

Chairman Shockley and members of the committee: My name is Lori Hamm, L-O-R-I H-A-M-M, and I am the Notary Compliance and Education Specialist for the Secretary of State's office, which is responsible for appointing and commissioning Montana's notaries public. I am also one of the 19,847 active notaries in the state of Montana. I am speaking on behalf of Secretary of State Linda McCulloch in opposition to HB 306.

There are three primary concerns that we have about this bill: It mischaracterizes the purpose of that section of the statute, it will convey a counterproductive message to notaries and the public, and finally, the bill as written does not accomplish what the sponsor and the supporters are attempting to do.

First, this bill has been put forth as an effort to "repeal an onerous and unnecessary business regulation". In fact it is just the opposite. Montana's nearly 20,000 notaries public are, indeed, public officials just like you, me, and the other 12,000+ state employees, insofar as their official duties are concerned. **1-5-416(1)(h), MCA is prudent and proper regulation of public officials**, not businesses, and is designed to protect the notary, the notary's employer, and most importantly, the public they are commissioned to serve.

Admittedly, the vast majority of our notaries are employed by the thousands of private and public sector entities around the state. The fact remains, however, that every single one of these individuals, at the time when they are providing notarial services to or for their employers, co-workers, or customers, are acting as ministerial agents of the State of Montana. **They are notaries public, not notaries private.** As public officials, notaries must be held to the standards of accountability and transparency as all other public officials. **I know of no public official authorized to act of behalf of the State of Montana that is not required to create, keep, and maintain a written record of their official acts.**

Unlike with most other public officials, the state offers notaries public **no immunity whatsoever in the performance of their official acts**, rather, Montana notaries are **personally liable** for the full amount of the damages or losses suffered due to their malpractice or negligence. Would any of you be willing to take a job in which you got no pay at all, but you were liable for unlimited financial damages if you did something wrong, even inadvertently? In the past year alone, our office has received over two dozen complaints against notaries involving almost \$400,000 in alleged losses – averaging \$65,000 per claim. That's a lot of money for a bank teller or a car salesman! Montana notaries are not required to carry any kind of liability insurance and, as you heard from Mr. Robinson, there is at least some question whether an employer's umbrella policy would cover a notary's liability - particularly if the document in question could be construed as being "non-work related."

You've heard previous testimony that journaling prevents fraud and forgery. It's absolutely true! **Not once, in all the complaints we have processed in the six years I have worked for the Secretary of State's office has there been a successful claim made against a notary who faithfully kept a journal, properly recording each transaction.** A \$12 journal is the cheapest and best insurance available to notaries. Notary law expert Peter Van Alstyne has stated, "In the notarial context, journaling is the least intrusive solution, for the greatest good, for the greatest number of people."

At the end of my testimony I will submit letters from two of the largest companies underwriting Montana notary bonds, CNA Surety and Merchants Bonding. On behalf of the insurance and bonding industry, these companies want to be on record opposing HB 306.

William G. Peterson, Vice President of CNA Surety, states that, "**A notary's journal has proven to be a very valuable tool** in determining the validity of a claim, ... because it documents when the notarization took place, the circumstances of the notarization and the authentication of the people involved in the transaction. **This helps to protect the notary if they have acted properly, or the consumer if they have not...**"

James A. Holter, Assistant Vice President of Merchants Bonding Company, writes in his letter, "As an underwriter of surety bonds and notary errors and omissions policies, we are involved in a wide variety of cases in which the notary has been accused of wrongdoing. Often the journal is the primary piece of evidence to determine what actually occurred..."

Our second major concern is the message that will be conveyed to notaries and to the public if this bill passes – whether it is your intention or not – is that a notarization is "no big deal". You risk creating the impression that the state of Montana somehow approves or endorses improper notarizations or at least

doesn't care if notaries are careful and prudent in the performance of their duties. Too often a notarization is seen as little more than a clerical nuisance. It is that attitude which underlies the assertion that keeping a notary journal is onerous, unimportant and unnecessary. HB 306 reinforces that perception.

Almost every important transaction in your life involves a notarized document.

Two years ago when this committee heard SB299 you heard one of the witnesses tell you that it was his common practice to have his clients sign documents in his presence and then have his secretary "notarize" them later. Last month during Executive Session in the House State Admin Committee, one of the members of the committee explained his support of this bill by explaining how he routinely signed documents and left them for someone to notarize hours or even days later. These aren't isolated or unusual examples of many people's understanding of notarial practice. But they are blatant and unequivocal violations of the law on the part of both the notary and the individual who compels the notary to break the law!

The notary serves a very specific purpose: That is to be the state's official witness to the identity, ability and intent of the person who signs a particular document. In order to fulfill this purpose the notary and the signer **MUST** be physically present to each other at the time the notarization takes place. We call that Rule # 1 and it is the one universal standard in notarial law in every state in the union, and every country in the world. And it is just as universally misunderstood and ignored. However, a notary who properly uses a journal that requires the signer's signature can't possibly break RULE # 1.

Does it really matter if a notary does the job properly? Did you realize that the seven of the terrorists who murdered almost three thousand people on 9/11 were able to obtain valid IDs on the basis of fraudulently notarized documents? Several of the bills you've dealt with this session involve identity theft and fraud. This bill makes it easier for criminals to commit this type of felony and harder for law enforcement to detect and prosecute it.

Passage of HB 306 will do much more to strengthen the Law of Unintended Consequences than you could possibly anticipate. Some of the bills you will enact this session require affidavits, waivers or other signed and notarized statements as proof that someone did, or intended to do, some thing. I can hardly believe that you would intentionally make it easier for someone to obtain a notarization of a fraudulent signature. And yet that is exactly what this bill does: It makes it easier for a person to commit a crime and harder for those crimes to be proven. And it also leaves public officials with less protection against frivolous claims. It's very easy to challenge a signature and claim it was forged, or made under duress or without the signer's full intent and knowledge.

Let me tell you about an elderly lady who lives in Southwest Montana. She was suffering from the early stages of dementia, so her son allegedly had her sign a Power of Attorney giving him authority over her finances. He used that Power of Attorney to clean out all her bank accounts – to the tune of over \$200,000, leaving her destitute and living on welfare. Our office is currently involved in the investigation because there is a question as to whether the lady actually signed the Power of Attorney and/or whether it was notarized at the time it was signed. In this type of "she said/she said" controversy the notary's journal can provide legally accepted proof of what happened. But, because the notary did not enter that one particular transaction in her journal – which she ordinarily kept – there is much suspicion and question as to what really occurred and the litigation will be lengthy, contentious, and expensive.

Two days ago I received another complaint against a Montana notary for virtually this same situation. Notarized Powers of Attorney are frequently used as the method to defraud our senior citizens of their life savings. I believe some of you recently heard the testimony on HB 374 – Representative Hanson's bill to revise the laws on Powers of Attorney. It is ironic that some of the folks who testified in support of that bill are here today asking you to weaken the laws that provide the fundamental legal foundation for a Power of Attorney to be valid and enforceable. HB 374 will be of little use if the actual Power of Attorney is successfully challenged because it cannot be proven that the signer knowingly and willingly signed it in the presence of an unbiased third-party witness.

Our third objection to this bill is that the repeal 1-5-416(1)(h), MCA does not absolve a notary from the responsibility of "creating" a record of his/her official acts – rather it removes the mandated regulation of what

constitutes a satisfactory record, what is expected to be included in the record, and how it is to be "kept and maintained".

As you heard from Mr. Robinson, there is a common law duty for notaries as public officials to create and preserve records that document their official acts. Failure to create such a record is, in itself, negligence – the failure to take "reasonable care" in the performance of one's duty. Any notary who performs a notarial act without recording it in a permanent record is automatically in legal jeopardy.

It is our position that HB 306 only removes the statutory clarification of what is expected to be included in the record and how it is to be "kept and maintained" and leaves the individual notary to guess whether to include driver's license numbers, social security numbers, birthdates, fingerprints. What constitutes enough information, what is too much? And what does a notary do with the journal when it's full? Or when they move or retire or die? 1-5-416(1)(h), MCA was carefully crafted to include sufficient information to protect the notary, the employer, and the public and not so much that the journal contains private information that can be used for fraudulent purposes such as identity theft. It also provides clear instructions as to the permanent storage of the journal so that those records will be available if needed years in the future. HB 306 removes the balance, clarification and direction that the current law provides.

You've heard some concerns about privacy issues. **To the best of my knowledge there has never been a successful legal challenge to a notary journal anywhere in the country on the basis of a privacy violation or a violation of attorney-client privilege.**

Two years ago when the bill addressing this issue was debated, many people told us that notaries would be resigning by the thousands because of the additional requirements. To date, we have received resignations from 26 notaries citing the new law as the reason for resignation and the number of active notaries now is approximately the same as we had two years ago. I would submit that, despite the little bit of extra time it takes to complete a journal entry, most business still feel that having an readily available notary is more convenience than hassle. I have a letter for you from Randall G. Penton, Director of Risk Management for the Billings Clinic. In it he states, **"It is the Billings Clinic's opinion that Notary Journals are a key piece of our Risk Management procedures...In a circumstance regarding documentation for a legal proceeding, this is a valuable piece of evidence."**

I would also like to submit for the record a letter from Kathleen Butler, Executive Director of the American Society of Notaries and a letter from another Montana notary, Lydia Gomes, from Farmers Bank in Stevensville, who is one of our certified notary trainers. They also wish to be on the record in opposition to HB 306.

Record keeping in all its forms is a hassle. We get that. But if what is being notarized is of so little import that the hassle of creating a journal record outweighs the benefit of having that record, I would suggest that doing away with the notarization is a much more reasonable approach. We know that far too many documents call for notarization when it really isn't necessary. Our office has worked with and supported several entities, including the Motor Vehicle Division and the insurance industry, to find ways to eliminate the unnecessary notarization on various documents. We're firm believers that you can get rid of the bathwater without throwing out the baby. HB 306 is the wrong solution to the problem that Rep. Berry brings before you.

After listening to the testimony presented today, I think I can sum it up in a very few words: Rep. Berry and the supporters of HB 306 are asking you to toss out the journal because it's an inconvenient hassle. We are asking you to preserve the journal because it provides notaries and the citizens of this state with unparalleled prevention, protection and proof. There is no compelling reason to change a law that is actually working well. I urge you to vote no on HB 306.

Thank you Chairman Shockley and members of the committee.