



COMMONWEALTH of VIRGINIA

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February 2, 2009

The Honorable John T. Frey
Clerk of the Circuit Court for Fairfax County
4110 Chain Bridge Road
Fairfax, Virginia 22030-4048

Dear Mr. Frey:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issue Presented

You request guidance concerning electronic notarization of documents in Virginia. Specifically, you ask whether an electronic notarization of a document by a Virginia notary public prior to July 1, 2008, constitutes a valid notarial act in the Commonwealth of Virginia. You further inquire whether Virginia notaries have the authority to notarize documents electronically without the Secretary of the Commonwealth commissioning them as an electronic notary public.

Response

It is my opinion that prior to July 1, 2008, an electronic notarization of a document by a Virginia notary public would constitute a valid notarial act so long as the act was performed by a valid and commissioned notary public who complied with applicable laws and regulations. It further is my opinion that electronic notarial acts currently performed by Virginia notaries would constitute valid notarial acts under the Uniform Electronic Transactions Act, provided such acts comply with all other applicable statutes and regulations.

Background

You relate that your office has been recording electronic documents signed and notarized by electronic signatures in reliance upon § 17.1-258.4 and its predecessors statutes and upon the Uniform Electronic Transactions Act¹ (“UETA”), specifically §§ 59.1-485 and 59.1-489. You explain that the Virginia Notary Act² (the “Act”) authorizes the Secretary of the Commonwealth to commission electronic notaries public (“electronic notaries” or “electronic notary”), but no electronic notaries have been commissioned. You express concern that some may call into question the efficacy of previous electronic notarial acts. Further, you question the ability of notaries public to continue current and ongoing practices

¹See VA. CODE ANN. tit. 59.1, ch. 42.1, §§ 59.1-479 to 59.1-497 (2006).

²See VA. CODE ANN. tit. 47.1, §§ 47.1-1 to 47.1-30 (2005 & Supp. 2008).

of notarizing electronic documents and performing electronic notarial acts until such time as the Secretary exercises the statutory authority to commission electronic notaries public.

Applicable Law and Discussion

Section 47.1-3 of the Act authorizes the Governor to appoint “as many notaries as to him shall seem proper.” A 1978 Attorney General opinion recognized that the appointment of notaries is discretionary with the Governor.³ Any person acting as a notary in the Commonwealth “shall register with and be commissioned by the Secretary of the Commonwealth” and must comply with all provisions of the Act.⁴ The 2007 Session of the General Assembly amended the Act (the “Amendments”) adding sections to provide for commissioning and governing the conduct of electronic notaries.⁵ The Amendments were effective on July 1, 2008.⁶ Electronic notaries are authorized to exercise the same duties as conventional notaries.⁷ However, electronic notaries do so in the context of transactions involving electronic documents or signatures.⁸

To qualify for a specific commission as an electronic notary in the Commonwealth under Title 47.1, an applicant shall meet the requirements expected of all notaries.⁹ Additionally, an electronic notary must submit a registration form established by the Secretary of the Commonwealth which shall include “[a] description of the technology or technologies the registrant will use to create an electronic signature in performing official acts[.]”¹⁰ If the device used to create the applicant’s electronic signature is issued or registered through a licensed authority, the applicant must also provide the name of that authority, the source of the license and additional information necessary to identify the source of the device and its status and other pertinent information.¹¹ Section 47.1-16(E) requires a notary’s electronic signature and seal to conform “to generally accepted standards for secure electronic notarization.”

³ See 1977-1978 Op. Va. Att’y Gen. 279, 279.

⁴ Section 47.1-3 (Supp. 2008).

⁵ See 2007 Va. Acts chs. 269, 590, at 369, 369-75, 800, 800-06, respectively. Section 47.1-2 defines an “electronic notary public” or “electronic notary” as “a notary public who has been commissioned by the Secretary of the Commonwealth with the capability of performing electronic notarial acts under § 47.1-7 and has been sworn in by the clerk of the circuit court under § 47.1-9.”

⁶ *Id.* cl. 3, at 375, 806, respectively (mandating effective date).

⁷ See § 47.1-2 (Supp. 2008) (defining “notary public” to include “an electronic notary except where expressly provided otherwise”); see also § 47.1-12 (Supp. 2008) (authorizing each notary to take acknowledgements, administer oaths and affirmations, certify copies of documents, certify witness affidavits and depositions, and perform other acts specifically permitted by law).

⁸ Section 47.1-2 (defining “electronic notarial act” or “electronic notarization” as official act by notary under § 47.1-12 or as otherwise authorized by law involving electronic documents).

⁹ See § 47.1-4 (Supp. 2008) (requiring that notary “be (i) at least eighteen years of age, (ii) a citizen of the United States, (iii) able to read and write the English language, (iv) shall never have been convicted of a felony under the laws of the United States, this Commonwealth, or any other state ...; and, (v) shall otherwise be in compliance with the provisions of [Title 47.1]”).

¹⁰ Section 47.1-7(A)(2) (Supp. 2008).

¹¹ See § 47.1-7(A).

The Amendments, which provide authority for and a system to commission electronic notaries, are prospective. There is nothing to suggest that the General Assembly intended to interfere with existing rights.¹² Therefore, electronic notarial acts performed prior to the effective date of the Amendments would still be effective and recognized by law, provided all other requirements were met.¹³

Article 4.1, Chapter 2 of Title 17.1, §§ 17.1-258.2 through § 17.1-258.5 (“Article 4.1”), governs electronic filing of records related to clerks of court. Section 17.1-258.3 permits circuit court clerks to “establish a system for electronic filing in civil or criminal actions.” Further, § 17.1-258.3 requires clerks to establish certain procedures and security safeguards “as defined in [UETA],¹⁴ for transmitting notarized documents.” Section 17.1-258.4(B) provides that “[a]ny statutory requirement for a document to be notarized shall be deemed satisfied by the appropriately executed electronic signature of such notary pursuant to the Virginia Notary Act (§ 47.1-1 et seq.).”¹⁵

UETA is an act of general applicability and governs “electronic records and electronic signatures relating to transactions”¹⁶ and “shall be construed and applied to ... [f]acilitate electronic transactions consistent with other applicable law[.]”¹⁷ UETA contains specific exceptions for laws governing the creation and execution of wills, codicils, or testamentary trusts¹⁸ and certain provisions of Virginia’s Uniform Commercial Code.¹⁹ A transaction subject to UETA also is subject to other applicable substantive law.²⁰ Section 59.1-489 of UETA specifically addresses notarization and acknowledgment and provides that:

¹²Kesterson’s Adm’r v. Hill, 101 Va. 739, 742, 45 S.E. 288, 289 (1903) (“The general rule, in reference to all statutes, is that they are to be so construed as to have a prospective effect merely, and will not be permitted to affect past transactions, unless such intention is clearly and unequivocally expressed.”); *see also* § 47.1-2 (defining “electronic notarization” as official act by notary under § 47.1-12 “*or as otherwise authorized by law* that involves electronic documents” (emphasis added)); § 59.1-482 (applying UETA prospectively to any electronic signature “created, generated, sent, communicated, received, or stored on or after the effective date” of UETA). The 2000 Session of the General Assembly enacted UETA, which became effective July 1, 2000. *See* 2000 Va. Acts ch. 995, at 2216, 2222-27.

¹³*Id.*

¹⁴UETA defines a “security procedure” as “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.” Section 59.1-480(14).

¹⁵It appears that the phrase “pursuant to the Virginia Notary Act” was added as a direct result of the Amendments. *See* 2008 Va. Acts chs. 823, 833, *available at* <http://leg1.state.va.us/cgi-bin/legp504.exe?081+ful+CHAP0823+pdf>, <http://leg1.state.va.us/cgi-bin/legp504.exe?081+ful+CHAP0833+pdf>, respectively (amending § 17.1-258.4). I note that prior to the 2008 amendment to § 17.1-258.4, § 17.1-258.4(A)-(B) provided authority for electronic signatures of the signers of the document as well as those of the notaries.

¹⁶Section 59.1-481(a).

¹⁷Section 59.1-484.

¹⁸*See* § 59.1-481(b)(1).

¹⁹*See* § 59.1-481(b)(2) (excluding all of Titles 8.3A, 8.4, 8.4A, 8.5A, 8.6A, 8.7, 8.8A, 8.9A, 8.10, and 8.11 and all of Title 8.1A except § 8.1A-306).

²⁰*See* § 59.1-481(d).

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.

It would be consistent with UETA, Article 4.1, and the Act to recognize and accept electronic notarial acts performed by conventional notaries public if required safeguards are in place and followed. Notwithstanding the fact that the Secretary of the Commonwealth has not commissioned any electronic notaries, notarial acts performed by existing conventional notaries public may be valid if they conform with all other governing laws, regulations, and rules. Such laws would include UETA and Article 4.1.

In the context of filings with circuit courts, each clerk has the discretion to establish a system for electronic filing and security procedures consistent with UETA.²¹ Such discretion also may include notarial acts performed by commissioned electronic notaries pursuant to the Act. Therefore, in my opinion, a circuit court clerk may choose to establish a system for electronic filings and may choose to accept electronic notarial acts that comply with Article 4.1 and UETA. Additionally, a clerk may require that notarial acts be performed by electronic notaries officially commissioned by the Secretary of the Commonwealth under the Act. It is my opinion that either course of action would be a reasonable exercise of a clerk's discretion in establishing necessary security safeguards.

Conclusion

Accordingly, it is my opinion that prior to July 1, 2008, an electronic notarization of a document by a Virginia notary public would constitute a valid notarial act so long as the act was performed by a valid and commissioned notary public who complied with applicable laws and regulations. It further is my opinion that electronic notarial acts currently performed by Virginia notaries would constitute valid notarial acts under the Uniform Electronic Transactions Act, provided such acts comply with all other applicable statutes and regulations.

Thank you for letting me be of service to you.

Sincerely,

A handwritten signature in black ink that reads "Robert F. McDonnell". The signature is written in a cursive style with a large, prominent initial "R".

Robert F. McDonnell

²¹See § 17.1-258.3. Section 59.1-497 provides that a public body adopting standards under UETA and the Secretary of Technology may encourage and promote consistency and interoperability among the public bodies of the Commonwealth. UETA recognizes that such "standards may specify differing levels of standards from which public bodies of the Commonwealth may choose in implementing the most appropriate standards for a particular application." Section 59.1-497.