



STATE ETHICS COMMISSION

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December 27, 2021

MEMORANDUM

From: Jeremy Farris, Executive Director, State Ethics Commission
Re: State Ethics Commission's authority under the Revised Uniform Law on Notarial Acts

Under the Revised Uniform Law on Notarial Acts ("RULONA"), NMSA 1978, §§ 14-14A-1 to -32 (2022) (effective January 1, 2022), the State Ethics Commission has authority to take adverse action against a notary public's commission or application for a commission as a notary public for certain acts and omissions. *See* NMSA 1978, §§ 14-14A-22(A) & 14-14A-24(I) (2022). This authority takes effect on January 1, 2022.

This memorandum sets forth the procedure by which the State Ethics Commission will handle complaints alleging violations of RULONA; the Notary Public Act, NMSA 1978, §§ 14-12A-1 to 27 (2003, repealed by Laws 2021, ch. 21, §36, effective January 1, 2022); and the Uniform Law on Notarial Acts, NMSA 1978, §§14-14-1 to 14-14-11 (1993, repealed by Laws 2021, ch. 21, §36, effective January 1, 2022), until such time as the Commission promulgates rules in the New Mexico Administrative Code to administer its authority.¹

I. For complaints seeking adverse action against a commission as a notary public submitted on or after January 1, 2022

For complaints alleging an act or omission that, under Section 14-14A-22 (effective January 1, 2022), supports an adverse action against a notary public's commission, the following procedures apply until such time as the Commission promulgates supervening rules in the New Mexico Administrative Code:

1. Any person may submit a complaint alleging an act or omission that, under Section 14-14A-22(A) (effective January 1, 2022), supports an adverse action against a notary public's commission. The complaint shall:

¹ The procedures set forth in this memorandum are also subject to ratification by the State Ethics Commission at its next-scheduled meeting. The Commission will likely issue a notice of proposed rulemaking for rules of procedure governing the administration and enforcement of RULONA at the Commission's February 4, 2022 meeting. This memorandum is the Commission staff's interpretation of what process is required before adverse action against a notary public commission may be taken pursuant to RULONA. It does not confer any rights or impose any obligations on members of the public beyond those set forth in RULONA or conferred according to constitutional law, and accordingly does not constitute a "rule" as defined by the State Rules Act, NMSA 1978, 14-4-1 to -11 (1967, as amended 2017).

- (a) provide the name and, if available, the address of the respondent who is the subject of the complaint;
 - (b) attach any supporting documentation related to the complaint's allegations;
 - (c) be submitted on a form provided by the Commission or on a substantially equivalent form; and
 - (d) be submitted by electronic mail to ethics.commission@state.nm.us or by U.S. Mail to State Ethics Commission, 800 Bradbury Dr., Ste. 215, Albuquerque, NM 87106.
2. Upon receiving a properly submitted complaint, the Commission's executive director, or their designee, may share the complaint with the Office of the Secretary of State ("SOS") and request the SOS to provide record related to the respondent.
3. After receiving the respondent's file from the SOS, the Commission's executive director, or their designee, shall:
 - (a) send the complaint to the respondent at every address and electronic mail address that either the complainant provided to the commission or the respondent provided to the SOS;² and
 - (b) request that the respondent submit a response in writing within 30 days of the correspondence from the Commission's executive director, or their designee.
4. If the respondent fails to provide a response within 30 days, then the notary public's failure to provide a response will be construed as the respondent's failure to maintain the SOS with the respondent's updated contact information, as required by 12.9.3.8(E) NMAC, and the Commission may take adverse action, up to and including revocation of the respondent's commission as a notary public, on that basis.

² See, e.g., *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 & 319 (1950) (concluding that due process requires notice reasonably calculated to reach the person to be notified); see also *Uhden v. N.M. Oil Conservation Comm'n*, 1991-NMSC-089, ¶ 9, 112 N.M. 528 ("The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.") (quoting *Mullane*, 339 U.S. at 315); *Maso v. State Tax. & Rev. Dep't, Motor Vehicle Div.*, 2004-NMCA-028, ¶ 10, 136 N.M. 161 ("Due process does not require the same form of notice in all contexts; instead, the notice should be 'appropriate to the nature of the case.'") (quoting *Mullane*, 339 U.S. at 313); cf. also *Hansen v. Bd. of Registered Nursing*, 145 Cal. Rpt. 3d 739, 7747 (Cal. Ct. App. 2012) (upholding service by certified mail to the address provided by the party subject to license revocation proceedings, noting that California law did not require actual notice and that the party was under a legal obligation to apprise the professional regulator of her current address).

5. After receiving the respondent's response, the Commission's executive director or their designee shall conduct a review of the complaint, the response, and any other relevant documents or material that the Commission's executive director or their designee may obtain pursuant to an investigation. As part of an investigation, Commission staff or contractors may interview witnesses, request documents, and obtain and review any other evidence relevant to the complaint or the provisions of RULONA. Failure by a complainant or a respondent to participate in the investigation in good faith is a basis for the Commission to draw an adverse inference.
6. After reviewing the materials and conducting any investigation:
 - (a) if an adverse action against a commission as notary public is not appropriate, the Commission's executive director or their designee shall issue a notice to the complainant and the respondent that, subject to the Commission's approval, the Commission will not pursue revocation proceedings; and
 - (b) if an adverse action against a commission as notary public would be appropriate, the Commission's executive director or their designee shall issue the respondent with a notice of contemplated action. The notice of contemplated action gives formal notice that the Commission is pursuing revocation proceedings. That notice shall inform the respondent that the respondent may either (i) resign their commission as a notary public or (ii) defend against the contemplated action at a hearing before a hearing officer. The notice shall detail the process and rights afforded in an administrative hearing, and shall be transmitted to the respondent pursuant to the requirements of Paragraph 3(a) of this Memorandum.
7. If the respondent does not respond to the notice of contemplated action within 30 days, the respondent's failure to respond amounts to a waiver of the notary public's right to a hearing and the State Ethics Commission will take the adverse action against the notary's commission specified in the notice of contemplated action. The Commission's adverse action shall take place at an open meeting.
8. If the notary public exercises their right to a hearing, the State Ethics Commission shall contract with either the Administrative Hearings Office or another hearing officer for hearing officer services. The designated hearing officer shall hold a hearing to determine whether the recommendations in the notice of contemplated action should be adopted, modified, or set aside.
9. At any hearing requested by the respondent pursuant to these procedures, the Commission's executive director, or their designee, and the respondent may call

witnesses, present objections, and submit evidence relevant to the hearing officer's disposition of the notice of contemplated action. The hearing need not be conducted according to the rules of evidence, and any relevant evidence, including hearsay of probative value, is admissible. Oral evidence shall be taken only on oath or affirmation. Evidence which possesses probative value commonly accepted by reasonable and prudent persons in the conduct of their affairs may be admitted and given probative value. The rules of privilege shall be given effect, and incompetent, immaterial, and unduly repetitious evidence may be excluded. Documentary evidence may be received in the form of copies or excerpts, or by incorporation by reference.

10. If, after a hearing, the hearing officer finds the notary committed an action that, under Section 14-14A-22, supports the notice of contemplated action, or other adverse action, against the respondent's commission as a notary public, the hearing officer's report and recommendation will be forwarded to the State Ethics Commission recommending any adverse action available under Sections 14-14A-22(A) and 14-14A-24(I).
11. Upon receiving the hearing officer's report and recommendation, the State Ethics Commission may take adverse action against the respondent's commission as a notary public, up to and including revocation of the commission as a notary public, and will provide the SOS with the order and accompanying case file.
12. At any time, the Commission's executive director or their designee may enter into a settlement agreement with the respondent. All settlement agreements are subject to approval by the Commission.
13. Any action by the Commission regarding a commission as a notary public will take place at a public meeting.
14. Revocation proceedings are separate from any related criminal proceedings.

II. For complaints seeking adverse action against a commission as a notary public handled by the Regulation and Licensing Department before January 1, 2022

Up until January 1, 2022, the Governor has authority to issue a warning and to revoke the commission of a notary public under certain circumstances. *See* § 14-12A-26(A)(1)–(5), (D). Any revocation under Section 14-12A-26 of the Notary Public Act requires the notary public to receive notice, a hearing, an adjudication and an appeal. *See* § 14-12A-26(B). Executive Order 2011-036 (June 2, 2011) sets forth the process by which the Regulation and Licensing Department (“RLD”), under the Governor's authority and in coordination with the Secretary of

State, receives complaints and conducts revocation proceedings against a person's commission as a notary public.

Beginning January 1, 2022, the Governor no longer has authority to take adverse actions on persons' commissions as notaries public, and the State Ethics Commission assumes that authority. Accordingly, the Commission will accept from the Regulation and Licensing Department ("RLD") or the Office of the Secretary of State ("SOS") all pending license-revocation matters against commissions as notaries public under the Notary Public Act or the Uniform Law on Notarial Acts.³ After accepting those matters implicating a license under the Notary Public Act or the Uniform Law on Notarial Acts, the Commission must follow substantially the same procedures that Executive Order 2011-036 (June 2, 2011) created for RLD and the Office of the Governor.⁴ As a result, notaries public who are the subject of license-revocation cases (including complaints, investigations, or proceedings) pending either with RLD, as of January 1, 2022, will receive the same rights and process as they would have received had RLD continued with the matter under Executive Order 2011-036.

Accordingly, for complaints and matters pending as of January 1, 2022 that implicate an adverse action against a commission as a notary public, the State Ethics Commission will employ the following procedures, which is substantially the same as Executive Order 2011-036, *mutatis mutandis*:

1. The State Ethics Commission shall receive from RLD and the SOS all pending complaints that implicate an adverse action against a commission as a notary public. The Commission shall forward any complaint received from RLD to the SOS and request the SOS's corresponding file for the notary public.
2. The Commission's executive director or their designee shall conduct a review of the allegations made against the notary public and finalize a formal report.

³ From January 1, 2022, the State Ethics Commission's authority to take adverse action against a commission as a notary public applies not only under RULONA, *see* § 14-14A-22(A), but also under the Notary Public Act and the Uniform Law on Notarial Acts, for two reasons: First, as of January 1, 2022, the State Ethics Commission is the only state governmental agency authorized to take adverse actions on a commission as a notary public. *See* Laws 2021, ch. 21, § 36. Second, RULONA's provisions indicate that the Legislature did not intend for the shift from the Notary Public Act and the Uniform Law on Notarial Acts to RULONA to create gaps in state government's authority over commissions as notaries public. *See* Laws 2021, Ch. 21, § 35 ("References in the New Mexico Statutes Annotated to the Notary Public Act or the Uniform Law on Notarial Acts shall be deemed to be references to the Revised Uniform Law on Notarial Acts."); NMSA 1978, § 14-14A-27(A) ("A commission as a notary public in effect on the effective date of the Revised Uniform Law on Notarial Acts continues until its date of expiration.").

⁴ Article IV, Section 34 of the New Mexico Constitution provides that "[n]o act of the legislature shall affect the right or remedy of either party, or change the rules of evidence or procedure, in any pending case." This prohibition applies both to the legislature and administrative agencies. *See Pineda v. Grande Drilling Corp.*, 1991-NMCA-004, ¶ 7, 111 N.M. 536, 807 P.2d 234.

3. The report will be sent to the notary public against whom the complaint was filed, with a copy to SOS.
4. The Commission's executive director, or their designee (if an attorney), will recommend disciplinary action, if appropriate. The disciplinary action can take the form of a written reprimand, a formal warning, or a notice of contemplated action. The SOS shall receive a copy of the disciplinary action.
5. A notice of contemplated action gives formal notice that the State Ethics Commission is pursuing revocation proceedings. That notice shall inform the notary public that the notary public can resign their commission. The notice shall also detail the process and rights afforded in an administrative hearing.
6. If the notary public does not respond to the notice of contemplated action within the time provided by the notice, this amounts to a waiver of the notary public's right to a hearing and the State Ethics Commission will take adverse action against the notary's commission at an open meeting.
7. If the notary public exercises their right to a hearing, the State Ethics Commission shall contract with either the Administrative Hearings Office or another hearing officer for hearing officer services.
8. If, after a hearing, the hearing officer finds the notary committed an action that, under Section 14-12A-26 of the Notary Public Act, supports an adverse action against a notary public's commission, the hearing officer's report and recommendation will be forwarded to the State Ethics Commission recommending revocation of the notary's commission.
9. Upon receiving the hearing officer's report and recommendation, the State Ethics Commission will take adverse action against the notary public's commission, up to and including revocation of the commission.
10. Revocation proceedings are separate from any related criminal proceedings.

Cf. Executive Order 2011-036.