronically notarized documents, an international and national e-

¹³ See Advisory Committee Notes to FED. R. EVID. 902(2) (1972 Proposed Rules). See also Karla J. Elliott, *The Notarial Seal – The Last Vestiges of Notaries Past*, 31 J. Marshall L. Rev. 903, at 908 (1998) (“The embosser seal provides maximum safeguards against forgery and fraud by providing an obvious, tactile means by which to verify an original document.”).

¹⁴ See, e.g., N.H. REV. STAT. ANN. § 455-A (LexisNexis 2007) (in New Hampshire, a Justice of the Peace and Quorum for the State is not required to affix an official seal).¹⁵ WINN & WRIGHT, *THE LAW OF ELECTRONIC COMMERCE*, § 20.05 (4th ed. Aspen Publishers, Inc. 2007).; RICE, *supra* note 7, at 222; Thomas J. Smedinghoff and Ruth Hill Bro, *Moving with Change: Electronic Signature Legislation as a Vehicle for Advancing E-Commerce*, 17 J. Marshall J. Computer & Information Law 723, at 731 (1999); See also Stephen Mason, *Electronic Signatures in Practice*, 6 J. High Tech L. 149, at 158 (2006) for discussion of authentication of electronic documents generally in common law countries.

¹⁶ See *In re Vinhnee, American Express Travel Related Service Co. Inc. v. Vinhnee*, 336 B.R. 437 (9th Cir. B.A.P. 2005) (proponent failed to authenticate computer generated

business records because of an inability to assure content integrity from the time they were originally created). *See generally* George L. Paul, *The ‘Authenticity Crisis’ in Real Evidence*, 15 Prac. Litigator No. 6, at 45-49 (2004).

Reprinted with permission from *Foundations of Digital Evidence*, available for purchase from: <http://apps.americanbar.org/abastore/index.cfm?section=main&fm=Product.AddToCart&pid=5450053>. 2008© by the American Bar Association. All rights reserved. This information or any or portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

document authenticity standard has emerged that reflects the evidentiary need for electronic documents to have the capability of authenticity testing.¹⁷ This standard requires that any relying party be able to verify the origin and integrity of the notarized electronic document.¹⁸ Establishing the authenticity of a notarized document thus requires the capability, in perpetuity, of independently authenticating the notary and verifying whether the content of the electronic document is complete and unaltered.

4. Attributing (Authenticating) Electronic Notarial Acts. Under the Uniform Electronic Transactions Act (“UETA”), authentication of the origin and contents of a document to a particular individual is termed “attribution”.¹⁹ While not requiring the use of any one method to prove that an electronic signature is attributable to a person or document, the UETA importantly does provide that attribution may be proven by means of a security procedure.²⁰

Electronic notarization is a security procedure for authenticating or attributing the principal signer.²¹ As defined by Section 2(14) of UETA, a security procedure is:

¹⁷ *See infra* in “Authenticating Electronic Public Documents for Interstate and International Use” the discussion of the non-repudiation standards for electronic notarization, electronic Certificates of Authenticity, and e-Apostilles promulgated by the National Association of Secretaries of State and the Hague Conference on Private International Law.

¹⁸ NATIONAL E-NOTARIZATION STANDARDS, Standards 14 and 15 (Nat’l Ass’n of Secretaries of State 2006) available at <<http://www.nationalnotary.org/commission>>; FIRST INTERNATIONAL FORUM ON E-NOTARIZATION AND E-APOSTILLES, Conclusions 15 and 18 (Nat’l Notary Ass’n 2005) available at <<http://www.e-app.info>>. ¹⁹ UNIF. ELEC. TRANSACTIONS ACT § 9(a) and Comment (Nat’l Conf. of Comm’rs on Unif. State Laws 1999). The UETA has been adopted in every state and the District of Columbia except Georgia, Illinois, New York, and Washington.

²⁰ *Id.*

²¹ UETA, *supra* note 19, at § 2(14); ARIZ. REV. STAT. § 41-351(9) (LexisNexis 2007); DANIEL J. GREENWOOD, ELECTRONIC NOTARIZATION: WHY IT'S NEEDED, HOW IT WORKS, AND HOW IT CAN BE IMPLEMENTED TO ENABLE GREATER TRANSACTIONAL SECURITY at 10 (Nat'l Notary Ass'n 2006) available at

Reprinted with permission from *Foundations of Digital Evidence*, available for purchase from: <http://apps.americanbar.org/abastore/index.cfm?section=main&fm=Product.AddToCart&pid=5450053> 2008© by the American Bar Association. All rights reserved. This information or any or portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

A procedure employed for the purpose of verifying that an electronic signature, record, or performance is that of a specific person or for detecting changes or errors in the information in an electronic record. The term includes a procedure that requires the use of algorithms or other codes, identifying words or numbers, encryption, or callback or other acknowledgment procedures.

Just as in the paper world, the act of electronic notarization authenticates an executed document by proving attribution of the electronic signature and document to the signatory.²² When the electronic notarization process is performed in the manner of a security procedure, by incorporating encryption or similar technology, subsequent changes to the electronic signatures and document can be detected.²³

The two-pronged function of electronic notarization as a security procedure — to verify the signer and the integrity of the signatures and document — in evidentiary terms renders both the underlying electronic document self-authenticating and the notarial act,

<http://www.nationalnotary.org/commission>>. The four states that haven't enacted the UETA also recognize attribution by security procedure: GA. CODE ANN. § 10-12-4(j) (LexisNexis 2007) (notary is required to use a secure or advanced electronic signature); 5 ILL. COMP. STAT. ANN. § 175/10-110(b) (LexisNexis 2007) (authentication by security procedure expressly incorporated); 9 NYCRR 540.5(d) (Loislaw 2007) (procedures by government entities and public officers required for ensuring authenticity and integrity of records); and WASH. REV. CODE ANN. § 19.34.340 (LexisNexis 2007) (authentication by digital signature).

²² GREENWOOD, *supra* note 21, at 10.

²³ See ABA SUBCOMMITTEE ON ETRUST: ENW WHITEPAPER ON ENOTARIZATION at 3.3 (American Bar Association 2006) available at <<http://www.nationalnotary.org/commission>> (“[T]he document being proffered must contain or be accompanied by evidence that it has not changed since it was first generated in its final form (see Section 12, UETA), or if it has changed, what those changes were and their significance, if any.”).

Reprinted with permission from *Foundations of Digital Evidence*, available for purchase from: <http://apps.americanbar.org/abastore/index.cfm?section=main&fm=Product.AddToCart&pid=5450053> 2008© by the American Bar Association. All rights reserved. This information or any or portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

itself, self-proving. Performing the electronic notarization in the manner of a security procedure also serves to provide presumptive evidence of attribution of the electronic document as the act of the signer and attribution of the electronic notarial certificate as the act of the specific notary.²⁴

5. Nature of Public Office. A notary is a public officer.²⁵ The primary duties of the office are to take acknowledgments of instruments, administer oaths and affirmations, execute jurats, certify copies of documents, witness and attest signatures, and perform

²⁴ See, e.g., ARIZ. REV. STAT. § 44-7033 (LexisNexis 2007) and 5 ILL. COMP. STAT. ANN. § 175/10-120(b) (LexisNexis 2007).

²⁵ See ALA. CODE § 40-1-123 (LexisNexis 2007); ARIZ. REV. STAT. § 41-312(C), § 41-353(D) (LexisNexis 2007); ARK. CODE ANN. § 23-38-207 (LexisNexis 2006); CAL. GOV'T CODE § 6106 (LexisNexis 2007); COLO. REV. STAT. § 11-41-128 (LexisNexis 2006); D.C. CODE ANN. § 22-1404 (LexisNexis 2007); FLA. STAT. § 443.141(3)(a)(1) (LexisNexis 2007); GA. CODE ANN. § 7-1-788 (LexisNexis 2007); HAW. REV. STAT. ANN. § 12-7 (LexisNexis 2006); KY. REV. STAT. ANN. §§ 14.090(2) (LexisNexis 2007); LA. REV. STAT. ANN. § 42:282 (LexisNexis 2006); MD. CODE ANN. CTS. & JUD. PROC. § 2-212(c)(2) (LexisNexis 2006); MASS. GEN. LAWS ch. 267, § 1 (LexisNexis 2007); ME. REV. STAT. ANN. tit. 5 § 87 (LexisNexis 2006); MICH. COMP. LAWS § 750-248(1) (LexisNexis 2007); MINN. STAT. ANN. § 609.65 (LexisNexis 2006); N.Y. CONS. LAWS § 8021 11(b)(1) N.Y.C.P.L.R. (LexisNexis 2007); N.C. GEN. STAT. § 10B-3(13) (LexisNexis 2006); N.D. CENT. CODE § 12.1-01-04(22) (LexisNexis 2007); OR. REV. STAT. § 194.152 (LexisNexis 2006) (some notaries are considered public officials and some are not); R.I. GEN. LAWS § 11-17-1 (LexisNexis 2006); S.D. CODIFIED LAWS § 15-6-45(a) (LexisNexis 2005); TENN. CODE ANN. § 8-21-1201 (LexisNexis 2007); TEX. GOV'T CODE ANN. § 406.005(b) (LexisNexis 2006), VA. CODE ANN. § 17.1-270 (LexisNexis 2007); VT. STAT. ANN. tit. 13 § 1801 (2007); W.VA. CODE ANN. § 21-5-3 (LexisNexis 2007). The following states reference notaries as notarial officers: DEL.

CODE ANN. tit. 29 § 4321 (LexisNexis 2007); IOWA CODE ANN. § 9E.2(3) (LexisNexis 2006); MONT. CODE ANN. § 1-5-602(3) (LexisNexis 2005); NEB. REV. STAT. § 64-202(3) (LexisNexis 2007); NEV. REV. STAT. ANN. § 240.005 (LexisNexis 2007). *See also, State Ex Rel. Pickett v. Truman*, 64 S.W.2d 105 (Mo. Banc. 1933); *Smith v. Johnson*, 231 N.E.2d 81 (Ohio App. 1967); *Opinion of the Justices*, 73 N.H. 621, 622 (1906); *People v. Rathbone*, 145 N.Y. 434, 437 (1895). For a survey of relevant cases pronouncing that notaries are public officials, *see* Michael L. Closen, *The Public Official Role of the Notary*, 30 J. Marshall L. Rev. 651, at 652 n.4 (1998).

Reprinted with permission from *Foundations of Digital Evidence*, available for purchase from: <http://apps.americanbar.org/abastore/index.cfm?section=main&fm=Product.AddToCart&pid=5450053> 2008© by the American Bar Association. All rights reserved. This information or any or portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

other acts as specified by law.²⁶

The United States Supreme Court has recognized notaries as public officers whose official acts, without further proof, are given legal recognition beyond the borders of the originating jurisdiction.²⁷ Consistent with this approach, the Minnesota Supreme Court has observed, “[a] public notary is considered not merely an officer of the country where he is admitted or appointed, but as a kind of international officer, whose official acts, performed in the state for which he is appointed, are recognized as authoritative the world over.”²⁸

6. Commission. Authority to perform notarial acts is granted to persons who have qualified and applied for a notary public commission with a state’s notary appointing official.²⁹ To qualify for a commission, typically a person must be 18 years of

²⁶ These “other acts” are wide and varied. For example, notaries can solemnize weddings (Florida, Louisiana, Maine and South Carolina), open and inventory the contents of safe deposit boxes (New York and many other states), perform protests of negotiable instruments (many states), qualify parties to bills in chancery (Tennessee) and subpoena witnesses to appear in court to testify (Connecticut, Ohio). ²⁷ *Smith v. Gale*, 144 U.S. 509 (1892); *Pierce v. Indseth*, 106 U.S. at 549; *Britton v. Niccolls*, 104 U.S. 757 (1881).

²⁸ *Wood v. St. Paul City Ry. Co.*, 44 N.W. 308, 308 (Minn. 1890). ²⁹ The Secretary of

State appoints notaries in American Samoa (Secretary of American Samoa within the Office of Governor), Arizona, Arkansas, California, Colorado, Connecticut, Idaho, Illinois, Iowa, Kansas, Kentucky, Maine, Michigan, Missouri, Montana, Nebraska, Nevada, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Texas and Wyoming. Other appointing officials include the Governor (Delaware, Florida, Indiana, Louisiana, Maryland, Massachusetts, Minnesota, Mississippi, New Hampshire, New Mexico, Rhode Island, South Carolina, Tennessee, West Virginia, Virginia and Wisconsin); Lieutenant Governor (Alaska, Utah and U.S. Virgin Islands); Attorney General (Guam, Hawaii and Northern Marianas); County probate judge (Alabama); Mayor (District of Columbia);

Reprinted with permission from *Foundations of Digital Evidence*, available for purchase from: <http://apps.americanbar.org/abastore/index.cfm?section=main&fm=Product.AddToCart&pid=5450053> 2008© by the American Bar Association. All rights reserved. This information or any or portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

age or older, maintain residency or employment in the state or jurisdiction where application is made, possess good moral integrity and take an oath of office. Certain states require notaries to take an educational course³⁰ on the duties and ethical conduct of the notary public office or pass an examination³¹ on state laws and rules governing the performance of notarial acts. In thirty-five states, notaries must post a bond conditioned for the faithful performance of official duties.³²

Superior court clerk (Georgia); Supreme Court (Puerto Rico); County superior judge (Vermont) and Director of the Department of Licensing (Washington). ³⁰ CAL. GOV'T CODE § 8201(a)(3) (LexisNexis 2007); FLA. ANN. STAT. § 668.50(11)(b) (LexisNexis 2007); MO. ANN. STAT. § 486.225(6) (LexisNexis 2007); N.C. GEN. STAT. § 10B-8(a) (LexisNexis 2006); OR. REV. STAT. § 194.022(h) (LexisNexis 2006); 57 PA. CONS. STAT. ANN. § 151(c) ((LexisNexis 2006). Puerto Rico notaries public must fulfill the educational requirements for attorneys.

³¹ CAL. GOV'T CODE § 8201(a)(4) (LexisNexis 2007); CONN. GEN. STAT. ANN. § 3-94b(b)(3) (LexisNexis 2006); 17 D.C. MUN. REGS. § 2402.3 (Loislaw 2007); LA. REV. STAT. ANN. § 35:191(C)(2)(a) (LexisNexis 2006); NEB. REV. STAT. ANN. § 64-101.01 (LexisNexis 2007); N.C. GEN. STAT. § 10B-8(b) (LexisNexis 2006); N.Y. EXEC. LAW. § 130 (LexisNexis 2007); OHIO REV. CODE ANN. § 147.02(B) (LexisNexis 2007); OR. REV. STAT. 194.022(g) (LexisNexis 2006); UTAH CODE ANN. § 46-1-3(5) (LexisNexis 2006). Puerto Rico notaries public must fulfill the examination requirement for attorneys. Applicants for a Hawaii and Maine notary commission also must pass an examination.

³² States and jurisdictions with bond requirements (in parentheses) are: ALA. CODE §

36-20-3 (LexisNexis 2007) (\$10,000); ALASKA STAT. § 44.50.034 (LexisNexis 2007) (\$1,000); ARIZ. REV. STAT. § 41-312(B) (LexisNexis 2007) (\$5,000); ARK. CODE ANN. § 21-14-101(d)(1) (LexisNexis 2006) (\$7,500); CAL. GOV'T CODE § 8202 (LexisNexis 2007) (\$15,000); D.C. CODE ANN. § 1-1203 (LexisNexis 2007) (\$2,000); FLA. ANN. STAT. § 117.01(7)(a) (LexisNexis 2007) (\$7,500); HAW. REV. STAT. ANN. § 456-5 (LexisNexis 2006) (\$1,000); IDAHO CODE ANN. § 51-105(2) (LexisNexis 2007) (\$10,000); 5 ILL. COMP. STAT. ANN. § 312/2-105 (LexisNexis 2007) (\$5,000); IND. CODE ANN. § 33-42-2-1(e) (LexisNexis 2007) (\$5,000); KAN. STAT. ANN. § 53-102 (LexisNexis 2006) (\$7,500); KY. REV. STAT. ANN. §§ 423.010 - .990 (LexisNexis 2007) (Amount varies by county); LA. REV. STAT. ANN. § 35:71(A)(1) (LexisNexis 2006) (\$10,000 – attorneys are exempt); MICH. COMP. LAWS § 55.273(2) (LexisNexis 2007) (\$10,000 – attorneys are exempt); MISS. CODE ANN. § 25-33-1 (2007) (\$5,000); MO. ANN. STAT. § 486-235(1) (LexisNexis 2007) (\$10,000); MONT. CODE ANN. § 1-5-405(1)

Reprinted with permission from *Foundations of Digital Evidence*, available for purchase from: <http://apps.americanbar.org/abastore/index.cfm?section=main&fm=Product.AddToCart&pid=5450053> 2008© by the American Bar Association. All rights reserved. This information or any or portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

Qualification and commissioning procedures for attorneys are also varied. Certain states grant automatic notarial powers to attorneys, including Maine, Connecticut (for taking acknowledgments only), New Hampshire (for administering oaths related to taking testimony) and New Jersey (for taking acknowledgments and proofs). Ohio³³ and Wisconsin³⁴ automatically qualify attorneys, but they must formally apply for a commission.³⁵

7. Presumption of Validity. As a public officer, the notary's official acts and all certified facts enjoy an evidentiary presumption of having been validly performed.³⁶

(LexisNexis 2005) (\$10,000); NEB. REV. STAT. § 64-102 (LexisNexis 2007) (\$15,000); NEV. REV. STAT. ANN. § 240.030(1)(c) (LexisNexis 2007) (\$10,000); N.M. STAT. ANN. § 14-12A-4 (B) (LexisNexis 2007) (\$10,000); N.D. CENT. CODE § 44-06-03 (LexisNexis 2007) (\$7,500); OKLA. STAT. ANN. tit. 49, § 2(A) (LexisNexis 2006) (\$1,000); 57 PA. CONS. STAT. ANN. § 154 (LexisNexis 2006) (\$10,000); S.D. CODIFIED LAWS § 18-1-2 (LexisNexis 2005) (\$5,000); TENN. CODE ANN. § 8-16-104(a) (LexisNexis 2007) (\$10,000); TEX. GOV'T CODE ANN. § 406.010(a) (LexisNexis 2006) (\$10,000); UTAH CODE ANN. § 46-1-4(1) (LexisNexis 2006) (\$5,000); WASH. REV. CODE ANN. § 42.44.020(5) (LexisNexis 2007) (\$10,000); WIS. STAT. ANN. § 137.01(1)(d) (LexisNexis

2006) (\$500 – attorneys exempt); WYO. STAT. ANN. § 32-1-104(a) (LexisNexis 2006) (\$500); 4 LPRA § 2001 (LexisNexis 2006) (\$15,000); and 3 V.I. CODE R. 773(b) (LexisNexis 2007) (\$5,000 or \$10,000 in property).

³³ See OHIO REV. CODE ANN. § 147.01(B) (LexisNexis 2007).

³⁴ See WIS. STAT. ANN. § 137.01(2)(a) (LexisNexis 2006).

³⁵ In 2005, Missouri enacted a statute defining a notary public as “any person appointed and commissioned to perform notarial acts, including an attorney licensed to practice in this state” (MO. ANN. STAT. § 486.200[5] (LexisNexis 2007)). The Secretary of State currently does not interpret this statute as granting attorneys automatic notarial powers.

³⁶ See, e.g., *Eveleigh v. Conness*, 933 P.2d 675, 682 (Kan. 1997) (“[P]resumption that a public office has performed the duties of his or her office faithfully”); *Gombach v. Department of State*, 692 A.2d 1127, 1132 (Pa. Commonw. Ct. 1997) (“[A] notary commission notifies the public that the Commonwealth believes the notary can be trusted properly.”); *In re Medlin*, 201 B.R. 188, 192 (E.D. Tenn. 1996) (“[P]resumption that

Reprinted with permission from *Foundations of Digital Evidence*, available for purchase from: <http://apps.americanbar.org/abastore/index.cfm?section=main&fm=Product.AddToCart&pid=5450053> 2008© by the American Bar Association. All rights reserved. This information or any or portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

Accordingly, absent rebuttal evidence, the notarial act is self-proving and the certified facts are received into evidence without further proof of the notary’s official authority or seal.³⁷ In some states, successful rebuttal requires clear and convincing evidence.³⁸

Notarial Seal of Office

The notarial seal is a particular sign or written mark made to attest the formal

sworn public officers have properly executed their duties absent evidence to the contrary.”).

³⁷ By statutory means, the following states presume the official character of the notary and the lawful performance of the duties: ALASKA STAT. § 09.63.060 (LexisNexis 2007); ARIZ. REV. STAT. § 33-502(A) (LexisNexis 2007); CAL. EVID. CODE § 1453(c) and § 1452(f) (LexisNexis 2007) (notary’s signature and seal presumed genuine); COLO. REV. STAT. § 12-55-204(1) (LexisNexis 2006); 29 DEL. CODE § 4323(c) (2007); D.C. CODE ANN. § 42-143(c) (LexisNexis 2007); GA. CODE ANN. § 9-10-113 (2006); 765 ILL. COMP. STAT. ANN. § 30/3(a) (LexisNexis 2007); IND. CODE ANN. § 34-37-1-5 (LexisNexis 2007); KAN. STAT. ANN. § 53-504 (LexisNexis 2006); ME. REV. STAT. ANN. tit. 4 § 1012(1) (LexisNexis 2006); MICH. COMP. LAWS § 565.263(1)(LexisNexis 2007); MINN. STAT. ANN. § 358.43(c) (LexisNexis 2006); MONT. CODE ANN. § 1-5-604(4) (LexisNexis 2005); NEV. REV. STAT. ANN. § 240.1635(3) (LexisNexis 2007); N.H. REV. STAT. ANN. § 456-B:3 III (LexisNexis 2007); N.M. STAT. ANN. § 14-14-3(C) (LexisNexis 2007); N.C.

GEN. STAT. § 10B-99(a) (LexisNexis 2006) (notarial acts are given a presumption of regularity); N.D. CENT. CODE § 47-19-14.2(1) (LexisNexis 2007); OKLA. STAT. ANN. tit. § 49-114(C) (LexisNexis 2006); OR. REV. STAT. § 194.525(3) (LexisNexis 2006); S.C. CODE ANN. § 25-1-630(E) (LexisNexis 2006); VA. CODE ANN. § 55-118.2(a) (LexisNexis 2007); WASH. REV. CODE ANN. § 42.44.080(9) (LexisNexis 2007); W. VA. CODE ANN. § 39-1A-2(a) (LexisNexis 2007); WIS. STAT. ANN. § 706.07(3)(c) (LexisNexis 200).³⁸ See, e.g., *Colburn v. Mid-State Homes, Inc.*, 266 So.2d 865 (Ala. 1972) (the acknowledgment is conclusive of the facts therein absent proof of fraud or duress); *Witt v. Panek*, 97 N.E.2d 283, 285 (Ill. 1951) (“the certificate of acknowledgment can be overcome only by proof which is clear, convincing and satisfactory, and by disinterested witnesses”); *Waitt Bros. Land, Inc. v. Montange*, 257 N.W.2d 516 (Iowa 1977); *Jensen v. Skibiski*, 28 So.2d 328 (Fl. 1947) (being a quasi-judicial act, the acknowledgment is conclusive of the facts therein absent proof of fraud or duress); *Murdock v. Nelms*, 212 Va. 639, 641 (1972) (the acknowledgment is a judicial act that imparts absolute verity and cannot be impeached except for fraud); *Evans v. Bottomlee*, 148 S.E.2d 712 (WV 1966) (being a quasi-judicial act, the acknowledgment is conclusive and cannot be impeached except for clear and satisfactory proof of fraud or collusion).

Reprinted with permission from *Foundations of Digital Evidence*, available for purchase from: <http://apps.americanbar.org/abastore/index.cfm?section=main&fm=Product.AddToCart&pid=5450053> 2008© by the American Bar Association. All rights reserved. This information or any or portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

execution of a document.³⁹ Information contained in the seal identifies the individual as a duly commissioned notary imbued with authority to perform official acts.⁴⁰ The notarial seal authenticates or attributes the official act as the act of a notary.⁴¹ The evidentiary function of the seal is to render the notarial act self-proving and the underlying document self-authenticating or admissible without further proof.⁴² Forty-nine states and the District of Columbia prescribe the form and content of

³⁹ See CAL. CODE OF CIVIL PROCEDURE § 1930 (LexisNexis 2007); MONT. CODE ANN. § 1-4-201 (LexisNexis 2005); OR. REV. STAT. § 42.110 (LexisNexis 2006); *Van Den Borre v. State*, 596 So.2d 687, 691 (Fla. App. 4. Dist. 1992); and *King v. Guynes*, 42 So. 959,960 (La. 1907) (“The purpose of a ‘seal’ is to attest in a formal manner to the execution of an instrument.”). See also BLACK’S LAW DICTIONARY, at 1210 (West 1979).

⁴⁰ “The seal ensures that the Notary’s credentials are present and legible.” Douglas M. Fischer, *The Seal: Symbol of Security*, NAT’L NOTARY MAG., Nov. 1995, at 12. ⁴¹ ALA. CODE § 36-20-4 (LexisNexis 2007); ALASKA STAT. § 44.50.062(5) (LexisNexis 2007); ARIZ. REV. STAT. § 41-313(C)(3) (LexisNexis 2007); CAL. GOV’T CODE § 8207

(LexisNexis 2007); D.C. CODE ANN. § 1-1204 (LexisNexis 2007); FLA. STAT. § 95.03 (LexisNexis 2007); GA. CODE ANN. § 45-17-6 (2006); HAW. REV. STAT. ANN. § 456-3 (LexisNexis 2006); 5 ILL. COMP. STAT. ANN. § 312/3-101 (LexisNexis 2007); IND. CODE ANN. § 33-42-2-4(b) (“All notarial acts not attested by a seal as described in subsection (a) are void”) (LexisNexis 2007); KAN. STAT. ANN. § 53-105 (LexisNexis 2006); MD. CODE ANN. STATE GOV’T. § 18-108(a) (LexisNexis 2006); MASS. GEN. LAWS ch. 59, § 31 (LexisNexis 2007); MINN. STAT. ANN. § 359.03 SUBDIV. 1 (LexisNexis 2006); MISS. CODE ANN. § 25-33-3 (“[A]nd his official acts shall be attested by his seal of office”) (LexisNexis 2007); NEB. REV. STAT. § 64-210 (LexisNexis 2007); NEV. REV. STAT. ANN. § 240.040 (LexisNexis 2007); N.M. STAT. ANN. § 14-12A-18(B) (LexisNexis 2007); N.D. CENT. CODE § 6-02-05 (LexisNexis 2007); OKLA. STAT. ANN. tit. 49, § 5 (LexisNexis 2006); OR. REV. STAT. § 194.152 (LexisNexis 2006) (a document without an imprint of the official seal of the notary shall be of no effect); 57 PA. CONS. STAT. ANN. § 158 (LexisNexis 2006); TENN. CODE ANN. § 66-22-110 (2007) (acknowledgment without a seal is void); TEX. GOV’T CODE ANN. § 406.013(a) (LexisNexis 2006); UTAH CODE ANN. § 69-1-4 (LexisNexis 2006); WASH. REV. CODE ANN. § 65.52.050 (LexisNexis 2007) WIS. STAT. ANN. § 137.01(4)(b) (LexisNexis 2006) WYO. STAT. ANN. § 32-1-106(a) (2006).

⁴² See *supra* note 5. See also WIGMORE, *supra* note 9, at §§ 2161 and 2165.

Reprinted with permission from *Foundations of Digital Evidence*, available for purchase from: <http://apps.americanbar.org/abastore/index.cfm?section=main&fm=Product.AddToCart&pid=5450053> 2008© by the American Bar Association. All rights reserved. This information or any or portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

the notarial seal.⁴³ With paper notarizations, the notarial seal appears in one of three forms: 1) impressed or embossed sign, 2) imprinted or stamped sign, and 3) handwritten (scrolled) or typed mark.⁴⁴ Information in the seal typically includes a combination of

⁴³ The following states mandate a specific form for the notarial seal: ALA. CODE § 36-20-4 (LexisNexis 2007); ALASKA STAT. § 44.50.064 (LexisNexis 2007); ARIZ. REV. STAT. § 41-312(B)(2) (LexisNexis 2007); ARK. CODE ANN. § 21-14-106(a)(4), § 21-14-107(b)(1) (LexisNexis 2006); CAL. GOV’T CODE § 8207, CIV. CODE § 1193 (LexisNexis 2007); COLO. REV. STAT. § 12-55-112(2) (LexisNexis 2006); CONN. GEN. STAT. ANN. § 3-94j(a) (LexisNexis 2006); 29 DEL. CODE § 4309(b) (2007); D.C. CODE ANN. § 1-1204, § 42-147 (LexisNexis 2007); FLA. ANN. STAT. § 117.01(5)(b), § 117.05(3)(a) (LexisNexis 2007); GA. CODE ANN. § 45-17-69(a)(1) (2006); HAW. REV. STAT. ANN. § 456-3 (LexisNexis 2006); IDAHO CODE ANN. § 51-106(1) (2007); 5 ILL. COMP. STAT. ANN. § 312/3-101 (LexisNexis 2007), 755 ILL. COMP. STAT. ANN 5/5-3(b); IND. CODE ANN. § 33-42-2-4(a) (LexisNexis 2007); IOWA CODE ANN. § 9E.14(1) (LexisNexis 2006); KAN. STAT. ANN. § 53-105 (LexisNexis 2006); ME. REV. STAT. ANN. tit. 5 § 951 (LexisNexis 2006); MD. CODE ANN. STATE GOV’T. § 18-108(a), § 19-107(a), (LexisNexis 2006); MASS. EXEC. ORDER NO. 455 § 5(c) (April 2004); MINN. STAT. ANN. § 359.03

SUBDIV. 1 (LexisNexis 2006); MISS. CODE ANN. § 25-33-3 (LexisNexis 2007); MO. ANN. STAT. § 486-380, § 492-370 (LexisNexis 2007); MONT. CODE ANN. § 1-5-416(1)(d) (LexisNexis 2005); NEB. REV. STAT. § 64-210(1) (LexisNexis 2007); NEV. REV. STAT. ANN. § 240.040 (LexisNexis 2007); N.H. REV. STAT. ANN. § 455:3 (LexisNexis 2007); N.M. STAT. ANN. § 14-12A-18(A) (LexisNexis 2007); N.C. GEN. STAT. § 10B-36(a) (LexisNexis 2006); N.D. CENT. CODE § 44-06-04, § 47-19-32 (LexisNexis 2007); OKLA. STAT. ANN. tit. 49, § 5 (LexisNexis 2006); OH. REV. CODE § 147.04 (LexisNexis 2007); OR. REV. STAT. § 194.031(1) (LexisNexis 2006); 57 PA. CONS. STAT. ANN. § 158(a) (LexisNexis 2006); S.C. CODE ANN. § 26-1-60 (LexisNexis 2006); S.D. CODIFIED LAWS § 18-1-3 (LexisNexis 2005); TENN. CODE ANN. § 8-16-114(a) and (b) (LexisNexis 2007); TEX. GOV'T CODE ANN. § 406.013(a) (LexisNexis 2006); UTAH CODE ANN. § 46-1-16(2)(a) (LexisNexis 2006); VA. CODE ANN. § 47.1-16C (LexisNexis 2007); WASH. REV. CODE ANN. § 42.44.090(1) (LexisNexis 2007); W. VA. CODE ANN. § 29C-4-102(a) (LexisNexis 2007); WIS. STAT. ANN. § 137.01(3)(a) (LexisNexis 2006) and WYO. STAT. ANN. § 32-1-106(a) (LexisNexis 2006). The following states prescribe seal informational content but permit multiple forms: KY. REV. STAT. ANN. § 423.010 (LexisNexis 2007); LA. REV. STAT. ANN. § 35:12 (LexisNexis 2006); MICH. COMP. LAWS § 55.287(2) (LexisNexis 2007); N.J. STAT. ANN. § 52:7-19 (LexisNexis 2007); N.Y. CONS. LAWS § 137 Exec. (LexisNexis 2007); and R.I. GEN. LAWS § 34-11-1.1 (LexisNexis 2006).⁴⁴ *Id.* See also Corbin, CONTRACTS 3241 (one volume ed. 1952) and RESTATEMENT (SECOND) OF CONTRACTS § 96 cmt. a (1981).

Reprinted with permission from *Foundations of Digital Evidence*, available for purchase from: <http://apps.americanbar.org/abastore/index.cfm?section=main&fm=Product.AddToCart&pid=5450053>, 2008© by the American Bar Association. All rights reserved. This information or any or portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

the notary's name, title, county, commission number, and commission expiration date.⁴⁵

Forty three states mandate one specific form for the notary's seal, most commonly an imprint.⁴⁶ Seven states permit the notary to use any of the three general forms for affixing information concerning commission and official capacity.⁴⁷ A certificate of notarization, containing some form of seal informational elements of a duly commissioned notary, constitutes a lawful notarization in those jurisdictions that don't mandate an impress or imprint of the notarial seal.⁴⁸

LEGAL REQUIREMENTS FOR EVIDENCING THE NOTARIZATION OF ELECTRONIC DOCUMENTS

In General

1. Authorization. The federal Electronic Signatures in Global and National Commerce Act (“E-SIGN”)⁴⁹ and the widely enacted UETA authorize the use of electronic signatures and seals by notaries public.⁵⁰ E-SIGN is modeled after the UETA

⁴⁵ See *supra* note 43.

⁴⁶ *Id.*

⁴⁷ These states include Kentucky, Louisiana, Michigan, New Jersey, New York, Rhode Island, and Vermont. While Vermont preserves the authenticating evidentiary function of the notarial seal, Vermont does not require the seal for enforceability and is the only state that leaves the content and form entirely to the discretion of the notary. FAERBER, *supra* note 2, at 183, 191, 231, 301, 319, 415, and 471.

⁴⁸ See, e.g., WIGMORE, *supra* note 9, at § 2165.

⁴⁹ 15 U.S.C.A. §§ 7001 *et seq.*

⁵⁰ See UETA, *supra* note 19, at § 11. (“If a law requires a signature or record to be notarized, acknowledged, verified, or made under oath, the requirement is satisfied if the electronic signature of the person authorized to perform those acts, together with all other information required to be included by other applicable law, is attached to or logically associated with the signature or record.”).

Reprinted with permission from *Foundations of Digital Evidence*, available for purchase from: <http://apps.americanbar.org/abastore/index.cfm?section=main&fm=Product.AddToCart&pid=5450053>. 2008© by the American Bar Association. All rights reserved. This information or any or portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

and contains the same notary related provisions and definitions.⁵¹ Commensurate with

their policy of technological neutrality, while authorizing e-notarization, neither

E-SIGN nor the UETA specifies the manner for performing the electronic notarial act.

Because notaries are principally governed by state law, this discussion will focus on the

UETA and the pertinent language variations in the state enactments.

Section 11 of the UETA gives notaries the authority to act electronically using any type of electronic signature.⁵² An electronic signature satisfies any requirement for a handwritten signature⁵³ and expresses the principal’s intent to be bound by the

document.⁵⁴ Section 11 also specifies that any other information required by a state law to be included for the notarial act — such as the notary’s name, title, commission number, commission expiration date, and seal image — must be attached to or logically associated with the notary’s electronic signature or the electronic document.

Of the 46 enactments of the UETA to date, six states have amended or qualified Section 11 in various ways. California and Indiana replaced the phrase “electronic signature of the person authorized to perform these acts,” with “the electronic signature of the notary public,”⁵⁵ clarifying that only a *notary public*, and not just any non-notary

⁵¹ Electronic Signatures in Global and National Commerce Act (“E-SIGN”) 15 USC § 7001(g).

⁵² An electronic signature is any “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.” UETA § 2(8) (1999).

⁵³ *Id.* § 7(d).

⁵⁴ *Id.* § 2(8).

⁵⁵ CAL. CIV. CODE § 1633.11(a) (LexisNexis 2007); IND. CODE ANN. § 26-2-8-110 (LexisNexis 2007).

Reprinted with permission from *Foundations of Digital Evidence*, available for purchase from: <http://apps.americanbar.org/abastore/index.cfm?section=main&fm=Product.AddToCart&pid=5450053> 2008© by the American Bar Association. All rights reserved. This information or any or portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

who has been statutorily granted notarial powers, may perform electronic notarizations.

Hawaii’s version provides that those documents made under seal are satisfied if the electronic signature or seal of the officer is attached to or logically associated with the signature or record.⁵⁶

Florida made two substantive changes. First, neither a rubber stamp nor impression type seal need be used for an electronic notarization.⁵⁷ Second, all first-time applicants for a notary public commission must take a course of instruction on notarization and

electronic notarization before commencing official duties.⁵⁸

Kansas specifically authorized the Secretary of State to promulgate rules and regulations establishing procedures for an electronic notarization.⁵⁹ These rules were published effective December 30, 2005.⁶⁰

In enacting the UETA, Pennsylvania postponed the effective date of its section on notarization until 30 days after a notice was published in the *Pennsylvania Bulletin* by the Secretary of the Commonwealth indicating that the section no longer conflicted with the requirements and procedures for electronic notarization, acknowledgment and verification.⁶¹ The required notice was subsequently published in the *Pennsylvania*

⁵⁶ HAW. REV. STAT. ANN. § 489E-11 (LexisNexis 2006).

⁵⁷ FLA. ANN. STAT. § 668.50(11)(a) (LexisNexis 2007). See FLA. ANN. STAT. § 117.021(2) (LexisNexis 2007) for security requirements.

⁵⁸ *Id.* § 668.50(11)(b).

⁵⁹ KAN. STAT. ANN. § 16-1611(b) (LexisNexis 2006).

⁶⁰ KAN. ADMIN. REG. §§ 7-43-1 et seq. (Loislaw 2007).

⁶¹ 73 PA. CONS. STAT. ANN. § 2260.5101(1) (LexisNexis 2006).

Reprinted with permission from *Foundations of Digital Evidence*, available for purchase from: <http://apps.americanbar.org/abastore/index.cfm?section=main&fm=Product.AddToCart&pid=5450053> 2008© by the American Bar Association. All rights reserved. This information or any or portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

Bulletin on December 30, 2005.⁶²

2. Notary Registration Requirement. Coincident to the enactment of the UETA and

E-SIGN, states have considered whether a notary public commission authorizes a notary to perform electronic acts or whether an additional authorization is necessary. Arizona and Virginia have taken one approach by requiring “electronic notaries”⁶³ to obtain a separate commission to perform electronic acts, including submission of a

separate application and application fee, and oath of office.⁶⁴

The states of Colorado, Kansas, Minnesota, North Carolina, and Pennsylvania have taken a second approach. These states stop short of mandating a separate commission, opting instead to have notaries “register” for authorization to perform electronic acts. This registration informs the commissioning official that the notary public possesses the technology, tools and capability to perform electronic acts and can require the notary to enumerate the technology or technologies the notary will use to create an official electronic signature and/or electronic notary seal.⁶⁵

3. National Association of Secretaries of State Standards. In 2005, the National Association of Secretaries of State (NASS) established the National e-

⁶² 35 PA. B. 7068 (December 31, 2005),
<http://www.pabulletin.com/secure/data/vol35/35-53/2416.html>.

⁶³ See ARIZ. REV. STAT. § 41-351(7) (LexisNexis 2007) (The term “electronic notary” is defined as “any person commissioned to perform notarial acts under this article.”). ⁶⁴ See *id.* § 41-353; VA. CODE ANN. § 47.1-7 (LexisNexis 2007)).

⁶⁵ 8 COLO. CODE REG. § 1505-11. RULE 2 (Loislaw 2007); KAN. ADMIN. REG. § 7-43-2(d) (Loislaw 2007); N.C. GEN. STAT. § 10B-106 (LexisNexis 2006); MINN. STAT. ANN. § 359.01(SUBD. 5) (LexisNexis 2006); 35 PA. B. 7068 (December 31, 2005), <http://www.pabulletin.com/secure/data/vol35/35-53/2416.html>.

Reprinted with permission from *Foundations of Digital Evidence*, available for purchase from: <http://apps.americanbar.org/abastore/index.cfm?section=main&fm=Product.AddToCart&pid=5450053> 2008© by the American Bar Association. All rights reserved. This information or any or portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

Notarization Commission to study and propose national standards for electronic notarization. Chaired by North Carolina Secretary of State Elaine Marshall and comprised of secretaries of state, state notary regulating officials, state attorneys general, and federal government representatives, the commission developed standards that were adopted by NASS in July 2006. The resulting standards reflect the need for the electronic

notarial act to be self-proving and to provide the capability of document authenticity testing and non-repudiation.⁶⁶

The NASS National e-Notarization Standards require an electronic notarization to give relying parties the ability to independently verify the notary and detect alterations to the signatures and document.⁶⁷ The principal must be physically present before the notary at the time of the electronic notarization,⁶⁸ and the notary must identify the principal using the same methods of identification as for paper-based acts.⁶⁹ NASS rejected the idea that, in an electronic environment, “physical appearance”⁷⁰ can be

⁶⁶ NATIONAL E-NOTARIZATION STANDARDS, Standard 13 (Nat’l Ass’n of Secretaries of State 2006). The American Bar Association defines the term “non-repudiation” as “[s]trong and substantial evidence of the identity of the signer of a message and of message integrity, sufficient to prevent a party from successfully denying the origin, submission or delivery of the message and the integrity of its contents.” DIGITAL SIGNATURE GUIDELINES § 1.20 (American Bar Association 1996).

⁶⁷ NATIONAL E-NOTARIZATION STANDARDS, Standards 5 through 11.

⁶⁸ *Id.* Standard 1.

⁶⁹ *Id.* Standard 2.

⁷⁰ “‘Physical appearance’ and ‘appears before the notary’ mean that the principal and the notary public are physically close enough to see, hear, communicate with, and give documents to each other without reliance on electronic devices such as telephones, computers, video cameras or facsimile machines.” *Id.* Definition 10.

Reprinted with permission from *Foundations of Digital Evidence*, available for purchase from: <http://apps.americanbar.org/abastore/index.cfm?section=main&fm=Product.AddToCart&pid=5450053>. 2008© by the American Bar Association. All rights reserved. This information or any or portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

established through video-conference links, audio-visual hookups or similar

technology.⁷¹ An electronic notarization also must be performed securely and reliably.

Any electronic signature, seal and certificate of a notary must identify the notary public who is authorized to perform the electronic act and provide a means for subsequently

testing the integrity of the contents and signatures.

4. Notary's Electronic Signature. The NASS standards adopt the UETA's definition of electronic signature⁷² and add a definition for the notary's electronic signature.⁷³ No particular technology for the notary's electronic signature is specified, but an electronic notary signature must be attached to or logically associated with the electronic document in such a manner that removal or alteration of the electronic signature is detectable, and renders evidence of the change so as to invalidate the electronic notarial act.⁷⁴ A notary may use any type of electronic signature as long as it meets the following criteria:

The notary public's electronic signature is deemed to be reliable if the following requirements are met: a) it is unique to the notary public, b) it is capable of independent verification, c) it is retained under the notary public's sole control, d) it is attached to or logically associated with the electronic document, and e) it is linked to the data in such a manner that any subsequent alterations to the underlying document or electronic notarial certificate are detectable

⁷¹ Of note is the fact that in 2006, the Utah legislature enacted Senate Bill 20 which repealed a law allowing an acknowledgment to be made "either in the presence of the notary or by an electronic communication that is as reliable as an admission made in the presence of a notary."

⁷² *Id.* Definition 6.

⁷³ *Id.* Definition 9.

⁷⁴ *Id.* Standard 5.

Reprinted with permission from *Foundations of Digital Evidence*, available for purchase from: <http://apps.americanbar.org/abastore/index.cfm?section=main&fm=Product.AddToCart&pid=5450053> 2008© by the American Bar Association. All rights reserved. This information or any or portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

and may invalidate the electronic notarial act.⁷⁵

5. Electronic Notarial Seal. The NASS standards provide for the use of an electronic notarial seal, which is defined as "information within a notarized electronic

document that includes the notary public's name, jurisdiction of appointment, commission number, and commission expiration date, and generally corresponds to data in notary public seals used on paper documents.”⁷⁶

The electronic notary seal must be affixed to or logically associated with the electronic document in such a manner that removal or alteration of the electronic seal is detectable, provides evidence of the change, and as a result invalidates the electronic notarial act.⁷⁷ The notary's electronic seal must meet the same 5-point reliability test as for an electronic signature.⁷⁸ The electronic seal also may function as the electronic signature.⁷⁹

6. Electronic Notarial Certificate. As with paper-based acts, the NASS standards require a notary to complete a certificate to evidence an electronic notarial act.⁸⁰ This electronic certificate contains important evidentiary facts certified or attested

⁷⁵ *Id.* Standard 7.

⁷⁶ *Id.* Definition 5. The definition is based virtually verbatim upon the *Model Notary Act (2002)* definition in § 14-6 (NAT'L NOTARY ASS'N 2002).

⁷⁷ NATIONAL E-NOTARIZATION STANDARDS, Standard 8.

⁷⁸ *Id.* Standard 9.

⁷⁹ *Id.* Standard 4 Comment.

⁸⁰ *Id.* Definition 7 (“‘ Electronic notarial certificate’ means the portion of a notarized electronic document that is completed by the notary public, bears the notary public's electronic signature and/or official electronic seal, official title, commission number, commission expiration date, any required information concerning the date and place of

Reprinted with permission from *Foundations of Digital Evidence*, available for purchase from: <http://apps.americanbar.org/abastore/index.cfm?section=main&fm=Product.AddToCart&pid=5450053>. 2008© by the American Bar Association. All rights reserved. This information or any or portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

to by the notary in an electronic notarization, such as the date and place of the act, the name of the signer or signers personally appearing before the notary and the type of

notarization performed. In order to preserve a trustworthy record of what was signed by the principal and notary, the electronic notarial certificate must be affixed in such a manner as to render both the certificate and the underlying document tamper-evident.⁸¹

State Law Requirements for Manner of Performing e-Notarization 1. In General.

Electronic notarization is a security procedure that both attributes the signature to the principal signer and renders the electronic notarial act self proving.⁸² By attaching the seal information in a manner that enables independent verification of the notary and tamper evidence of the electronic document, the notary's evidentiary function of rendering documents self-authenticating is preserved.⁸³ While physically affixing the imprint or impress of the paper seal image doesn't apply to an electronic document, the information concerning the notarial seal nevertheless must be

the electronic notarization, and states the facts attested to or certified by the notary public in a particular electronic notarization.”).

⁸¹ *Id.* Standard 6 (“When performing an electronic notarization, a notary public shall complete an electronic notarial certificate, which shall be attached to or logically associated with the electronic document such that removal or alteration of the electronic notarial certificate is detectable and will render evidence of alteration of the document containing the notary certificate which may invalidate the electronic notarial act.”).⁸² See *supra* note 21 and accompanying text. Although E-SIGN is silent on the matter, procedures and methods for authenticating or attributing signers are set forth by state law.⁸³ NATIONAL E-NOTARIZATION STANDARDS, “Form and Manner of Performing the Electronic Notarial Act,” Comment (“Although UETA, URPERA, and the federal E SIGN law can be read to have eliminated the need for a physical seal image as a requirement for determining whether an electronic document is an ‘original’ versus a copy, the seal requirement remains essential to authenticating documents under federal and state rules of evidence.”).

Reprinted with permission from *Foundations of Digital Evidence*, available for purchase from: <http://apps.americanbar.org/abastore/index.cfm?section=main&fm=Product.AddToCart&pid=5450053>. 2008© by the American Bar Association. All rights reserved. This information or any or portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

attached.⁸⁴ E-SIGN and the UETA defer to other state laws and regulations for direction

on how the notary's seal information is to be attached to a document or for detailing a specific security procedure to be used by the notary in attributing the signature to the principal.⁸⁵

In performing the electronic notarization as a security procedure, states either require or permit the notary to use any combination of the following forms or methods for attaching the seal information: 1) the seal information combined with a secure electronic signature,⁸⁶ 2) a secure electronic notarial seal combined with a secure electronic signature,⁸⁷ 3) an electronic image of the paper seal imprint or impress,⁸⁸ 4) an electronic image of the paper seal imprint as well as an electronic image of the

⁸⁴ See ABA SUBCOMMITTEE ON ETRUST: ENOTARIZATION, *supra* note 23, at 1.0. ⁸⁵ *Id.* "Registration Requirement" Comment ("The important matter is that all of the notary public's identifying and commissioning information be made a part of, or a secure attachment to, the underlying notarized electronic document.").

⁸⁶ ARIZ. REV. STAT. § 44-7011 and § 44-7034 (LexisNexis 2007); ARK. CODE ANN. § 19-11-203(29) and § 25-31-104(b)(3) (LexisNexis 2006), CAL. PROBATE CODE § 4673(b) (LexisNexis 2007); (electronic advance health directives), FLA. ANN. STAT. § 117.021(2) (LexisNexis 2007); GA. CODE ANN. § 10-12-3(6) and § 10-12-4(j) (2006); 5 ILL. COMP. STAT. ANN. § 175/10-110 and 14 ILL. ADMIN. CODE 100.30 (LexisNexis 2007); KAN. ADMIN. REG. § 7-43-3(a) (Loislaw 2007); NEV. REV. STAT. ANN. § 720.150(5) and NEV. ADMIN. CODE § 720.770 (LexisNexis 2007); 35 PA. B. 7068 (December 1, 2005), <http://www.pabulletin.com/secure/data/vol35/35-53/2416.html>; WASH. REV. CODE ANN. § 19.34.020(11) and § 19.34.340 (LexisNexis 2007).

⁸⁷ MINN. STAT. ANN. § 358.47(a) (LexisNexis 2006); N.C. ADMIN. CODE tit. 18 ch. 7 § 07C.0401(a-d) and § 07C.0402(a-d) (Loislaw 2007); VA. CODE ANN. § 47.1-16(B), (D) (LexisNexis 2007).

⁸⁸ California (except for electronic advance health directives).

holographic signature,⁸⁹ and 5) the seal information combined with a document authentication number.⁹⁰

2. E-Notarization Performed as a Form-Specified Security Procedure.

Fourteen states now prescribe either a specific method or specific security criteria for performing the electronic notarial act in the manner of a security procedure: Arizona, Arkansas, California, Colorado, Florida, Georgia, Illinois, Kansas, Minnesota, North Carolina, Nevada, Pennsylvania, Virginia and Washington. Various forms or methods are required.

Several states require the use of an electronic notary signature or seal that identifies the notary public and is unique to that notary.⁹¹ In the states of California (electronic advance health directives), Kansas, Minnesota, Nevada, Pennsylvania, and Washington use of a digital signature is the specified method.⁹² In the states of Arizona,

⁸⁹ N.C. ADMIN. CODE tit. 18 ch. 7 § 07C.0401(e) and § 07C.0402(e) (Loislaw 2007) available at <<http://www.nationalnotary.org/commission>>).

⁹⁰ COLO. REV. STAT. § 12-55-106.5 (LexisNexis 2006).

⁹¹ ARIZ. REV. STAT. § 41-351(8), (9) and § 44-7034 (LexisNexis 2007); ARK. CODE ANN. § 25-31-103(1) and § 25-31-104(b)(3) (LexisNexis 2006); 8 COLO. CODE REG. § 1505-11 Rule 1(1) (Loislaw 2007); FLA. ANN. STAT. § 117.021(2) (LexisNexis 2007); GA. CODE ANN. § 10-12-3(6) and § 10-12-4(3)(j) (2006); KAN. STAT. ANN. § 16-1602(d) and KAN. ADMIN. REG. § 7-43-3(a) (LexisNexis 2006); MINN. STAT. ANN. § 325K.23 (LexisNexis 2006); NEV. REV. STAT. ANN. § 720.150(5) and NEV. ADMIN. CODE § 720.770 (LexisNexis 2007); N.C. GEN. STAT. § 10B-117 and N.C. ADMIN. CODE tit. 18 ch. 7 § 07C .0401 and § 07C .042 (LexisNexis 2006); WASH. REV. CODE ANN. § 19.34.020(11) and § 19.34.340 (LexisNexis 2007).

⁹² CAL. PROBATE CODE § 4673(b) (LexisNexis 2007); KAN. ADMIN. REG. § 7-43-3(a) (Loislaw 2007); MINN. STAT. ANN. § 325K.23 (LexisNexis 2006); NEV. REV. STAT. ANN. § 720.150(5) and NEV. ADMIN. CODE § 720.770 (LexisNexis 2007); 35 PA. B. 7068 (December 1, 2005), <http://www.pabulletin.com/secure/data/vol35/35-53/2416.html>; WASH. REV. CODE ANN. § 19.34.020(11) and § 19.34.340 (LexisNexis 2007).

[art&pid=5450053](#) 2008© by the American Bar Association. All rights reserved. This information or any or portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

Arkansas, Florida, Georgia, Illinois, North Carolina, and Virginia a secure electronic signature is required that is unique to the notary, capable of independent verification, under the notary's sole control, and linked to the electronic document so as to show evidence of alterations or forgery.⁹³

Minnesota, Pennsylvania and Virginia specify that the notary's *electronic signature* and accompanying seal information be attached in a manner so as to attribute the signature as the act of the notary identified on the official commission.⁹⁴

States further set requirements for securing the notary's electronic signature from loss, theft, or use by any other person.⁹⁵ These rules correspond to similar rules for paper-based signatures and seals.⁹⁶ As long as the electronic signature or seal is used

⁹³ ARIZ. REV. STAT. § 44-7031 and § 44-7034 (LexisNexis 2007); ARK. CODE ANN. § 19-11-203(29) and § 25-31-104(b)(3) (LexisNexis 2006); FLA. ANN. STAT. § 117.021(2) (LexisNexis 2007); GA. CODE ANN. § 10-12-3(6) and § 10-12-4(j) (2006); 5 ILL. COMP. STAT. ANN. § 175/10-110 and 14 ILL. ADMIN. CODE 100.30 (LexisNexis 2007); N.C. ADMIN. CODE tit. 18 ch. 7 § 07C.0401(a-d) and § 07C.0402(a-d) (Loislaw 2007); VA. CODE ANN. § 47.1-16(B), (D) (LexisNexis 2007).

⁹⁴ MINN. STAT. ANN. § 359.47(a) (LexisNexis 2006); 57 PA. CONS. STAT. ANN. § 155(c) (LexisNexis 2006); VA. CODE ANN. § 47.1-16(B) (LexisNexis 2007)). ⁹⁵ VA. CODE ANN. § 47.1-14(G) (LexisNexis 2007); N.C. GEN. STAT. § 10B-125(a), § 10B-126(a) and (b) (LexisNexis 2006).

⁹⁶ ALASKA STAT. § 44.50064 (LexisNexis 2007); ARIZ. REV. STAT. § 41-312(C) and § 41-323(B) and (C) (LexisNexis 2007); ARK. CODE ANN. § 21-14-107(d) and (e) (LexisNexis 2006); CAL. GOV'T CODE § 8207 (LexisNexis 2007); COLO. REV. STAT. § 12-55-118 (LexisNexis 2006); FLA. ANN. STAT. § 117.05(3)(c) and (e) (LexisNexis 2007); IDAHO CODE ANN. § 51-119(4) (2007); 5 ILL. COMP. STAT. ANN. § 312/7-107 (LexisNexis 2007); MASS. EXEC. ORDER NO. 455 § 5(c) (April 2004), available at <<http://www.sec.state.ma.us/pre/prepdf/execorder445.doc>>; MO. ANN. STAT. § 486-285(3) and § 486-380 (LexisNexis 2007); NEV. REV. STAT. ANN. § 240.143 (LexisNexis 2007); N.M. STAT. ANN. § 14-12A-18(A) and (E) (LexisNexis 2007); N.C. GEN. STAT. § 10B-36(a) and § 10B-60(f) (LexisNexis 2006); N.D. CENT. CODE § 44-06-04 (LexisNexis 2007); OKLA. ADMIN. CODE 655:25-5-2 (Loislaw 2007); OR. REV. STAT. § 194.990(1)(c)

Reprinted with permission from *Foundations of Digital Evidence*, available for purchase from: <http://apps.americanbar.org/abastore/index.cfm?section=main&fm=Product.AddToCart&pid=5450053> 2008© by the American Bar Association. All rights reserved. This information or any or portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

only by the notary and is kept secure from unauthorized or wrongful use by others, the public can have confidence that any electronic document bearing the notary's signature or seal is authentic.

California and North Carolina require notaries to affix an actual image of the notary's physical seal⁹⁷ to all⁹⁸ electronic notarizations. However, under California's electronic recording statute, three specific types of documents are exempted from this electronic image requirement: an assignment of a deed of trust, substitution of trustee, and deed of reconveyance.⁹⁹

The state of Colorado adopts an entirely unique approach. Each notary who has registered intent to notarize electronically with the Secretary of State is assigned an individually unique accounting system validation number and a set of "Document Authentication Numbers" (DAN). Each DAN includes the accounting system validation number issued to the notary and a randomly generated number that when used together may constitute the notary's electronic signature and identify both the individual notary

(LexisNexis 2006); 57 PA. CONS. STAT. ANN. § 158(d) and (e) (LexisNexis 2006); UTAH CODE ANN. § 46-1-16(2) (LexisNexis 2006); WASH. REV. CODE ANN. § 42.44.090(4) (LexisNexis 2007); W. VA. CODE ANN. § 29C-6-204 (LexisNexis 2007).

⁹⁷ CAL. GOV'T CODE § 8207 (LexisNexis 2007); N.C. ADMIN. CODE tit. 18 ch. 7 § 07C.0402 (Loislaw 2007).

⁹⁸ California's Electronic Recording Delivery Act of 2004 (GOV'T CODE §§ 27390 et seq.) does not allow real property documents affecting consumers, including deeds of trust and conveyance deeds, to be electronically notarized and submitted for digital

electronic recording in the state.

⁹⁹ CAL. GOV'T CODE § 27391(e) (LexisNexis 2007).

Reprinted with permission from *Foundations of Digital Evidence*, available for purchase from: <http://apps.americanbar.org/abastore/index.cfm?section=main&fm=Product.AddToCart&pid=5450053> 2008© by the American Bar Association. All rights reserved. This information or any or portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

and the document to which the DAN has been affixed.¹⁰⁰ The notary then uses a different DAN for each electronically notarized document.¹⁰¹ The notary may use a DAN as an electronic signature if the notary's name, the words "NOTARY PUBLIC" and "STATE OF COLORADO", and the words "my commission expires," followed by the expiration of the notary's commission are included with each DAN affixed to an electronic document.¹⁰² If the notary elects to use a different type of electronic signature, such as a digital signature, a DAN must still be used in the electronic notarization.

3. E-Notarization Performed as a Form-Unspecified Security Procedure.

Thirty-six and the District of Columbia currently have not prescribed a specific method for securely attaching the required seal information to an electronic document.¹⁰³ Nor have these states yet mandated a type of security procedure to be used in performing an e-notarization or to ensure non-repudiation. As a result, the notary is not limited to using one type of security procedure or method.

4. E-Notarization Performed as a Security Procedure – Time-Stamping.

Time-stamping helps to ensure signer and document non-repudiation by providing strong and verifiable cryptographic evidence that a specific electronic record existed at a specific moment in time. Time-stamping an electronic record thus gives relying parties verifiable proof of when a certain act has taken place. Currently, only Arizona requires

¹⁰⁰ COLO. REV. STAT. § 12-55-112(4.5(b)) (LexisNexis 2006); 8 COLO. CODE REG. §

1505-11 Rule 1 (Loislaw 2007).

¹⁰¹ 8 COLO. CODE REG. §1505-11 Rule 2(4)(b) (Loislaw 2007).

¹⁰² 8 COLO. CODE REG. § 1505-11 Rule 2(4)(c) (Loislaw 2007).

¹⁰³ Of these, rules are forthcoming from Alaska and Oregon.

Reprinted with permission from *Foundations of Digital Evidence*, available for purchase from: <http://apps.americanbar.org/abastore/index.cfm?section=main&fm=Product.AddToCart&pid=5450053>. 2008© by the American Bar Association. All rights reserved. This information or any or portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

the electronic notarial act to include time-stamping.¹⁰⁴

5. Electronic Notary Journal. An important aspect for establishing the veracity of a notarization and ensuring non-repudiation is the creation of a record of the notarial act in a bound or electronic journal. Nearly half the states require notaries to log the pertinent facts of each notarization performed in an official journal or record book.¹⁰⁵ E-SIGN and the UETA authorize the use of electronic journals. Virginia requires the use of an electronic notary journal for all electronic notarial acts.¹⁰⁶

The journal entry preserves an entirely separate and independent record of the transaction, which can be of great value in the event that the document is later lost,

¹⁰⁴ ARIZ. REV. STAT. § 41-355 and § 41-356 (LexisNexis 2007).

¹⁰⁵ ALA. CODE § 36-20-6 (LexisNexis 2007); ARIZ. REV. STAT. § 41-319(A) (LexisNexis 2007); CAL. GOV'T CODE § 8206(a) (LexisNexis 2007); COLO. REV. STAT. § 12-55-111(1) and (4) (LexisNexis 2006) (where notaries must keep a journal for all electronic acts); D.C. CODE ANN. § 1-1211 (LexisNexis 2007); FLA. ANN. STAT. § 117.01(4) (LexisNexis 2007); HAW. REV. STAT. ANN. § 456-15 (LexisNexis 2006); KY. REV. STAT. ANN. § 423.030 (LexisNexis 2007) (for notarial protests only); ME. REV. STAT. ANN. tit. 19-A § 654 (for marriages only); MD. CODE ANN. ST. GOV. Art. 18 § 107 (LexisNexis 2007); MASS. EXEC. ORDER NO. 455, § 11(a) (April 2004), MISS. CODE ANN. § 25-33-5 (LexisNexis 2007); MO. ANN. STAT. § 486-260 (LexisNexis 2007); NEB. REV. STAT. § 64-101(6) (LexisNexis 2007) (notaries must "faithfully discharge the duties pertaining to said office and keep records according to law"); NEV. REV. STAT. ANN. § 240.120(1) (LexisNexis 2007); N.D. CENT. CODE § 44-06-08 (LexisNexis 2007) (for notarial protests only); OHIO REV. CODE ANN. § 147.04 (LexisNexis 2007) (for notarial protests only); OKLA. STAT. ANN. tit. 49, § 7 (LexisNexis 2006) (for notarial protests only); OR. REV. STAT. § 194.152 (LexisNexis 2006); 57 PA. CONS. STAT. ANN. § 161(a) (LexisNexis 2006); TENN. CODE ANN. § 18-16-118 (LexisNexis 2007) (notaries must keep a journal in order to charge a fee); TEX. GOV'T CODE ANN. § 406.014 (LexisNexis

2006); UTAH CODE ANN. § 46-1-13 (LexisNexis 2006) (“A notary may keep, maintain, and protect as a public record, and provide for lawful inspection a chronological, permanently bound official journal of notarial acts, containing numbered pages.”); 4 LPRA § 2071 (LexisNexis 2006) (protocol of original deeds and acts executed by a notary) and § 2092 (registry of affidavits).

¹⁰⁶ VA. CODE ANN. § 47.1-14(C) (LexisNexis 2007).

Reprinted with permission from *Foundations of Digital Evidence*, available for purchase from: <http://apps.americanbar.org/abastore/index.cfm?section=main&fm=Product.AddToCart&pid=5450053> 2008© by the American Bar Association. All rights reserved. This information or any or portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

damaged or contested. A document signer’s signature¹⁰⁷ and even a thumbprint¹⁰⁸

captured in the journal are compelling, if not irrefutable, evidence that the identified signer was physically present before the notary on the date of the notarization.

AUTHENTICATING ELECTRONIC PUBLIC DOCUMENTS FOR INTERSTATE AND INTERNATIONAL USE

1. General Principle. When a document executed in one place is to be submitted in a court or office of another state or foreign jurisdiction, certification of the notary’s identity and official status may be required as a prerequisite for that document to be recognized or received into evidence in that other court or office.¹⁰⁹ The current methods and treaties of authentication for traditional paper documents apply to electronic documents.

Because notarial acts do not expressly fall within the terms of the Full Faith and Credit

Clause of Article IV of the United States Constitution,¹¹⁰ many states have enacted statutes that presume the validity of official acts performed by notaries in other states and

¹⁰⁷ CAL. GOV’T CODE § 8206(a)(2)(A) (LexisNexis 2007); HAW. REV. STAT. ANN. § 456-15(3) (LexisNexis 2006); HANDBOOK FOR MD NOTARIES PUBLIC (MD SEC’Y OF STATE 2006) at 7; MASS. EXEC. ORDER NO. 455, § 11(c)(4) (April 2004); MO. ANN. STAT. § 486-260(4) (LexisNexis 2007); NEV. REV. STAT. ANN. § 240.120(1)(d) (LexisNexis 2007); OR. ADMIN. RULES § 160-100-120(6).

¹⁰⁸ CAL. GOV’T CODE § 8206(a)(2)(G) (LexisNexis 2007) (required for all deeds,

quitclaim deeds and deeds of trust affecting real property).

¹⁰⁹ A discussion of the background of interstate and international recognition of notarial acts is outside the scope of this chapter. *See generally* Closen, *supra* note 2, at 217-236, 455-81; Keith D. Sherry, Comment, *Old Treaties Never Die, They Just Lose Their Teeth: Authentication Needs of a Global Community Demand Retirement of the Hague Public Documents Convention*, 31 J. MARSHALL L. REV. 1045-1083 (1998).

¹¹⁰ No case interpreting the Full Faith and Credit Clause of Article IV has ruled specific “notarial acts” to be “public acts” within the meaning and application of the text.

Reprinted with permission from *Foundations of Digital Evidence*, available for purchase from: <http://apps.americanbar.org/abastore/index.cfm?section=main&fm=Product.AddToCart&pid=5450053>. 2008© by the American Bar Association. All rights reserved. This information or any or portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

foreign nations.¹¹¹

2. Certificates of Authenticity (Appointment). State, county, and judicial officials have the legal obligation, when requested, to verify the authority of a notarial officer performing electronic notarizations.

Standards for electronic Certificates of Authenticity and apostilles have been established by NASS. As prerequisites to issuing certifications and apostilles, electronic notarial

acts must meet certain basic requirements to ensure non-repudiation:

- a) the fact of the notarial act, including the notary's identity, signature, and commission status, must be verifiable by the commissioning official and b) the notarized electronic document will be rendered ineligible for authentication by the commissioning official if it is improperly modified after the time of notarization, including any unauthorized alterations to the document content, the electronic notarial certificate, the notary public's electronic signature, and/or the notary public's official electronic seal.¹¹²

Thus, the NASS requirements for electronic certifications and apostilles follow the same e-document authenticity standard as that of the Hague Conference on Private International Law (“the Hague”) regarding e-apostilles: the fact of the issuance of the certification or apostille must be independently verifiable and the certification or apostille must be invalidated if the underlying document is improperly modified.¹¹³

¹¹¹ Examples of such laws are 1) The Uniform Law on Notarial Acts, adopted in Delaware, the District of Columbia, Kansas, Minnesota, Montana, Nevada, New Hampshire, New Mexico, Oklahoma, Oregon and Wisconsin, and 2) the Uniform Recognition of Acknowledgments Act, adopted in Alaska, Arizona, Colorado, Connecticut, Illinois, Kentucky, Maine, Michigan, Nebraska, North Dakota, Ohio, South Carolina, Virginia, West Virginia and U.S. Virgin Islands.

¹¹² NATIONAL E-NOTARIZATION STANDARDS, Standard 13.

¹¹³ *Id.* Standards 14 and 15.

Reprinted with permission from *Foundations of Digital Evidence*, available for purchase from: <http://apps.americanbar.org/abastore/index.cfm?section=main&fm=Product.AddToCart&pid=5450053> 2008© by the American Bar Association. All rights reserved. This information or any or portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

Provisions for the electronic Certificate of Authenticity are contained in the Model Notary Act of 2002:

On a notarized electronic document transmitted to another state or nation, electronic evidence of the authenticity of the official signature and seal of an electronic notary of this [State], if required, shall be attached to, or logically associated with, the document and shall be in the form of an electronic certificate of authority signed by the [commissioning official] in conformance with any current and pertinent international treaties, agreements, and conventions subscribed by the government of the United States.¹¹⁴

The Model Notary Act also includes the content for an authentication certificate for electronic documents.¹¹⁵

North Carolina and Virginia have enacted the first laws specifying how their respective Secretaries of State must issue electronic certifications and apostilles.¹¹⁶ North Carolina's law follows the *Model Notary Act*, while Virginia's law tracks more closely to the National e-Notarization Standards.

3. E-Apostilles and The Hague Conference on Private International Law. To effectuate legal recognition of notarized documents that cross national borders, The Hague Conference on Private International Law (the "Hague") oversees the Convention

Abolishing the Requirement of Legalization for Foreign Public Documents (the “Convention”), a treaty currently subscribed to by 93 nations and over 100 Competent

¹¹⁴ *Model Notary Act*, *supra* note 78, at § 20-1.

¹¹⁵ *Id.* § 20-2.

¹¹⁶ N.C. GEN. STAT. § 10B-38 *et seq* (LexisNexis 2006); VA. CODE ANN. § 47.1-11.1(A) (LexisNexis 2007).

Reprinted with permission from *Foundations of Digital Evidence*, available for purchase from: <http://apps.americanbar.org/abastore/index.cfm?section=main&fm=Product.AddToCart&pid=5450053> 2008© by the American Bar Association. All rights reserved. This information or any or portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

Authorities.¹¹⁷ The Convention eliminates the often time consuming and costly requirement of diplomatic and consular authentication and replaces its burdensome method of requiring a chain of authenticating certificates beginning with the signature and seal of the issuer and several intermediary authorities.

The Hague has determined that the spirit and letter of the Convention do not pose an obstacle to usage of technology, and that the interpretation of the Convention in the light of functional equivalence permits competent authorities to issue electronic apostilles.¹¹⁸ For e-apostilles and electronically notarized documents, the Hague has established an e-document authenticity standard based on a non-repudiation standard. Accordingly, an electronic public document with an electronic notarization or an electronic apostille must be independently verifiable, and must be invalidated if it is improperly modified.¹¹⁹ These requirements do not require the use of a particular technology.¹²⁰

The Hague encourages all competent authorities to issue e-apostilles.¹²¹ Under the

auspices of the Electronic Apostille Pilot Program (e-APP) between the Hague Conference on Private International Law and the National Notary Association (USA), on February 15, 2007, Kansas became the first competent authority to send an e-apostille

¹¹⁷ For the current official list of member and non-member states party to the convention, refer to the list at <<http://www.hcch.net/>>.

¹¹⁸ FIRST INTERNATIONAL FORUM ON E-NOTARIZATION AND E-APOSTILLES, *supra* note 18, Conclusion 1.

¹¹⁹ *Id.* Conclusions 15 and 18.

¹²⁰ *Id.* Conclusions 16 and 19.

¹²¹ *Id.* Conclusion 13.

Reprinted with permission from *Foundations of Digital Evidence*, available for purchase from: <http://apps.americanbar.org/abastore/index.cfm?section=main&fm=Product.AddToCart&pid=5450053> 2008© by the American Bar Association. All rights reserved. This information or any or portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

attached to an electronically notarized document. Subsequently, Rhode Island and Belgium each adopted a completely electronic register under the e-APP. Colombia has become the first jurisdiction to implement both an electronic register and a system to issue *all* of its e-Apostilles electronically.¹²²

¹²² Information concerning the e-APP and the implementation of electronic registers and electronic apostilles generally is available at <<http://www.e-app.info>>.

Reprinted with permission from *Foundations of Digital Evidence*, available for purchase from: <http://apps.americanbar.org/abastore/index.cfm?section=main&fm=Product.AddToCart&pid=5450053> 2008© by the American Bar Association. All rights reserved. This information or any or portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.