

A Position on Misleading Usage of Notary Terms in the Electronic Age

A Position Statement from the
NATIONAL NOTARY ASSOCIATION
A Nonprofit Educational Organization



In our highly complex and regulated society, the public often depends on the precise definition of words. Some words affect matters of such great consequence that tampering with a definition that is well established in the public consciousness can have catastrophic repercussions.

For example, imagine the impact on mariners if the U.S. Weather Service redefined gale from a wind of 32 to 63 miles per hour to one of 64 to 100 miles per hour without making a public announcement. Currently, the word notarization is undergoing a similar type of dangerous redefinition in the electronic arena. Notarization denotes the authenticating process of documents, a precisely defined procedure that has legal ramifications and protects consumers and their valuable property from document fraud.¹

Notarization, Notary, and related terms are being co-opted by certain private companies and state legislatures and applied to processes that have nothing to do with valid, legally recognized notarization. These new processes either do not involve state-commissioned Notaries at all or they violate key principles involving trusted third parties, principles that form the bedrock of commerce and law.

The repercussions of this verbal misappropriation can be devastating to consumers because, believing they are receiving certain protections from a process misrepresented as notarization, they may instead find themselves victimized by loss of valuable personal and real property without the legal assurances offered by valid notarization.

The National Notary Association encourages the development of electronic technologies to simplify traditional paper transactions or invest them with a higher level of security; nevertheless, we insist that in the course of utilizing these technological developments the essential meanings of the terms Notary and notarization should not be eroded or compromised by entities intent on flouting long-standing principles of notarization by using these terms to advertise services that provide negligible or illusory safeguards against fraud.

Inaccurately referring to procedures as notarization when, in fact, they are not performed by duly government-screened and commissioned Notaries disregards principles of Notary law that deter fraud; doing so is as risky to the public welfare as redefining pasteurization as the process of pouring raw milk through a sieve rather than super-heating it to kill harmful germs.

Fundamental Components of Notarization

In order to fully appreciate the harm caused by misleading usage of the term notarization it is necessary to understand the fundamental components of a traditional notarial act. Briefly explained, there are five essential steps in an acknowledgment;² acknowledgment is the notarial act most often used to authenticate documents of great monetary value:

- **Personal Appearance:** The document signer must appear in person before, and communicate with, the Notary Public, face to face, in the same room. Physical presence allows the Notary not only to identify the signer, but also to make observations and commonsense judgments that the individual appears willing and aware.
- **Identification:** The Notary must positively identify the document signer beyond a reason-

able doubt, either through personal knowledge of the individual's identity, the sworn vouching of a personally known credible witness, or reliable identification documents.

- **Acknowledgment by Signer:** Personal appearance and identification are meaningless without a context, and it is the signer's active acknowledgment of a particular signature, document, and transaction that provides the context.
- **Lack of Duress:** Integral to the acknowledgment is the Notary's observation that the signer was not under duress or direct physical threat at the hands of a third party.
- **Awareness:** Essential as evidence of the signer's intent is the Notary's observation and judgment that the signer appears to be conscious and aware at the time of signing.

Of the five components of notarization listed above the first is the most critical, the signer's personal appearance before a Notary at the time of notarization; without personal appearance the other four steps cannot be effectively implemented. A great deal of the forged deeds and car titles filed across the United States are the result of Notaries who dispensed with the personal appearance requirement due to coercion or misguided attempts at saving time. As a trusted, impartial officer commissioned by a state government, the Notary must screen signers not only for identity, but also for awareness and lack of duress.

The most dangerous and potentially harmful misuse of the terms Notary and notarization include their application to processes that do not require personal appearance by the signer before a Notary. Examples of these mislabeled processes follow.

Corporate License

Increasingly, American corporations offering Public Key Infrastructure (PKI)³ management services have been using the terms Notary and notarization to describe their services. These processes typically involve the time-date stamping of text, and they amount to notarization only in the metaphorical sense. These services do not provide the assurances associated with official notarial acts by a state-commissioned Notary Public and, for that reason, they lack the legal authority of proper notarization, which is "... to provide prima facie evidence of the truth of the facts recited in the certificate and to establish the genuineness of the signatures attached to an instrument."⁴

One company, for example, offers "tamperproof notarization of any digital data" through the patented Digital Notary® Service: "Digital Notary Service 'notarizes' any digital content by creating a small digital fingerprint of the target data and sending it to the company to be registered and time-stamped. A unique Digital Notary Record is then sent back to the requesting client for later use in validating the notarization."⁵

Another entity, the Electronic Notebook Project, is a collaboration among three national laboratories, which offers a method for "notarizing" data that they describe in the following manner:

At the user's option a notebook page can be notarized automatically or at the press of a button. The notarization is done electronically in a way that the Notary never sees the information on the page (which otherwise would

be a potential espionage hole). Regularly, a physical (paper) copy of a hash of all the notebook's notarized pages is notarized and kept by Records Management to provide a second level of proof that entries have not been tampered with.⁶

Use of the words notarize and notarization above bear no semblance whatsoever to the manner in which these terms have been traditionally defined by state law. These misguided applications of the co-opted terms are in reference to the process of time-stamping hashes of electronic text.

At no point in the above-described processes is the signer required to be present before a trusted third party to assert the truth of the facts in the document and accept its purpose. Furthermore, these services do not require the presence of a commissioned Notary Public; nor do these processes result in the production of an official certificate executed by a Notary who has certified that the signer was present for verification of identity, willingness, and awareness. While time-stamping has useful applications; namely, it provides a record of what a certain document looked like at a particular time, it falls short of providing consumer protections inherent in the notarial process.

One high-tech firm "commissions" its own Notaries to work in an elaborate "Web of Trust System," the requirements of which are summarized as follows:

- You need to obtain 100 points in order to become a Notary. If there is a roadshow passing near you and a Thawte employee identifies you personally, you will be issued 100 points in one go. 100 points will also be issued to those people who enroll via the remote authentication method....
- In order for your identity to become 'trusted,' you need to obtain 50 points. A face-to-face meeting with a Notary will result in the Notary giving you between 10-35 points depending on the number of points that the Notary is able to give. Therefore you will have to see between two and five notaries in order for your identity to become 'trusted'....⁷

Another company embraces the term Notary in its very name; DomainNotary.com provides digitally signed certificates guaranteeing the authenticity of appraisals of Web domain names. To strengthen the public perception that the company is associated with traditional Notaries, DomainNotary.com's Website features a masthead with a picture of a Notary's embosser seal impressing a sheet of paper.

Deceptive and misleading advertising is rampant in the high tech industry, and it is not exclusive to disingenuous use of the term Notary. The Federal Trade Commission reports receiving more consumer complaints regarding high tech ads than any other industry.⁸ The common denominator of many of these ads is an attempt to trade on the cachet of the Notary Public. Around the world, Notaries are respected as trusted third parties who lend integrity and reliability to sensitive commercial and legal transactions. Evidently, the aura of the Notary has proven irresistible to marketers.

Corporations and individuals who have not been commissioned by the state are usurping

the term Notary in an endeavor to cloak themselves in the aura and authority of the Notary Public; in doing so they either willingly violate the law or tread dangerously close to the line drawn by state legislatures to demarcate unlawful deceptive practices. Laws in many states expressly prohibit non-Notaries from representing themselves as state officials authorized to perform notarial acts. The following provision of the California Government Code is typical:

It shall be a misdemeanor for any person who is not a duly commissioned, qualified, and acting notary public for the State of California to do any of the following:

- (a) Represent or hold himself or herself out to the public or to any person as being entitled to act as a notary public.
- (b) Assume, use or advertise the title of notary public in such a manner as to convey the impression that the person is a notary public.
- (c) Purport to act as a notary public.⁹

Use of the word Notary (like attorney) is circumscribed by law due to the potential for exploitation. Blatantly illegal or not, corporate co-opting of the term Notary promises to be a growing source of confusion for the general public. Commercial services and processes that are held out to the public as notarization are easily mistaken for state-sanctioned notarization by unknowing citizens who, in turn, will not be accorded the advantages and legal protections of true notarization.

Governmental License

Another development is adding to the current state of confusion in the marketplace and it is potentially more harmful to the public than deceptive misuse of sensitive terms by corporate marketers; that is, poorly thought-out redefinition of notarial procedures by hasty lawmakers.

In the state of Arizona, for example, a law was signed in April of 2000 allowing “electronic notarization” outside the presence of a Notary Public.¹⁰ Electronic documents can be notarized in a way that doesn’t require the presence of a Notary. Instead, the signer need only affix a Notary Service Electronic Certificate — i.e., a digital signature based on a digital certificate issued by a Notary. Additionally, an electronic time stamp from an Approved Time Stamp Provider is required. As a result, all the guarantees heretofore afforded by a signer’s in-person appearance before a Notary (identification, lack of duress, awareness, etc.) are forgone.

Several other states, including Minnesota,¹¹ Nevada,¹² and Missouri¹³ have taken the equally dangerous step of defining any use of a digital certificate in creating a digital signature as equivalent to appearance before, and notarization by, a Notary.

The National Notary Association has steadfastly opposed any retooling of the definition of notarization that weakens consumer protections.¹⁴ The Association holds that, to protect the public from document fraud, the fundamental principles of notarization must remain in effect regardless of the technology used to create a signature. Sadly, the allure of e-commerce and the rush to adopt new technology has begun to compromise the integrity of certain important official documents and commercial transactions.

The National Notary Association and many other prominent observers of Notary law and e-commerce believe that the increasing complexity of electronic transactions necessitates more involvement by trusted third parties, not less.¹⁵ The opportunities for fraud will increase rather than

diminish as technology grows more complex. As a result, Notaries will become more important than ever in deterring impostors and assuring all parties to a transaction that the signer was not coerced or incompetent at the time of signing. Rather than reacting to advancing technology by curtailing procedures that deter fraud, the more reasoned and responsible approach is to satisfy the Notary Public's need for technical training. Any definition of electronic notarization that eradicates fraud-detering principles which require in-person screening of electronic signers by a Notary at the time of signing is a disservice to the public.

Additionally, much more clarity, honesty, and simplicity are needed in corporate boardrooms and legislative chambers in order for electronic documents and signatures to be embraced by the general public. Many leading observers believe that digital signatures and electronic records may prove to be so daunting to laypersons as to be rejected on a widescale.

For those who haven't noticed, the public at large has not yet rallied behind the concept of digital signatures. In fact, many people, if asked, probably do not understand how a digital signature works. Perhaps if the process of using digital signatures were easier, the masses might get behind the idea.¹⁶

Of course, the previously explained inappropriate uses of the terms Notary and notarization further exacerbate the public's confusion in grappling with terms like electronic signature and electronic notarization. Were the entities involved to desist from mischaracterizing services that are not true notarization, the public may come more speedily to an adequate understanding of, and acceptance of, these processes and their subtle distinctions — comprehension that is likely to result in prompt, full acceptance of electronic transactions.

Conclusion

There are few professional fields in which the precise meaning of words is more critical than in the field of notarization. When a Notary Public's certificate states that a document signer "personally appeared before me" and that the signer was "identified by me through satisfactory evidence," much depends on the truthfulness, accuracy, and precise definition of those declarations. The disposition of large fortunes and the resolution of civil and criminal lawsuits often hinge on the words in a notarial form, words which are regarded around the world as *prima facie* evidence of the facts they declare. In the field of notarization, the misuse of one word can be catastrophic.

It is one thing for a solitary Notary to misuse language and thereby violate the public trust, perhaps by declaring a complete stranger as personally known; it is quite another for language misuse to become institutionalized. This dangerous trend has taken root across the United States.

State governments are tolerating misleading use of the words Notary and notarization by corporate marketers. Such misuse confuses the public and often apparently violates state law against exploitative use of the title Notary. Worse still, state legislatures have been applying the term notarization to electronic processes that do not involve Notaries and that violate every time-tested precept of notarization. In the electronic arena, it seems that technology rather than consumer protection and principle is shaping much recent legislation.

The National Notary Association does not object to the enactment of new electronic procedures to authenticate documents; indeed, an update of its own *Model Notary Act*, to be published

in 2001, devotes a lengthy new article on commissioning Electronic Notaries and performing electronic notarizations.¹⁷ The National Notary Association, though, does object to misrepresenting services as notarization when in fact they do not adhere to universally accepted notarial principles and do not involve government-screened, commissioned Notaries.

Just as it would be a danger to the public health to redefine pasteurization in order to expedite the processing of raw milk, so it would be a danger to the personal rights and assets of all of us to redefine notarization in order to expedite the processing of valuable documents.

Notes

1. Notarization, according to Webster's Third New International Dictionary of the English Language Unabridged (G. & C. Merriam Co., 1976), is "...the act of a notary in authenticating a document or verifying it under oath." And a Notary, according to Black's Law Dictionary, is a "[P]ublic officer whose function it is to administer oaths; to attest and certify, by his hand and official seal, certain classes of documents, in order to give them credit and authenticity in foreign jurisdictions; to take acknowledgments of deeds and other conveyances, and certify the same; and to perform certain official acts, chiefly in commercial matters, such as the protesting of notes and bills, the noting of foreign drafts, and marine protests in cases of loss or damage," *Kip v. People's Bank & Trust Co.*, 110 N.J.L. 178, 164 A. 253, 254 (1933).
2. For a fuller discussion of the five essential components of an acknowledgment, see National Notary Association, *A Position on Digital Signature Laws and Notarization* (2000).
3. For a definitive explanation of Public Key Infrastructure, see David L. Gripman, *Electronic Document Certification: A Primer on the Technology Behind Digital Signatures*, 17 J. Marshall J. of Computer & Info. L. 769 (1999).
4. *Bernd v. Eu*, 100 Cal. App. 3d 511, 161 Cal. Rptr. 58 (1979); see also *Transamerica Title Ins. Co. v. Green*, 11 Cal. App. 3d 693, at 702, 82 Cal. Rptr. 915 (1970); and Cal. Evid. Code 1451 (1965).
5. Surety.com Inc., headquartered in Reston, Virginia, <<http://www.surety.com>>.
6. The Oak Ridge National Laboratory, the Lawrence Berkeley National Laboratory and the Pacific Northwest National Laboratory have developed the "...electronic notebook, which allows scientists located across the country to share the record of ideas, data, and events of their joint experiments and research programs." Such a notebook was seen as a necessary piece of infrastructure now that online instruments and real-time conferencing enable remote scientists to collaborate on scientific tasks. The notebook will allow scientists "...to interoperate and to share components for input and display of sketches, text, equations, images, graphs, and other data types, as well as tools for authentication and other services." See <<http://www.csm.ornl.gov/enote/>>, and <www.epm.ornl.gov/~geist/java/applets/enote/>.
7. Thawte Certification, a VeriSign company, "...is a global provider of digital certificate products, services and solutions that create security, privacy and authentication in electronic commerce." See,

<<http://www.thawte.com/support/wot/wot.html>>.

8. See Edward Iwata, *Officials Say Deceptive Tech Advertising on Rise*, USA Today, May 29, 2001.

9. See Cal. Gov. Code § 8227.1 (1999).

10. See Ariz. Rev. Stat. Ann. § 41-356 (2000).

11. See Minn. Stat. Ann. § 325K.23 (2000).

12. See Nev. Admin. Code § 720.770 (1999).

13. See Mo. Rev. Stat. § 28.666 (1998).

14. See National Notary Association, *A Position on Digital Signature Laws and Notarization*, *supra* note 2.

15. See, for example, Glen-Peter Ahlers, Sr., *The Impact of Technology on the Notary Process*, 31 J. Marshall L. Rev. 911, 912 (1998).

16. See Paul A. Greenberg, *E-Signatures: Unsigned, Unsealed, Undelivered*, E-Commerce Times, June 5, 2001.

17. The revised *Model Notary Act of 2001* is based on the influential *Model Notary Act of 1984*, which was an update of the National Notary Association's *Uniform Notary Act of 1973*, drafted with the assistance of Yale Law School.

About the National Notary Association

Since 1957 the National Notary Association has been the primary source for Notary education, service and advocacy in the United States.

As a clearinghouse for information on notarial laws, practices and procedures, the NNA is the preeminent publisher of Notary materials including the recent *Notary Law and Practices*, a casebook for law students, *The National Notary* magazine and *Notary Bulletin* newspaper, the landmark *Notary Public Code of Professional Responsibility* and the *Model Notary Act*, which provides state lawmakers with a statutory prototype to use in updating their jurisdictions' Notary laws.

A strong proponent of new technologies that can improve traditional documentary transactions, the NNA believes that, regardless of technology, the essential functions of the Notary office and notarization must be retained to ensure that the fundamental principles of trust, impartiality and fraud deterrence are not compromised.

