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October 29, 1979

ATTORNEY GENERAL OPINION NO. 79- 249

The Honorable Jack H. Brier
Secretary of State
Second Floor, State Capitol
Topeka, Kansas 66612

Re: Notaries Public and Commissioners -- Powers and Duties --
Authority to Revoke Appointment

Synopsis: A notary public may be removed from office by way of ouster proceedings commenced pursuant to K.S.A. 60-1205 et seq.

The notarial seal must be personally affixed by the notary public concurrent with the notary's execution of his or her signature.

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Dear Secretary Brier:

You have requested our opinion regarding three matters relating to notaries public. First, you inquire if the Secretary of State of Kansas has the power and authority to revoke a notary public's appointment after the individual has been convicted of a crime and incarcerated. Secondly, you inquire if a notary public must affix his or her seal concurrently with the execution of the notary's signature or whether the seal may be affixed subsequently by another party at the notary's direction. Finally, you inquire as to which county should be identified in the caption of the acknowledgment if a notary public signs his or her name to the acknowledgment in one county and affixes his or her seal in another county.

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The statutory guidelines for the appointment of notaries public and their resulting powers and duties are set out in K.S.A. 53-101 et seq. A review of these statutes reveals that there is no express, statutory authority for the Secretary of State to revoke a notary public's appointment due to conviction of a crime and incarceration thereafter. However, the absence of such statutory authority within the act is not determinative, in our opinion, in light of the provisions set out in K.S.A. 60-1205 et seq. which establish ouster proceedings. This conclusion is supported in 59 Am.Jur.2d Notaries Public §13, which states:

"Notaries like other public officers, may be removed from office in the manner and for causes prescribed by statutory or constitutional provisions relating to removal of officers generally."

The pertinent Kansas statute which sets forth the grounds for forfeiture of public office is K.S.A. 60-1205, which provides:

"Every person holding any office of trust or profit, under and by virtue of any of the laws of the state of Kansas, either state, district, county, township or city office, except those subject to removal from office only by impeachment, who shall (1) willfully misconduct himself or herself in office, (2) willfully neglect to perform any duty enjoined upon him or her by law, or (3) who shall commit any act constituting a violation of any penal statute involving moral turpitude, shall forfeit his or her office and shall be ousted from such office in the manner herein-after provided."

It is our opinion, therefore, that the appointment of a notary public may be revoked by the accomplishment of ouster proceedings as set out in K.S.A. 60-1206, if the elements prescribed by K.S.A. 60-1205 are satisfied. Further support for this position is contained in Patterson v. Dept. of State of New York, 312 N.Y.S. 2d 300, 35 A.D.2d 616 (1970), wherein the court stated:

"A notary public is a public officer and the responsibilities of the Secretary of State extend to protecting the public against misconduct by notaries, the caliber of a notary and his right to remain in office to be measured not only by his activities as such but also by trustworthiness and competence exhibited in other areas in which the public is concerned." (Citations omitted.) Id. at 303.

Although it is clear from the statutory definition set out in K.S.A. 53-101 that notaries public are not to be considered "state officers," such fact does not alter our conclusion, since the proceedings outlined in K.S.A. 60-1205 et seq. extend beyond the confines of "state officers"

to include all persons holding an office of trust or profit by virtue of any of the laws of the State of Kansas. K.S.A. 53-101, 53-102 and 53-103 all refer to the position of notary public as one of "office" in describing the procedure for appointment and prescribing the requisite bonds and oath of office. The authority vested in notaries public clearly contemplates an office of trust, in that notaries are empowered to administer oaths and acknowledge official documents and instruments. K.S.A. 53-107, 54-101, 60-228. Although it may be asserted that a notary public is not a person holding an office of trust or profit, such an argument is without merit, in our judgment, in light of the foregoing statutes. For these reasons, it is our opinion that a notary public is subject to the sanction established in K.S.A. 60-1205 et seq. and may be removed from office via ouster proceedings.

Your second inquiry is whether a notary public must affix his or her seal concurrently with the execution of the notary's signature, or whether the seal may be affixed subsequently by another party at the notary public's direction. The use of the notarial seal is considered in K.S.A. 53-105 which provides, in part:

"Every notary public shall provide a notarial seal containing such notary's name, county of residence and the words 'notary public' and shall authenticate all official acts, attestations and instruments therewith." (Emphasis supplied.)

From the foregoing statute it is clear that affixing the notarial seal is a mandatory step of the authentication process. Neither the language of the statute nor any decisional law of Kansas that we have discovered authorizes a notary public to delegate this essential function to another person. Rather, the language of the statute expressly states that the notary public shall so authenticate such acts by affixing the notarial seal. In 66 C.J.S. Notaries §§ 7,8 the delegation of authority is discussed and it is stated:

"In the absence of a statute or valid custom a notary cannot delegate his official authority, even to another notary, and a notarial act cannot be performed by his clerk or deputy."

The same position as the preceding is stated at 58 Am.Jur.2d Notaries Public §21.

The question of whether the seal must be affixed concurrently with the execution of the notary's signature is considered in 58 Am.Jur.2d Notaries Public §33 where it states:

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"Where a notary is required to possess a seal as a condition precedent to his right to act, and he does not affix his seal at the time of executing a certificate, the defect cannot thereafter be supplied. However, in the absence of any such requisite, it has been held that a notarial seal may subsequently be fixed in order to prove the notary's authority."

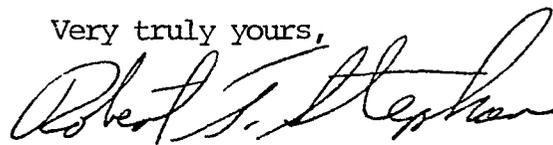
That a seal is a condition precedent to the right to act in Kansas is clear in light of K.S.A. 53-102, which provides:

"Every notary public before entering upon the duties of that office shall file with the secretary of state an application for appointment as a notary public, the oath of office and a good and sufficient bond to the state of Kansas in the sum of two thousand five hundred dollars (\$2,500), with one or more sureties to be approved by the said secretary of state, conditioned for the faithful performance of the duties of that office; and also shall file with the secretary of state the official signature and an impression of the seal to be used by said notary public." (Emphasis supplied.)

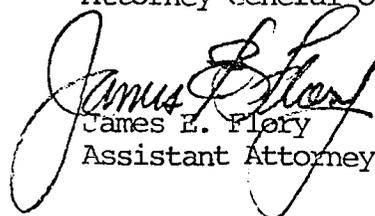
In conclusion, it is our opinion that the notarial seal must be affixed concurrently with the notary's execution of signature and, further, that the seal must be affixed by the notary personally.

Your final inquiry is whether the county in which the notary public signs his or her name to the acknowledgment or the county wherein the notary affixes his or her seal would be the proper county to be identified in the caption of the acknowledgment. Since it is our opinion that the execution of the signature and the affixing of the seal must be concurrent, such a factual situation should not legally arise. For that reason we do not feel it is necessary to address this issue.

Very truly yours,



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Attorney General of Kansas



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