

ISBA DIRECTIVE ON RECENT INDIANA RECORDING LAW CHANGE

On July 1, 2020, an obscure change to an Indiana recording statute becomes effective, requiring lawyers to change how they prepare deeds, mortgages, powers of attorney, affidavits, and other instruments¹ that must be recorded in an Indiana County recorder's office. This directive provides significant guidance to all Indiana State Bar Association members about this change and the sufficiency of signatures and notarial certificates for recording any deed, mortgage, or other paper or electronic instrument after June 30, 2020.

Indiana Code 32-21-2 and prior statutes have provided flexible authority to Indiana county recorders to accept deeds and other written instruments that contain *either* an acknowledgment of the grantor's or other signer's signature before certain authorized notarial officers *or* a common law "proof" described in Indiana Code 32-21-2-6. The roots of this flexibility stretch back to Indiana's young statehood during the 1800s, when opportunities to locate a notarial official were not as prevalent as in our modern times. Many drafters, signers, and notaries of instruments submitted to Indiana county recorders in our day and age utilize an acknowledgment as a notarial certificate related to a signer's identity, signature, and representations to a notary. During the general session of the 2020 Indiana General Assembly, Senate Enrolled Act 340 changed a critical conjunction in Indiana Code 32-21-2-3(a) from "or" to "and," culminating in two significant outcomes:

1. The long standing flexibility provided by the word "or" was destroyed; and
2. The use of "and" in the Indiana Code 32-21-2-3(a) amendment with other related recording statutes created the requirement for **BOTH** an acknowledgment for any signer **AND** a proof related to a witness' viewing the signer's execution of the instrument as well as the witness' signature of the instrument in order to record that instrument with an Indiana county recorder after June 30, 2020.

What is a Common Law "Proof"?

Since the "acknowledged" in Indiana Code 32-21-2-3(a) refers to the notarial act of an acknowledgment (the authentication of a signer's identity and signature with a signer's declaration about the purpose of the instrument and any authority of the signer to execute the instrument), the "proved" in Indiana Code 32-21-2-3(a) and the use of "proved" and "proof" in other areas of Indiana Code 32-21 refers to another notarial act: a proof. One form of a common law "proof" involves a disinterested person to the transaction as a witness, who observes the grantor, mortgage borrower, lease landlord or other signer as that signer signs a paper or electronic instrument. The witness also signs his or her name on the instrument and appears before a notarial officer so the notarial officer can:

1. authenticate the witness' identity and signature;
2. disclose in a notarial certificate the results of the authentication;

¹ The word, "instrument(s)", in this directive means any written, paper, or electronic document or record submitted to an Indiana county recorder to record in the indexes and among the various land records in that Indiana county recorder's office.

3. place the witness under oath; and
4. disclose in a notarial certificate the sworn witness' declaration of viewing the signing of the instrument by the signer identified by the witness.

Common law proof still involves notarization or swearing before a notarial officer, but the interaction is between the witness and the notarial officer, instead of between the grantor or original signer and the notarial officer. This common law "proof" by a witness is different than the "credible witness" provisions currently found in the Indiana notary public statutes (Indiana Code 33-42) from the 2017 and 2018 legislative sessions.

What is the Significance of this Change to the Recording Statute?

Senate Enrolled Act 340's one-word change to Indiana Code 32-21-2-3(a)(1) [replacing the word "or" with the word, "and"] becomes effective July 1, 2020. This change can be read as requiring a deed, mortgage, or other real estate instrument to include *both* an acknowledgment notarial act related to a signer *and* a second notarial act of a common law proof related to a witness. This result was not the intended result of the Indiana Recordors Association (IRA) efforts with Senate Enrolled Act 340's amendment of Indiana Code 32-21-2-3(a) because it would erase the more-than-a-century-old flexibility permitting a recordable deed, mortgage, or other instrument to contain *either* a notarized acknowledgment *or* a common law proof.

The Indiana State Bar Association's Probate Trust & Real Property Section is working with the Indiana Recordors Association, the Indiana Land Title Association, and various stakeholders on legislation for the 2021 regular session of the Indiana General Assembly. The legislation is to provide clarity as to the notarial acts and notarial certificates required for instruments to be successfully submitted for, entitled to, and accepted for recording by an Indiana county recorder and to be indexed among that county recorder's public land records. At the time of the issuance of this directive, the Indiana Recordors Association has not released guidance on the Indiana Recordors Association website to guide county recorder members on how to address Indiana Code 32-21-2-3(a) after June 30, 2020 before a legislative solution is addressed by the 2021 Indiana General Assembly.

What Guidance does this Directive Provide in term of Real Estate, Financial Interests, Estate Planning, Family Law, Construction, and Development?

The Indiana State Bar Association recommends that on and after July 1, 2020, and until critical later-enacted legislation provides a permanent solution, the following two notarial certificates should be included within instruments submitted to the office of an Indiana County Recorder:

1. An acknowledgment(s) (as defined in Indiana Code § 33-42-0.5-2) pertaining to the signer(s) of an Instrument who appears before a notarial officer as defined in Indiana Code § 33-42-0.5-19 and 33-42-9); **and**
2. A common law proof, disclosing the authentication of a disinterested witness' signature on the instrument and identity and disclosing the witness' viewing the signing of the instrument by a grantor or other signer to the instrument, as described in more detail below.

These two notarial certificates address the two notarial acts referenced in the post-June 30, 2020 provisions of Indiana Code 32-21-2-3 and other recording statutes in Indiana Code 32-21 and Indiana Code 36-2-11-16. Indiana Code 32-21-2-3, as amended by Senate Enrolled Act 340 affects all instruments submitted for recording. The bona fide purchaser provision of Indiana Code 32-21-4-1(b) applies to only certain instruments (conveyance, mortgage, memorandum of lease, or lease) and a limited group of subsequent bona fide interest holders (bona fide purchaser, lessee, or mortgagee in good faith). The technical corrections provisions of Indiana Code 32-21-4-1(c) (the “technical deficiency statute”) only pertain to a select group of conveyance, mortgage, memorandum of lease, or lease instruments. Thus, any instrument that is not part of that select group is ineligible for the technical correction aspects of the technical deficiency statute. These ineligible instruments include, but are not limited to, powers of attorney, land contracts, land contract memoranda, transfer on death (TOD) deeds, affidavits by surviving joint-owners or TOD beneficiaries, passage of title affidavits under Indiana Code 29-1-7-23, covenant declarations, and any non-mortgage liens.

At the time of this guidance, the technical deficiency statute remains untested as to whether the omission of a witness signature and accompanying notarial certificate (*i.e.* a common law “proof”) from a post-June 30, 2020 recorded conveyance, mortgage, memorandum of lease, or lease instrument would qualify for technical deficiency protection by the technical deficiency statute. -If an Indiana County Recorder rejects an instrument with or without a common law proof, the 30 day safe harbor time under 11 USC 547(c) may be at risk to expire as parties, title companies, and/or attorneys try to address the rejection reasons in order to successfully record the instrument among the recorder’s public land records.

What is the Difference Between an Acknowledgment and a Proof?

Under current and post-June 30, 2020 Indiana law, a deed, mortgage, or other instrument contains a valid “acknowledgment,” satisfying Indiana Code § 32-21-2-3(a), and is recordable if:

1. The instrument bears or contains the signature of the signer;
2. As part of the notarial officer’s responsibilities, the notarial officer authenticates the identity of the signer;
3. A notarial officer states in a notarial certificate that the signer declared his or her signing of the instrument for the purpose stated in the instrument; and
4. If an individual signed the instrument in a representative capacity (for example, a corporate officer signing on behalf of a corporation, an attorney in fact, or a trustee, executor or personal representative signing on behalf of a trust or estate), the notarial officer states that the individual signed the instrument with the proper authority and as the act of the entity or other person identified as the grantor, mortgagor, etc.; and
5. The instrument bears the name and signature of the notarial officer, the required information related to the notarial officer’s official status, and any related notarial seal. A notary public will always have an official seal.

See Indiana Code §§ 32-21-2-7 and 33-42-0.5-2. Indiana Code § 33-42-9-7 through 11 also discloses various types of “notarial officers” in Indiana (as defined in Indiana Code § 33-42-0.5-19, including a notary public), and in other jurisdictions who are authorized to take

acknowledgments and complete notarial certificates on deeds, mortgages, and other instruments. Also, Indiana Code § 33-42-9-10 essentially provides that a U. S. military notary acknowledgment completed under 10 U.S.C. § 1044a(b) or a U. S. consular acknowledgment completed abroad satisfies the “acknowledgment” requirement to make a deed, mortgage, or other instrument recordable.

An acknowledgment within a deed, mortgage, or another instrument will satisfy the acknowledgment portion of Indiana Code § 32-21-2-3(a) if it contains substantially the following text:

Before me, C.D. [*identify the type of notarial officer*], this ____ day of _____, 20____, A.B. [*name of grantor or other signer*] acknowledged the execution of the foregoing or attached _____ [*identify deed, mortgage or other instrument*] as ____ [*his or her*] voluntary act for the purposes stated therein.

[Signature and printed name of notary public or other notarial officer and official seal, if any]

An acknowledgment is not defective if it contains additional text than Indiana Code 32-21-2-7 (for example, a statement about the signer signing in a representative capacity). Indiana Code 32-21-2-7 or this directive do not exempt compliance with Indiana Code 33-42-9-12 and 33-42-17-7, regarding the required content of a notarial certificate.

A common law “proof” should be signed by an adult witness who satisfies all of the following requirements:

1. The witness is not a party to the real estate transaction (deed, mortgage, lease, etc.) disclosed by the instrument and does not benefit from that transaction.
2. The witness watched the grantor, mortgagor, or original signer execute the instrument with his or her signature or mark.
3. The witness signs the instrument, and the witness’s name is legibly printed, typewritten, or stamped immediately beneath the witness’s signature.
4. The witness appears before a notary public or other notarial officer, provides satisfactory proof of the witness’s identity, and is sworn or placed under oath by the notary public or other notarial officer.
5. The witness swears or affirms to the notarial officer that the witness saw the original signer sign the instrument in the witness’s presence.
6. The witness provides any other necessary information to the notarial officer to complete the notarial certificate as to the witness’s identity, signature and sworn or affirmed declaration information.

The notarial officer includes his or her signature with the notarial certificate along with the notarial officer’s typed name, the required information related to the notarial officer’s notary status, and any related notarial seal.

The following block of text satisfies the requirements for common law “proof” of a deed:

EXECUTED AND DELIVERED in my presence:

_____ [*Witness’s Signature*]

Witness: _____ [*Witness’s Printed Name*]

STATE OF INDIANA)

) SS:

COUNTY OF _____)

Before me, a Notary Public in and for said County and State, personally appeared _____ [*Witness’s Name*], being known to me to be the person whose name is subscribed as a witness to the foregoing instrument, who, being duly sworn by me, deposes and says that the foregoing instrument was executed and delivered by _____ [*Grantor’s or other Signer’s Name*] in the above-named subscribing witness’s presence, and that the above-named subscribing witness is not a party to the transaction described in the foregoing instrument and will not receive any interest in or proceeds from the property that is the subject of the transaction.

Witness my hand and Notarial Seal this _____ day of _____, 2020.

_____ [*Notary Public’s Signature*]

_____ [*Notary Public’s Printed Name*]

[Include Notary Public’s commission number, seal, commission county of residence or employment, and commission expiration date.]