

## rules - Comment on Proposed Rules

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Good afternoon,

Attached are comments of the Estate Planning & Fiduciary Law Section of the North Carolina Bar Association on the Secretary of State's Phase Two proposed Notary Public rules.

I am happy to answer any questions you may have about the comments. I can be reached at the phone number below or by this email address.

Thank you for your consideration.

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# Comments on Proposed Notary Public Rules

Submitted January 2, 2024

These comments are in response to the Secretary of State's Phase Two proposed Notary Public rules. They are submitted on behalf of Estate Planning & Fiduciary Law Section of the North Carolina State Bar (NCBA).

## Comment #1

### Proposed Rule 18 NCAC 07C .0201 - Initial Application

18 NCAC 07C .0201 is proposed for amendment as follows:

#### 18 NCAC 07C .0201 INITIAL APPLICATION

~~(a) Application Form.~~

~~(1) Applicants~~ An applicant for initial appointment as a traditional notary public shall use the application form designated by the Division for that purpose and may download the application form from the Department's website. shall:

- (1) possess a current personal copy of the North Carolina notary public manual applicable to traditional notaries;
- (2) Applicants for initial appointment who are members of the North Carolina State Bar may download the application form from the Department's website and may file the completed application without first obtaining a signature from a notary instructor. successfully complete the notary course and exam; and
- (3) All other applicants for initial appointment who download the application form from the Department's website shall obtain a signature on the application from a notary instructor certifying that the applicant successfully completed the required course of instruction before the applicant may file the form with the Department. submit the application form specified in 18 NCAC 07B .0407.

~~(b) Submission of Application.~~ An applicant for an initial appointment shall submit his or her application by:

- (1) U.S. mail;
- (2) In-person delivery; or
- (3) Courier service.

Specific Issue: Substance of the proposed rule and its wording as relates to applicants who are NC licensed attorneys

### Comments:

The proposed amendment to 18 NCAC 07C .0201 seems to mandate the successful completion of the notary course and exam for all applicants, including NC-licensed

attorneys. This appears to contradict [N.C. Gen. Stat. 10B-8\(a\)](#) and proposed 18 NCAC 07C .0700-0704, which exempt attorneys from this requirement. A cross-reference or qualification in proposed rule 18 NCAC 07C .0201 to align with these sections would be beneficial for clarity.

## **Comment #2**

### **Proposed Rule Section .0400 (Confidential Information) and 18 NCAC 07D .0402 (Disclosure of Confidential Information Generally)**

"18 NCAC 07D .0402 is proposed for adoption as follows:

#### **SECTION .0400 CONFIDENTIAL INFORMATION**

#### **18 NCAC 07D .0402 DISCLOSURE OF CONFIDENTIAL INFORMATION GENERALLY**

A notary may disclose confidential information in response to the following:

- (1) a valid subpoena;
- (2) a court order;
- (3) a warrant;
- (4) a written request from the Department; or
- (5) a written request from all principals in a specific notarial transaction.

*History Note: Authority G.S. 10B-4; 10B-126; 10B-134.15; 10B-134.21;  
Eff. July 1, 2024.*

Specific Issue: Substance of the proposed rule and its wording as relates to the scope and application of this rule, including the definition of confidential information, who may receive the disclosure of the confidential information, and confirmation that the notary's disclosure is discretionary.

#### **Comments:**

The lack of a definition for "confidential information" in 18 NCAC 07D .0402 and who is entitled to the disclosure of confidential information creates potential for broad interpretation and misuse. Clarity on what constitutes confidential information and who is entitled to it under this Rule is essential to prevent confusion or unintended consequences.

In interpreting this new proposed rule, we looked at the following three resources that seemed relevant:

- 1) Proposed Rule 18 NCAC 07B .0110 (Request to Department for Confidential Information) references confidential information in the context of "notary

*information that is confidential pursuant to G.S. 10B7, 10B-60, G.S. 10B106, or that is personally identifiable information.”*

- 2) Subchapter Overview for 18 NCAD 07D (Continuing Obligations of Notaries) on page 13 of the [Fiscal Note](#) states “*Subchapter 07D governs the continuing obligations of notaries during their commission period. Proposed amendments to this subchapter are intended to clarify a notary’s obligation to **respond to Departmental inquiries and to update the Department regarding any change in the notary’s status that might affect the validity of their commission.***” (emphasis added).
- 3) [G.S. 10B-126](#) and [10B-134.15](#) cited in the history of the proposed rule address the security of the notarial records. G.S. 10B-126(a) provides “A notary shall safeguard the notary's electronic signature, the notary's electronic seal, and all other notarial records. Notarial records shall be maintained by the notary, *and the notary shall not surrender or destroy the records except as required by a court order or as allowed under rules adopted by the Secretary.*” (emphasis added). G.S. 10B-134.15(d) similarly provides “Except as provided in subsection (c) of this section, *the notary shall not surrender or destroy the electronic journal or the communication technology recordings of remote electronic notarial acts except as required by a court order or as allowed under rules adopted by the Secretary.*” (emphasis added).

The references in items 1 and 2 above imply that the Secretary of State intended to limit the scope and application of 18 NCAC 07D .0402 to confidential information referenced in 18 NCAC 07B .0110 and to Departmental inquiries and status updates, but this is not clear in the current draft of the Proposed Rule. In fact, subsection (5) provides disclosure in response to a written request from all principals in a specific notarial transaction and subsections (1)-(3) provide disclosure to any person or entity pursuant to a subpoena, court order, or warrant.

The statutory references cited in item 3 implies this rule broadens the statutory authority under which a notary is permitted to surrender their notarial records.

An additional comment to this proposed rule relates to the use of the term "may" in the context of disclosure requirements. Is the notary’s obligation to disclose the confidential information in the instances stated mandatory or discretionary? The wording of this proposed rule seems to imply that a notary may or may not choose to comply with a court order, subpoena, or warrant, which would seem to conflict with the mandate set forth in G.S. 10B-126(a).

Attorneys have legal and ethical duties to protect their clients’ confidential information. In addition, they often have notaries on staff that are privy to a client’s confidential information. Many businesses also have proprietary and confidential information and have notaries on staff. It is important that this rule referencing a

notary's obligation to disclosure confidential information be written in precise language to unambiguously convey the obligation and limitations of notaries. We recommend revisions to Proposed Rule 18 NCAC 07D .0402 that clearly state the intended scope and application of the Rule, which should include:

1. Adding a definition of Confidential Information for purposes of this Rule. If it is the same as confidential information in other chapters, consider adding it as a defined term. If this rule relates to notarial records as referenced in G.S. 10B-126 and 10B-134.15 this should also be clarified.
2. Adding language that limits who is entitled to receive disclosure of confidential information, as applicable.
3. If the notary's obligation to disclose is mandatory, or if it is mandatory only in certain situations, then the word "may" should be replaced with "shall," and the circumstances for mandatory disclosure should be revised to reflect the relevant statutes. It may also be helpful to separate disclosure rules for "confidential information" as opposed to "other notarial records" that could also include information that would otherwise be privileged (such as information subject to attorney-client privilege). Until the nature or scope of items 1 and 2 are clarified, it is difficult to comment further on the impact of the discretionary vs mandatory obligation of the notary.