MEMORANDUM OF LAW

DATE: December 5, 1985

TO: Charles G. Abdelnour, City Clerk

FROM: City Attorney

SUBJECT: Acknowledgment of Documents and Notary Responsibilities

By means of a recent memorandum, you asked for guidance in establishing the proper procedure necessary for notaries public to acknowledge the execution of documents. The purpose of an acknowledgment is evidentiary in nature and its object is to allow the instrument to be recorded and subsequently introduced into evidence.

One of the duties of a notary public as specified in California Government Code section 8205 is to take the acknowl-
edgment of instruments of writings executed by a person. The requirements of an acknowledgment are specifically provided in

California Civil Code section 1185 as to substance and section 1189 as to form.

Sec. 1185. Acknowledgments; requisites

(a) The acknowledgment of an instrument must not be taken unless the officer taking it personally knows, or has satisfactory evidence that the person making the acknowledgment is, the individual who is described in and who executed the instrument.

(b) For purposes of this article, "personally knows" means having an acquaintance, derived from association with the individual in relation to other people and based upon a chain of circumstances surrounding the individual, which establishes the individual's identity with at least reasonable certainty.

(c) For the purposes of this section "satisfactory evidence" means the absence of any information, evidence, or other circumstances which would lead a reasonable person to believe that the person making the acknowledgment is not the individual he or she claims to

be and any one of the following:

(1) The oath or affirmation of a credible witness personally known to the officer that the person making the acknowledgment is per-
sonally known to the witness.

(2) Reasonable reliance on the presentation to the officer of any one of the following, if the document is current or has been issued within five years;

(A) An identification card or driver's license issued by the California Department of Motor Vehicles.

(B) A passport issued by the Department of State of the United States.

. . .

Further the form required by Civil Code section 1189 contains the phrase "personally appeared." Hence the requisites for acknowledgment of an instrument are 1) the personal appearance of the maker, 2) his affirmation he signed it and 3) the notary's personal knowledge or satisfactory evidence that the maker is who he purports to be. Transamerica Title Ins. Co. v. Green, 11 Cal.App.3d 693 (1970); California Civil Code section 1189.

The California cases construing these requirements have

required strict adherence to these requisites since the certificate of acknowledgment establishes the identity of the person, the genuineness of the signature attached to the instrument and is prima facie evidence of the truth of the facts stated. California Evidence Code section 1451; Ryan v. Bank of Italy National Trust and Savings Assn., 106 Cal.App. 690, 693 (1930).

In light of the consequences of an acknowledgment, civil liability for negligently certifying an acknowledgment is well established as well as potential suspension of the notary's commission. Bernd v. Eu, 100 Cal.App.3d 511 (1979).

Absent statutory requirements, failure to follow the strict requisites of acknowledgment will not affect either the validity of the document or necessarily prevent its recordation. The law recognizes, however, alternative methods of proving execution which have the same effect as an acknowledgment.

Thus where the signer of an instrument is unable to appear before the notary as required for an acknowledgment, proof of execution may be made by a subscribing witness.

Sec. 1195. Proof of Execution of Unacknowledged Instruments.

Proof of the execution of an instrument, when not acknowledged, may be made either:

1. By the party executing it, or either of them; or,

2. By a subscribing witness; or,

3. By other witnesses, in cases mentioned in section eleven hundred and ninety-eight.

Sec. 1196. By Subscribing Witness Known to Officer.

If by a subscribing witness, that witness shall be personally known to the officer taking the proof to be the person whose name is subscribed to the instrument as a witness, or shall be proved to be such by the oath of a credible witness who is personally known to the officer taking the proof, as defined in subdivision (b) of Section 1185.

Sec. 1197. Maker Must Be Known to Witness.

The subscribing witness must prove that the person whose name is subscribed to the instrument as a party is the person described in it, and that such person executed it, and that the witness subscribed his name thereto as a witness.

Under this procedure, the requirements of proof of execution

are as follows:

1. The witness must be personally known to the Notary or the witness' identity must be proved to the Notary by the oath of a credible witness who is personally known to the Notary (Civil Code Sec. 1196).
2. The witness must sign the instrument.
3. The witness must prove by oath that the person whose name is subscribed to the instrument is the person who executed it.

See generally, "Laws of California Relating to Notaries Public" (July 1984). Proof of execution taken in this manner satisfies the statutes requiring acknowledgment. California Civil Code sections 2933 and 2952; Government Code section 27287.

While we recite the above alternative, we must caution against use of the jurat as an alternative method of acknowledgment. In signing a jurat, the notary makes no certification that the individual subscribing the document is who they purport to be and hence it is not competent to prove the identity of the affiant. Allstate Savings and Loan Assn. v. Lotito, 116 Cal.App.3d 998, 1005 (1981).

As you can readily discern from the above, care must be taken

by the notary in distinguishing between acknowledgments, proof of execution and jurats. The foregoing outlines the requisites and effects of each for your guidance in reviewing the documents brought before you.

JOHN W. WITT, City Attorney

By

Ted Bromfield

Chief Deputy City Attorney

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