Why do we Care about notarization at all?

It’s an ancient concept that started long ago with Roman Scribes – in a pre-literate time, and as a means of taxing transactions. So a lot of those original reasons don’t apply anymore.

But as title insurers, we still want to be sure the Right Person Signed

That they were competent, not under duress, etc. – OK mobile Notaries don’t do a great job of any o fthis – but they at least check IDs

We want to be sure that all of the signing mechanics were proper – In a paper world, not much to that. Blue Ink or Black, in a few states Deeds and mortgages still require witnesses. But that question gets more complex as we move into e-signing models – and the person supervising the signing will have to be the point of control.

We need to know that all of the requirements have been met to record the signed document. It’s very frustrating to send a document to recording and have them kick it back because of some technical omission – say a missing notary seal, or an incomplete notary certificate.

To insure these transactions, we need a comfort level that the acknowledgement, on its face, satisfies the legal requirements for a valid instrument & to record the instrument

And that That the official and the acknowledgement process they followed are not subject to challenge.

The big Gotcha for title insurers is the bankruptcy strong arm power. There is a provision in the bankruptcy code that says that the trustee can invalidate recorded instruments which don’t provide “constructive notice” – that means they can throw out recorded deeds and mortgages if they weren’t entitled to be recorded under state law and in some states if they failed to meet all the technical requirements.

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There are some Basic Concepts that guide us

Each state creates the laws that govern what makes a valid deed, a valid mortgage, a valid recording -- for properties **located in that state**. That part is governed by the state where the land is located.

The Laws of the state where the Notary was commissioned and is physically located, govern what that Notary is allowed to do and the mechanics of how they do it

The Law of the state where the signor is physically located determines the signor’s capacity, age of majority, and legality of their actions.

For years, we had the interaction of two states in real estate transacctions. The notary always had to be physically located with the signor. With the addition of remote online notarization, we add the potential for a third state’s laws to get into the mix. So It all gets very Confusing!

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So lets start with the Common Elements for what makes a Valid Deed or Mortgage under Most State’s Laws – and I’m generalizing a bit here. Because there are state by state differences, and for the most part we HOPE are taken care of in the forms uploaded in Resware. But as a gross oversimplification a deed or mortgage:

Must properly identify the parties

Must properly identify the property – have a Valid legal description. Some of you know that in a few states a street address or even a property tax number have been held to be sufficient legal descriptions. While we will use those laws to handle claims – it’s damn sloppy. It introduces ambiguities – and let’s face it, street addresses and even tax ID numbers can get changed.

In many states, recorders are allowed to reject instruments which don’t meet Format requirements. How big are the margins, font size, does it have the right size space for the recording information, and so on. Those rules differ – sometimes quite a bit – from state to state

Spousal joinder requirements are inherently driven by state law

Witness Requirements – They used to be very common, now only 6 states have witness requirements for deeds and mortgages. More have witness requirements for Powers of Attorney.

Here’s a surprising fact. In Most states, a Deed or Mortgage is valid between the parties without any acknowledgement or notarization at all – but the resulting document is usually not entitled to be recorded! And if it slips through the cracks and gets recroded anyway, it may not provide constructive notice providing the opportunity for a bankruptcy trustee to turn it into a policy limit loss. That’s Bad!

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State Notary Acts often contain specific requirements on how a notary must do their job

CA – Very narrow as to what is being certified, specific forms, strong journal and finger print requirements

At times in various state’s History, a Notary had to expressly state in the notary certificate

* That the signor Personal appeared before the notary
* That the person took an oath if it was a sworn statement
* That signing the document was the Free act and deed of the signor
* That the notary conducted a Separate examination of the spouse outside of the presence of the other spouse to make sure they were not being unduly influenced. “Yeah, you’ve come a long way, Baby”
* In a small number of states, you even saw requirements for the notary to certify that the Signor understood the transaction
* Or was Competent

Those sometimes became “gotchas” where instruments were challenged or subject to challenge if the notary’s form wasn’t correct and complete.

And as title insurers, we do not like anything that challenges or may challenge the validty of the instruments we insure. And even though most of these added burdens have been removed in most states – it’s still important to know when there are specific requirements.

And as we’re going to discuss, there are still some major state by state differences in what is required to rely on a foreign proof of a document.

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History has played a major part in the evolution of the laws regarding the recognition of out of state and of foreign notarizations.

In the very early days of US, State laws were less than clear as to whether an out of state notary was acceptable and entitled to be recorded. It was not uncommon for a state to say, essentially, only a notary from my state may notarize a deed affecting land in my state.

And in the very earliest days, it wasn’t much of a problem. There wasn’t that much travel or interstate land sale to worry about. Anybody interested in buying your land, probably lived within a few hours or at most a few days horseback ride. And you’d go down to the courthouse together and tend to your business

But things changed as the Size of the US expanded with the opening of the western territories that became Tennessee, Kentucky and Ohio, with the Louisiana purchase; in 1848 with the treaty of Guadalupe Hidalgo the United states stretched from coast to coast..

The country was suddenly huge – and at the time we had poor communication and almost non-existent transport.

By the time the US acquired the western states, there were no trains, a wagon train from Missouri to California often took 5 months and there are estimates that 5 percent of the people died making the trip.

It was faster to sail all the way around the south end of South America. The united states government owned a ton of land, across the country, but they couldn’t get the people to it to start farms, build cities and make it productive.

So the government said to the Railroad Barons and canal builders, if you’ll open up these new territories so we can sell off our land in what we then called the West – today we call it the plains states – by building the necessary transportation we’ll pay you in Land.

For every mile of railroad that was built, they would give the railroad company every other section of land – a section of land is one mile square -- for 6 miles either side of the railroad. At certain times in our history they gave lands 10 miles on either side and sometimes more. By the time the Golden Spike was driven at Promontory Summit Utah huge amounts of land had been vested in various railroads.

Guess where the officers of those railroads were based? Very often it was back in New York or Chicago – certainly not in the baron wastelands they were trying to sell.

And those railroads promptly set about to resell those lands by subdividing, creating towns and communities often selling tracts to investors and speculators – who were also out of state.

And there was a legitimate fear that under the laws of the day, that the deeds and mortgages being created at faster and faster paces, might be invalid

So one of the first ways to deal with this was for each state to authorize their Governor to appoint a Commissioner of Deeds to formalize instruments that were signed out of state but affected lands in the home state. And that was a great gig for buddies of the Governor. They got to live in a big city, and charge pretty high fees to notarize deeds and mortgages that affected land back home. But also a bit of a racket.

In 1892 first Uniform Act on interstate recognition of acknowledgement was adopted by what later became the uniform law commission. This was one of the very first “Uniform Acts” And it was specifically designed to address the need to facilitate interstate commerce in land – and said very loosely, in the state which adopts this, an instrument acknowledged by a list of officials (including a notary) in any other state “will have the same effect as” if it was acknowledged by an official in our state.

In 1914, they adopted the first uniform act on International recognition of acknowledgements.

We’ve gone through Multiple versions of the law since – and there are many state specific variations

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As of 2018…

Every state recognizes traditional “in person” notarial acts and acknowledgments from every other state

There is currently an Open question as to recognition of “remote online notarizations” because in many states, the language of recognition acts use phrases like “personally appeared” or “before” and the uniform notary laws specifically require the signor to physically appear before the notary or the act is invalid – and then says the act of an out of state notary “shall have the same effect as” – so does that mean it would be invalid too.

In Iowa, they adopted laws specifically saying we don’t recognize any Remote Online Notarizations.

We Underwriters tend to be very conservative – we don’t want to insure a bunch of deeds and mortgages using RON only to discover that they can be set aside in bankruptcy.

And as we go through the legislative process, Some states are discussing backtracking as they adopt RON legislation to the old days of we’ll only recognize a RON Notarization in our state, if it was done by a notary from our state.

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Which is a rather long lead in to today’s real topic. What do we do when we receive an instrument that was acknowledged outside of the country by a foreign official or notary?

Just as every state has a law addressing how they handle other state’s notaries, Every state also has a law specially addressing when and under what circumstances they will accept something acknowledged or notarized outside the United States.

And back to the point we started with. That is Governed by Law of the State where the land located. And also by a Federal Treaty – The Hague Convention

As you go around the country, you will find three broad approaches to acceptance of foreign notarizations and certifications.

* Some states trust everybody, including foreign officials – nothing more required – except perhaps an English language translation. Some put relatively minor requirements over that – like an official seal
* The uniform act model treats the acts of the Foreign official the same as U.S. notary – and then statutorily adds various presumptions that reduce the scope of lawyerly quibbling over the validity of an instrument. The underlying philosophy seems to be we want to be able to require additional things to gain certainty that the right party signed and the official signing was legit, but we don’t want those to be the source of challenges to the resulting documents.
* The third approach Requires compliance with the Hague Convention by getting an Apostille – a certification of the authority of the notary or acknowledging official by a specificied official of the foreign country or by a US Consular authentication

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Now you are asking yourself What Could a Lawyer possibly Quibble About? To those who know us well, the answer is “Damn near anything” In drafting the uniform notary recognition acts, they tried to think of all the likely challenges surrounding notaries and establish presumptions to head off the quibbling if certain additional steps were taken. And it boiled down to these three issues:

* How do I prove –especially years later in another country -- that the signature in the certificate of notarial act is that of the individual identified as a notarial officer;
* How do I prove that the individual named in the certificate of notarial act holds the designated office as a notarial officer; and
* How do I prove that individuals holding the designated office may perform notarial acts.

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We’re going to start by examining the Uniform Act Model -- both because it is a well thought out legal framework – but because it or one of the prior versions has been adopted in many states – including in WA, OR, CO, and NV. Actually it is an older version that was adopted in Nevada, so the language is a little different.

And the Uniform Act Establishes broad acceptance of a foreign notary’s actions – using this “has the same effect as” language:

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Then the uniform act addresses the 3 proof questions we just talked about:

How do we know that it was the Right person & that person is really that officer:

The signature and the official stamp are prima facie evidence – the burden is shifted to the challenger to prove they aren’t

How do we know that an officer with that title may notarize:

If you can find it in a digest of foreign laws (we used to rely on Martindale Hubble for that) or in a list customarily used – and I believe the state department still has one of those, then the authority is conclusively established.

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Then the Uniform Act gives you an option to totally eliminate any questions by jumping through the hoops of the Hague Convention.

The Nevada laws do not reference the Hague Convention option, but being a Federal Treaty probably supercedes Nevada’s omission. Regardless it is a best practice.

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And the uniform act gives a second option. Getting it certified by a Diplomatic officer also conclusively establishes the notarizing officials acts.

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What does all this mean?

Under the uniform act, anyone who has authority to notarize in a foreign country can create a legally sufficient acknowledgement – **nothing else is required for a valid instrument.**

Everything else we do and expect to see in the document are just there are ways to improve the certainty and eliminate the quibbling and potential challenges.

As an underwriting matter, WFG wants the extra certainty

So we always ask for the Apostille or the Consular certificate when we are dealing with a document that will be executed overseas.

I’m also a big fan of sending people to a US Embassy. We’ve found that there is very little identity fraud when someone has to show his ID to two armed Marines and be run through a State Department database before they get into the building to see the notary.

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There is a Danger here:

Not Every State has adopted the Uniform Act – and some states have added other specific requirements for acceptance of Foreign acknowledgements – and failing to jump through all the hoops when dealing with land in those states may result in an invalid deed or mortgage.

Some states don’t accept foreign notarizations at all in their statutes – but that is superceded by the Hague convention. On the screen there is a reference to a State Department guide and that link is also on the last page of your materials. I want to stress that the state department guide is a summary so it’s important to review the actual language of the the underlying statute or ask your underwriter.

In the next few minutes, we’re going to talk about some o the state specific variations in states where we have direct offices. As mentioned already, Washington, Oregon, Colorado and Nevada follow the uniform act model.

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California is one that adds additional requirements.

California Will accept proof or acknowledgement by US Consular officials and California Commissioners of deed in foreign country, but Otherwise must be acknowledged before a foreign judge or notary public.

AND THEN To be valid, the foreign notary public MUST HAVE validity proven:

* Before a foreign judge
* By a US Consular official; or
* In An Apostille under the Hague Convention.

Note the difference from Uniform Act – In CA, a foreign notary is never valid, unless you take the additional steps. Under the Uniform Act, the foreign notary is valid, but the validity can be challenged.

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Arizona adds additional standards, but as a practical matter the standard for validity is pretty loose – an official seal. Here’s the language of their statute:

any of the following is sufficient proof of authority

1. Certification by a U.S. foreign service officer

2. Affixation to the notarized document of the official seal of the person performing the notarial act.

3. The appearance either in a digest of foreign law of authority

It’s not stated, but an Apostille under the Hague Convention also works – but you will occasionally run into a local interpretation that if it doesn’t say it in the Arizona Statutes we don’t accept it. So belt and suspedners.

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Texas trusts everybody

(c) An acknowledgment or proof of a written instrument may be taken outside the United States or its territories by:

(3) a notary public or any other official authorized to administer oaths in the jurisdiction where the acknowledgment or proof is taken

But our Underwriting standard still calls for an Apostille – If you get one without the apostille ask Bruce or Mark.

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So How do you get an Apostille?

The Good news is that we are not responsible for getting the Apostille from a foreign country. The party providing it – usually the foreign official makes those arrangements. But when getting ready for the closing you do need to set out the standards you expect them to meet – whether that is for an embassy closing, or something else.

The Hague Convention’s website lists sources for Apostille in each country – who to go to. In many countries there are also services that will expedite the process for your customers.

In U.S. each state has a designee (usually the Secretary of State) to issue an Apostille for U.S. Notarized documents. So if you are a California Notary who certified something that will be used out of state, you contact the California Secretary of state to get the apostille.

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What Does an Apostille Look Like? It looks a lot like this. It’s short and almost deceivingly simple.

The apostille itself is a stamp or printed form consisting of 10 numbered standard fields.

The title *APOSTILLE*, and under that language “*Convention de La Haye du 5 octobre 1961”* are always in French – that’s actually a requirement for It’s validity. Everything else can be in another language – usually the language of the issuing country.

And if that language isn’t English, you have to check your laws – the laws of the state where the land is located in this instance – to see the requirements for recording a certified translation.

At the back of your handouts, you’ll find a summary of this – because we know this isn’t an everyday question. And also a list of the countries that are parties to the Hague Convention.

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Your next logical question is what do I do with a document from a country that hasn’t signed the Hague Convention? Because if they haven’t signed the Hague Convention they aren’t going to issue an Apostille.

Here you are going to be thrown back to where we started today. Check the laws in the state where the land is located as to their requirements for acceptance of foreign acknowledgements and then talk to your underwriter.

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I’m happy to take any questions