

June 19, 2002

Mr. Thomas J. Esch
Flathead County Attorney
Justice Center
P.O. Box 1516
Kalispell, MT 59903-1516

Dear Mr. Esch:

You have requested an Attorney General's Opinion on the following question, which I have rephrased as follows:

Should a Clerk and Recorder refuse to record a document that is not notarized in strict conformance with Mont. Code Ann. § 1-5-416?

It has been determined that a letter of advice, rather than a formal Attorney General's Opinion, provides the appropriate response to your request.

In your opinion request, you state that the Flathead County Clerk and Recorder's Office has brought it to your attention that some notarial officers do not comply with the strict letter of the law. Specifically, you state that documents have been tendered for recording that do not have the words "Notarial Seal" on the notary's stamp seal, but instead are engraved with the words "Notary Public." You also state that documents have been tendered for recording which have "02" in the date of the acknowledgement rather than the four-digit year.

You note that this practice does not strictly comply with Mont. Code Ann. § 1-5-416, which provides in relevant part:

- (1) A notary public shall:
 - (d) provide and keep an official crimper-type or ink stamp seal, **upon which must be engraved the name of the state of Montana and the words "Notarial Seal"**, with the name of the notary public exactly as

Mr. Thomas J. Esch
June 18, 2002
Page 2

that name appears on the notary's certificate of commission issued by the secretary of state;

(e) authenticate the notary public's official seal, and the notary's original signature as it appears on the notary's certificate of commission, all official acts. Whenever the notary public signs officially as notary public, the notary public shall add to the signature the words "Notary Public for the State of Montana, residing at (stating the name of the notary public's post office)" and **shall endorse upon the instrument the date, showing the month, day, and four-digit year, of the expiration of the notary public's commission.**

(Emphasis added.)

You also cite to Mont. Code Ann. § 70-21-203, which sets forth the recording requirements for transfers and other transactions relating to real property. Pursuant to this section, an instrument must be acknowledged before it can be recorded.

Title 1, chapter 5, part 6 governs Notarial Acts and Mont. Code Ann. § 1-5-602(1) defines acknowledgement as "a declaration by a person that the person has executed an instrument for the purposes stated in the instrument and, if the instrument is executed in a representative capacity, that the person signed the instrument with proper authority and executed it as the act of the person or entity represented and identified in the instrument."

You contend documents which are stamped with the words "Notary Public" rather than "Notarial Seal" or which are dated "02" rather than with the four-digit year have not been properly acknowledged as the term is defined in Mont. Code Ann. § 1-5-602(1) and therefore the clerk is not authorized by law to record such documents. You do not allege that the notarial officer acknowledging such documents does not meet the qualifications required in Mont. Code Ann. § 1-5-402 or has not satisfied the requirements for notarial acts set forth in Mont. Code Ann. § 1-5-603, which generally require a determination that the person appearing before the notary is in fact the person whose signature is on the document to be notarized.

Although I agree the notary public has not strictly observed the requirements of Mont. Code Ann. § 1-5-416 in the described documents, your complaint elevates form over substance. And, while I would encourage notarial officers to comply with the plain requirements of Mont. Code Ann. § 1-5-416, it is my opinion that the deficiencies you

Mr. Thomas J. Esch
June 18, 2002
Page 3

note do not preclude instruments from being recorded. No facts were presented that would indicate the documents were not properly acknowledged as the term is defined in Mont. Code Ann. § 1-5-602(1).

It is a codified maxim of jurisprudence that law disregards trifles. See Mont. Code Ann. § 1-3-224. The situation presented in your opinion request falls within this maxim. This conclusion is consistent with the general rule announced in 66 C.J.S. Notaries, § 7 (1998), citing Sheridan County v. McKinney, 79 Neb. 223, 115 N.W. 548, 559-50 (1908). Additionally, § 1-5-609, which requires that notarial acts be evidenced by a certificate signed and dated by a notarial officer, notes that the officer's failure to indicate the expiration date of the officer's commission does not invalidate the certificate and may subsequently be corrected. It stands to reason that if the legislature did not intend to invalidate instruments where the notary public's commission expiration date is not listed, invalidation of instruments where the notary's date of expiration is written as 06/13/02 rather than 06/13/2002 would not be appropriate.

This letter should not be construed as a formal Opinion of the Attorney General.

Sincerely,

CIVIL SERVICES BUREAU

ALI N. SHEPPARD
Assistant Attorney General

ans/jym