



COMMONWEALTH of VIRGINIA

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April 1, 2008

The Honorable Katherine K. Hanley
Secretary of the Commonwealth
P.O. Box 2454
Richmond, Virginia 23218

Dear Secretary Hanley:

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 amendments to the Virginia Notary Act,¹ which will become effective on July 1, 2008,² (the “2007 Amendments”). Specifically, you ask whether the Secretary of the Commonwealth has the authority to prescribe equipment or technological requirements for “electronic notar[ies] public” and to prescribe standards for third-party providers of electronic notary devices or technology. If such authority exists, you further inquire whether the Secretary is obliged to promulgate formal regulations under the Administrative Process Act.

Response

It is my opinion that the Virginia Notary Act does not authorize the Secretary of the Commonwealth to prescribe equipment or technological requirements for electronic notaries public, to prescribe standards beyond that imposed by general law for third-party providers of electronic notary devices or technology, or to promulgate rules or regulations.

Background

You inquire concerning the authority of the Secretary of the Commonwealth to register and commission electronic notaries public and the administration of a program to govern such notaries. You note that the 2007 Amendments³ have amended the Virginia Notary Act pertaining to the commissioning and practice of electronic notaries public. You relate that the 2007 Amendments will affect your statutory

¹ See VA. CODE ANN. tit. 47.1, §§ 47.1-1 to 47.1-30 (2005 & Supp. 2007).

² See 2007 Va. Acts chs. 269, 590, cl. 3 available at <http://leg1.state.va.us/cgi-bin/legp504.exe?071+ful+CHAP0269>, <http://leg1.state.va.us/cgi-bin/legp504.exe?071+ful+CHAP0590>, respectively.

³ I note that certain statutory provisions amended by the 2007 Amendments currently are in effect while other provisions will not become effective until July 1, 2008. Citations to provisions that are not in effect until July 1, 2008, will include the notation, “(effective July 1, 2008),” will cite the 2007 Acts of Assembly, or both.

responsibilities. You state that electronic notaries public will utilize a variety of hardware and software applications to notarize electronic documents. You note that the variety of such applications and various private licensing agencies within the industry may affect the reliability, safety, and security of the Commonwealth's notary public system. You express concern about the extent of your authority to commission electronic notaries public and approve their use of various hardware or software applications.

Applicable Law and Discussion

"Any person who acts 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 Virginia Notary Act.⁴ The General Assembly has established the general qualifications for appointment as a notary.⁵ The 2007 Amendments amended the Act to provide for the commissioning of "electronic notar[ies] public"⁶ and to govern their conduct. All notaries public, including electronic notaries public, are authorized to: "(i) take acknowledgements, (ii) administer oaths and affirmations, (iii) certify that a copy of any document, other than a document in the custody of a court, is a true copy thereof, (iv) certify affidavits or depositions of witnesses, and (v) perform such other acts as may be specifically permitted by law."⁷ However, electronic notaries perform these functions in the context of transactions involving electronic documents.

To be commissioned as a notary public,⁸ an applicant must submit "registration forms along with the appropriate fee to the Secretary of the Commonwealth."⁹ The General Assembly has delegated the duty of assessing an applicant for appointment as a notary public and the granting of a commission to the Secretary.¹⁰ The Secretary determines if the applicant meets the qualifications to be a notary public and the additional requirements for performing electronic notarial acts.¹¹ When an applicant meets all the requirements, the Secretary registers the applicant and forwards the commission to the clerk of the appropriate circuit court.¹² The Secretary also notifies the applicant that the commission has been

⁴Section § 47.1-3 (Supp. 2007).

⁵See § 47.1-4 (Supp. 2007).

⁶See § 47.1-2 (Supp. 2007) (effective July 1, 2008) (defining "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."); see also 2007 Va. Acts chs. 269, 590, *supra* note 2 (amending § 47.1-2).

⁷Section 47.1-12 (Supp. 2007).

⁸For purposes of this opinion, references to notary[ies] public or notary[ies] shall include electronic notary[ies] public unless otherwise specified.

⁹See § 47.1-2 (effective July 1, 2008) (defining "commissioned notary public").

¹⁰See 1999 Op. Va. Att'y Gen. 140, 141 (interpreting § 47.1-8). It is my opinion that the 2007 Amendments to § 47.1-8 have not altered this delegation of duty.

¹¹See § 47.1-4 (listing general notary qualification requirements); § 47.1-7 (Supp. 2007) (effective July 1, 2008) (listing additional requirements for electronic notary applicants); § 47.1-8 (Supp. 2007) (effective July 1, 2008) (delegating to Secretary duty to determine whether applicant is qualified to be notary public); see also § 47.1-2 (effective July 1, 2008) (defining "electronic notarial act" and "electronic notarization" as "an official act by a notary under § 47.1-12 of [Title 47.1] or as otherwise authorized by law that involves electronic documents.").

¹²See § 47.1-8 (effective July 1, 2008); see also 2007 Va. Acts, *supra* note 2 (amending § 47.1-8).

granted.¹³ Thereafter, the applicant must appear before the clerk of the appropriate circuit court within sixty days of his appointment, provide sufficient identification, and take the oath of office.¹⁴

Section 47.1-4 governs the basic qualifications for commission as a notary public and as an electronic notary public. Commission as an electronic notary requires additional information from the applicant, which shall include “[a] description of the technology or technologies the registrant will use to create an electronic signature in performing official acts.”¹⁵ If the device used to create the electronic signature is issued or registered through a licensed authority, the applicant also must 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.¹⁶ The 2007 Amendments require an electronic notary’s electronic signature and seal to “conform to generally accepted standards for secure electronic notarization.”¹⁷

Section 47.1-3 of the Virginia Notary Act authorizes the Governor to appoint “as many notaries as to him shall seem proper.” A prior opinion of the Attorney General (the “1978 Opinion”) has recognized that the appointment of notaries is discretionary with the Governor.¹⁸ The 1978 Opinion relied upon statutory authority that permitted the Governor to adopt regulations.¹⁹ The current Act is distinguishable and does not authorize the Governor to adopt regulations governing the appointment and qualifications of notaries.²⁰ In the absence of a delegation of authority to promulgate regulations, such authority does not exist,²¹ and the only controlling authority is the Virginia Notary Act itself.

The Virginia Notary Act and the 2007 Amendments provide to the Secretary of the Commonwealth the discretion to determine whether applicants meet the qualifications to be a notary.²² However, such discretion does not permit imposition of additional requirements for qualification beyond what the General Assembly has prescribed in the Act. Such additional requirements would be beyond the scope of the Act and would constitute rules or regulations not approved or authorized by the General Assembly. Likewise, the General Assembly’s allowance for the Secretary to exercise discretion in evaluating personal qualifications does not constitute a delegation of authority to prescribe equipment or

¹³ *Id.*

¹⁴ See § 47.1-9 (Supp. 2007) (effective July 1, 2008); *see also* 2007 Va. Acts, *supra* note 2 (amending § 47.1-9).

¹⁵ See § 47.1-7(A)(2) (effective July 1, 2008); *see also* 2007 Va. Acts chs. 269, 594, *supra* note 2 (amending § 47.1-7).

¹⁶ See § 47.1-7(A)(3) (effective July 1, 2008).

¹⁷ See § 47.1-16(E) (Supp. 2007) (effective July 1, 2008); *see also* 2007 Va. Acts chs. 269, 594, *supra* note 2 (adding § 47.1-16(E)).

¹⁸ See 1977-1978 Op. Va. Att’y Gen. 279, 279 (interpreting § 47-2, predecessor to § 47.1-3).

¹⁹ *Id.* (recognizing, however, that no regulations existed).

²⁰ Compare VA. CODE ANN. § 47-2 (1974) (authorizing Governor to appoint notaries who “shall be subject to the same restrictions and regulations as are prescribed by general law”) with § 47.1-3 (Supp. 2007) (“The Governor may appoint in and for the Commonwealth as many notaries as to him shall seem proper.”). See 2006 Op. Va. Att’y Gen. 36, for a discussion of the powers of the Governor by executive order.

²¹ See 1977-1978 Op. Va. Att’y Gen. 5, 8.

²² See *supra* notes 9-12 and accompanying text.

The Honorable Katherine K. Hanley
April 1, 2008
Page 4

technological requirements for electronic notaries beyond those enunciated in the Act.²³ Therefore, it likewise follows that such exercise of discretion does not extend to prescribing standards or requirements for third-party providers of electronic notary devices or technology. Although the Secretary is directed to prepare reference materials containing the provisions of the Act and “such other information as the Secretary shall deem useful,”²⁴ any information or instructions contained in such reference materials are not tantamount to those of a statutory requirement or regulation.²⁵ Since the Virginia Notary Act and the 2007 Amendments do not provide for the authority to promulgate regulations, I must conclude that such authority does not exist.²⁶

Conclusion

Accordingly, it is my opinion that the Virginia Notary Act does not authorize the Secretary of the Commonwealth to prescribe equipment or technological requirements for electronic notaries public, to prescribe standards beyond that imposed by general law for third-party providers of electronic notary devices or technology, or to promulgate rules or regulations.

Thank you for letting me be of service to you.

Sincerely,

A handwritten signature in black ink, reading "Robert F. McDonnell". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

Robert F. McDonnell

1:1133; 1:941/08-022

²³ See, e.g., §§ 47.1-7, 47.1-11.1, 47.1-16 (Supp. 2007) (effective July 1, 2008); 2007 Va. Acts chs. 269, 594, *supra* note 2 (adding § 47.1-11.1 and amending §§ 47.1-7, 47.1-16).

²⁴ See § 47.1-11 (effective July 1, 2008).

²⁵ See 2000 Op. Va. Att’y Gen. 161, 162.

²⁶ See *supra* note 21 and accompanying text.