OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY

Who Are You and How Do I Know That? Acknowledgements in Virginia

Jon Brodegard

Counsel, Old Republic Title

The first covered risk in both the Owner's Policy of Title Insurance and the Loan Policy, is "Title being vested other than as stated in Schedule A." The Homeowners Policy of Title Insurance comes to the same point but clarifies that "title" means "ownership . . . in [land]." To issue a title insurance policy title, we must be able to identify the land to which property rights attach, the individual(s) who, or entity(ies) which, control those rights, and the nature or scope of the rights themselves. This presentation focuses on the identity of individuals and will review the primary facts and tools that our industry relies on to confirm the identity of the individuals involved in real estate transactions. Because title insurance builds on legal rights, much of the presentation will address standards set by law. Of course, individual facts and circumstances vary from situation to situation, and, as such, this presentation cannot, and is not intended to, provide legal advice.

I. Purpose:

In Virginia, ownership of land passes by intestate succession[1] unless it is "conveyed . . . by deed or will."[2] Deeds and other documents are signed with the intent that the documents will be relied on by persons who could not be present when the documents were signed. Likewise, testators[3] direct the distribution of their estate through a writing that he or she expects to be implemented even though the person making the will is deceased, and therefore cannot be called upon to affirm that the document is genuine. Fraud is an ever-present concern. Virginia law provides that, if certain protocols are followed, parties who were not present at the execution of a document may be confident that the identity of a person who signed the document was established in accordance with standards set by law. The nature and purpose of the document determines which specific standard applies.

II. What is an acknowledgment?

Under the Virginia statute of conveyances, most interests in real property must be conveyed in writing.[4] Specific rights attach if deeds, wills, liens, lis pendens, judgments and other documents are recorded in the records of the circuit court for the circuit in which the real property is located.[5]

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[1] Va. Code § 64.2-200.

[2] Va. Code § 55-2. Note that, in certain circumstances, court orders may also be used to establish title.

[3] Testator means "a person who has made a will." Black's Law Dictionary 1235 (Abr. 8th Ed. 2005).

[4] Va. Code §§ 11-1 and 55-2.

[5] Va. Code § 55-96. See also VA. Code § 17.1-227 for an exemplary list of documents that relate to real property that must be acknowledged to be recorded.

"Acknowledgment or its statutory equivalent – proof by two witnesses – is an essential prerequisite to recordation."[6]

VA. Code § 17.1-227 directs the clerk of every circuit court to record deeds and other documents that impact interests in real property "which have been acknowledged as required by law." Notaries and other officials are authorized by Virginia statute to take acknowledgments. In so doing, they certify the authenticity of a signature, the identity of the person who signed the document, and the intent with which the document was signed.[7]

For notaries:

> "Acknowledgment" means a notarial act in which an individual at a single time and place (i) appears in person before the notary and presents a document; (ii) is personally known to the notary or identified by the notary through satisfactory evidence of identity; and (iii) indicates to the notary that the signature on the document was voluntarily affixed by the individual for the purposes stated within the document and, if applicable, that the individual had due authority to sign in a particular representative capacity.[8]

A traditional notary is not permitted to notarize a document "if the signer is not in the presence of the notary at the time of notarization."[9]

The Notary Handbook explains that:

> A notary public is a public official whose powers and duties are defined by statute. A notary acts as an official, unbiased witness to the identity and signature of the person who comes before the notary for a specific purpose. The person may be taking an oath, giving oral or written testimony, or signing or acknowledging his or her signature on a legal document. In each case, the notary attests that certain formalities have been observed.
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> The key function is to be **certain** that the person appearing before the notary is who that person claims to be.
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> Virginia law defines certain "notarial acts" which a notary is empowered to perform. **Notaries must constantly be aware that every notarial act affects the legal rights of others. Carelessness or negligence by the notary may injure these rights.**

III. Writings under seal

Acknowledgment serves a similar purpose as the historic use of a seal. At common law, a seal was used to authenticate or execute documents.[10] Use of a seal established a presumption that

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[6] Douglas W. Dewing, Ed., A Virginia Title Examiner's Manual (4th Ed., 2017), § 1-2. Wills, but not deeds, may be proved by witnesses. Va. Code §§ 55-113 and 64.2-403.
[7] Va. Code §§ 55-118.3 and 55-118.5.
[8] Va. Code § 47.1-2. Cf. Va. Code § 55-118.5 (defines of "acknowledged before me" for persons authorized to take acknowledgments).
[9] Va. Code § 47.1-15.
[10] Black's Law Dictionary, Abr., 1118.

consideration had passed as to the sealed document.[11] Certain documents, including deeds, were not valid unless sealed.[12] Starting in 1788, the requirement that a seal be "made on wax or other adhesive substance" began to be relaxed in Virginia.[13] The explicit requirement that a deed be sealed was finally removed in 2014.[14] Acknowledgment before an officer authorized to take acknowledgments of deeds serves to give solemnity to the process by which we transfer land. Among other benefits, this 'solemnity' allows for land to be conveyed without monetary consideration, as in the case of a deed of gift.

IV. What is a signature?

Deeds and wills and other acknowledged documents require signatures, but "[t]he meaning of 'signature' is not restricted to a written name."[15] With respect to wills, Va. Code § 64.2-403(A) does not mandate the form of a signature, but provides that the signature be made "in such a manner as to make it manifest that the name is intended as a signature." Virginia Courts have accepted initials and marks as signatures, provided that the proper intent can be determined.[16]

For electronic notaries, "'[e]lectronic signature' means an electronic sound, symbol, or process attached to or logically associated with an electronic document and executed or adopted by a person with the intent to sign the document."[17]

For negotiable instruments subject to the Uniform Commercial Code, such as promissory notes:

> A signature may be made (i) manually or by means of a device or machine, and (ii) by the use of any name, including a trade or assumed name, or by a word, mark, or symbol executed or adopted by a person with present intention to authenticate a writing.[18]

V. How should a representative sign?

Frequently, deeds and other documents are executed by persons who represent an organization or another person, or who act in some other fiduciary capacity. In each of these circumstances, the individual whose signature is acknowledged should affirm that his or her act is made on behalf of the represented entity or person and under proper authority.[19]

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[11] Virginia Title Examiner's Manual § 16.14(a).

[12] Game Place, L. L.C. v. Fredericksburg 35, LLC, 813 S.E.2d 312, 314-16 (Va., 2018). (Sets forth history of seals.) Note that the specific holding of this case has been superseded by legislation. This case is referenced here solely for the history provided regarding the use of sealed instruments.

[13] See Id. at 317. See also Virginia Title Examiner's Manual § 16.14(a)-(b) ("The statute relaxing the provisions regarding sealed instruments was first enacted in 1788. It was extended to partnerships in 1946 and to corporations in 1975.")

[14] Act approved March 27, 2014, Ch. 338, codified at Va. Code § 55-48.

[15] Ferguson v. Ferguson, 47 S.E.2d 346, 351 (Va. 1948)

[16] In Irving v. DiVito, 807 S.E.2d 741 (Va., 2017), for example, the Virginia Supreme Court acknowledged that marks and initials have been accepted as signatures but rejected the use of initials as a signature to a codicil because it was shown that the testator commonly used his full signature to authenticate legal and testamentary documents.

[17] Va Code § 47.1-2.

[18] Va. Code § 8.3A-401(b).

[19] Va. Code § 55-118.5.

a. Commercial Entities

Deeds made by a corporation "shall be signed in the name of the corporation by the president or acting president, or any vice-president, or by such other person as may be authorized thereunto by the board of directors of such corporation[.]"[20] If a writing "purports to have been signed in behalf or by authority of any person or corporation, or in any representative capacity whatsoever" then it may be acknowledged "by the person so signing the writing . . . without expressing that such acknowledgment was in behalf or by authority of such other person or corporation or was in a representative capacity."[21] The certificate of acknowledgment in such a case must affirm the identity of the individual who signed the writing, but it does not need to recite the authority of the person whose acknowledgment was taken.[22]

In partnerships and in member-managed limited liability companies ("LLCs"), in the ordinary course of business, the signature of a partner or a member binds the partnership or LLC.[23] However, if the act is not in the ordinary course of business, then a signature of a partner or member only binds the partnership or LLC if the act was authorized by the other partner(s) or member(s).[24] In a manager-managed LLC, the signature of the manager may bind the LLC for matters in the ordinary course of business, but matters that are not in the ordinary course of business must be specifically authorized.[25] A general partner of a limited partnership has the rights and powers of a partner in a partnership without limited partners.[26]

In an acknowledgment, a partner or agent of a partnership would affirm that her or she "signed the instrument on behalf of the partnership by proper authority and he executed the instrument as the act of the partnership for the purposes therein stated."[27] Likewise, the member, manager, or agent of an LLC would affirm that he or she "signed the instrument by proper authority and [. . .] executed the instrument in the capacity and for the purposes therein stated."[28]

There is a difference between entities that are in the business of buying and selling land and entities that are not. Where an entity is in the business of buying and selling land, then execution of a deed or other real estate related documents may not require special approval; but, if the entity is selling the only real estate that it owns, specific authorization may be required. Because the powers of the officers of a corporation, partners of a partnership and members or managers of an LLC may be limited through corporate bylaws,[29] a partnership agreement,[30] a statement of partnership authority,[31] or an operating

[20] Va. Code § 55-119.
[21] Va. Code § 55-120.
[22] Id.
[23] Va. Code §§ 50-73.91 and 3.1-1021.1. See also Va. Code 50-73.92 for specific guidance on how partnership property may be transferred in various circumstances.
[24] Id.
[25] Va. Code § 13.1-1021.1(B).
[26] Va. Code § 50-73.29(A).
[27] Va. Code§ 55-118.5(3)(iii).
[28] Va. Code§ 55-118.5(3)(v).
[29] Va. Code §§ 13.1-624 and 13.1-823.
[30] Va. Code § 50-73.81.
[31] Va. Code §§ 50-73.92-93.

agreement,[32] specific guidelines have been developed to insure transactions involving these entities. Contact underwriting counsel if you are unfamiliar with the guidelines or have questions regarding a specific transaction.

While the ability of the member of a member-managed LLC or manager of a manager-managed LLC to convey an interest in real property may be limited by the LLC's operating agreement, an instrument "transferring or affecting the limited liability company's interest in real property" is deemed by statute to be "conclusive in favor of a person who gives value without knowledge of the lack of authority of the person signing and delivering the instrument."[33] Similar protections exist for partnerships.

b. Trustees under a deed of trust in foreclosure, Court-appointed commissioners of sale, Conservators, and other fiduciaries

Any instrument that is executed by a fiduciary should set forth the title of the fiduciary, the authority under which the fiduciary acts, and the individual who executes the document, by his or her signature, would acknowledges that he or she "signed the instrument by proper authority and [. . .] executed the instrument in the capacity and for the purposes therein stated."[34] Specific underwriting guidelines exist for many transactions involving trustees under a deed of trust in foreclosure, Court-appointed commissioners of sale, Conservators, and other fiduciaries. Contact underwriting counsel if you are unfamiliar with the guidelines or have questions regarding a specific transaction.

c. Agents under a Power of Attorney

Acknowledgment made by an agent as attorney in fact under a power of attorney means that the agent "executed the instrument by proper authority as the act of the principal for the purposes therein stated."[35] In order to clarify that the agent acts for and has authority to bind the principal, it is recommended that the following signature format be used by the agent when signing for the principal:

[Name of Principal] by [Name of Agent], [his or her] Agent

Many lenders require that this phrase be handwritten, and, in some instances, that the entire phrase be written out in script as opposed to print. An original power of attorney needs to be recorded if the instrument executed under its authority is recorded. An agent certification should also be recorded to confirm that neither the Power of Attorney nor the agent's authority under the Power of Attorney has been terminated.

Of course, always contact underwriting counsel prior to closing to verify that you may rely on a power of attorney.

d. Trustees of a revocable trust

Many individuals who place their homes or other real property in a revocable trust do not realize that they cannot convey the property to another in their personal capacity. Notwithstanding the broad powers afforded to both settlor and trustee, only the trustee or trustees acting within the scope of the

[32] Va. Code §§ 13.1-1021.1, 1022, and 1024.
[33] Va. Code § 13.1-1021.1(C).
[34] Va. Code§ 55-118.5(3)(v).
[35] Va. Code§ 55-118.5(3)(iv).

trust agreement may encumber or convey real property held in trust.[36] Property held in trust should be titled in the name of the trustee, not the name of the trust,[37] as follows:

> [Name of Trustee] for [name of trust as set forth in the trust agreement] dated [effective date of trust agreement]

A trustee who acknowledges a document affirms, by his or her signature, that he or she "signed the instrument by proper authority and [. . .] executed the instrument in the capacity and for the purposes therein stated."[38] Specific guidelines not only exist to insure transactions involving trustees, but also include instruction on how and when to rely on a certificate of trust. Contact underwriting counsel if you are unfamiliar with the guidelines or have questions regarding a specific transaction.

i. Decedent's Estates

If an individual domiciled in Virginia dies without a will, then his or her real property passes according to the laws of intestate succession.[39] Although a personal representative may be appointed to probate the estate, normally, the personal representative is not normally authorized to sell or otherwise convey the decedent's real property. The personal representative or any other interested party may record a List of Heirs or Real Estate Affidavit to identify the new owners.[40] In any subsequent deed, the decedent's heirs are the grantors, and each heir must sign the deed or authorize another to sign the deed by power of attorney.

If an individual domiciled in Virginia dies with a will, then ownership of real property passes to the beneficiaries under the will, unless the executor is directed to sell.[41] Many wills include language that authorized, but does not require, the executor to sell real property. In such a case, both the beneficiaries and the executor will be required to sign the deed. If the will does not merely authorize, but specifically directs the executor to sell real property, then the executor may sign the deed without the beneficiaries. If the will does not authorize the executor to sell real property, then the beneficiaries may be able to sell without the executor having to sign the deed.

If a decedent's will is probated outside the Commonwealth of Virginia, then the will may be used to pass title, even if the executor does not qualify in Virginia, if: (1) The executor qualifies "according to the laws of the state where the will was probated;" (2) The will was "duly executed according to the laws of the Commonwealth" and "confers upon the executor . . . the power to convey the real estate so conveyed;" and (3) The will is admitted to probate in the county or city where the subject real estate is located.[42] If these conditions are not met, then the decedent's estate must be probated in Virginia in order to pass title through probate.

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[36] Va. Code §§ 64.2-752 and 64.2-777-8.
[37] Va. Code §§ 64.2-752. But See Va. Code § 772(E) ("A deed or other instrument purporting to convey or transfer real or personal property to a trust instead of to the trustee or trustees of the trust shall be deemed to convey or transfer such property to the trustee or trustees as fully as if made directly to the trustee or trustees.")
[38] Va. Code § 55-118.5(3)(v).
[39] Va. Code § 64.2-200(A).
[40] Va. Code §§ 64.2-509 through 10.
[41] Va. Code § 64.2-521(A).
[42] Va. Code § 64.2-524.

Again, specific guidelines exist for transactions that involve decedent's estates. Contact underwriting counsel if you are unfamiliar with the guidelines or have questions regarding a specific transaction.

VI. Who may take acknowledgments?

With respect to acknowledgment, Section 55-106 states that the clerk "shall admit to record any such writing as to any person whose name is signed thereto with an original signature[:]"

(1) If the signature is acknowledged in court or before the clerk or his deputy;[43]
(2) If the signature is acknowledged within the United States, Puerto Rico, or any territory or other dependency or possession of the United States before a notary public, a commissioner in chancery, or clerk of any court of record or before a commissioner appointed by the Governor of Virginia;[44]
(3) If the signature is acknowledged before certain diplomatic officers[45] of the United States appointed to any foreign country[46]
(4) If the signature is acknowledged before "the proper officer of any court of record of such [foreign] country or of the mayor or other chief magistrate of any city, town or [municipal] corporation therein."[47]
(5) If the signature is acknowledged before a notary public or persons authorized to perform notarial acts[48] by the laws and regulations of Virginia or of other governments;[49]
(6) If the signature is acknowledged before a commissioned officer of a branch of the United States military as authorized by law.[50]

VII. What should an acknowledgment look like?

Under Va. Code § 55-118.3:

> The person taking an acknowledgment shall certify that:
> (1) The person acknowledging appeared before him and acknowledged he executed the instrument; and
> (2) The person acknowledging was known to the person taking the acknowledgment or that the person taking the acknowledgment had satisfactory evidence that the person acknowledging was the person described in and who executed the instrument.

[43] See Va. Code § 55-106.
[44] See Id. See also Va. Code § 55-113.
[45] The officers identified in the statute are "ambassador, minister plenipotentiary, minister resident, charge d'affaires, consul-general, consul, vice-consul [and] commercial agent." See Va.Code § 55-114.
[46] Id.
[47] Id. See also "Foreign acknowledgements," below.
[48] "'[N]otarial acts' means acts which the laws and regulations of this Commonwealth authorize notaries public of this Commonwealth to perform, including the administering of oaths and affirmations, taking proof of execution and acknowledgments of instruments, and attesting documents." Va. Code § 55-118.1.
[49] See Va. Code § 55-106. See also Va. Code § 55-118.1.
[50] Va. Code §§ 55-114.1-115. See also discussion regarding Military notaries, below.

Model forms and sample acknowledgments are described by various statutes and found in the Notary Handbook.[51] The fact of acknowledgment is attested to by a certificate signed by the person before whom the acknowledgment is made.[52] According to the Notary Handbook: "Every effort should be made for the notarial statement to be on the same page as the signature being notarized, however, if they are on different pages, the notarial statement must include the name of the person whose signature is being notarized."[53] This is good advice even if a certificate of acknowledgment is made by someone who is not a notary."

As set forth in the Notary Handbook:

> Every notarial act must contain seven items of TRADITIONAL information:
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> 1. Notarial statement
>
> 2. The date of the notarial act
>
> 3. The location of the notarial act in the city or county where notarization occurs
>
> 4. The expiration date of the notary's commission
>
> 5. Notary's signature
>
> 6. Notary's registration number
>
> 7. Photographically reproducible notary seal/stamp

In the case of acknowledgments, the notarial statement would identify the name of the person who came before the notary and would include the words "acknowledged before me" or their substantial equivalent.[54]

The phrase "acknowledged before me" means:

1. That the person acknowledging appeared before the person taking the acknowledgment,

2. That he acknowledged he executed the instrument,

3a. That, if a natural person, he executed the instrument for the purposes therein stated or

3b. That, if acting in a representative capacity,[55] the representative holds the position indicated, and signed or executed the instrument under proper authority as an act of the represented person or entity, and

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[51] The current (as of February 2019) notary handbook is available at https://www.commonwealth.virginia.gov/media/governorvirginiagov/secretary-of-the-commonwealth/pdf/2017-December-15-revised-Handbook-.pdf.

[52] Va Code§ 55-113. See also Cumbee v. Myers, 350 S.E.2d 633, 634 (Va. 1986).

[53] The requirement that the notarial certificate be on the same page as the signature, or that the name of the person whose act is notarized be included in the notarial certificate is codified at Va. Code § 47.1-15(3).

[54] Va. Code § 55-118.4.

[55] Such representative capacities include an officer or agent of a corporation, a partner or agent of a partnership, an agent duly appointed under power of attorney, or other public officer, trustee, administrator, guardian, conservator or other representative. See Va. Code § 55-118.5(3)(ii-v).

4. That the person taking the acknowledgment either knew or had satisfactory evidence that the person acknowledging was the person named in the instrument or certificate.[56]

Certificates made by persons who are not notaries must conform to the appropriate form and will include the name of the person who acknowledges the instrument, the name and title of the person before whom the signature was acknowledged, the date of the acknowledgment, and the location where the acknowledgment was made.[57]

i. Electronic Notary (short)

Virginia law also recognizes acknowledgments before electronic notaries.[58] As discussed below, both legal and title insurance guidelines must be considered before agreeing to rely on an acknowledgment made before an electronic notary.

VIII. Clerk's duty

The clerk of each circuit court is responsible for maintaining records of deeds and other documents related to the ownership of real property.[59] The clerk may refuse to record documents that do not meet certain standards.[60] For example, a clerk may reject documents that are illegible, contain unredacted social security numbers, fail to conform to the statutory form of a deed or deed of trust, or which have not been acknowledged or notarized properly.[61] "A writing that appears on its face to have been properly notarized in accordance with the Virginia Notary Act (§ 47.1-1 et seq.) shall be presumed to have been notarized properly and may be recorded by the clerk."[62]

IX. Foreign acknowledgments

Not infrequently, parties to a transaction involving Virginia real estate must execute documents outside of the Commonwealth. What requirements must be met depend on where the document is acknowledged.

a. Full Faith and Credit among U.S. states

One basis for accepting acknowledgements from outside of the Commonwealth of Virginia, but within the United States is the full faith and credit clause of the Constitution.[63] In addition, Va. Code § 55-113(1) specifically authorizes recordation of documents acknowledged within the United States, Puerto Rico, or any territory or other dependency or possession of the United States before a notary public, a commissioner in chancery, or clerk of any court of record.

[56] Va. Code § 55-118.5
[57] Va. Code § 55-113, 115, and 120.
[58] Va. Code § 17.1-258.4.
[59] Va. Code § 17.1-227.
[60] Va. Code §§ 17.1-223, 17.1-227, 17.1-227-1, 55-106.5, 55-108
[61] Id.
[62] Va. Code § 17.1-223(C).
[63] U.S. Const. art. IV, § 1.

b. Notarization certificate requirements may vary – Check statute to see what is required

If you receive a document that has been notarized in another state, and the notary certificate looks different than what you are used to seeing from a Virginia notary, do not immediately despair! Instead, locate and review the relevant state standards. State requirements vary as to what constitutes a valid notary certificate. Virginia will accept the document, provided that it meets the requirements of the originating state.[64]

c. Military notaries

Va. Code §§ 55-114.1 and 115 recognizes acknowledgments made before certain officers of the United States armed forces. The list of persons authorized to act in the capacity of notary public is found at 10 U.S.C. § 1044a. This section also provides that:

> The signature of any such person acting as notary, together with the title of that person's offices, is prima facie evidence that the signature is genuine, that the person holds the designated title, and that the person is authorized to perform a notarial act.[65]

d. U.S. officials who may notarize abroad (i.e., State Department)

Va. Code § 55-114 authorizes the clerk to record acknowledgments made before "any ambassador, minister plenipotentiary, minister resident, charge d'affaires, consul-general, consul, vice-consul or commercial agent appointed by the government of the United States to any foreign country." The United States Department of State maintains a website[66] with information regarding notary services provided at U.S. Embassies and Consulates. The website notes: "Notarizing officers at any U.S. Embassy or Consulate abroad can provide a service similar to the functions of a notary public in the United States."[67] Further:

> Notarizing officers at U.S. Embassies and Consulates require the personal appearance of the person requesting the notarial service; establish the identity of the person requesting the service; establish that the person understands the nature, language and consequences of the document to be notarized; and establish that the person is not acting under duress. (22 C.F.R. 92.31).[68]

There is a fee for notarial services provided by State Department officers and employees.[69] Individuals wishing to use notary services provided through embassies or consulates should contact the embassy or consulate to determine the hours and availability of notarizing officials.[70] Depending on the Embassy or Consulate, notary services may be offered to both U.S. citizens and foreign nationals.[71]

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[64] Va. Code § 55-118.1.
[65] 10 U.S.C. § 1044a(d).
[66] https://travel.state.gov/content/travel/en/legal/travel-legal-considerations/internl-judicial-asst/authentications-and-apostilles/Notarial-Authentication-Services-Consular.html
[67] Id. "How do you get a document notarized overseas?"
[68] Id. "How do the notarial functions of U.S. Notarizing officers differ from those of a U.S. Notary Public?"
[69] Id. "What fees are charged for consular notarial and authentication services abroad?"
[70] Id. "What are the hours of operation for notarial services at U.S. Embassies and Consulates?"
[71] See Id.

e. Foreign Nations

A United States Treaty and Virginia statute serve as independent sources that allow for documents acknowledged before appropriate authorities in other countries to be recorded in Virginia.

i. Hague Convention

The Hague Apostille Convention provides for notarial acts performed in one country to be authenticated for use in another, if both countries are parties to the Convention, by use of an apostille.[72] An apostille is "a certificate that authenticates the origin of a public document" provided by a "competent authority" of the country in which the document originates.

A list of the countries that are parties to the Convention is available at https://www.hcch.net/en/instruments/conventions/status-table/?cid=41.

A brochure describing The Hague Apostille Convention, and how to use it, is available at https://assets.hcch.net/docs/6dd54368-bebd-4b10-a078-0a92e5bca40a.pdf. Additional links in the brochure provide addresses of who to contact to obtain an apostille.

ii. Countries that are not part of The Hague Convention

Use of an apostille is not the only way to make an acknowledgment made before a foreign official acceptable in Virginia. Va. Code § 55-114 provides for recordation of documents acknowledged before "the proper officer of any court of record of [a foreign] country or of the mayor or other chief magistrate of any city, town or [municipal] corporation therein." Likewise, under Va. Code § 55-118.1:

> Notarial acts may be performed outside this Commonwealth for use in this Commonwealth with the same effect as if performed by a notary public of this Commonwealth by . . . A notary public authorized to perform notarial acts in the place in which the act is performed . . . [or] Any other person authorized to perform notarial acts in the place in which the act is performed."

This statute applies to the notaries of foreign nations as well as the notaries of other U.S. States and Territories and applies to countries that are not parties to The Hague Apostille Convention as well as those countries that are parties to the Convention.

> A document notarized outside the Commonwealth by a notary public or other person [authorized by law] which appears on its face to be properly notarized shall be presumed to have been notarized properly in accordance with the laws and regulations of the jurisdiction in which the document was notarized.[73]

Note that the responsibilities of persons who hold the title of "notary" are not consistent across countries. Not all persons who hold the title of "notary" are authorized to perform notarial acts as defined under Virginia law.

iii. How to approach the clerk

[72] CITE TO HAGUE CONVENTION
[73] Va. Code § 47.1-13.1.

Employees in the Clerk's Office have a demanding job. Depending on the size of the city or county, they may be required to review hundreds of documents each day to determine, in short order, whether each document meets the criteria for recordation. An unusual document, or a document acknowledged in an unusual manner, will not be welcome. Not all employees in the clerk's office understand that they may accept documents acknowledged by a notary or other official outside of the United States. However, most clerks will record such documents if they are made aware of the statutes authorizing such acknowledgments. Contact the clerk early to avoid delay. If possible, take the proposed deed or other document to the clerk, before it needs to be recorded, to confirm that the instrument is in recordable form. Be prepared to show the clerk that the official who took the acknowledgment was authorized to do so under the laws of the jurisdiction in which the writing was acknowledged.

Va. Code § 55-118.2 sets forth what proofs to look for in ascertaining that an acknowledgment has been made before someone holding the proper authority:

> (a) If the notarial act is performed by any of the persons described in paragraphs (1) through (4) of § 55-118.1, other than a person authorized to perform notarial acts by the laws or regulations of a foreign country, the signature, rank, or title and serial number, if any, of the person are sufficient proof of the authority of a holder of that rank or title to perform the act. Further proof of his authority is not required.
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> (b) If the notarial act is performed by a person authorized by the laws or regulations of a foreign country to perform the act, there is sufficient proof of the authority of that person to act if:
>
> (1) Either a foreign service officer of the United States resident in the country in which the act is performed or a diplomatic or consular officer of the foreign country resident in the United States certifies that a person holding that office is authorized to perform the act;
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> (2) The official seal of the person performing the notarial act is affixed to the document; or
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> (3) The title and indication of authority to perform notarial acts of the person appears either in a digest of foreign law or in a list customarily used as a source of such information.
>
> (c) If the notarial act is performed by a person other than one described in subsections (a) and (b), there is sufficient proof of the authority of that person to act if the clerk of a court of record in the place in which the notarial act is performed certifies to the official character of that person and to his authority to perform the notarial act.
>
> (d) The signature and title of the person performing the act are prima facie evidence that he is a person with the designated title and that the signature is genuine.

X. What to do if you doubt an acknowledgment (short answer: reach out and call someone)

In real estate transactions, the settlement agent and the individual who takes an acknowledgment are the best defense against fraud. If you doubt that a document was properly acknowledged, then it is

reasonable to look for contact information for the person before whom the acknowledgment was made, and to contact that person.

Contact information for Virginia notaries may be found at:

https://solutions.virginia.gov/Notary/Search/Search.

Other states also maintain lists of their notaries, just as Virginia does.

Internet search capability makes it possible to identify and, in many instances, obtain contact information for persons who take acknowledgments in foreign countries. If there is any suspicion regarding fraud, such contact information should be found through an independent search, not through the offices of the person who executed the document.

These tools are also useful if a correction needs to be made to an acknowledgment.

If a notary or other official cannot be found on a state list or through a diligent search, then a question arises as to the validity of the appointment and the authenticity of the notarial act.

XI. Improperly acknowledged documents found in the chain of title

Recorded documents that do not comply with acknowledgment requirements do not necessarily break the chain of title. Under Va. Code § 55-106.2:

> A writing that is not properly notarized in accordance with the laws of the Commonwealth shall not invalidate the underlying document, however, any such writing shall not be in proper form for recordation. All writings admitted to record shall be presumed to be in proper form for recording after having been recorded, and conclusively presumed to be in proper form for recording after having been recorded for a period of three years, except in cases of fraud.

In addition to the foregoing, numerous statutes validate documents with specific flaws related to acknowledgments, such as lack of a seal being affixed to notarized documents. Where a statute addresses these flaws, the acknowledgment is generally validated, provided that it was taken prior to July 1, 1995. Contact underwriting counsel if you have questions regarding a specific document.

XII. Remote Electronic Notary (long)

Old Republic Title does not currently offer title insurance if the insured deed of trust is executed or notarized electronically. However, we all should recognize that electronic signatures and electronic notarization will be common, or even standard, in real estate transactions.

In Virginia,[74] electronic notaries must be commissioned as traditional notaries either before or concurrent with their commission as electronic notaries. The primary responsibility of the notary to confirm identity does not change, but the tools used by an electronic notary are slightly different than those of a traditional notary.

[74] The points made in this presentation are primarily focused on notarizations that conform to Virginia statutes. Several other states have also recently adopted statutes authorizing electronic notarization.

a. How does it work?

While a traditional notary meets face to face in the same physical space as the party appearing before the notary, an electronic notary may utilize secure two-way live teleconferencing.[75] The notary must keep copies of each video conference for five years following performance of the notarial act.[76]

A traditional notary may rely on specific identification documents to establish identity in those common situations in which the notary does not personally know the person whose signature will be notarized.[77] In similar circumstances, an electronic notary who operates remotely may rely on "an antecedent in-person identity proofing process in accordance with the specifications of the Federal Bridge Certification Authority" or "a valid digital certificate accessed by biometric data or by use of an interoperable Personal Identity Verification card that is designed, issued, and managed in accordance with the specifications published by the National Institute of Standards and Technology[.]"[78]

Many, if not most, electronic notary services use on-line verification methodology developed in conjunction with the Federal Bridge Certification Authority antecedent in-person identity proofing process. This methodology employs an Identity Verification Provider to certify identity based on questions and answers "drawn from multiple, and appropriately secured, data sources."[79]

Once the electronic notary is satisfied that the identity of the person whose act is to be notarized is established, then the person affixes his or her electronic signature, and the notary affixes the electronic seal.[80] The digital document serves as the original and may be recorded in those counties that accept both electronic recording and electronically notarized documents.[81]

b. Benefits

The chief benefit of electronic notaries is convenience. Electronic notarization is available around the clock and, under Virginia law, available in any location where there is a secure internet connection.[82]

A second, less commonly recognized benefit is the ability to confirm the identity of persons who are not otherwise able to access reliable notaries or others who can take acknowledgments. As the use of electronic notaries becomes more commonly accepted, this benefit may become very important.

c. Risks

Among the significant risks associated with remote online notarization are:

1. An individual who signs a document remotely may be coerced by someone who is off camera.

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[75] Va. Code § 47.1-2.
[76] Va. Code § 47.1-14(C).
[77] Va. Code § 47.1-2.
[78] Id.
[79] FBCA Supplementary Antecedent, In-Person Definition, FPKIPA – CPWG Antecedent, In-Person Task Group, published July 16, 2009. Available at https://www.ayininternationalinc.com/FBCA_Supplementary_Antecedent-1.pdf.
[80] Va. Code §§ 47.1-2 and 47.1-7.
[81] Va. Code § 55-142.11.
[82] Va. Code § 47.1-13.

2. Remote notarization, despite being authorized by Virginia law, may not meet loan standards which require in-person acknowledgment of loan documents.

3. Because the on-line verification methodology has not been tested in court, it is not clear that this system truly meets the statutorily mandated standard.

4. Finally, some errors and omissions or professional liability insurance requires in-person notarization, and it is not clear that remote notarization meets these standards.

The biggest risk facing anyone who wishes to rely on an acknowledged document is that the acknowledgment may be found to be unauthentic, and, thus, that the signature be found spurious, and the document unenforceable. This risk is particularly great in bankruptcy, where a trustee or court has both the motivation and the authority to set aside any commitment made by the debtor under questionable circumstances to increase the assets made available to the remaining creditors.[83] Because of the risk that an electronically signed and notarized document may be voided in bankruptcy proceedings, **Old Republic does not currently insure transactions where the deed of trust is executed or notarized electronically.** Please contact an underwriter before approving any transaction that utilizes an electronic notary, especially a remote electronic notary.

There is presently no ability to distinguish between Virginia remote notarization and Virginia electronic notarization based solely on the notarization itself. Va. Code §§ 17.1-258.4 and 55-142.11. directs clerks of court that accept electronic filing to accept documents as that are properly electronically signed and electronically notarized. Many clerks that do not accept electronically filed land records also do not accept electronically notarized documents.

d. A word to the wise

Electronic notarization is being encouraged by many industry partners and will become more common. If you have not already, you will have the opportunity in the future to accept or reject use of an electronic notary. Before agreeing to accept electronically notarized documents, make sure that you fully understand applicable underwriting guidelines, applicable requirements, if any, set forth in your errors and omissions insurance coverage, and the recording context in which the document will be used. You may need to be prepared to explain to the clerk the basis on which the clerk should accept the electronically notarized document. If this is the case, then it will be much more comfortable to have that conversation prior to the moment when the document must be recorded.

XIII. How to avoid fraud:

As noted above, in real estate transactions, the settlement agent and the individual who takes an acknowledgment are the best defense against fraud. Practical steps to minimize the risk of fraud include:

a. If you take the acknowledgment (How to protect yourself):

Proper identification prevents fraud. Never overlook this critical step when taking an acknowledgment. To make sure that proper identification is not overlooked:

[83] 11 U.S. Code §§ 548 and 550.

1. Use a written checklist. Include identity verification on the checklist.
   Not having to remember everything increase the ability to focus on the important things.
2. Do the same thing every time.
   Repetition creates good habits.
3. Make copies of ID
   While there are restrictions on making copies of certain IDs, such as military IDs, making sure that there are copies creates a reminder to review the IDs. Keeping copies of the IDs also creates a paper trail.
4. Require proof of name change
   It is too easy to pretend to be someone else if you do not have to produce a marriage certificate or other documentation of name change.
5. Keep a notary journal
   An updated notary journal provides proof of actual notarial acts and disproves spurious ones.

b. Relying on someone else's acknowledgment:

Frequently a title agent or settlement agent will receive documents that have been acknowledged by someone with whom the agent has no relationship. It is nice to think that everyone is honest all the time, but experience shows that such is not the case. To minimize the likelihood of passing on an erroneous or fraudulent document, take the following into account:

1. Errors happen. Be alert.
   Not one of us is perfect. A second set of eyes can catch mistakes that someone else overlooked. Furthermore, different professionals have different standards. Do not assume that documents have been reviewed before being passed along.
2. Review every document; the earlier the better.
   It is better to identify a problem before a document has to be recorded.

ii. The phone is your friend (contact settlement agent or notary)
   In many circumstances, what looks irregular may have an innocent explanation. On the other hand, innocent mistakes, if not corrected, can create larger problems. Reaching out to clarify, confirm or correct is not only a professional courtesy, but also a course of action that can prevent significant future distress.

c. Understand circumstances. Don't assume all is well.

Be skeptical. If something does not look right, inquire further. The honest will welcome the additional inquiry. The dishonest will become someone else's problem. There are, of course, unique situations that arise from time to time in real estate transactions. But these situations, if legitimate, can be explained. And those who find themselves in challenging circumstances will appreciate professionals who are willing to complete a task without cutting corners.

Fraudulent execution of a document may make the document unenforceable. The suggestion that an improper acknowledgment or execution of a document by someone without authority should be overlooked should be treated the same as a bald invitation to lie, cheat, or steal. Such a suggestion may not be precisely the same thing, but the effects are difficult or impossible to distinguish.

d. Fiduciaries – Self-dealing

Individuals who act in a representative capacity and choose to commit fraud are of particular concern because their abuse of the trust placed in them may be nearly invisible. Documents that create a fiduciary relationship should be carefully examined to confirm that the fiduciary is acting within the limits of the fiduciary's authority. Any attempt to direct funds to the account or order of the fiduciary, instead of being conveyed to the principal, should prompt additional questions. There is nothing wrong with insisting on providing a check made out to the seller instead of wiring funds to a fiduciary's bank account.

XIV. Special concerns regarding powers of attorney

In most real estate transactions, multiple personal contacts between sellers, buyers, real estate agents, attorneys, settlement agents and lenders reduce the risk of fraud through impersonation. Because a power of attorney separates the principal from professional service providers, use of a power of attorney inhibits the ability of diligent professionals to recognize and prevent fraudulent acts. However, in some cases, use of a power of attorney is essential to facilitate a successful sale or purchase. Despite the risk, both title underwriting guidelines and Virginia law allow for the use of a power of attorney in limited circumstances. Alert title agents will take steps to minimize the inherent risk of using a power of attorney.

Before agreeing to accept use of a power of attorney, a title agent must be satisfied that the power of attorney was properly signed, that it gives the agent the power or powers required to complete the subject transaction, that it has not expired or been revoked, and that, if necessary, an original will be available to be recorded. In Virginia, Old Republic asks its agents to give underwriting counsel the opportunity to review and approve the use of all powers of attorney before closing. Approval should be sought as early as possible, as there is a seven-day window prescribed by statute during which it is most suitable to raise questions regarding the power of attorney.[84]

Special protections benefit those who, in good faith,[85] and without actual knowledge of certain defects, rely on a properly executed[86] and acknowledged[87] power of attorney, even if the power of attorney, or the authority of the agent, is defective.[88] But, it must be noted that these protections "**shall not apply to an acknowledged power of attorney that contains a forged signature of the principal.**"[89] These protections and conditions under which these protections apply are discussed below.

[84] The window opens upon "presentation of the power of attorney for acceptance." See Va. Code § 64.2-1618(A)(1). Note that the power of attorney may be rejected, even outside the seven-day window, for any of the reasons set forth in Va. Code § 64.2-1618(B).
[85] "'Good faith' means honesty in fact. Va. Code § 64.2-1600.
[86] The standards for execution of a power of attorney are set forth in Va. Code §§ 64.2-1603-4.
[87] "'Acknowledged' means verified before a notary public or other individual authorized to take acknowledgments." Va. Code § 64.2-1617(A).
[88] Va. Code § 64.2-1617(B)
[89] Id. Emphasis added.

a. Preliminary statutory definitions

Under Va. Code § 64.2-1600:

> "Power of attorney" means a writing or other record that grants authority to an agent to act in the place of the principal, whether or not the term power of attorney is used.
>
> "Principal" means an individual who grants authority to an agent in a power of attorney.
>
> "Agent" means a person granted authority to act for a principal under a power of attorney, whether denominated an agent, attorney-in-fact, or otherwise. The term includes an original agent, coagent, successor agent, and a person to which an agent's authority is delegated.
>
> "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

b. What is not protected?

The location in which the power of attorney was executed and the law of the jurisdiction, if any, referenced in the power of attorney are very important. Under Va. Code § 64.2-1605:

> The meaning and effect of a power of attorney is determined by the law of the jurisdiction indicated in the power of attorney and, in the absence of an indication of jurisdiction, by the law of the jurisdiction in which the power of attorney was executed.

The standards set forth in this section apply to powers of attorney construed according to Virginia law. Contact underwriting counsel if you have any question regarding these standards or if a different standard should apply in a specific situation.

Lack of proper execution of the power of attorney will, in most instances, be fatal to any transaction that relies on a power of attorney.[90] As noted in bold above, no statutory protections exist for a power of attorney that contains a forged signature.[91] To minimize the risk of a signature being forged:

1. Compare the signature on the power of attorney to other documents signed by the principal, if any are available;
2. Look up the notary;
3. Find out if someone else in the transaction has had direct personal contact with the principal; and,
4. If appropriate, contact the principal.

If there is doubt as to the authenticity or validity of a power of attorney, do not hesitate to refuse to insure a transaction. There is no requirement to accept a power of attorney if there is no obligation to

[90] See Va. Code § 64.2-1617(B).
[91] Id.

engage in a transaction with the principal.[92] Very few, if any, attorneys or settlement or title agents are obligated to facilitate real estate transactions for any specific seller or buyer. Doubt as to the authenticity of a principal's signature is firm ground upon which to refuse to accept a power of attorney.[93]

Make sure that the agent is properly identified. If two or more agents are appointed, and the power of attorney does not require that the agents act together, then any agent may act.[94] If a successor agent or agents is or are appointed, then, unless the power of attorney provides otherwise, any successor agent or agents may not act until all predecessor agents have resigned, died, become incapacitated, are no longer qualified to serve, or have declined to serve.[95] Unless the power of attorney directs otherwise, successor agents have the same authority granted to the original agent.[96]

It is reasonable to presume that a title or settlement agent or attorney would read a power of attorney before permitting an agent to act under its authority. Acceptance implies actual knowledge of the limits of the authority granted in a power of attorney. Careful review is essential to verify that an agent does not exceed the agent's scope of authority.

Not everything that the agent is authorized to do needs to be spelled out in detail. In addition to a specific grant, a power of attorney may refer to a general authority described in Va. Code §§ 64.2-1625 through 64.2-1638, cite one of those specific code sections,[97] or grant the agent authority to do all that a principal could do.[98] A short list of authorities which may not be exercised unless specifically granted, including the power to make a gift or to further delegate authority, is set forth in Va. Code § 64.2-1622(A). Likewise,

> [U]nless the power of attorney otherwise provides, an agent that is not an ancestor, spouse, or descendant of the principal may not exercise authority under a power of attorney to create in the agent, or in an individual to whom the agent owes a legal obligation of support, an interest in the principal's property, whether by gift, right of survivorship, beneficiary designation, disclaimer, or otherwise.[99]

Some situations require inquiry into the mental or physical condition of the principal or the relationship between the principal and the agent. A power of attorney that is not durable[100] terminates

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[92] See Va. Code § 64.2-1618(B)(5). ("A person is not required to accept an acknowledged power of attorney [if] [t]he person believes in good faith that the power is not valid[.]") A valid power of attorney must be properly executed in accordance with the law of jurisdiction in which it is signed. See Va. Code § 64.2-1604. The protections set forth in Va. Code § 64.2-1617(B) do not adhere to a power of attorney unless the power of attorney is "signed by the principal or in the principal's conscious presence by another individual directed by the principal to sign the principal's name on the power of attorney." See Va. Code §§ 64.2-1617(B) and 64.2-1603.

[93] Id.

[94] Va. Code § 64.2-1609(A).

[95] Va. Code § 64.2-1609(B). Any notice of resignation must be given as set forth in Va. Code § 64.2-1616.

[96] Id.

[97] See Va. Code § 64.2-1623.

[98] Va. Code § 64.2-1622(C). Note that such a grant excludes the authorities set forth in Va. Code § 64.2-1622(A).

[99] Va. Code § 64.2-1622(B).

[100] "'Durable' [means] not terminated by the principal's incapacity." Va. Code § 64.2-1600. A power of attorney created under current Virginia law "is durable unless it expressly provides that it is terminated by the incapacity of the principal." See Va. Code § 64.2-1602.

upon the incapacity[101] of the principal.[102] Likewise, a power of attorney terminates if the principal dies or revokes the power of attorney.[103] The agent's authority under the power of attorney also terminates if the principal revokes the agents authority or:

> Unless the power of attorney otherwise provides, an action is filed (i) for the divorce or annulment of the agent's marriage to the principal or their legal separation, (ii) by either the agent or principal for separate maintenance from the other, or (iii) by either the agent or principal for custody or visitation of a child in common with the other[.][104]

On the other hand, a power of attorney also may state that it is not effective unless the principal is incapacitated, or some other contingency is met.[105] To minimize these risks, an agent should be required to execute an affidavit or a certificate that states that the power of attorney, and the agent's authority under the power of attorney, is currently in effect.[106] Refusal by the agent to sign such a document removes any obligation to accept a power of attorney.[107] Any suggestion that a power of attorney may not be effective should be investigated prior to relying on the agent certification in order to preserve the protections afforded those who "in good faith" rely on a power of attorney "without actual knowledge" of a defect.

Acknowledged powers of attorney drafted in a foreign language may be accepted if an English language translation is provided by the proponent of the power of attorney. Such a translation should be in recordable form and include an affidavit from the translator stating that the translation is correct. If a question arises as to a matter of law concerning a power of attorney, the recipient of the power of attorney may ask for an opinion of counsel for the principal, the agent, or the recipient. Additionally, a person who is asked to accept a power of attorney may petition a court to construe a power of attorney or review the agent's conduct and grant appropriate relief. A person that is asked to accept an acknowledged power of attorney may also request an agent's certification under oath as to any factual matter concerning the principal, agent, or power of attorney.

Under what is known as the "equal dignities rule," a power of attorney used to sign a deed or deed of trust must be recorded with the deed or deed of trust. This means that the power of attorney must be in recordable form. Va. Code § 64.2-1617 recognizes this reality by stating that: "An agent's certification, an English translation, or an opinion of counsel shall be in recordable form if the exercise of the power requires recordation of any instrument under the laws of the Commonwealth."

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[101] "'Incapacity' means inability of an individual to manage property or business affairs because the individual:
1. Has an impairment in the ability to receive and evaluate information or make or communicate decisions even with the use of technological assistance; or
2. Is missing or outside the United States and unable to return." Va. Code § 64.2-1600.
Note that "unable to return" does not mean merely unwilling or filled with desire not to be inconvenienced.

[102] Va. Code § 64.2-1608(A)(2).

[103] Va. Code § 64.2-1608(A)(1) and (3).

[104] See Va. Code § 64.2-1608(B)(1) and (3). Note that the agent's authority also terminates if the power of attorney terminates. Va. Code § 64.2-1608(B)(2).

[105] See Va. Code § 64.2-1607.

[106] See Va. Code § 64.2-1617(C)(1).

[107] See Va. Code § 64.2-1618(B)(4).

Under Va. Code § 64.2-1618(A)(1)-(2), a request for a certification, a translation, or an opinion of counsel should be made no later than seven business days after presentation of a power of attorney, and then should accept the power of attorney no later than five business days after receipt of the certification, translation, or opinion of counsel. Furthermore, "[a] person may not require an additional or different form of power of attorney for authority granted in the power of attorney presented."[108] However,

> A person is not required to accept an acknowledged power of attorney for a transaction if:
>
> 1. The person is not otherwise required to engage in the transaction with the principal in the same circumstances [. . .]
>
> 2. Engaging in the transaction with the agent or the principal in the same circumstances would be inconsistent with federal law;
>
> 3. The person has actual knowledge of the termination of the agent's authority or of the power of attorney before exercise of the power;
>
> 4. A request for a certification, a translation, or an opinion of counsel [. . .] is refused;
>
> 5. The person in good faith believes that the power is not valid or that the agent does not have the authority to perform the act requested [. . .]; or
>
> 6. The person makes, or has actual knowledge that another person has made, a report to the local adult protective services department or adult protective services hotline stating a good faith belief that the principal may be subject to physical or financial abuse, neglect, exploitation, or abandonment by the agent or a person acting for or with the agent.

c. Reliance upon an acknowledged power of attorney.

As noted above, important protections adhere to powers of attorney that are not only properly executed, but also properly acknowledged. Under Va. Code § 64.2-1617(A), "'acknowledged' means verified before a notary public or other individual authorized to take acknowledgments." Under Va. Code § 64.2-1617(B), unless the power of attorney contains a forged signature of the principal:

> A person that in good faith accepts an acknowledged power of attorney that has been signed [by the principal or in the principal's conscious presence by another individual directed by the principal to sign the principal's name on the power of attorney][109] without actual knowledge that the power of attorney is void, invalid, or terminated, that the purported agent's authority is void, invalid, or terminated, or that the agent is exceeding or improperly exercising the agent's authority may rely upon the power of attorney as if the power of attorney were genuine, valid, and still in effect, the agent's authority were genuine, valid, and still in effect and the agent had not exceeded and had properly exercised the authority.

[108] Va. Code § 64.2-1618(3).
[109] See Va. Code § 64.2-1603.

d. Military powers of attorney

Va. Code § 64.2-1604(C)(ii) recognizes the validity of a power of attorney executed in compliance with the requirements for a military power of attorney pursuant to 10 U.S.C. § 1044b, as amended. 10 U.S. Code § 1044b defines a military power of attorney as any general or special power of attorney notarized by a notary authorized to act under 10 U.S. Code § 1044a, and provides that:

> A military power of attorney—
>
> (1) is exempt from any requirement of form, substance, formality, or recording that is provided for powers of attorney under the laws of a State; and
>
> (2) shall be given the same legal effect as a power of attorney prepared and executed in accordance with the laws of the State concerned.

It is worth noting that, because a military notary is "authorized to take acknowledgments," the protections set forth in Va. Code § 64.2-1617(B), together with the exceptions to those protections, adhere to a military power of attorney. It is also worth noting that, even though a military power of attorney does not have to conform to specific requirements for recording, the clerk may still reject a photocopy just the same as the clerk would reject any other power of attorney prepared or executed in accordance with Virginia law that does not contain an original signature.

e. Common fiduciary errors

Occasionally individuals who operate a closely-held commercial enterprise or are trustees under a revocable trust agreement will seek to delegate their authority by means of a power of attorney. Generally speaking, this is improper. Unless the relevant bylaws, partnership agreement, operating agreement, or trust agreement provides otherwise, the authority to act as a fiduciary is not assignable through a power of attorney. In the case of a commercial enterprise, the authority to act may be conveyed to an employee, officer, manager, partner, or member by resolution. A trust agreement typically identifies who may act as successor trustee if the initial trustee or trustees is or are unable to act.

Likewise, unless a power of attorney specifically provides otherwise, an agent may not authorize someone else to act as power of attorney for the principal.[110]

f. Alternatives

One motivation to review powers of attorney early in a transaction's life cycle is that the parties who seek to act through a power of attorney may be able to find an alternative before the anticipated closing date if, for any reason, the power of attorney cannot be used at closing or cannot be recorded. Such alternatives may include locating a local notary, embassy, or other facility that may take an acknowledgment. As electronic notarization becomes more accepted, then this service may also become an alternative to use of a power of attorney.

[110] Va. Code § 64.2-1622(A)(5).