

Securing the Vote:

The Role of Notaries Public in Absentee Voting

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NATIONAL
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INTRODUCTION

The 2024 general election has concluded, and the votes are in. It will not be long before legislators nationwide will focus on ways to improve the fairness, safety, security, and transparency of future elections. As policymakers tackle key issues — such as voter access and turnout, election misinformation and disinformation, election administration and oversight, and advancements in technology and cybersecurity — absentee voting is likely to emerge as a focal point in several of these discussions.

An often overlooked but crucial aspect of absentee voting is the role of Notaries Public. In eight states and one U.S. territory, Notaries play an important role in facilitating absentee voting. Voters from these jurisdictions who find themselves in another state during election season rely on Notaries in their current location to help them cast their ballots. However, conflicting state laws can create obstacles that make it difficult for Notaries to assist their visiting fellow Americans exercise their right to vote.

This paper explores the role of Notaries in absentee voting, the legal and practical challenges they encounter, and actionable solutions that can help improve the process.

THE NOTARY PUBLIC'S ROLE IN ABSENTEE VOTING

In the United States, each state creates the laws governing the conduct of elections. Some have crafted a role for Notaries Public to play in it. For example, in Wyoming, a voter registration application must be sworn before a Notary,¹ while in Mississippi and South Dakota, an application for an absentee ballot must as well.² This paper, however, primarily focuses on the role given to Notaries in Alabama, Alaska, Maine, Minnesota, Mississippi, Missouri, North Carolina, Oklahoma, and the territory of Guam to witness and certify the casting of absentee ballots.³

These jurisdictions have inserted the Notary Public into the absentee voting process to add a layer of security to balloting that takes place outside the locally supervised voting setting. Their laws do not necessarily require voters to only use in-state Notaries,⁴ nor do they disqualify Notaries of other states from providing absentee ballot services.

While the Notary's role varies by jurisdiction, the process may involve the Notary being asked to perform any or all the following functions:

¹ See Wyo. Stat. Ann. § 22-3-103(b).

² See Miss. Code Ann. § 23-15-627(2); S.D. Cod. Laws § 12-19-2.

³ See Ala. Code §§ 17-11-7(b), 17-11-8, 17-11-9; Alaska Stat. § 15.20.081(d), Guam Code Ann. tit. 3, § 10110; Me. Rev. Stat. Ann. tit. 21-A, § 754-A.2-3; Minn. Stat. Ann. § 203B.07 Subd. 3; Miss. Code Ann. § 23-15-631(c); 23-15-635(f); Mo. Rev. Stat. Ann. § 115.283; N.C. Gen. Stat. § 163-231(a)(6); Okla. Stat. Ann. tit. 26, §§ 14-108, 14-108.1A.

⁴ Alabama, Minnesota, and North Carolina authorize either one or two witnesses or a Notary or other officer authorized to administer oaths to witness the absentee ballot. Maine authorizes a Notary Public to witness a voter sign their ballot if the voter had the ballot delivered or returned by a third person other than the voter, or if the voter needed assistance reading and marking the ballot.

- Verify the identity of the voter.
- Witness the voter take the unmarked ballot out of the mailing envelope.
- Observe the voter mark the ballot in private.
- Certify that no one solicited the voter to vote for any candidate or issue.
- Watch the voter place and seal the marked ballot in an accompanying envelope.
- Witness the voter sign the ballot envelope.
- Place the voter under oath.
- Complete a certificate on the ballot envelope to evidence the notarial act.

CONFLICTING STATE NOTARY LAWS

It is commendable that the nine identified jurisdictions have incorporated Notaries Public into their absentee voting process. However, conflicting laws between these jurisdictions that authorize Notaries to perform absentee voting services and states where an absentee voter may request notarial services have created numerous barriers that are difficult for Notaries to overcome. We will discuss three in the paragraphs to follow.

No authority. The first challenge Notaries may face when approached by out-of-state voters seeking to cast their ballots is that their Notary laws may not authorize them to perform the notarial or non-notarial duties required by some states.

The U.S. notarial system is based on each state commissioning and regulating its own Notaries Public. Consequently, every state enumerates in statute the duties its Notaries Public may perform.⁵ The primary duties include taking acknowledgments, executing verifications on oath or affirmation,⁶ and administering oaths and affirmations.⁷ Depending on the state, Notaries are authorized to perform other functions.⁸

⁵ See, e.g., Ga. Code Ann. § 45-17-8(a); Mass. Gen. Laws Ann. ch. 222, § 15(a); Pa. Cons. Stat. Ann. tit. 57, § 302 “notarial act”; Utah Code Ann. § 46-1-6(1).

⁶ In some states, this notarial act may be variously described as taking or certifying an affidavit (Cal. Gov’t Code § 8205(a)(3); Va. Code Ann. § 47-1-12(iv)), performing a jurat (S.C. Code § 26-1-90(A)(3)), or administering an oath when it is necessary for the execution of a writing (Fla. Stat. Ann. § 117.03).

⁷ Many states distinguish between this act and the act of executing a verification on oath or affirmation (or affidavit or jurat). See, e.g., Iowa Code Ann. § 9B.2.5; Kan. Stat. Ann. § 53-5a04(a); Utah Code Ann. § 46-16(1); Va. Code Ann. § 47-1-12.

⁸ Most, but not all, states authorize Notaries to certify copies. Other lesser duties may be performed as well, such as verifying a vehicle identification number (Florida), issuing a subpoena (Massachusetts), calling a town meeting (Maine), and performing marriage ceremonies (several states).

In the jurisdictions where Notaries have a role in absentee voting, a Notary typically will be required to administer an oath to the voter or notarize the voter's signature on the absentee ballot envelope⁹ and sign a certificate to evidence the performance of the notarial act. These duties are usually within the Notary's wheelhouse.

The problem arises when Notaries are asked to perform notarial acts or certify certain matters in their official capacity with respect to absentee voting that are not expressly permitted under their states' Notary laws. For example, in Alaska, the notarial act required on an absentee ballot envelope — a signature witnessing — is not an official act that Notaries in all states are authorized to perform.¹⁰

Additionally, some states require Notaries to certify other non-notarial actions. For example, in Minnesota, a Notary who witnesses an absentee ballot is required to certify that:

- The ballot was displayed to the Notary unmarked.
- The voter marked the ballot in the Notary's presence without showing how it was marked.
- If the voter was physically unable to mark the ballot, the voter directed another individual to mark the ballot.
- If the voter was not previously registered, the voter provided proof of residence.¹¹

No state explicitly authorizes Notaries to certify these non-notarial actions in their official capacity,¹² while one state specifically prohibits Notaries from using their title or seal except to render notarial service as defined by its law.¹³

Therefore, although nine jurisdictions may authorize Notaries to perform certain notarial or non-notarial duties with respect to absentee ballots, the law of the state where an absentee voter seeks notarial services may not expressly permit Notaries to do so. As a result, a voter enlisting the services of an out-of-state Notary might be denied service.

⁹ The absentee ballot envelopes of Alabama, Missouri, and Oklahoma require a verification on oath or affirmation (affidavit or jurat), a notarial act Notaries of all states may perform. The Alaska absentee ballot envelope requires a signature witnessing.

¹⁰ Notaries in Alabama, Alaska, Arkansas, California, Connecticut, Louisiana, Nebraska, Nevada, New York, Ohio, Tennessee, Texas, and Virginia are not expressly authorized to perform a signature witnessing.

¹¹ See Minn. Stat. Ann. § 207B.207 Subd. 3. Mississippi and North Carolina have similar requirements. The 2020 Maine ballot envelope requires the witness or witnesses to check boxes if an aide assisted the voter, a third party other than the voter delivered or returned the ballot, or the witness was a municipal clerk.

¹² Montana and Washington authorize Notaries to certify the occurrence of an event or the performance of an act, which may permit Notaries of these states to certify these actions (see Mont. Code Ann. § 1-5-603(11)(a); Wash. Rev. Code Ann. § 42.45.010(8)).

¹³ See Cal. Gov't Code § 8207.

Notarial certificate. The second difficulty many Notaries face is that they may be unable to complete the certificate of notarial act on the absentee ballot envelope.

When a Notary Public performs a notarial act, the Notary must complete and sign a certificate that recites the facts of the notarial act.¹⁴ These facts include the jurisdiction, date, name of the person for whom the notarial act is performed, and type of notarial act (i.e., acknowledgment, verification on oath or affirmation, signature witnessing, etc.).

Legislatures typically enact statutory certificate forms for each notarial act.¹⁵ Depending on the state, Notaries must adhere either to substantial or strict compliance with these forms. In the states that require substantial compliance, a Notary may use certificate forms that are largely similar to the statutory ones.¹⁶ However, the one state with strict compliance rules mandates that Notaries use the exact statutory forms without deviation.¹⁷

Even when authorized to perform the notarial act, Notaries may encounter notarial certificates on ballot envelopes that substantially differ from the statutory forms in their state¹⁸ or include variations that prevent Notaries adhering to strict compliance rules from completing them. Notaries even may find that some ballot envelopes fail to include a notarial certificate to indicate that a notarial act was performed.¹⁹

Notary seal. The third and final predicament relates to the Notary Public seal or stamp. Minnesota and North Carolina require Notaries who witness an absentee ballot to affix their official seals on the ballot envelope.²⁰ Several states, however, do not require Notaries to use an official seal or stamp when performing a notarial act on a paper document.²¹

¹⁴ See, e.g., Iowa Code Ann. § 9B.15.1; Me. Rev. Stat. Ann. tit. 4, § 1916.1; Mont. Code Ann. § 1-5-609(1); Okla. Stat. Ann. tit. 49, § 118.A.

¹⁵ See, e.g., Ariz. Rev. Stat. Ann. § 41-265; D.C. Code Ann. § 101231.15; N.H. Rev. Stat. Ann. § 245-B:8; N.M. Stat. Ann. § 14-14A-15.

¹⁶ See, e.g., Ala. Code § 35-4-29; Conn. Gen. Stat. Ann. § 1-60; Mass. Gen. Laws ch. 222, § 15(b), (c), (d), (e); N.J. Stat. Ann. §§ 52:7-10.12, 52:7-19.b; 52; N.C. Gen. Stat. §§ 10:41, 10-42, 10-42.1, 10-43.

¹⁷ In California, a jurat, acknowledgment, and proof of execution by subscribing witness certificate must be in exactly the form prescribed in statute (Cal. Gov't Code § 8202(d); Civ. Code §§ 1189(a)(3), 1195(e)).

¹⁸ The North Carolina absentee ballot envelope contains notarial certificate wording that reads as follows: "The voter (name of voter) appeared in person and was positively identified on (date)." This certificate does not indicate any known type of official notarial act (identification of a signatory is a component part of several notarial acts but not a notarial act in itself). Notaries in states operating under substantial or strict compliance would not be able to complete this form.

¹⁹ Minnesota law requires the envelope to contain a statement to be signed and sworn by the absentee voter indicating the voter met all the requirements for voting absentee (Minn. Stat. Ann. § 207B.207 Subd. 3), but there is no indication where the Notary signs that the Notary performed a verification on oath or affirmation or a jurat. In fact, there is nothing to indicate the Notary performed a notarial act at all. The 2020 Maine ballot envelope, the only available envelope that could be analyzed for this paper, has spaces for the witness or witnesses to sign, print their names, and indicate their titles, if any. But like Minnesota, there is no certificate of notarial act.

²⁰ See the instruction on the Minnesota absentee ballot envelope; N.C. Gen. Stat. § 163-231(a).

²¹ Connecticut, Kentucky, Louisiana, Maine, Michigan, New York, and Vermont do not require Notaries to use a seal when notarizing a paper document, although use of a seal is not prohibited.

If a Notary from one of these states fails to affix a seal on an absentee ballot envelope, the ballot may be rejected or face legal challenge.²²

Conversely, the Alaska, Maine, and Mississippi absentee ballot envelopes do not require nor provide space for a Notary seal, and this unavoidably creates problems for Notaries whose laws require them to use a seal.²³ In addition, the Missouri envelope contains a square box that will not accommodate a rectangular Notary seal, which poses a challenge for most Notaries who use a rectangular seal. And, if their Notary laws require the imprint of the seal to be affixed legibly, Notaries handling the Alaska, Maine, Mississippi, and Missouri envelopes will find insufficient, if any, space to place their seals without covering text or signatures.²⁴

RECOMMENDED SOLUTIONS

Conflicting state rules governing notarial duties, certificates, and seals create challenges that hinder Notaries from assisting with absentee ballots. These inconsistencies also frustrate voters who are trying to make their voices heard through their votes. To ensure Notaries can support absentee voters and the absentee voting process, several potential solutions should be considered.

By way of introduction, any first step toward making the absentee voting process involving the Notary Public more workable must be for legislators to educate themselves on the differences in state Notary Public laws.²⁵ When policymakers overlook these differences, they create impractical requirements that Notaries outside their own state cannot meet. A thorough understanding of the varied state laws governing Notaries is foundational to the recommendations that follow.

Notary duties. The first and most important issue is to ensure that Notaries of all states may perform the notarial and non-notarial duties on absentee ballot envelopes.

²² Minnesota's White Bear Township's FAQ answers the question, why was my absentee ballot rejected? by stating the envelope "must include witness name, witness's MN address and signature, or a notary (sic) information with an official seal or stamp"). <http://www.ci.white-bear-township.mn.us/FAQ.aspx?QID=133>. Last viewed November 11, 2024.

²³ See, e.g., Ala. Code § 36-20-72(a); Colo. Rev. Stat. Ann. § 24-21-515(2); 5 ILCS § 313/3-101(a); Neb. Rev. Stat. § 64-210(2); Ohio Rev. Code Ann. § 147.04; Utah Code Ann. § 46-1-16(3)(b).

²⁴ "A notary shall affix the notarial seal in a manner that does not obscure or render illegible any information or signatures contained in the document or in the notarial certificate" (Utah Code Ann. § 46-1-16(5); see, e.g., Cal. Gov't Code § 8207; 5 ILCS § 312/6-103(c); Ill. Admin. Code § 176.500 b); Mo. Rev. Stat. Ann. § 486.730.4; Neb. Admin. Code tit. 433, § 6.002.02(A); N.C. Gen. Stat. § 10B-20(b)(3)).

²⁵ The National Notary Association's U.S. Notary Reference comprehensively sets forth all relevant laws and current procedures for each U.S. state and the District of Columbia. The Reference may be freely accessed at <https://www.nationalnotary.org/knowledge-center/news/us-notary-reference>.

First, we will address the notarial act, with particular attention to Alaska, Maine, Minnesota, and North Carolina. Alaska legislators who familiarize themselves with the Notary laws of other states may notice that many states do not allow Notaries to perform the notarial act of signature witnessing but all states permit Notaries to take a verification on oath or affirmation.²⁶ To address this, Alaska could consider replacing the notarial act on its absentee ballot envelope with a verification on oath or affirmation. Unlike Alaska, the Maine, Minnesota, and North Carolina absentee ballot envelopes lack any specified notarial act,²⁷ but the solution is the same: incorporate a verification on oath or affirmation on the ballot envelope.

Second, we turn to the non-notarial actions that Maine, Minnesota, Mississippi, and North Carolina require Notaries to certify in their official capacity. Two potential solutions may be considered. First, by understanding Notary Public laws of all states, policymakers in these four states can explore alternative ways to address the issue. One possible way would be to have the absentee elector, rather than the Notary, sign a sworn written statement regarding these actions on the ballot envelope, with the Notary then notarizing the elector's signature.

A second, more controversial and difficult approach would be for all state legislatures to enact an exception authorizing Notaries to perform the non-notarial witnessing duties related to absentee voting.²⁸ Critics may argue that an exception for absentee voting sets a precedent that could invite further exceptions. But it is not uncommon for states to expand the functions of Notaries when the needs of society change or evolve.²⁹ Furthermore, certifying actions such as the voter taking the unmarked ballot out of the envelope and placing the marked ballot back into it are consistent with the Notary Public's official and impartial witnessing role. Thus, the need for this exception is both justifiable and compelling, given that the right to vote is so fundamental to our democracy.³⁰

Notarial certificates. In this case, we must deal with the outlier, California. California no doubt welcomes many absentee voters to the state during election season, but it has effectively closed the door on California Notaries assisting them with their absentee ballots.

²⁶ For the different ways states name this notarial act, see note 6, *supra*. For a list of the states that do not authorize Notaries to perform signature witnessings, see note 10, *supra*.

²⁷ See notes 18 and 19, *supra*.

²⁸ The exception might read, "Notwithstanding any other provision of law to the contrary, a notary public may perform any services related to the witnessing and casting of an absentee or vote-by-mail ballot."

²⁹ Recent examples include Montana, Virginia, and Wyoming adding "verifications of fact" and Montana, Nevada, and Tennessee authorizing Notaries to perform marriage ceremonies. In addition, several states that previously did not authorize Notaries to witness and attest signatures now authorize it.

³⁰ Florida requires its Notaries to witness vote-by-mail ballots (Fla. Stat. Ann. § 117.05(2)(b)) and several others prohibit Notaries from charging a fee for services relating to absentee voting or administering an oath related to a person's right to vote (see, e.g., Cal. Gov't Code § 8211(d); Mass. Gen. Laws Ann. ch. 222, § 23; Wis. Stat. Ann. § 887.02(2)).

The central issue is that the California statutory requirements for notarial certificates preclude California Notaries from completing the certificate forms found on today's absentee ballot envelopes. Among other requirements, a California-compliant notarial certificate must contain a boxed consumer notice at the top of the certificate that contains no fewer than thirty-six words,³¹ but absentee ballot envelopes do not contain the notice and lack the space needed to include it.

What are some ways to address this problem? The California Legislature could consider creating an exception authorizing California Notaries to complete other states' verification on oath or affirmation or jurat certificate forms. The advantage of this solution is that there is precedent for it. California law already permits a California Notary to complete an acknowledgment certificate required by another state if certain conditions are met.³² The drawback is that it is a partial solution. It would only apply to four of the jurisdictions that incorporate a jurat certificate on their absentee ballot envelopes.³³ Secondly, the Legislature could enact the exception suggested in the previous section,³⁴ which would enable California Notaries to provide absentee ballot services and complete notarial certificate forms for the nine jurisdictions with absentee voting procedures that involve a Notary.

Notary seal. This brings us to the issue of the Notary seal. We address first Minnesota's and North Carolina's seal requirement and the states that do not require Notaries to use a seal.³⁵ It is highly likely that the interstate recognition laws for notarial acts in Minnesota and North Carolina would uphold the validity of the notarial act on an absentee ballot omitting a Notary seal.³⁶ However, a simpler solution that would not test interstate recognition laws would be to add the instruction, "Notary Seal (if required)" on the ballot envelope where the seal or stamp is to be placed, as is done in Missouri. In North Carolina, the statute also would require this change.³⁷

³¹ "A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document" (Cal. Civ. Code §§ 1189(a)(1), 1195(c); Gov't Code § 8202(b)).

³² Civil Code § 1189(c) reads, "On documents to be filed in another state or jurisdiction of the United States, a California notary public may complete any acknowledgment form as may be required in that other state or jurisdiction on a document, provided the form does not require the notary to determine or certify that the signer holds a particular representative capacity or to make other determinations and certifications not allowed by California law."

³³ While this solution is a partial fix for absentee voting, its utility would extend to jurat certificate forms on documents in all other contexts, including law, education, medical and healthcare, real property, manufacturing, and trade, to name several.

³⁴ See note 28, *supra*.

³⁵ See note 21, *supra*.

³⁶ In Minnesota, a notarial act performed by a Notary Public of another state has the same effect as a notarial act performed by a Minnesota notarial officer (Minn. Stat. Ann. § 358.61 Subd. 1), and the signature and title of a Notary Public conclusively establishes the authority of the officer to perform the notarial act (Minn. Stat. Ann. § 358.61 Subd. 3). In North Carolina, "[a]ny notarial certificate made in another jurisdiction shall be sufficient in this State if it is made in accordance with federal law or the laws of the jurisdiction where the notarial certificate is made" (N.C. Gen. Stat. § 10B-40(e)).

³⁷ "The notary shall affix a valid notarial seal to the envelope..." (N.C. Gen. Stat. § 163-231(a)(6)).

Secondly, there is the issue that ballot envelopes in Alaska, Maine, and Mississippi neither require nor provide space for a Notary seal, while Missouri's envelope provides insufficient space for the seal. Notaries in forty-one other states and the District of Columbia must use a Notary seal. Although a notarial act performed without a seal by a Notary from a state that requires one is unlikely to invalidate the act on an absentee ballot envelope in Alaska, Maine, or Mississippi,³⁸ the Notary could still face the prospect of administrative discipline from their commissioning official for failing to comply with their own state's seal requirement. The same holds for the requirement to affix the seal legibly. Considering the serious potential consequences for the Notary, it is not too much to ask these four states to redesign their absentee ballot envelopes to accommodate a Notary seal. Or all states could enact the exception suggested above.³⁹

CONCLUSION

In our highly mobile society, absentee voters and their ballots travel far and wide. Each election cycle, Notaries all over the United States are asked to perform absentee ballot services for visiting electors who are away from their local polling places on election day, but conflicting state laws related to notarial duties, certificates, and seals present obstacles that prevent Notaries from assisting them. It is essential that policymakers understand the differences between their state's Notary laws and those of other states. With this understanding, they can begin to create solutions, or adopt the ones proposed in this paper, that make accessing notarial services easier for voters and Notaries alike.

³⁸ See Alaska Stat. §§ 09.63.050(f), 09.63.060(a); Me. Rev. Stat. Ann. tit. 4, § 1911.1, 3; Miss. Code Ann. §§ 25-34-23(1), (3).

³⁹ See note 28, *supra*.

ABOUT THE NATIONAL NOTARY ASSOCIATION

Established in 1957, the National Notary Association (NNA) is the leading professional authority on the American Notary office and is dedicated to educating, serving and advocating for the nation's 4.4 million Notaries. The NNA published the *Model Notary Act* and the *Model Electronic Notarization Act* to help lawmakers enact effective legislation, and created *The Notary Public Code of Professional Responsibility*, a standard for best practices and professional conduct. To learn more, visit NationalNotary.org.

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