

Notaries and Electronic Notarization

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Draft

This is the final copy of the Resources Page for the E-Notarization Technical Committee

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The Civil Law Tradition and History

In many countries, notaries put private transactions in proper legal format, authenticate them, and record them. They often must be graduates of law schools. And in many countries, the government limits the number of positions. A very competitive exam is used to determine who could fill such vacancies as do occur. Thus, in these jurisdictions, notaries are more prestigious. In Japan, notaries are frequently former judges and prosecutors. [Clos97][Val99]

These notaries are similar to the Roman tabelliones who drafted deeds and wills. Later in Roman history, tabelliones were allowed to register acts directly into public archives without a court proceeding. [Clos97][Val99]

The Modest Role of the American and Scottish Notary

American notaries' duties were always modest. At one time, they archived documents, and in many states could serve as a kind of public stenographer, taking the document down as it was dictated. (Some state statutes, including California, still give notaries the power to "take" documents.) Another obsolete power is to verify the condition of shipped goods, once important for transatlantic commerce in colonial times. Washington State has given the notaries the power to "certify" that something occurred. [Clos97][Val99] Other states give notaries the authority to solemnize marriages, inventory bank deposit boxes, and take renunciations of doweries. [Jac96] also noted that Congress repealed the requirement that trademark applications and some other federal paperwork be notarized.

The duties of the notary in Scotland are also modest--their services being required in filing affidavits related to divorce and matrimonial homes. [BRA2000]

However, the "core duty" is to insure that a person who signs the document is the person purported, is aware and is not under obvious duress. In some states, another duty is to verify that the person has authority to sign the document. This might include checking a power of attorney or partnership agreement. However, other states such as California removed this function. This creates a problem. Sometimes, attorneys in state A insist that a notary in state B certify capacity according to the forms of state A. [Val99]

Other Potential Duty for the Notary

[Val99] also points out the National Notary Association notes the following additional functions that would be useful in interstate and foreign commerce:

1. certifying facts about adoptive parents for foreign adoptions
2. certify that a pensioner receiving a foreign pension is still alive
3. certifying true copies of documents
4. certifying photographs for renewing a foreign passport
5. certifying age for ordering products such as cigarettes

[Kor99]also observes that other nations often require suitable validation of foreign documents including the transfer of real estate, transfers of corporate shares, wills, trusts, [Open2000] argues for the use of standard messages to be used to add people to electronic mailing lists.

Doctors taking the United States Medical Licensing Exam must have a notarized photograph with a notary seal. Originally, the language, "I certify that the photograph and signature on this form accurately apply to the person named above." Unfortunately notaries did not have the statutory authority to so certify. However, the National Board of Medical Examiners and the National Notary Association worked out the language:

"I certify that on the date set forth below the individual named above did appear personally before me and that I did identify this applicant by (a) comparing his/her physical appearance with the photograph on the identifying document presented by the applicant and with the photograph affixed hereto, and (b) comparing the applicant's signature made in my presence on this form with the signature on his/her identifying document." Mail Order tobacco companies use notaries to "verify" age using the following contortion. They have the notary identify the purchaser, and copy the age onto the form. California statutes also provides that notary public check identifying information and ages in jurat's against the documents. [Val99]

Electronic Notary Statutes

Florida and Utah have already created statutes authorizing "electronic notaries"who would certify digital signatures [Val98], [Lex002]) These became Florida statutes section 117.20.

However, Florida repealed this section in 1998 [West02]. To become an electronic notary, the person would have to be commissioned as a regular notary and be issued a private/public key by a certification authority. The Florida Secretary of State would "amend" their certificate. Note, that such notaries would still have to have the person personally appear and keep a sequential journal of all acts performed.

Arizona also established an electronic notarization. (Title 41, Chapter 2, Article Three, Arizona Revised Statutes) [Arizona 2002]

Arizona's statute provides for notarization in the presence of the "electronic notary.

An electronic notarized document prepared in the presence of the notary is required by the statute to contain

1. the document
2. time and date stamp
3. an electronic notary token
4. signature or mark affixed to the document by the signer
5. date that the electronic notary commission expires

The electronic notary would have to keep a public record of their acts.

It also allows the electronic notary to give a person a token by which they can later notarize their own documents without going to the notary again. The electronic notary would be responsible for ensuring that the party requesting one understands the significance of their "notary service electronic signature certificate."

When the person uses their notary service electronic certificate, it would contain:

1. the document itself
2. the notary service token given to them by their notary
3. a time stamp provided by an "approved time stamp token provider"

The statute also provides for electronic acknowledgments, jurats, and oaths or affirmations.

[Val99] also notes the relationship between notaries and certificate authorities, and notes that Verisign uses notaries to issue its "highest class of digital ID." Puerto Rico [Garc00] has its Department of State register certificate authorities, and has them audited regularly by both accountants and experts in computer security.

The certificate authority must check that the person

- a. is the party they purport to be
- b. they are an authorized agent
- c. the information is correct
- d. the subscriber has an appropriate and working private key

The Department can order the certificate authority to revoke certificates when they do not comply with the law and pose a risk on those who might rely on them. The certificate authority might set maximum limits of liability.

Proposals for a "Cybernotary"

The American Bar Association's Information Security Committee conceived of a "CyberNotary" who would have both computer and legal specialist. They would be similar status to the Latin notaries and whose main purpose would be facilitating international commerce [Val99][Jac96].

[Clos97] conceives that the cybernotary role "would be to bind the private key of the particular sender with the public key of the intended recipient" and to envelope the entire transaction in an "umbrella of trust." [Clos97] also conceives that the cybernotary would verify the financial responsibility and legal capacity of the parties--leading to the requirement that electronic notaries be attorneys. [BRA2000] advocates Scottish cybernotaries to verify identity of the parties for electronic commerce.

[Kor99] conceives that the Cybernotary can authenticate a document

1. validating its legal contents
2. validating the digital signature
3. validating the identity of the signer
4. validating the capacity of the signer
5. validating the authority of the signer
6. and including the validation of the digital certificate

For example, when an electronic power of attorney is executed and digitally signed before a CyberNotary, the CyberNotary will cause an authentication message to be appended to the power of attorney validating its legal contents, the digital signature used to sign it, as well as the identity, capacity and authority of the signing party to execute it and the digital certificate used to certify the signer's public key.

Miscellaneous Information

Florida also created a "civil-law notary" who must be a member of the Bar, and who could issue "authentic acts." This certifies not only documents, but transactions, events, conditions or occurrences. (FLA STAT 118.10) This is a separate title from both regular notary or cybernotary. [West02] Also, the Secretary of State is authorized to issue a certification of a particular civil law notaries which explains the legal meaning of the civil-law notarie's certification.

On a related subject, [Val99] noted that many of the state statutes restrict notarial fees to very low amounts They also require very small surety bonds. State set a required bond that ranges between \$500.00 and \$15,000. no more than a thousand dollars [Clos97][Val99]. No state requires errors and omissions insurance [Clos97]. In some cases, the amount of these fees have not changed since the state joined the Union.

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non-Normative

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