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## The Case That There is a Common Law Duty of Notaries Public to Create and Preserve Detailed Journal Records of Their Official Acts, 42 J. Marshall L. Rev. 231 (2009)

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# THE CASE THAT THERE IS A COMMON LAW DUTY OF NOTARIES PUBLIC TO CREATE AND PRESERVE DETAILED JOURNAL RECORDS OF THEIR OFFICIAL ACTS

MICHAEL L. CLOSEN\* & CHARLES N. FAERBER\*\*

I.	Introduction .....	231
II.	Evolution of Common Law Standards of Care .....	249
III.	The Background To The Contemporary Neglect of Notarial Record-Keeping .....	267
IV.	The Content and Procedure For Journalizing Notarizations .....	291
V.	The Historic Traditions of Notary Record-Keeping .....	341
VI.	Incomplete Notary Practice Legislation .....	360
VII.	Custom and The Availability of Methodology and Technology .....	377
VIII.	Changing Notarial Circumstances .....	387
IX.	Fostering of Sound Public Policy .....	402
X.	Lawyer Opposition To Mandatory Notary Journalizing ...	413
XI.	Pronouncement and Publication of The Record- Keeping Standard .....	442
XII.	Conclusion .....	455

## I. INTRODUCTION

I would sooner trust the smallest slip of paper for truth, than the strongest and most retentive memory, ever bestowed on mortal man.<sup>1</sup>

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1. Miller v. Cotten, 5 Ga. 341, 349 (1848) (per Justice Lumpkin).

This Article exposes the most serious fault with the notary public system in the United States and offers a cost-effective solution readily available within the workings of the legal system that would virtually eradicate this critical problem. It is a fact that only about one-third of the country's more than 4.8 million notaries<sup>2</sup> are required by statutes or executive department orders to create and preserve records in notary journals to document the many millions of notarizations they perform each year,<sup>3</sup> and many of the affected notaries do not obey those laws at all or perform their record-keeping responsibilities irregularly and inadequately.<sup>4</sup> Indeed, the indifference to the values of notary record-keeping is so profound that many of the journals which are created are abandoned, lost and/or prematurely destroyed,<sup>5</sup> and thus most of their worth is also lost. It would be quite safe to estimate, as did notary expert Peter Van Alstyne, that "the majority of American

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2. Michael Lewis, *Knocking on the Door of 5 Million*, NAT'L NOTARY, July 2007, at 20 [hereinafter 2007 Notary Census]. The more than 4.8 million U.S. notaries represents an increase over the "some 4.3 million notaries in the United States" that had been widely reported just a decade ago. MICHAEL L. CLOSEN, ET AL., NOTARY LAW & PRACTICE: CASES AND MATERIALS 14 (National Notary Association) (1997) [hereinafter CLOSEN]. Professor Malcolm Morris is one of the co-authors of that book, and his name will appear several times in the following pages and notes.

3. "Nearly 1 billion documents—and climbing—are notarized every year." National Notary Association, Advertisement, NAT'L NOTARY, Jan. 2008, at 3. See the list of jurisdictions which by statute or executive order expressly and generally require their notaries public to journalize their official acts, as well as our discussion of the number of notaries affected, *infra* notes 194-95 and accompanying text. Even as the field of electronic verification to be performed by certification authorities or "cybernotaries" was first developing, there had been a decided absence of statutory requirements for the maintenance of "a record of electronic communications . . . to document the conduct of cybernotaries and the transactions involved"—paralleling the situation which prevails for notaries public. Michael L. Cloesen & R. Jason Richards, *Cyberbusiness Needs Supernotaries*, NAT'L L. J., Aug. 25, 1997, at A19.

4. Lynn Kimbrough of the Denver District Attorney's Office remarked that keeping a thorough record of notarial acts in a journal is "supposed to be a requirement [by statute] in Colorado . . . but a lack of penalties means a lot of Notaries don't." David S. Thun, *Don't Take Identity at Face Value*, NAT'L NOTARY, May 2007, at 31.

5. For example, in a recent Illinois case, a notary had maintained a rough, homemade form of journal, but abandoned it at the premises of his employer when he left his job there. See *Vancura v. Katris*, No. 98 CH 6225 (Chancery Division, Cook County Ct. 1998), which is the case discussed at length in Part XI, *infra* notes 880-911 and accompanying text. The National Notary Association's Hotline was contacted in 2006 with a question from a California company which had employed a notary because the "former employee left her Notary seal and journal in our office more than a year ago" and the company wanted to know what to do with those items. Monique Twine, *Information Services Dept. Restructured to Serve You*, Hotline [column], NAT'L NOTARY, Jan. 2007, at 43.

notaries do not journalize their notarial services.”<sup>6</sup> In reality, we suspect it is more likely that some two-thirds of U.S. notaries neglect to prepare and retain journal records of their notarial acts. This omission results in a number of fundamental failures by those U.S. notaries—jeopardizing the validity of the notarizations they execute, increasing the opportunity for document fraud and identity theft, denying police and other governmental authorities evidence to assist in investigating and prosecuting such fraud and theft, and undermining the integrity of the notarial system itself—all of these consequences will be addressed at length below. If all U.S. notaries were to comprehensively journalize their official acts and retain those records, those two practices would deter and/or prevent all of the other significant problems which occur in connection with notarizations, or, in the unlikely event document fraud had initially succeeded, would provide important evidentiary information to assist in investigating the fraud and in identifying and finding the wrongdoers.

To begin, three specific concerns should be noted. First, when notaries perform notarizations for document signers, the notarial “certificates”<sup>7</sup> which they complete are always taken away by the document signers as part of the notarized instruments, not retained, copied or recorded in ledgers by the vast majority of the officiating notaries public. Thus, those notaries, who are presumably responsible public officials, retain no written records of the notarizations they perform because the only written documents which they prepare are taken by the notaries’ customers and because the notaries do not voluntarily create and retain supplemental journal records.<sup>8</sup> Second, as already

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6. Peter J. Van Alstyne, *The Notary’s Duty to Meticulously Maintain a Notary Journal*, 31 J. MARSHALL L. REV. 778, 778 (1998). Peter Van Alstyne has been honored twice by the National Notary Association: in 1989 with its prestigious March Fong Eu Annual Achievement Award, and in 2007 with the designation as one of “The 50 Most Influential People In Notarization In The Last 50 Years.” See Stacia L. Ray, *The 50 Most Influential People in Notarization in the Last 50 Years*, NAT’L NOTARY, May 2007, at 32-33.

7. The notarial certificate that is completed by the notary public most commonly is typed or printed physically onto the end of the document on which one or more signatures is being notarized, but the notarial certificate may also take the form of an attachment stapled or otherwise affixed to the document. “‘Notarial certificate’ or ‘certificate’ means the part of or attachment to a notarized document for completion by the notary that bears the notary’s signature and seal.” ARIZ. REV. STAT. ANN. § 41-311(8) (2008). The two most common notarial acts for which certificates are prepared are jurats and acknowledgments. “A notarial certificate is not part of the signer’s document. It is a separate [state] document authenticating the signature appearing on the signer’s document.” PETER J. VAN ALSTYNE, NOTARY PUBLIC ENCYCLOPEDIA 18-19 (Wasatch Peaks Publishing) (2001); see also the discussion *infra* notes 261-62 and accompanying text.

8. For a number of reasons, we know that most notaries do not voluntarily keep such records. The authors have heard numerous first-hand anecdotal

mentioned, the evidence suggests that even in those jurisdictions which presently require notaries by statute or executive order to maintain journals, many notaries fail to keep any record of their official actions,<sup>9</sup> and that many of the notaries who maintain journals do so in woefully inadequate fashion.<sup>10</sup> Moreover, the preservation and appropriate accessibility of notary journal records are not adequately described and mandated by existing notary statutes, and notaries tend not to properly safeguard the journals they do maintain.<sup>11</sup> Third, proper journalizing of notarizations is a highly valuable practice because it enhances the present performance of those official acts by assuring that document signers personally appear before notaries at the times of notarizations, by affording more reliable identifications of document signers and by providing the foundation for more

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accounts to this effect, and have observed some notaries omit such record-keeping. Reported judicial opinions about notary errors and omissions make no reference to the existence of notary records. Many employers, in the exercise of poor business judgment, discourage or prohibit their employee-notaries from keeping ledgers. The high volume of notarial mistakes would not have occurred if notary journals had been maintained. See *infra* notes 9, 199-208, 222, 228-33 and accompanying text.

9. See Marc A. Birenbaum, *Enforcing the Law*, NAT'L NOTARY, Sept. 1997, at 13 (reporting that for the year 1995 in Pennsylvania the most frequent violation among notaries found by the Department of State was the "failure to keep or maintain a Notary journal"); see also Charles N. Faerber, John Henderson, *Hearing Examiner, Pennsylvania Department of State*, NAT'L NOTARY, May 2004, at 28 (reporting that at the hearings in Pennsylvania of notaries for alleged illegal activities, "the top two violations were a Notary's failure to keep a register of official acts and to require the signer's personal appearance.").

10. We know about such inadequacies for a number of reasons. The authors have heard of many anecdotal accounts to this effect. A case in which one of the authors recently served as an expert witness illustrates this point. See Part XI, *infra* notes 880-911 and accompanying text. There is no state agency oversight of the completeness of notary record-keeping even in those states and territories which statutorily mandate it, such as by randomly checking notary journals or by requiring applicants for renewals of notary commissions to prove they have been properly keeping journal records. According to Sheriff's Detective Chris Christopher of Los Angeles County, California, "[Notaries] loan their [notary record] books and stamps out, don't take thumbprints for their journal entries [which they are statutorily required to do for certain real estate transactions in California] and don't record the proper information in their journals." David S. Thun, *Training, Good Journal Entries Help Stop Fraud—But More is Needed*, NOTARY BULL., Oct. 2007, at 13. A California notary was recently arrested and "charged with one count of willful failure to perform a notarial duty for neglecting to obtain a [signer's] thumbprint" in the notary journal, "according to a statement from the San Bernadino County District Attorney's Real Estate Fraud Unit." The notary had "notarized a grant deed affecting real property," which "turned out" to be "forged and later recorded with the county recorder's office." *Lack of Thumbprint Leads to Arrest*, NOTARY BULL., Oct. 2007, at 2.

11. See *infra* notes 384-438 and accompanying text.

accurate completion of certificates of notarization.<sup>12</sup> Without such journal record-keeping, notarizations might be performed for absent signers, imposters are more likely to go undetected, and errors and omissions by notaries undoubtedly increase dramatically. Furthermore, there are other significant long-term benefits to be derived from the retention by notaries of detailed notary journal records. In writing about notarial record-keeping in the United States in 2003, Milton Valera, president of the National Notary Association (“NNA”) (the world’s largest and most active notary membership and education organization)<sup>13</sup> concluded: “For some time, the American Notary system has been broken . . . . Notary record-keeping is often discouraged . . . [a]nd, sophisticated fraud techniques have been out-pacing fraud-deterrent measures.”<sup>14</sup>

The many millions of notarizations performed annually in this country involve countless instruments and underlying transactions having enormous financial value, as well as other substantial commercial and governmental significance.<sup>15</sup> The

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12. See *infra* notes 264-328 and accompanying text.

13. See generally Milton G. Valera, *The National Notary Association: A Historical Profile*, 31 J. MARSHALL L. REV. 971 (1998) (describing the NNA). “For some forty years, the NNA has served the nation’s notaries as the country’s largest and most active educational and advocacy organization.” John C. Anderson & Michael L. Closen, *A Proposed Code of Ethics for Employers and Customers of Notaries: A Companion to the Notary Public Code of Professional Responsibility*, 32 J. MARSHALL L. REV. 887, 890-91 (1999); see also Phillip W. Browne, *Fifty Years of Leadership, Professionalism and Trust—The National Notary Association*, NAT’L NOTARY, Nov. 2006, at 16 (celebrating the NNA’s 50<sup>th</sup> anniversary as “the preeminent professional association serving the nation’s Notaries Public”). The membership of the NNA is now more than 300,000 individuals and organizations. See *Membership Reaches Milestone*, NAT’L NOTARY, July 2003, at 15 (reporting that the NNA had at that time become “more than 200,000 members strong”); Timothy S. Reiniger, *State of the Association—Laying a Foundation for the Future*, NAT’L NOTARY, Mar. 2007, at 24 (announcing that “NNA membership in 2006 soared above 300,000 for the first time” and noting the wide array of programs conducted by the NNA).

14. Milton Valera, *Respecting the Past, Embracing the Future*, NAT’L NOTARY, July 2003, at 20.

15. “[D]aily, thousands of legal documents are sent from state to state—already notarized or to be notarized and returned.” *Introduction* to CHARLES N. FAERBER, 2006-2007 U.S. NOTARY REFERENCE MANUAL, at v (National Notary Association)(8th ed. 2006). Some notaries perform large numbers of notarizations, totaling hundreds or even thousands annually. For example, one Massachusetts notary recently spoke of performing “more than 200 notarizations daily.” Adviser [column], NAT’L NOTARY, Sept. 2004, at 46-47. “Millions of documents are created in government and commerce in this country every business day, and tens of thousands of them require notarizations to be performed.” Michael L. Closen, *The Notary’s Interstate Reach*, NOTARY BULL., Oct. 2004, at 7. See Frankie Sue Del Papa, *Foreword* to CLOSEN, *supra* note 2, at ix (noting that “[m]any significant commercial documents must be notarized before the transaction can be completed, and

failure to obtain a necessary notarization, or the inability to prove the performance of a required notarization, can invalidate the instrument in question and its underlying transaction.<sup>16</sup> Similarly, the faulty performance of a notarization can cause the same fatal documentary and transactional consequences.<sup>17</sup>

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many legal documents must be notarized before filing . . . Documents which are notarized often deal with great sums of money and invaluable personal rights.”).

16. The failure to obtain a notarization where one is required may invalidate a document. *See, e.g.*, Mancini v. Redland Ins. Co., 248 F.3d 729 (8th Cir. 2001) (failure of insureds to have their signatures on a proof of loss form notarized, as required by their insurer, invalidated their claim); Holmes v. Mich. Capital Med. Ctr., 620 N.W.2d 319 (Mich. Ct. App. 2000) (an affidavit is invalid when it is not sworn to or affirmed before a notary or other authorized person). Certainly, if fatally defective notarizations can invalidate their principal documents, it must be the case that the complete absence of notarizations can have the same consequences. *See infra* note 15; *see also* Michael L. Closen, *Oath is not Just Empty Ceremony*, NOTARY BULL., Feb. 2005, at 7 (pointing out that the failure of a notary to properly administer a required oath or affirmation “may subject the document to a legal challenge that could result in a finding that the document is invalid, causing an unraveling of the underlying transaction.”).

17. A number of faults may invalidate a notarization, such as the failure of the notary to affix the notarial seal, the failure of the signer to personally appear at the time of the notarization, the failure of the notary to administer an oral oath or affirmation (where one is required), and other failures. *See, e.g.*, IDAHO CODE ANN. § 51-117 (2008); IND. CODE ANN. § 33-16-2-4 (West 2008). A faulty notarization may cause the invalidity of the document it supports. *See, e.g.*, Hurley v. Johnson, 779 N.Y.S.2d 771 (N.Y. App. Div. 2004) (illustrating a case in which defective acknowledgment language on a divorce agreement invalidated the notarization and the agreement, and in which the court granted the divorce only after proper acknowledgment language was added, the parties signed and had their signatures notarized); City of San Juan v. Gonzalez, 22 S.W.3d 69 (Tex. App. 2000) (a deposition merely signed and sealed by a notary, but without jurat language, was invalid as evidence to support a summary judgment); Glisson v. Freeman, 532 S.E. 2d 442 (Ga. Ct. App. 2000) (illustrating a case in which a transaction was invalidated in part due to an improperly performed notarization); *In re Marsh v. Fleet Mortgage Co.*, 12 S.W.3d 449 (Tenn. 2000) (finding a lien on realty based upon a deed of trust bearing a defective notarization was invalid, as was the deed); Mix v. State, 827 So. 2d 397 (Fla. Dist. Ct. App. 2002) (invalidating a motion filed in a legal case because the wrong form of notarization was performed); *see also* *Vancura v. Katris*, No. 98 CH 6225 (Chancery Division, Cook County Ct. 1998), discussed at length in Part XI, *infra* notes 880-911 and accompanying text. Iowa actually enacted a statute which declares that a written instrument to which a defective notarial certificate of acknowledgment was attached more than 10 years earlier is valid—as though “properly acknowledged by the notary public.” IOWA CODE ANN. § 9E.9A (2008). Presumably, more recent defective notarizations will or can invalidate Iowa documents. “A faulty notarization might invalidate a commercial document and its underlying business transaction.” Michael L. Closen, *10 Steps to Sound Risk Management for Companies with Notaries*, NAT’L NOTARY, Nov. 2001, at 25 [hereinafter *Risk Management*]. “Notaries and their employers can be held legally accountable for substantial actual and punitive damages.”

Document frauds, including those perpetrated by imposters and identity thieves, are frequent and growing in number.<sup>18</sup> The neglect of notaries to fully record their notarizations in notary journals and thereafter to preserve those notarial records can contribute significantly to all of these deleterious outcomes, and can result in legal responsibility for notaries and their employers.<sup>19</sup> Quite unfortunately, as the most notorious

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*Id.*; Michael L. Closen, *The Legal Perspective*, NOTARY BULL., Apr. 2007, at 7 (pointing out that the employee-notary and the notary's employer can be held jointly liable for an occurrence of notarial malpractice).

18. "According to statistics compiled by the Federal Trade Commission, reports of identity fraud nearly doubled in the past two years." Deborah M. Thaw, *Security is as Important as Information*, NAT'L NOTARY, May 2003, at 7. Among the reasons for the ID theft problem is the ease with which confidential information can be accessed and stolen from legitimate American businesses. One study has "estimated [that] 70 percent of all identity theft starts with personal data being stolen by employees." David S. Thun, *Staying Ahead of Identity Theft: There's No Such Thing as an 'Unloaded' Journal*, NAT'L NOTARY, Sept. 2004, at 11. Also, ID documents are ripe for counterfeiting, tampering, and misuse. See David S. Thun, *A Call to Action*, NAT'L NOTARY, Nov. 2004, at 18 (reporting that, according to fraud investigation expert Carl Pergola, "there are more than 200 types of [government] licenses and IDs in use"; "they all appear different"; and it is "really hard to authenticate identification documents."); see also B. Edward Madge, *Staying Ahead of Identity Theft: On the Front Line in the War on Fraud*, NAT'L NOTARY, July 2004, at 9 (observing that "[m]any [ID] documents can be counterfeited and made to look identical to the originals and have even fooled the trained eye."). Many foreigners in the U.S., of course, carry foreign identification papers. Because of the unreliability of so many foreign ID documents, U.S. Representative Elton Gallegly of California introduced a federal "bill that would—with the exception of a passport—prohibit federal government entities from accepting identification cards issued by a foreign government." Armando Aguirre, *America's Notaries Ready to Answer Call to Duty*, NAT'L NOTARY, July 2004, at 31, 33. Gallegly also opined that "[p]ost 9/11 American attitudes now should be that the old way of doing things doesn't work anymore." *Id.* at 33.

19. The notarial process may be used by identity thieves to build a chain of documents for identification purposes or to apply for documents of identification. See Thaw, *supra* note 18, at 7 (referring to "breeder" papers to describe fake passports and other documents employed to develop such a chain); see also Betsy Fitzgerald, *Notary Law*, THE INFORMER [Bi-monthly newsletter of the Informed Notaries of Maine], Sept. – Oct. 2004, at 1 (remarking that "[i]n this day and age of increased litigation, a notary's conduct is being called into question more often."). Indeed, there have been so many legal cases filed against notaries and their employers in the last generation that a law school casebook on NOTARY LAW AND PRACTICE could readily be compiled. See generally CLOSEN, *supra* note 2. "A negligently performed notarization might erroneously authenticate a forged signature." *Risk Management*, *supra* note 17. Many notaries have no idea of the extent of their potential for legal liability for official wrongdoing. "A Notary who performs his or her duties improperly may be subject to a civil lawsuit to recover financial damages caused by any breach of notarial practice . . . . While Notaries have limited authority, their potential financial liability for misconduct may be unlimited." Armando Aguirre, *Liability*, NAT'L NOTARY,



illustration, negligent and unethical notaries assisted some of the terrorist hijackers responsible for the September 11, 2001, airliner attacks by providing notarizations on instruments used by those terrorists to obtain false identity documents, thereby contributing to the opportunity of the terrorists to carry out their plot.<sup>20</sup> Not surprisingly, those notaries who assisted the terrorists and who were commissioned in a state which did not statutorily require the keeping of notary journals, had not shown the wisdom or diligence to have kept journal records of those fateful notarizations—an omission that might otherwise have deterred the terrorists or even assisted in detecting and preventing their sinister schemes.<sup>21</sup> It is doubtful that the terrorists chose a jurisdiction which did not statutorily require notarial journalizing purely by coincidence.

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July 2003, at 36. “[L]awsuits are increasingly common and Notaries are not immune to them in their line of work.” Nevin Barich, *Lawsuit Protection*, NAT’L NOTARY, Sept. 2004, at 37.

20. In light of the fact that notaries contributed to the efforts of the 9/11 hijackers to obtain documents of identification, this warning in 1963 of former Judge Charles Desmond sounds profoundly prophetic: “The consequences of a notary’s malfunctioning or ignorance may be serious and even tragic.” Chief Judge Charles Desmond, New York Court of Appeals, *Foreword* to J. SKINNER, SKINNER’S NOTARIES MANUAL at ii (3d ed. 1963). “Notaries are not immune from identity theft and can sometimes unwittingly facilitate it.” Paul H. Luehr, *Staying Ahead of Identity Theft: How ID Theft Struck a Former FTC Official’s Family*, NAT’L NOTARY, Mar. 2005, at 15. “At least four of the 9/11 terrorists obtained their fake [ID] documents through loopholes with the help of unethical Notaries.” Aguirre, *supra* note 18, at 31. “[O]ne Virginia Notary was discovered to have unwittingly signed fraudulent paperwork helping two of the [9/11] hijackers establish false identities.” Thun, *supra* note 18, at 18.

21. “[S]everal of the 9/11 hijackers were able to carry out their plans because they obtained fraudulent Virginia driver’s licenses by submitting false proofs of residency. They were able to obtain these licenses with the help of two men who ran a DMV scam that had a corrupt Notary, as well as an attorney, on their payroll.” *Staying Ahead of Identity Theft, Combating Terrorism One Notarization at a Time*, NAT’L NOTARY, May 2006, at 15. Virginia is one of the states which do not by statute mandate that their notaries maintain journal records of their official acts. See *Comparison of Notary Provisions*, NAT’L NOTARY, May 2006, at 35; FAERBER, *supra* note 15, at 488. According to one New York notary who was at work in Tower One at the World Trade Center at the time of the terrorist attacks of September 11, 2001, notary “[j]ournals . . . give us a paper trail that the authorities can work with” to investigate frauds and identity thefts. Aguirre, *supra* note 18, at 31. “Another valuable capability of the journal is helping law enforcement authorities track down forgers, as was the situation with recent cases in California, Louisiana and Florida.” Barich, *supra* note 19, at 30. Attorney Timothy Reiniger, NNA Executive Director, has concluded: “Law enforcement . . . is coming to see the services of the Notary as an invaluable weapon in [the] widening war [on identity theft and document fraud].” Aguirre, *supra* note 18, at 31. According to fraud investigation expert Carl Pergola, “all functionaries in business—especially Notaries—must understand that failing to screen potential imposters to the best of their ability could have unimaginably disastrous consequences.” Thun, *supra* note 20.

The failure to keep thorough records to document and protect notarizations has been a fact of life for the vast number of U.S. notaries for much longer than a century,<sup>22</sup> and few people seem to care. Yet, without complete paper or electronic records of their notarizations, notaries have to rely primarily upon their memories for details about the circumstances of a particular notarial act if a question or challenge arises, or if the original notarized document is lost. Moreover, almost all questions and challenges concerning notarizations arise months or years afterwards,<sup>23</sup> and inevitably tax the recall of the people involved.<sup>24</sup> The viewpoint, quoted above, of Justice Lumpkin and written more than 150 years ago remains true when applied to notary practice today, namely that paper or electronic journals of the official acts of notaries public would prove far more reliable than the remnants of quite fallible recollections.<sup>25</sup> The detailed notary ledger or journal should stand

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22. From an early time beginning just after the colonial period and continuing to about 1850-1900, the practice of thoroughly documenting and retaining of records of notarial acts, which had predominated, declined precipitously for several reasons, and was not reinstated by statutes as the new states adopted their first legislation. See *infra* notes 159-83 and accompanying text.

23. Many notarizations appear upon legal documents which may not become effective until months or years later (such as wills, living wills, health care powers of attorney and standard powers of attorneys) or which may not become the subject of close attention and controversy until months or years later (such as deeds, liens, mortgages, contracts, and titles). "Notary journal notes can be helpful in jogging [the notary's] memory three or four years after the fact." Charles N. Faerber, *Walker, Faerber, Turner: Question & Answer Session*, in *WHY FINGERPRINT?* 51 (1994) [hereinafter *WHY FINGERPRINT*]. Can you remember people that you've notarized documents for three years ago, or even a year ago? Can you recall the circumstances of the notarization? *Id.* at 50 (quoting law enforcement expert Dana Turner). According to the North Carolina Secretary of State's Web site: "Journals can be used to refresh your memory about [a notarization] that occurred years earlier, and if kept consistently, may be relied upon for court testimony." FAERBER, *supra* note 15, at 345.

24. See Fitzgerald, *supra* note 19, at 2 (commenting, after recommending notaries keep records of their official acts, that "most of us find it hard to remember what we did last week, let alone last year or ten years ago."). According to New York State Assemblywoman Patricial Acampora, "If [notaries] don't keep a journal, how are [they] going to remember six weeks after the notarization who appeared before [them]" Aguirre, *supra* note 15, at 31. This is in keeping with the old adage that: "Words fly, writings remain." RODNEY DALE, *A TREASURY OF ESSENTIAL PROVERBS* (2004), at 403.

25. See *supra* note 1. Of course, volumes have been written about the faults of unrecorded memories. For example, Alexander Smith remarked, "A man's real possession is his memory. In nothing else is he rich, in nothing else is he poor." *THE FORBES BOOK OF BUSINESS QUOTATIONS* 569 (Ted Goodman ed., Black Dog & Leventhal) (1997). According to Henry Van Dyke, "Memory is a capricious and arbitrary creature." *Id.* And, Thomas Jefferson observed, "Of all the faculties of the human mind, that of memory is the first that suffers decay from age." *Id.* at 568. A clever proverb declares that: "Writing destroys

as the lighthouse offering instant clarity above the fog of unwritten memory, but presently there are far too few such notarial lighthouses. We began this Article by characterizing the notary's failure to journalize and retain journal records as the most serious notarial problem, and conversely, the journal is the notary's "most important tool."<sup>26</sup>

Historically, it would be unimaginable that public officials would neglect to retain records of their official acts.<sup>27</sup> Could county clerks or court clerks file-stamp documents tendered by citizens or lawyers without creating records of what documents had been stamped (and what fees, if any, had been collected)? Of course not. Could county and state officials issue business licenses or driver's licenses without keeping records of the companies and individuals to whom such licenses were granted? Never. Could police officers arrest people, but not make and retain records of the circumstances of those arrests? Absolutely not. Could state officials supervising our notaries public issue notary commissions without creating and retaining records to document those actions? Hardly.<sup>28</sup> It would be preposterous for public officers to act so cavalierly and incompetently as to neglect to retain complete

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the memory." DALE, *supra* note 24, at 408.

26. "A properly designed and maintained notary journal . . . is indeed the notary's most important notarial tool." Van Alstyne, *supra* note 6, at 802. "The journal is one of our legal system's most important evidentiary tools." *Four Keys to Keeping Your Notary Journal*, NAT'L NOTARY, Jan. 2007, at 45.

27. Of course, many public officials have been required by statutes, some dating to colonial times, to keep detailed records of their official acts. For instance, in early U.S. history, the American Colonies proceeded to adopt numerous record-keeping requirements. In September of 1639, the General Court in the Massachusetts Bay Colony ordered the keeping of records of every judgment in a book and the keeping of records of "all wills, administrations and inventories, and the dates of every marriage, birth, and death." John E. Seth, *Notaries in the American Colonies*, 32 J. MARSHALL L. REV. 863, 872 (1999). See generally DONNA MERWICK, *DEATH OF A NOTARY: CONQUEST & CHANGE IN COLONIAL NEW YORK* (Cornell University Press) (1999) (describing the detail with which colonial American magistrates, military officers, notaries and others kept records of their official meetings, dealings and decisions).

28. See, e.g., GA. CODE ANN., § 45-17-4 (2008) (directing the Georgia Superior Court Clerks' Cooperative Authority to maintain a record of the appointment of all notaries public); MINN. STAT. ANN. § 359.061 (West 2007) (providing that "[t]he commission of every notary public shall be recorded in the office of the court administrator of the district court of the notary's county of residence."); OR. REV. STAT., § 194.040(1) (2007) (reading that the "Secretary of State shall keep a record of appointment and commission of each notary public."); TENN. CODE ANN., § 8-16-107 (West 2008) (requiring the county clerk to maintain a record of notary public commissions); VT. STAT. ANN., tit. 24, § 183 (stating that "[i]mmediately after the appointment of a notary public . . . the county clerk shall send to the secretary of state a certificate of such appointment" which is "to be bound in suitable volumes and to be indexed.").

records of their official actions. However, the great majority of the more than 4.8 million U.S. public officials who are notaries do exactly that all the time.

Although the notary public statutes and executive department orders of only some twenty-one of the fifty-six states and territories of the United States<sup>29</sup> expressly mandate that notaries keep journals or registers documenting their official acts,<sup>30</sup> the thesis of this Article is that the common law of the other thirty-five states and territories requires notaries to maintain and preserve such journals as well. A crucial part of that common law obligation would be the responsibility to create records of sufficient detail to be meaningful. No court case is known to have squarely considered this matter of the notary's non-statutory record-keeping and record-preserving duties, let alone to have resolved the issue one way or another.<sup>31</sup> However, the time is long overdue for judicial scrutiny of the notary's common law journalizing responsibilities, so that notaries everywhere may be clearly informed of the obligations they possess in this regard. The results would inspire vast improvement in the functioning of notaries, with an attendant increased security and integrity of the documents bearing notarizations. Indeed, the very act of making a journal entry reminds the notary to comply with the important steps of the notarial process, particularly the steps of requiring the physical presence of a document signer and of securing adequate and convincing evidence about a signer's identity.<sup>32</sup> Consequently, notaries would become more valued public officials, and the public would be better served. Almost all notarial mistakes and failures could be prevented, instantly detected, or timely corrected if all notaries faithfully kept detailed records of their notarizations,<sup>33</sup>

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29. In this Article, we will refer to the fifty-six U.S. states and territories which include the fifty states, the District of Columbia, and the five territories of American Samoa, Guam, the Northern Marianas, Puerto Rico, and the Virgin Islands. See FAERBER, *supra* note 15, at v (referencing the same 56 jurisdictions).

30. See *infra* note 194 and accompanying text.

31. However, the *Vancura* case, discussed at length in Part XI, *infra* notes 880-911 and accompanying text, comes quite close to having decided some of the basic issues.

32. The notary journal entry should be completed first, before the certificate of notarization is completed, and it thereby becomes a road map to lead the notary through the remainder of the notarization. "The notary journal guides the notary through the correct notarial procedures for every act, thus minimizing any potential for serious mistakes." Van Alstyne, *supra* note 6, at 778-79. "[T]he journal entries detail the essential elements of a proper notarization; by making the journal entry first, the notary reinforces the procedure that should be followed for each notarial act." MODEL NOTARY ACT § 7-2 cmt. at 44 (2002).

33. *Id.* "[A]lmost all notarial errors would be prevented if Notaries would complete a thorough journal entry at the time of every notarization." *Risk*

especially if those records included such a fraud deterrent entry as a thumbprint and/or a photograph of each signer.<sup>34</sup>

The case for a common law requirement that notaries keep and preserve a complete journal record of their official acts is a somewhat complex one to articulate. To begin, the phrase “common law” itself is somewhat ambiguous, but it “comes from the idea that English medieval law, as administered by the courts of the realm, reflected the ‘common’ customs of the kingdom.”<sup>35</sup> In general, imposition of common law responsibilities may depend upon one or more of numerous co-factors (each of which involves the concept of common, customary standards of conduct),<sup>36</sup> such as well-established historical practices (particularly ancient ones),<sup>37</sup> statutory interpretation (including necessary supplementation of incomplete legislation),<sup>38</sup> the development of traditional practices

*Management, supra* note 17, at 27.

34. See *infra* notes 278-79 and 283-98 and accompanying text.

35. 7 LEON L. BRAM & NORMA H. DICKEY, FUNK & WAGNALLS NEW ENCYCLOPEDIA 50 (1986); see also THE WORLD BOOK ENCYCLOPEDIA 708 (1965) (explaining that early English judges in deciding common law cases followed “the customs of the community and the common beliefs of the people.”).

36. Regarding the factors affecting tort liability and “[a]mong the many considerations affecting the decision as to which of conflicting interests is to prevail, a few may be singled out for special mention, with the repeated caution that no one of them is of such supervening importance that it will control the decision of every case in which it appears.” W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 20 (5th ed. 1984) [hereinafter PROSSER & KEETON]. “In determining the limits of the protection to be afforded by the law, the courts have been pulled and hauled by many conflicting considerations, some of them ill defined and *seldom expressed at all*.” *Id.* at 17 (emphasis added). “Behind the history recorded in judicial opinions lie the historical influences of the social, economic and political forces of the time.” *Id.* at 20-21. According to Thomas Schweich, the common law is “a complex and diffuse combination of history, hypotheticals, actual cases, analysis, interpretation, criticism, and philosophy—all woven together to create the rules by which we live.” Thomas A. Schweich, *Introduction* to the reprint of OLIVER WENDELL HOLMES JR., THE COMMON LAW (2004), at xvii.

37. “[H]istorical developments . . . continue to be significant influences on the modern law of torts.” PROSSER & KEETON, *supra* note 36, at 20. To put it differently, as Schweich interpreted the writing of Holmes, “the foundation of certain time-honored principles of law rests in human experience.” Schweich, *supra* note 36, at xix. However, such historic longevity is not merely the result of aging, but of continuing legitimacy. Holmes famously said: “It is revolting to have no better reason for a rule of law than so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished since, and the rule simply persists from blind imitation of the past.” *Id.* at xxii. See also *infra* notes 441-535 and accompanying text.

38. “In tort law, as elsewhere, the responsibility for answering the unanswered questions [in relevant statutes] falls to the courts.” PROSSER & KEETON, *supra* note 36, at 19. “The law embodies the story of a nation’s development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics . . . We

based upon then-available methodology and technology,<sup>39</sup> changing circumstances among relevant features,<sup>40</sup> and fostering of sound public policy outcomes.<sup>41</sup> In regard to the case for the notary journal requirement, each of these factors when viewed standing alone supports the position advanced. Cumulatively, they persuasively and overwhelmingly endorse the recognition of the common law duty of notaries in the United States to maintain and safeguard detailed paper or electronic journals of their official acts. The present Article will contend that this elevated standard of conduct for notaries is the only position construable from the common law.

This Article in Part II will very briefly review the general process for formulating standards of care in the common law. In Part III, this Article will set forth a more detailed historical account, explaining the failure of U.S. notaries to maintain thorough records of the notarizations they execute, and the extent of the problem throughout this country. Next, Part IV of this

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must alternatively consult history and existing theories of legislation. But the most difficult labor will be to understand the combination of the two into new products at every stage.” HOLMES, *supra* note 36, at 1. *See also infra* notes 536-98 and accompanying text.

39. This is the concept of customary practices, based upon the established standards of behavior of prudent and responsible people (especially business people). Customary practices may, of course, change over time. “Subsequent [common law] cases . . . may reveal new and different facts and considerations, such as changing social or technological conditions.” BRAM & DICKEY, *supra* note 35, at 50. *See* 12 THE WORLD BOOK ENCYCLOPEDIA, *supra* note 35 at 117 (describing the common law judicial decision making process as including the arrival “on a rule that it considers just” and “that agrees with the customs and opinions of the community”; and pointing out that “common-law rules, are constantly being changed to reflect changes in the customs and desires of the people.”); *see also infra* notes 599-654 and accompanying text.

40. The common law “would be changed . . . if the customs and beliefs of the community changed.” *See* THE WORLD BOOK ENCYCLOPEDIA, *supra* note 35, at 709. Of course, “[s]ubsequent [common law] cases may reveal new and different facts and considerations . . . . In this manner, common law retains a dynamic for change.” BRAM & DICKEY, *supra* note 35, at 50. *See* THE WORLD BOOK ENCYCLOPEDIA, *supra* note 35, at 120 (concluding that “the common law is constantly being changed to meet new conditions.”). “Change is part of the nature of tort law.” DAN B. DOBBS, *THE LAW OF TORTS* 29 (West Group) (2000). As “social values change over time,” such changes can affect court decisions. *Id.* at 28; *see also infra* notes 655-711 and accompanying text.

41. Public policy should represent the positions which serve the greater good of society, and should generally be consistent with the prevailing public opinion on issues. “Early in England’s history, judges had to decide legal cases according to what they felt most persons would think was right.” THE WORLD BOOK ENCYCLOPEDIA, *supra* note 35, at 708. Thus, the concept of public policy incorporates in the development of the common law the notions of “customs” and “changing social . . . conditions.” BRAM & DICKEY, *supra* note 35, at 50. “Besides considering the particular facts of the case, judges today are likely to consider logic, public policy, and justice.” DOBBS, *supra* note 40, at 28; *see also infra* notes 712-59 and accompanying text.

Article will discuss the nature of and procedure for creating and preserving usable and effective notarial records, including the recent advent of electronic notary journals, and the dangers inherent in a notarial system fundamentally flawed by the omission to keep such records. Then, the Article will consider individually in Parts V – IX each of the several bases upon which the proposed standard of care requiring detailed notary record-keeping could be grounded—the historic traditions of notarial record-keeping (Part V), the interpretation of incomplete notary statutes (Part VI), the existence of both methodology and technology to accommodate the advocated standard of conduct and the contextual place of custom in connection with notarial record-keeping (Part VII), the vastly changed circumstances within the contemporary notarial landscape (Part VIII), and the undeniably positive consequences for the public interest to be realized from recognition of the recommended journal record-keeping standard of behavior for notaries (Part IX). Thereafter, in Part X we will consider the important subject of the opposition to mandatory notary journalizing often voiced by lawyers and bar associations, and we will suggest that self-interest within the legal profession has caused this misguided opposition. The Article will next suggest in Part XI how the proposed standard could most effectively be advocated for in litigation, announced and publicized. That critical section is followed lastly by Part XII, which is our conclusion and which offers some final observations.

We believe that the knowledge and analysis provided in the forthcoming pages will convince every reader of the merit of our thesis. We hope to effect real change in American notarial practice, because we believe strongly that two basic principles should drive our society, including particularly its notarial system. The first was well described by Sir Philip Sydney: “The end of all knowledge should be in virtuous action.”<sup>42</sup> And, the second was keenly observed by Charles Kettering: “[C]hange . . . is the only thing that has brought progress.”<sup>43</sup> We will return to these central themes of our message.

While this Article suggests that the default of the legislatures of some thirty-five states and territories in not recognizing and remedying the serious problem of the failure of notaries public to create and maintain effective records of their official acts can and should be corrected by the judiciary, one might wonder alternatively whether the executive branch of government may be turned to for a solution. Until fairly recently, such an option would have been without precedent. However, within the last five years, two state executive officers have implemented sweeping

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42. Quoted in GOODMAN, *supra* note 25, at 31.

43. *Id.* at 129.

state-wide reforms of notarial procedures, including practices regarding notary journal records.

First, in December of 2003, Mitt Romney, then the Republican Governor of the Commonwealth of Massachusetts, took a monumental step forward and unilaterally established by executive order a detailed set of guidelines to govern notarial practice, including adoption of numerous provisions of the Model Notary Act of 2002 and specifically including the requirement not then expressly present in the Massachusetts notary statute that notaries public must prepare and preserve journal entries for all of their official acts and that the journal records be comprehensive in their substance (specifying that between eight and fourteen items of information be recorded for every official notarial act).<sup>44</sup> This executive order was prompted in large measure by the significant dangers of document fraud and identity theft and by the prophylactic impact which notarial journalizing can accomplish, and the National Notary Association declared the addition of the notary journal requirement to the law of Massachusetts to be the “most significant” feature of the 2003 Governor’s Executive Order.<sup>45</sup> Regrettably, the executive order was subsequently overridden in part by legislation in the summer of 2004, and the order itself was then modified in 2004, to exempt attorneys and law office personnel from the notarial record-keeping requirements, and this retreat from statewide coverage will be discussed below.<sup>46</sup>

Second, in April of 2007, Mississippi Secretary of State Eric Clark established expansive new administrative regulations for notarial practice, adopting “significant portions” of the Model Notary Act of 2002.<sup>47</sup> Although Mississippi had already statutorily

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44. See Commonwealth of Massachusetts, Governor Mitt Romney, Exec. Order No. 455, Standards of Conduct For Notaries Public (Dec. 19, 2003) [hereinafter “Exec. Order No. 455”] (setting out the details of the new standards of performance for notaries). That order was later amended and superseded by Revised Executive Order No. 455, effective on May 15, 2004. FAERBER, *supra* note 15, at 219. In 2007, the NNA honored former Governor Romney by naming him to its list of “The 50 Most Influential People In Notarization In The Last 50 Years.” See Ray, *supra* note 6, at 33.

45. See Exec. Order No. 455 § 11.

46. See Press Release, Exec. Dept. Commonwealth of Massachusetts, Romney Establishes New Standards For Notaries Public (Dec. 19, 2003) (stating in part that “Governor Mitt Romney today issued an Executive Order establishing new and modern standards of conduct for notaries public, saying the guidelines will help crack down on imposters, prevent document fraud, curb identity theft and property crimes,” and listing among the “highlights of the Executive Order” the “[r]equire[ment] notaries public . . . keep a journal in which they record their official acts.”)

47. See Press Release, National Notary Assn., Massachusetts Governor Romney Signs Executive Order To Strengthen State’s Notary System & Address ID Theft (Dec. 19, 2003) [hereinafter Romney Signs Executive Order]



mandated notary record-keeping, the new regulations impose requirements for the substantive content of those records, which standards had not previously been included in the Mississippi notary statute.<sup>48</sup> That executive department directive was an important step forward for the notaries of Mississippi.

Although we enthusiastically applaud those two executive officers for their bold and creative initiatives and would welcome comparable directives from executive department officials in other jurisdictions, we have elected not to press this particular approach to resolve the problem of the absence of notarial record-keeping in the other states and territories. There are a number of reasons for our reluctance, but, most assuredly, the novelty of the Massachusetts and Mississippi courses of action, is not one of them.<sup>49</sup> The first reason not to call for more such gubernatorial executive orders is that the great majority of states and territories place the responsibility for the appointment and oversight of notaries elsewhere than in the governor's office. Although in early U.S. history governors had authority over the appointment of notaries, rarely today do governors have any significant role in either the appointment or the supervision of notaries.<sup>50</sup> Most typically, the secretary of state is the executive officer overseeing a state's notaries,<sup>51</sup> and the secretaries of state would not seem to be

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(commenting that "[m]ost significantly, the order requires Notaries to record their official acts in journals.").

48. See FAERBER, *supra* note 15, at 228-29 (noting both that the executive order was modified and that the legislature intervened to prevent lawyers who are notaries and legal staff who are notaries from being covered by the requirement to journalize their notarizations); see also *infra* note 769 and accompanying text.

49. According to John Stuart Mill, "All good things which exist are the fruits of originality." MACMILLAN DICTIONARY OF QUOTATIONS 407 (Chartwell Books, Inc. 2000) (1989). It is shallow and unreasonable to object to matters simply because they are novel. John Locke wrote: "New opinions are always suspected, and usually opposed, without any other reason but because they are not already common." *Id.* at 391.

50. In the period of the 1800s to the early 1900s, the governors were most often the state officials who appointed notaries public. For instance, one vintage encyclopedia described a notary public as "a public officer, generally appointed, by a gov[ernor], of a state in the U.S." THE NEW AMERICAN ENCYCLOPEDIA 1018 (C. Ralph Taylor ed., Books, Inc.) (1942).

51. About 40 secretaries of state and the District of Columbia control the notary systems of their jurisdictions. See FAERBER, *supra* note 15, at 23, 39, 47, 61, 73, 85, 91, 143, 153, 161, 169, 177, 183, 191, 201, 209, 231, 241, 251, 259, 269, 275, 283, 295, 309, 319, 329, 347, 377, 385, 399, 415, 423, 431, 439, 449, 479, 505, 513, 523 (pointing out that the Secretaries of State administer the notary systems in Arizona, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Virginia, West Virginia,

inclined to promulgate sweeping administrative orders. Incidentally, in a few places, the agency in day-to-day control of the notarial system is the office of the attorney general or lieutenant governor, or it is part of the state department of licensing, or there may even be a shared responsibility between the branches of government.<sup>52</sup>

The next reason not to press for more sweeping notarial reforms by executive officers is that such elected officials would tend to be at least as politically inhibited as legislators about initiating progressive changes to regulate notarial practices.<sup>53</sup> The 2004 legislative revision to the coverage of the Massachusetts executive order was prompted by pressure from the legal community and serves as evidence of the vulnerability of substantive progress in the notarial arena to political influences.<sup>54</sup>

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Wisconsin, and Wyoming).

52. See FAERBER, *supra* note 15, at 1, 9, 19, 99, 115, 125, 133, 219, 301, 357, 365, 409, 463, 471, 489, 497 (pointing out that the Lieutenant Governor administers the notary system in Alaska, Utah, and the Virgin Islands; the superior court clerks administer the notary system in Georgia; the Attorneys General administer the notary systems in Guam, Hawaii, and the Northern Marianas; the Supreme Court administers the notary system in Puerto Rico; the Director of the Office of Licensing administers the notary system in Washington; in Alabama both the county probate judges and the Secretary of State oversee notaries; in American Samoa and Florida the Secretary of American Samoa and the Secretary of State, respectively, and the Governor together oversee notaries; in Minnesota the Governor, Secretary of State and county court administrators oversee notaries; in New Jersey the Department of the Treasury and Secretary of State oversee notaries; in Ohio the Secretary of State and county courts of common pleas oversee notaries; in Vermont the county superior court judges and Secretary of State oversee notaries).

53. "By article 4 of the amendments of the constitution adopted April 9, 1821, it was provided that 'notaries public shall be appointed by the governor in the same manner as judicial officers are appointed, and shall hold their offices during seven years, unless sooner removed by the governor.'" *In re Appointment of Women to Be Notaries Public*, 23 N.E. 850, 851 (Mass. 1890). Even in Massachusetts, the Governor and the Secretary of State share responsibility for the oversight of notaries. FAERBER, *supra* note 15, at 219. Interestingly, while the Governor of Ohio had served as the predominant authority over Ohio notaries, effective July 1, 2001, the Ohio Secretary of State replaced the Governor (with the county courts of common pleas playing an important regulatory role as well). *Id.* at 365. Historically, the governors of many states originally had the authority to appoint notaries, but that power has since been moved out of the governor's office in most states. For instance, in California, "in 1967 . . . the authority to commission and appoint Notaries was transferred from the Governor to the Secretary of State." A HISTORY OF NOTARIES IN CALIFORNIA, NOTARY HOME STUDY COURSE 50-59 (1989) reprinted in CLOSEN, *supra* note 2, at 7.

54. "Interest groups . . . play an influential role in the legislative process at . . . the state . . . level. Interest groups may lobby the governor [and] state legislatures . . . to give ear to their cause." Matthew J. Middleton, *Legislative Power: Legislation, State and Local*, in OXFORD COMPANION TO AMERICAN LAW 517 (Kermit L. Hall ed., Oxford University Press) (2002). But notice,

Judges should not be as politically affected. State and federal court judges tend to be somewhat insulated from raw politics—as all federal judges and some state judges are appointed rather than elected, many judges serve for long terms (including numerous state judges before needing to be reappointed or re-elected), and judicial ethics codes prohibit or severely restrict judges from being too involved in politics. Once they get to the bench, judges are supposed to cut most of their political ties, and to rise above politics.<sup>55</sup>

Finally, there will be little, if any, precedential value derived from the reform actions of the executive officers in Massachusetts and Mississippi. These executive actions came as complete surprises to observers of the notarial scene.<sup>56</sup> On the other hand, judges live their day-to-day lives in a profession dominated by *stare decisis* and deference to precedent.<sup>57</sup> Judges, especially in

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judges were not listed as those subjected to pressure from interest groups. See *infra* notes 55 and 57 and accompanying text.

55. Speaking of state court judges of the late 1800s and early 1900s, Professor Friedman explained that “judges, even though elected, did not stand so naked before the partisan public as, say, governors and congressmen did.” LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 382 (Simon & Schuster 1985) (1973). His reason was that judges wrote opinions that “provided magnificent camouflage.” *Id.* In the 1800s, although most states moved to a process of popular election of judges, such “elections did not become quite as partisan as they might have.” *Id.* at 371. Federal judges are appointed rather than elected and have life tenure, leading to a degree of “political independence.” *Id.* at 378. Many state and federal judges in our early history were described as having “unblemished record[s] of honesty,” and “almost unassailable prestige.” *Id.* These same reasons undoubtedly continue to insulate most judges from political pressure, along with the obvious fact of the significant growth in the number of judge—rendering each of them less visible and less politically vulnerable. We certainly do not wish to appear naive about this matter, for we are well aware of the political connections of many judges before they ascend to the bench. “[J]udges are selected from the ranks of lawyers; usually these attorneys have been politically active or have contributed heavily to political parties . . . . [J]udicial positions . . . usually are patronage rewards for political support.” ROBERT A. HEINEMAN, POLITICAL SCIENCE: AN INTRODUCTION 196 (1996). We think most judges “rise above” most of the politics, once they get there.

56. These two executive orders were surprises. No governor in history had ever acted as did the governor of Massachusetts to dramatically and expansively reform notary practices in any U.S. jurisdiction. The Mississippi story was an even greater surprise. There, after the Secretary of State failed in 2006 in his effort to have the legislature adopt most of The MODEL NOTARY ACT, in 2007 the Secretary supported a bill to allow the Secretary of State rulemaking authority over notaries. It passed in 2007, and later that year the Secretary adopted most of The Model Notary Act by administrative rule under the Mississippi Administrative Procedures Act.

57. Precedent is within the domain of the common law; it is not the consequence of an order of the executive branch of state government. Indeed, “[p]recedent is commonly considered one of the basic concepts of the common law.” FRIEDMAN, *supra* note 55, at 21. The judicial process of reliance on

civil matters, even routinely find value in the opinions of courts in jurisdictions other than their own. Therefore, it is the prospect of common law recognition of a notarial standard of care requiring the keeping of detailed journals that will remain the focus of this Article.

## II. EVOLUTION OF COMMON LAW STANDARDS OF CARE

[T]ort rules can be announced after the dispute arises; they do not invent a new standard and impose it on past conduct but instead resolve disputes about events in the past in light of standards we generally share but perhaps have not fully articulated.<sup>58</sup>

Initially, for the thesis of this Article to have merit, there must be confirmation that the common law stands as the appropriate source to announce a duty of notaries to prepare and safeguard for themselves detailed records of their official notarial acts. More particularly, the question to be answered is whether the usual common law process of deriving standards of care to govern so many forms of human behaviors satisfactorily fits the rather unique circumstances of the notary public system.<sup>59</sup>

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precedent has been assisted since at least the medieval age by the publication of the opinions of courts. “[T]he common law early developed a tradition of case reports.” John V. Orth, *Common Law: Historical Roots*, in OXFORD COMPANION TO AMERICAN LAW, *supra* note 54 at 125. The public’s view of judges as generally unbiased and open-minded resulted in no small measure from judges’ reasoned reliance upon precedents found in those case reports. “The ability of the common law over the centuries to command the respect of the public was largely dependent on the widespread perception of its fundamental fairness.” *Id.* at 129. Further, “a reputation for impartial decision making after an opportunity to be heard is what grounds a legal system in popular esteem.” *Id.*

58. DOBBS, *supra* note 40, at 30. “[T]he traditional tort rules governing conduct to a large extent reflect social values and norms already in existence in the culture.” *Id.* A similar view was once expressed by John Allen May: “Progress consists largely of learning to apply laws and truths that have always existed.” THE FORBES BOOK OF BUSINESS QUOTATIONS, *supra* note 25, at 694. The approach of concealing, or not revealing, the true policy reasons for judicial decisions is well-known. “The underlying policies of tort law did not, as a general rule, emerge explicitly from the cases; the cases did not talk policy.” FRIEDMAN, *supra* note 55, at 469.

59. “The fact is that notaries occupy a most peculiar place in government and business in this country.” Michael L. Closen, *The Public Official Role of the Notary*, 31 J. MARSHALL L. REV. 651, 661 (1998). Among the unusual features of the notary system in the United States is that notaries serve simultaneously as private and public functionaries. They almost always serve only part-time as notaries, while spending the vast majority of their time at some other occupations. They are paid little or no compensation for their notarial services, but deal with valuable documentary transactions that total hundreds of millions of dollars annually, and they are exposed to unlimited personal liability for any and all damages proximately caused due to their notarial errors, omissions, and frauds. Notaries are by far the most populous of public officials—numbering more than even school teachers, police and fire

Although the discussion of those two points is absolutely crucial to the strength of the present argument, the review of the general common law process must necessarily be brief, for entire treatises could be, and have been, devoted to such a wide-ranging topic of significance.<sup>60</sup>

The origins of contemporary standards of care tend to result from the traditions of prudent individuals of earlier eras, and in turn the statutes and common law decisions that sanction and embody those practices.<sup>61</sup> While modern federal and state statutes establish a vast array of standards of behavior, those laws will not be the focus of this Article. The federal government has left the oversight of notaries almost entirely to the states and territories,<sup>62</sup> making it virtually out of the question that Congress would act in sweeping fashion in the notarial field. Thus, every state and territory has enacted legislation to appoint and govern notaries,<sup>63</sup> but it is commonly known that such laws have tended, from their inceptions, to be inadequate in guiding notaries and that many

officers, and military personnel.

60. See, e.g., PROSSER & KEETON, *supra* note 36; DOBBS, *supra* note 40. See also RESTATEMENT (SECOND) OF TORTS (1965).

61. The common law "embraces that great body of unwritten law founded upon general custom, usage, or common consent." John D. Perovich, 15A AM. JUR. 2D *Common Law* § 1 (1976). "Rooted in tradition yet capable of growth, the common law proved readily adaptable to the new conditions of an expanding society." Orth, *supra* note 57, at 127. "The first part of the negligence inquiry is whether a general duty to act with reasonable care in a class of cases exists. The duty question is always a question of law for the judge." Jay M. Feinman, *Torts*, in OXFORD COMPANION TO AMERICAN LAW, *supra* note 54 at 804. "Torts figure prominently in business litigation in defining the appropriate scope of behavior in the marketplace." *Id.* at 808.

62. See CLOSEN, *supra* note 2, at 60 (pointing out that "the authority of modern day notaries is statutorily based. Each jurisdiction has enacted legislation to regulate the profession and its practice."). Such federal deference to the states and territories has tended to be the approach apart from those subjects more clearly regarded as national in scope. As the nation developed and expanded, "[b]oth criminal law and civil law remained in large part, though certainly not entirely, in the competence of the individual states rather than of the federal government." Harold J. Berman, *Legal Systems*, in OXFORD COMPANION TO AMERICAN LAW, *supra* note 54 at 511. In the notary field in particular, federal legislation has remained quite limited, most typically to the authorization of some federal military officers and civilian agents to have the authority of notaries. See Robin C. Lerner, 58 AM. JUR. 2D *Notaries Public* 519, 626-28 (1989) (discussing federal legislation for the appointment of notaries and for the authorization of certain individuals to exercise the authority of notaries).

63. See CLOSEN, *supra* note 2, at 60 (pointing out that "the authority of modern day notaries is statutorily based. Each jurisdiction has enacted legislation to regulate the profession and its practice."). See generally, FAERBER, *supra* note 15 (setting out the notary statutes of the U.S. states and territories); ANDERSON'S MANUAL FOR NOTARIES PUBLIC (9th ed. 2001) (same). It will be seen, however, that notary statutes in this country tend to be out-of-date and incomplete.

have remained so.<sup>64</sup> Relatively seldom in early history did statutes focus on prescribing what are commonly thought of as standards of care.<sup>65</sup> Moreover, the primary domain of most statutes establishing practices or standards of conduct has been regulatory, rather than liability related.<sup>66</sup> Instead, the law of torts has rightfully served as the source of the great number of standards of care because the creation of such standards functions as the basis upon which liability can be imposed for their breaches and because the common law process has simply proven to be more expedient and efficient than the legislative route.<sup>67</sup> Incidental but terribly important to the tort law liability assessment process has been the achievement of other vital goals, including compensation of the victims of wrongdoing, deterrence of misconduct, and

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64. "Many state notary laws are carry-overs from antiquated statutes [citations], some are quite minimalist [citations], and others a patchwork product of numerous unrelated legislative amendments [citations]." MODEL NOTARY ACT §1-2(2) cmt. at 1 (2002) (citations omitted). "Many jurisdictions have failed to enact legislation specifically prohibiting notaries from notarizing their own signatures or from notarizing instruments in which they are named." Michael L. Cloven & Trevor J. Orsinger, *Family Ties that Bind, and Disqualify: Toward Elimination of Family-Based Conflicts of Interest in the Provision of Notarial Services*, 36 VAL. U. L. REV. 505, 571 (2002). "Disappointingly, few jurisdictions have enacted any kind of statutory prohibitions against notaries performing notarial acts for their family members." *Id.* at 587.

65. Instead, standards of care in various fields of enterprise arose out of the decisions in common law cases, which established the reasonable man standard of care along with the concepts of fault and proximate cause. See FRIEDMAN, *supra* note 55, at 467-70 (discussing the development of tort law, especially in the 19th century).

66. The law of torts, since it was borne out of actual legal cases, most often resulted in compensation of the damaged plaintiff who had been injured by the wrongdoing defendant. In discussing the development of tort law, Professor Friedman observed that "[e]very legal system tries to redress harm done by one person to another . . . . Liability . . . was based on fault." *Id.* at 468. One of the "three essential purposes" of tort law is "requiring that wrongdoers compensate their victims." Feinman, *supra* note 61, at 803. "A signal difference between regulation and tort law is that regulation does not ordinarily aim at compensation." DOBBS, *supra* note 40, at 9.

67. "[T]ort is a field which pervades the entire law." PROSSER & KEETON, *supra* note 36, at 2. "[W]here relevant legislation does not exist, courts must by necessity decide a controversy without legislative guidance." *Id.* at 18. "American tort law, though now often supplemented by statutory law, initially developed from common law decisions." DOBBS, *supra* note 40, at 27. "[T]he tort system does not require a large administrative bureaucracy to formulate rules, investigate wrongdoing, and pursue complaints." Feinman, *supra* note 61, at 803. In fairness, of course, as to any particular issue either the legislative or the judicial process might happen to be more expedient. Certainly, the enormous volume of court decisions contributes to the common law having such a controlling influence. "The common law forms much the largest part of the great body of law under which we live." ALBERT S. BOLLES, PUTNAM'S HANDY LAW BOOK FOR THE LAYMAN 2 (1925).

spreading of the risks and costs of doing business.<sup>68</sup>

The law of torts originated through common law decisions and continues to be dominated by the common law.<sup>69</sup> Professor John Orth described the historic origin and result in America of the judicial law-making process: "As it had grown over the centuries in England, so the common law continued to grow when it was transplanted in the new soil of America."<sup>70</sup> Such growth in the law generally was a natural corollary to English settlers continuing to function in ways similar to those with which they were familiar in olde England,<sup>71</sup> although we will find that their familiarity with English notarial practices did not assure continued long-term close mirroring of the legal institution of the office of English notary public.<sup>72</sup>

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68. "The most commonly mentioned aims of tort law are (1) compensation of injured persons and (2) deterrence of undesirable behavior." DOBBS, *supra* note 40, at 12. "A recognized need for compensation is . . . a powerful factor influencing tort law." PROSSER & KEETON, *supra* note 36, at 20. "The 'prophylactic' factor of preventing future harm has been quite important in the field of torts." *Id.* at 25. Additionally:

Another factor the courts have considered in weighing the interests before them is the relative ability of the respective parties to bear a loss which must necessarily fall upon one or the other, at least initially . . .

[I]t is a matter of their capacity to avoid the loss, or to absorb it, or to pass it along and distribute it in smaller portions among a larger group.

*Id.* at 24. Among the "three essential purposes" of tort law are "detering wrongful conduct and reducing the incidence of injuries," and providing "compensation for victims of injuries." Feinman, *supra* note 61, at 803. Regarding the risk-sharing and cost-spreading of business in the tort arena, Professor Feinman has said, "Social and economic factors in the torts process shape the workings of the law . . . as much as the rules of law themselves." *Id.* at 807.

69. "Tort law is predominantly common law." DOBBS, *supra* note 40, at 1. "Tort law is overwhelmingly common law, developed in case-by-case decision-making by courts." PROSSER & KEETON, *supra* note 36, at 19.

70. Orth, *supra* note 57, at 127. "English common law is the basis of most of the law in the United States." THE WORLD BOOK ENCYCLOPEDIA, *supra* note 35, at 120. See also DOBBS, *supra* note 40, at 27 (concluding that "English colonists in the East brought with them common law assumptions").

71. "An interplay between inherited legal culture and the New World environment molded law in early America." KERMIT L. HALL, ET AL., AMERICAN LEGAL HISTORY: CASES AND MATERIALS 3 (2d ed. 1996). "Colonial practices derived in part from that law which the settlers knew best: the local laws and local customs of their communities back home." FRIEDMAN, *supra* note 55, at 25. Coincidentally, of course, we in the United States were the beneficiaries not only of the English notarial heritage but also of the heritage of the system of the common law which derived specifically from England. See Perovich, *supra* note 61, at 596 (observing that the phrase "common law of England," which is 'frequently encountered in statutes and [court] decisions . . . means that general system of law which prevails in England.').

72. "Although American [colonists] thought of themselves as English people, the very act of creating new societies provided both the opportunity and the necessity for inventing or adapting legal institutions appropriate to the New World environment." HALL ET AL., *supra* note 71, at 3.

Notarial practice was ripe for application of general common law tort doctrine, because of the risks of errors and omissions attendant to official notary acts, and the very real risks of fraudulent conduct by notaries.<sup>73</sup> Hence, such familiar principles as personal liability of notaries,<sup>74</sup> reasonable care,<sup>75</sup> proximate cause,<sup>76</sup> and other tort doctrines were first applied to the

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73. "Misconduct in connection with notarizations is a pervasive problem with a long history." Anderson & Closen, *supra* note 13, at 887. Citing to a decision dating to 1870, the judge in *Independence Leasing Corp. v. Aquino*, 506 N.Y.S.2d 1003, 1006 (N.Y. Civ. Ct. 1986) eloquently observed that "negligence has long been within the compass of misconduct by a notary." "[T]he curious historical truth is that the very first notary in the American colonies was removed from office because of his fraudulent notarial activities. Appointed a notary in New Haven Colony in 1639, Thomas Fugill 'was thrown out of office for falsifying documents.'" Closen, *supra* note 59, at 681-82. "Since at least 1858 in the case of *Fogarty v. Finlay*, 10 Cal. 239 (1858), court decisions have identified notarial mistakes and misdeeds." *Id.* at 682. Importantly, many of these early cases were decided under the common law, including even lawyer disciplinary case. *See, e.g., People v. Johnson*, 176 N.E. 278 (Ill. 1931) (involving the discipline of a lawyer for attorney-notary misconduct, and decided under the common law).

74. "The liability of a notary public is founded on the common law and predates any statutory duty." *First Bank of Childersburg v. Florey*, 676 So. 2d 324, 331 (Ala. Civ. App. 1996). From at least the time of the case of *Fogarty*, the courts "have regularly held notaries liable for negligent and intentional misconduct." Closen, *supra* note 59, at 682. Additionally, a line of common law cases has protected notaries from possible liability for performing false notarizations, under the de facto notary doctrine (which is a subcategory of the cases decided under the de facto public official doctrine). The de facto notary cases tend to hold valid the acts of notaries whose commissions have expired or whose commissions are invalid due to some technicality, in either event without the knowledge of the notary. *See, e.g., Citizens' Bank v. Bry*, 3 La. Ann. 630, 633 (1848); *Monroe v. Liebman*, 16 So. 734 (La. 1895). *But see Haynes v. Tenn.*, 374 S.W.2d 394 (Tenn. 1964).

75. "Even in the absence of statute, the duty to take reasonable care to ascertain the identity of the individual whose signature is being acknowledged has been imposed upon a notary public." *Larner, supra* note 62, at 544. "In the absence of statute, a notary is held to the care and diligence of a reasonably prudent man to ascertain the acknowledged's identity." *Mfrs. Acceptance Corp. v. Vaughn*, 305 S.W.2d 513, 522 (Tenn. Ct. App. 1956). *See also Butler v. Olshan*, 191 So. 2d 7, 16 (Ala. 1966); *First Bank of Childersburg*, 676 So. 2d at 331. *See generally* Gerald Haberkorn & Julie Z. Wulf, *The Legal Standard of Care for Notaries and Their Employers*, 31 J. MARSHALL L. REV. 735 (1998) (discussing the reasonable care standard of notaries, as well as the vicarious liability of employers of notaries).

76. "In order to recover for the negligent default of a notary, it must appear that such default was the proximate cause of the loss." *Larner, supra* note 62, at 561. For a discussion of the application of the doctrine of proximate cause to the misconduct of notaries, *McDonald v. Plumb*, 90 Cal. Rptr. 822 (1970) *Ameriseal of N.E. Fla. Inc. v. Leiffer*, 673 So. 2d 68 (Fla. Dist. Ct. App. 1996) (majority and dissenting opinions); *Willow Highlands Co. v. Md. Cas. Co.*, 85 A.2d 83 (Pa. 1952); *Commw. v. Am. Sur. Co. of N.Y.*, 149 A.2d 515 (Pa. Super. Ct. 1959); *State v. Maryland Cas. Co.*, 344 S.W.2d 55 (Mo. 1961) (and several cases cited therein); *Iselin-Jefferson Fin. Co. v. United Cal. Bank*, 549 P.2d



performance of notaries through common law decisions, not by statutes. This common law process in the notarial field paralleled developments in the tort arena,<sup>77</sup> for notarial misconduct is simply a subset of the broader subject of negligent and intentional wrongdoing. Curiously, however, in the U.S. in the field of notary law later statutes have with some frequency incorporated the positions of the common law tort decisions.<sup>78</sup> For instance, even the reasonable care standard for the performance of notarial responsibilities has been written into statutory form.<sup>79</sup> Additionally, old decisions holding notaries personally responsible for damages proximately caused by their misconduct were subsequently embodied in state laws,<sup>80</sup> as well as in the Model Notary Acts of 1984 and 2002.<sup>81</sup> Similarly, early cases imposing

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142 (Cal. 1976) (and cases cited therein).

77. In the realm of tort doctrine as well, the basic principles were established by court decisions. "By the beginning of the Gilded Age, the general features of the new tort law were crystal clear. The leading concepts—fault, assumption or risk, contributory negligence, proximate cause—had been all firmly launched on their careers." FRIEDMAN, *supra* note 55, at 475.

78. For instance, some early notary statutes did not even expressly authorize notaries to administer oaths, so that some court cases arose on the question of whether notaries had the inherent authority to do so. *See, e.g., Simpson v. Wicker*, 47 S.E. 966 (Ga. 1904) (holding that notaries possessed inherent authority to administer oaths). Over time, probably every U.S. notary law has been updated to specifically empower notaries to administer oaths and affirmations. Incidentally, in England statutory adoption of general common law rules has been frequent. In England, "[t]he common law . . . remains in force to provide assistance in interpreting statutes, many of which are primarily restatements of common-law rules and principles." BRAM & DICKEY, *supra* note 35, at 51.

79. *See, e.g.,* IDAHO CODE ANN. § 51-111(a) (2008) ("Each notary public shall exercise reasonable care in the performance of his duties generally."); VA. CODE ANN. § 47.1-14 ("A notary shall exercise reasonable care in the performance of his duties generally."). Incidentally, an old line of common law decisions under the de facto notary doctrine (which is a subset of the opinions under the de facto public official doctrine) declares valid the acts of notaries whose commissions had expired or been rendered void for technical reasons without the knowledge of the affected notaries. Those outcomes would, of course, shield the affected notaries from possible liability for false notarizations. And, the de facto notary doctrine has been written into a number of state notary statutes. *See, e.g.,* N.C. GEN. STAT. § 10A-16 (repealed 2005); OHIO REV. CODE ANN. § 147.12 (West 2008).

80. For sample state statutes announcing various formulations of personal liability of notaries for notarial misconduct, *see* FAERBER, *supra* note 15, at 141 (Hawaii), 150-51 (Idaho), 274 (Montana), 447 (Tennessee), 488 (Virginia), 520 (Wisconsin), and 530 (Wyoming). Clearly, the fact that by state and territorial statutes the notaries of some thirty-five U.S. jurisdictions are required to be bonded suggests those notaries may be held liable for unintentional notarial wrongdoing. *See Comparison of Notary Provisions*, *supra* note 21, at 35.

81. *See* MODEL NOTARY ACT §§ 6-101, 6-102 (1984); MODEL NOTARY ACT §§ 12-1, 12-2 (2002).

respondeat superior liability upon employers of notaries have also resulted in state statutory provisions expressly announcing the same conclusion,<sup>82</sup> including comparable sections of the Model Notary Acts.<sup>83</sup>

On the other hand and quite expectedly, not all states and territories have as yet adopted statutes or become homes to common law opinions applying the familiar tort principles mentioned earlier (personal liability of notaries, reasonable care, proximate cause, and vicarious liability of employers) to the practices of notaries public. Yet, there can be no doubt that if confronted with cases to test these doctrines in notarial settings, the courts of the remaining states and territories would also join the majority.<sup>84</sup> Clearly, the fact that only some states and territories have shown the wisdom to demand through statutes that notaries create and preserve records of their official acts does not preclude the reach of the common law to achieve the same outcome in the other states and territories. Extremely important is the proposition that no state or territory has ever forbidden its notaries from creating and retaining notary journal records<sup>85</sup>—

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82. See generally J. Michael Gottshalk, Comment, *The Negligent Notary Public-Employee: Is His Employer Liable?*, 48 NEB. L. REV. 503, 526 (1969) (discussing the vicarious liability of employers of notaries, and remarking that “the veil of ‘public officialdom’ behind which the notary may seek to conceal his misdeeds is far too thin to afford protection.”). See, e.g., *Simon v. Peoples Bank & Trust Co.*, 180 A. 682, 684 (N.J. 1935) (finding an employer vicariously liable for the negligence of a notary). But see *May v. Jones*, 14 S.E. 552, 553 (Ga. 1891) (holding that an employer was not vicariously responsible for notarial misconduct). For sample state statutes announcing various formulations of vicarious liability of employers of notaries for notarial misconduct, see FAERBER, *supra* note 15, at 83 (Connecticut), 112 (Florida), 130 (Guam), 150-51 (Idaho), 160 (Illinois), 240 (Michigan), 268 (Missouri), 292 (Nevada), 363 (Northern Marianas), 395 (Oregon), 488 (Virginia), 512 (West Virginia), and 530 (Wyoming).

83. See MODEL NOTARY ACT §§ 6-101, 6-102; MODEL NOTARY ACT §§ 12-1, 12-2.

84. The reason for this conclusion is most simple, and has been suggested earlier in this Article. The law governing notarial wrongdoing is not a field unto itself, but is merely a subset of the broader law of torts. Thus, the basic tort doctrines of reasonable care, fault, proximate cause, foreseeability, duty, and just compensation—with their virtual universal approval and adherence—will surely be applied to cases of notary misconduct. Importantly, in light of the highly influential role of precedent from other states and territories in the civil law arena, the large volume of common law notary cases already existing could not possibly be disregarded or distinguished away, and would most assuredly affect outcomes in future notary cases. Precisely because there are not as many notary case opinions as there are decisions in numerous other substantive areas, courts in notary cases tend especially to reach out and embrace the precedents from sister states and territories. “[A]fter hundreds of years of common law development, so much remains that can be disputed.” DOBBS, *supra* note 40, at 29.

85. “No jurisdiction specifically outlaws the practice [of journalizing official

and this key point will deserve to be mentioned again. In the notary field, there exists a generous mixture of statutory and common law applications of numerous legal standards of care and responsibility, as every state and territory has enacted notary legislation and undoubtedly has experienced one or more common law decisions on notary issues being rendered by its courts.<sup>86</sup> Therefore, to advocate for promulgation of a common law rule requiring notaries to maintain and preserve detailed journals of their notarizations in those states and territories without similar statutory provisions is apropos. It is exactly as Professor Dobbs explained in the quotation which introduced this segment of the Article. The record-keeping standard does not need to be invented or created anew, but it is a standard “we generally share but perhaps have not fully articulated.”<sup>87</sup> Of course, the viewpoint of Dobbs has been shared by many others who have reached essentially the same conclusion. According to Azarias, “Laws are not invented; they grow out of circumstances.”<sup>88</sup> P.J. Proudhon, the French social theorist, declared, “The law does not generate

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notarial acts].” MODEL NOTARY ACT ch. 7, general cmt. (2002). This proposition is so important to our argument that we will repeat it a number of times in the coming pages.

86. All the states and territories have enacted their own notary statutes. See generally FAERBER, *supra* note 15. For example, on the statutory side, most notaries must subscribe to a statutory oath of office which demands faithful service as a commissioned public official. 5 ILL. COMP. STAT. 312/2-104 (2008) (requiring the notary to “perform faithfully”), HAW. REV. STAT., § 456-2 (2008) (mandating an oath “for the faithful discharge” of notarial duties); N.D. CENT. CODE, § 44-06-03 (2008); some notaries must read the state’s notary statute. 5 ILL. COMP. STAT. 312/2-104 (requiring the notary to declare “I have carefully read the notary law of this state.”). Some notaries are statutorily prohibited from acting under circumstances in which they have disqualifying interests in, or relationships with the signers of, documents. IDAHO CODE ANN. § 51-108 (2008) (describing a disqualifying or beneficial interest); KAN. STAT. ANN., § 51-108 (repealed 1968) (setting out a financial or beneficial interest); N.H. REV. STAT. ANN. § 455:2-a (prohibiting a notary from notarizing his or her own signature). Regarding common law case decisions, hundreds and hundreds of them have been published in the official court reports. There are enough case decisions that a law school casebook was published a decade ago, and since then hundreds more notary cases have been decided by the courts. See generally CLOSEN, *supra* note 2.

87. See DOBBS, *supra* note 40 and accompanying text. “In determining the limits of the protection to be afforded by the law, the courts have been pulled and hauled by many conflicting considerations, some of them ill defined and seldom expressed at all.” PROSSER & KEETON, *supra* note 36, at 17. “[I]t is sometimes said that the common law rests wholly upon tradition and has always existed, having only been declared by the courts from time to time.” Perovich, *supra* note 61, at 596. This view is really consistent also with the following comment in the RESTATEMENT SECOND OF TORTS. “The entire history of the development of tort law shows a continuous tendency to recognize as worthy of legal protection interests which previously were not protected at all.” RESTATEMENT (SECOND) OF TORTS, § 1 cmt. e (1965).

88. THE FORBES BOOK OF BUSINESS QUOTATIONS, *supra* note 25, at 488.

justice, the law is nothing but a declaration and application of what is already just.”<sup>89</sup>

Notarial functioning should be seen as a part of the larger functioning of government and commerce, wherein the common law of torts greatly affects standards of conduct. Or, as Professor Jay Feinman aptly wrote: “Torts figure prominently in business litigation in defining the appropriate scope of behavior in the marketplace.”<sup>90</sup> Common law tort standards necessarily filter throughout the commercial system and, thus, regulate performance even in its far corners of specialization, including the work of notaries public. Further, Feinman observed: “Defenders of the tort system point out that the system has been a great success in improving the safety of the American people [from both personal and property injuries],”<sup>91</sup> although as would be expected “the duty to prevent economic harm is much more limited than the duty to prevent physical harm.”<sup>92</sup> This astute viewpoint when applied to notarial practice suggests that better overall performance by notaries, better security of documents bearing notarizations, and better protection of the public have resulted than would have occurred if common law decisions imposing appropriate tort-based standards of performance for notaries had not been rendered.

Both law and common sense generally support the simple point at the heart of the argument for common law recognition of a duty of notary record-keeping. The record produced in written form in both traditional and electronic notary journals is obviously more reliable than unwritten recollections of the circumstances of notarizations, especially where the record is prepared and preserved by an unbiased public official.<sup>93</sup> The legal preference for evidence in the form of a writing over mere oral history or testimony is so well established that it rises to the level of a general standard of conduct. It is simply well founded in human experience that written instruments generated contemporaneously with an event (that is not subject to dispute until later) are more likely to be trusted than subsequent orally described recollections

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89. *Id.* at 491.

90. Feinman, *supra* note 61, at 808.

91. *Id.* at 803. “[B]oth . . . tort law and regulation . . . can be seen as means of imposing a degree of social control by preventing injury or compensating it.” DOBBS, *supra* note 40, at 8.

92. Feinman, *supra* note 61, at 804.

93. See Ronni Ross, *The American Notary: Celebrating a 350-Year Heritage*, NAT’L NOTARY, Nov. 1989, at 11 (describing the responsibilities of ancient notaries “to put documents in writing, witness their signing and hold them in safekeeping”). A written record should be more reliable than mere memory. Henry Van Dyke perceptively observed: “Memory is a capricious and arbitrary creature.” THE FORBES BOOK OF BUSINESS QUOTATIONS, *supra* note 25, at 569. The point is consistent with the old saying—“Seeing is believing.” DALE, *supra* note 24, at 38.

of the event, as the former represent fresh, unchanged and accurate impressions while the latter are subject to the vagaries of human memory. This attitude is reflected in a number of the law's earliest and longest-enduring evidentiary and substantive rules, including the best evidence rule,<sup>94</sup> the Statute of Frauds,<sup>95</sup> the parol evidence rule,<sup>96</sup> and the business records exception to the rule against the admission of hearsay.<sup>97</sup> Each of these doctrines, some of which are grounded in common law decisions, approves written evidence over evidence solely oral. For example, in describing the "best evidence" rule, Professor Michael Saks explained: "Because written documents and other recording media can be so influential to the outcome of legal proceedings, and yet can easily be falsified, the rules [of evidence] express a strong preference for original documents and other recordings."<sup>98</sup> He could as aptly have been talking about the circumstances surrounding certificates of notarization and the detailed notary journal entries that should supplement and document their issuance. The U.S. Supreme Court as long ago as 1823 recognized an exception to the rule against the admissibility of hearsay where a notary record book detailed the circumstances surrounding the performance by the notary of a banking protest.<sup>99</sup> The reason for

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94. "The 'best evidence rule' prohibits the introduction into evidence of secondary evidence unless it is shown that original document has been lost or destroyed or is beyond jurisdiction of court without fault of offering party." BLACK'S LAW DICTIONARY 146 (5th ed. 1979). See FED. R. EVID. 1002, Requirement of Original ("To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by Act of Congress."). See generally MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE 559-78 (Edward W. Cleary, ed., 2d ed. 1972) [hereinafter CLEARY].

95. The "chief characteristic [of the Statute of Frauds] is the provision that no suit or action shall be maintained on certain classes of contracts or engagements unless there shall be a note or memorandum thereof in writing signed by the party to be charged or by his authorized agent." BLACK'S LAW DICTIONARY, *supra* note 94, at 595. See U.C.C. § 2-201 (1998) (setting out the Statute of Frauds provision requiring a memorandum in writing as evidence of enforceable sales of goods for the price of \$500 or more). See generally ARTHUR L. CORBIN, CORBIN ON CONTRACTS 370-486 (One Volume ed. 1972); JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS 710-78 (4th ed. 1998).

96. "Parol evidence rule. This evidence rule seeks to preserve integrity of written agreements by refusing to permit contracting parties to attempt to alter import of their contract through use of contemporaneous oral declarations." BLACK'S LAW DICTIONARY, *supra* note 94, at 1006. See U.C.C. § 2-202 (setting out the parol evidence rule governing sales of goods). See generally CALAMARI & PERILLO, *supra* note 95, at 118-46.

97. See FED. R. EVID. 803(6) (setting forth the business records exception); see generally CLEARY, *supra* note 94, at 717-34.

98. Michael J. Saks, *Evidence*, in OXFORD COMPANION TO AMERICAN LAW, *supra* note 54 at 281.

99. *Nicholls v. Webb*, 21 U.S. 326, 337 (1823).

the result in that old case was the reliability of the comprehensive record that the notary had maintained.<sup>100</sup>

In the field of commerce also, the preference for written records among honorable and prudent business people is of utmost importance as a standard practice and seems almost always to have been so. To illustrate, Giovanni of Bologna, an Italian notary practicing in the thirteenth century, remarked that “Italians, like cautious men, want to have a public instrument for practically every contract they enter into.”<sup>101</sup> The failure to keep business-like records is completely foreign to expected governmental and commercial routine in countless settings in the United States as well.<sup>102</sup> Hence, the first and foremost pragmatic rule of business is

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100. *Id.* at 330-31. The same result would likely have been obtained in ancient civil law jurisdictions and under English law. In the Middle Ages, “[t]he notary’s instruments or recorded acts in the minute book were proof of the validity of a contract and could be used in a court of law.” KATHRYN L. REYERSON & DEBRA A. SALATA, *MEDIEVAL NOTARIES AND THEIR ACTS: 1327-1328 REGISTER OF JEAN HOLANIES* 21 (2004). In England, “[s]o much faith was, in fact, given to notarial evidence, that even a duplicate made at any time from the original or protocol in the notarial book was deemed to be an equivalent to an original drawn up at the time of the entry in the book. And the entry in a book of a Notary Public would be received as documentary evidence.” RICHARD BROOKE, *A TREATISE ON THE OFFICE AND PRACTICE OF A NOTARY OF ENGLAND* 47 (George F. Chambers, ed., 5th ed. 1890) [hereinafter *BROOKE’S NOTARY*].

101. C.W. BROOKS, R.H. HEMHOLZ, & P.G. STEIN, *NOTARIES PUBLIC IN ENGLAND SINCE THE REFORMATION* 8 (1991).

Historically, the possibilities that memories would fail or parties would die, that fraud would be perpetrated, and that evidence would be lost encouraged parties to take steps to document transactions in an attempt to establish their genuineness. Since the earliest days of written language and recorded history, efforts to authenticate transactions have been undertaken, with varying degrees of success. The ancient Chinese, Greeks, and Romans reduced transactions to written form.

John C. Anderson & Michael L. Closen, *Document Authentication in Electronic Commerce: The Misleading Notary Public Analog for the Digital Signature Certification Authority*, 17 *J. MARSHALL J. COMPUTER & INFO. L.* 833, 840 (1999). “Record keeping is . . . rooted in ancient human history.” VAN ALSTYNE, *supra* note 7, at 187. “Recordkeeping had become essential in the complex economic world of commerce and finance” in southern Europe in the Middle Ages. REYERSON & SALATA, *supra* note 100, at 1. Notaries of that era and area prepared records of “a variety of contracts,” as well as the “official acts” of “political authorities”). *Id.*

102. “Record keeping is an implied duty in almost every walk of life. It is rooted in ancient human history.” VAN ALSTYNE, *supra* note 7, at 187. An endless list of examples could be provided. In corporate business settings, written records of meetings and financial matters are to be kept. MODEL BUSINESS CORPORATION ACT § 16.01 (1984). Written minutes are to be kept of meetings governed by Robert’s Rules of Order. See ROBERT’S RULES OF ORDER 80-82 (Rachel Vixman, ed., 1977) (setting out Rule 41 entitled “Clerk or Secretary and the Minutes” and describing that officer’s record-keeping responsibilities, and the substance of those records); see also FLA. STAT. § 720.303(3) (2008) (requiring the maintenance of recorded minutes of all

to “get it in writing,” which really translates to the principle that each party should obtain an original or duplicate copy of each document.<sup>103</sup> This approach prevents the difficulties which can arise if only one instrument is generated—namely, loss of, tampering with, and forgery of a single document. The same risks abound in the notarial field if a single instrument (the certificate of notarization) is created without any backup documentation (the journal entry for the notarization). Moreover, the risks would be significantly greater if the keeper of the backup record were other than an impartial public officer.

Lastly, consider a most realistic point about the politics of notary legislation as the potential source of the suggested standard of care. In over 230 years of U.S. notary practice, some thirty-five states and territories have not adopted statutes which currently mandate the maintenance of notary journals. It simply does not appear that the legislatures of so many jurisdictions, or even of substantially all those jurisdictions, would ever get around to doing otherwise, and certainly not within a reasonable period of time. Regrettably, the strongest evidence in support of this dire prediction is the fact that since about 1940 at least ten states, which had statutorily mandated notary journal record-keeping, went on to repeal those provisions.<sup>104</sup> Although again, we

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meetings of homeowners' associations and their boards of directors).

103. If businesspeople do not reduce their agreements/contracts to written form, then they are left merely to trust one another. “Trust is the mother of deceit.” DALE, *supra* note 24, at 354. We know the rule to “get it in writing” must be basic if Reader’s Digest recommends the practice, and Reader’s Digest does recommend it. “[W]hether the contract you are about to enter into is or is not covered by the statute of frauds, you should as a matter of course put it in writing if at all possible.” READER’S DIGEST, YOU AND THE LAW 199 (1971). Movie mogul Samuel Goldwyn once humorously but rightly quipped: “A verbal contract isn’t worth the paper it’s written on.” ALVA JOHNSON, THE GREAT GOLDWYN 16 (1937). In the introduction to her recent book, former Texas judge and newswoman Catherine Crier wrote: “We do not trust one another to be honest or fair . . . . We want things . . . reduced to writing.” CATHERINE CRIER, THE CASE AGAINST LAWYERS 4 (2002). Remember the proverb that “[s]eeing is believing.” MACMILLAN DICTIONARY OF QUOTATIONS, *supra* note 49, at 459. Not only is the notion to “get it in writing” a pragmatic rule of business, but also it is a rule of statutory contract law. The Statute of Frauds provides that in order for certain kinds of contracts to be enforceable in the courts, they must be evidenced in writing and signed by the parties to be charged therewith. See generally MICHAEL L. CLOSEN, ET AL., CONTRACTS: CONTEMPORARY CASES, COMMENTS, AND PROBLEMS 359-85 (1992); see also U.C.C. § 2-201 (setting out the statute of frauds for sales of goods). Moreover, if the parties reduce their contract to writing, the writing cannot generally be altered by parol evidence. U.C.C. § 2-202 (setting out the parol evidence rule in cases of sales of goods). And, if parties keep regular written records of their business dealings, those business records are generally admissible into evidence.

104. Those ten states include Arkansas, Georgia, Iowa, Kansas, Nebraska, New Mexico, Oklahoma, and Wyoming, which can be identified by comparing

emphasize that not one jurisdiction has prohibited voluntary notary journalizing, and it is this fact which holds the door open for the common law to enter.

Several examples of legislative failures and reversals should confirm our prediction about the near hopelessness of a swell of support for state and territorial statutes requiring notary record-keeping. For instance, in 2000, the Wisconsin notary statute, which did not provide for mandatory notary journalizing, was revised so as to address the confidentiality of notarial records, but the statute was not modified to require the creation of such records or journals in the first place.<sup>105</sup> Yet, the Wisconsin secretary of state's pamphlet for notaries has "encouraged" notaries to keep a notarial log book.<sup>106</sup> In 2004, Kansas Senate Bill 357 was introduced, proposing sweeping changes to the state's notary law in keeping with numerous sections of the comprehensive and progressive Model Notary Act of 2002 (which contains a provision on mandatory journal record-keeping),<sup>107</sup> but even that proposed Kansas legislation did not include a notary journal requirement.<sup>108</sup> Although the Kansas statute still does not require notaries to create and retain journal records, the Kansas secretary of state's handbook for notaries announces that the record-keeping practice is "recommended."<sup>109</sup> In 2004, Michigan underwent what has been

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a 1940 chart of those states that statutorily required notary record-keeping for all or substantially all official acts, see CARL L. MEIER, ANDERSON'S MANUAL FOR NOTARIES PUBLIC 27-29 (1940), with the list of those states that do not now statutorily require such record-keeping, see *Comparison of Notary Provisions*, *supra* note 21, at 35. The other two states are Maine and South Dakota. "Effective July 14, 1994 . . . Notaries Public commissioned in and for the State of Maine are no longer required to maintain or keep records of all acts they may perform." according to the official Notary Public Handbook. FAERBER, *supra* note 15, at 208. According to the South Dakota Notary Public Handbook, "South Dakota law no longer requires a register be kept by a notary." *Id.* at 438.

105. "Unfortunately . . . the new Wisconsin statute does not establish an obligation on Wisconsin notaries to prepare journal entries for their notarizations of signatures on documents." Michael L. Clozen, Trevor J. Orsinger & Bradley A. Ullrick, *Notarial Records and the Preservation of the Expectation of Privacy*, 35 U.S.F. L. REV. 159, 240 (2001). See FAERBER, *supra* note 15, at 515, 520 (pointing out that Wisconsin does not statutorily require notary journalizing, but quoting the Wisconsin provision which protects the confidentiality of notary records).

106. See FAERBER, *supra* note 15, at 520-21 (quoting the Wisconsin pamphlet which has been distributed by the Secretary of State).

107. MODEL NOTARY ACT § 7-1(a) (2002). The MODEL NOTARY ACT of 2002 stands as one of the most important and positive accomplishments in the notary field in the entire history of the United States. See *infra* notes 698-707 and accompanying text.

108. See Armando Aguirre, *Legislative Watch*, NOTARY BULL., Aug. 2004, at 14 (reporting that Kansas Senate Bill 357 was "[b]ased in large part on the NNA's MODEL NOTARY ACT of 2002," and that the bill died in committee).

109. See FAERBER, *supra* note 15, at 182 (quoting the Kansas Notary Public



described as the most extensive revision of its notary law in the state's history, but that sweeping revision did not include a requirement that notaries maintain records of their official acts.<sup>110</sup> Like the other state agencies just noted, the Michigan Department of State Web site for notaries observes that "many notaries find journals to be an effective method for keeping records."<sup>111</sup> Thus, the legislative proposals in Wisconsin, Kansas and Michigan, as well as most other recent proposed revisions of state notary statutes, have omitted provisions for notary journal record-keeping, although state notary oversight agencies nevertheless recommend such record-keeping and although provisions on mandatory notary record-keeping have appeared in the Uniform Notary Act since 1973,<sup>112</sup> in the Model Notary Act since 1984,<sup>113</sup> and in some state notary statutes since at least the 1800s.<sup>114</sup>

Utah's notary statute contains a unique section which merely announces that a notary "may keep, maintain, and protect . . . [an] official journal of notarial acts."<sup>115</sup> Disappointingly, in 2004, Utah Senate Bill 102, which would have required notaries to keep and then to retain journals of notarizations, died in committee.<sup>116</sup> The Florida Governor's Reference Manual For Notaries strongly endorses notary journal record-keeping, remarking that "[t]he best way to protect yourself is to document your notarial acts in a journal."<sup>117</sup> In Florida, in 2004, two bills—House Bill 337 and Senate Bill 432—would have mandated that notaries make a comprehensive journal entry for each notarial act, including the signer's thumbprint, but neither of these bills ever got out of committee.<sup>118</sup> Consider also the unfortunate situation in New

Handbook with regard to journalizing).

110. According to Michigan Secretary of State Terri Lynn Land, the new Michigan notary law effective on April 1, 2004, "marks the first comprehensive revision . . . since the first half of the 19th century [in 1846]." Terri Lynn Land, *Our Goal of Modernizing Notary Laws Is Achieved*, NOTARY BULL., June 2004, at 15. "Michigan legislators have approved what is perhaps the most sweeping reformation of Notary law in the history of the state." Armando Aguirre, *Legislative Watch*, NOTARY BULL., Feb. 2004, at 14. The extensive changes did not include the requirement of notary journal record-keeping. *Id.*

111. See FAERBER, *supra* note 15, at 240 (quoting the Michigan Web site regarding notary record-keeping).

112. UNIFORM NOTARY ACT §§ 4-101 to 4-103 (1973).

113. MODEL NOTARY ACT §§ 4-101 to 4-104 (1984).

114. For example, California's 1850 notary law required notaries to maintain a "fair record" of all of their official acts. See CLOSEN, *supra* note 2, at 5 (quoting from the NNA California Notary Home Study Course).

115. FAERBER, *supra* note 15, at 470.

116. See Armando Aguirre, *Legislative Watch*, NOTARY BULL., Apr. 2004, at 15 (pointing out that Utah Senate Bill 102 would have required the keeping of notary journals, but that it died).

117. FAERBER, *supra* note 15, at 113.

118. See Aguirre, *supra* note 108, at 14; see also Aguirre, *supra* note 110, at

Mexico in 2003, where the state enacted substantial revisions to its notary statute by adopting numerous provisions of the Model Notary Act of 2002, but not the model law's section on mandatory journal record-keeping.<sup>119</sup> It will come as no surprise that the official New Mexico notary Web site "recommend[s]" journalizing of official acts.<sup>120</sup>

Worst of all, already in the 1990s and 2000s at least three states have repealed mandatory notary journalizing provisions. In 2001, Oklahoma repealed its statutory provision requiring notaries to maintain records of their official acts.<sup>121</sup> Yet, the Oklahoma Secretary of State's Web site continues to recommend that notaries keep such records.<sup>122</sup> Similarly, South Dakota abolished its requirement for notaries to maintain registers or ledgers, although the official South Dakota Notary Public Handbook continues to recommend such record-keeping to the state's notaries.<sup>123</sup> Lastly, although Maine had required the keeping of a journal by its notaries for the short time from 1991 to 1994, it no longer does so.<sup>124</sup> Again however, the Maine Notary Public Handbook continues to "strongly recommend" that notaries maintain journals of official acts.<sup>125</sup>

Hence, legislation may not be counted on to provide a solution for the lack of record-keeping. A major obstacle to progress on notarial record-keeping legislation is the opposition of some lawyers and bar associations (as will be addressed at length below).<sup>126</sup> With the clout of attorneys and the organized bar, with the sizeable number of lawyer-legislators and with their typical view of such record-keeping as a nuisance, as unimportant and as inconvenient (since it necessitates the personal appearance of their clients at the time of notarizations), the notary journal requirement becomes even more difficult to accomplish through legislation.

A more likely remedy for this significant failure in the

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14 (detailing the information that would have been required to be recorded under Florida Senate Bill 432). Later that year, it was reported that Florida Senate Bill 432 and House Bill 337, both of which would have required notary journalizing, had died in committee. Aguirre, *supra* note 108, at 14.

119. FAERBER, *supra* note 15, at 317, 532.

120. *Id.* at 317.

121. *Id.* at 384.

122. *Id.*

123. The South Dakota Notary Public Handbook states, "While South Dakota law no longer requires a register to be kept by a notary, it would certainly be to the advantage of the notary to do so." *Id.* at 438.

124. *Id.* at 208. Actually, at a very early time, Maine required each of its notaries "to note and record at length, in a book of records kept for the purpose, all acts, protests, depositions, and other things by him noted, or done in his official capacity." LAWS OF MAINE, 1821 (Vol. I), Ch. CI, Sec. 5.

125. FAERBER, *supra* note 15, at 208.

126. See *infra* notes 760-873 and accompanying text.

notarial system may be provided by the common law. According to the Chinese philosopher Confucius, "To see what is right and not to do it is want of courage."<sup>127</sup> State court judges generally exhibit more courage and daring than state politicians and bureaucrats.<sup>128</sup> Importantly, judges are less susceptible to the political influences that impede legislators from acting on this matter, namely the pressure from misinformed constituents about the supposed time, cost and inconvenience of notarial record-keeping, and the inertia inherent in our political system against any major change. Our judges have been generally well respected. By and large, the extent of lawmaking by judges has been not only tolerated but also encouraged in this country. Professor Harold Berman explained it this way: "What is perhaps unique . . . among the nations of the West is America's great size and diversity and its complex history, which have led to its belief in law as a unifying force, a common faith, and in the judiciary as the high priesthood of that faith."<sup>129</sup> Consistent with that perception, political scientist John Brigham has described judges as those "sworn to uphold the law whose robes and separation from the proceedings behind the bench are meant to reinforce the notion that [they are] the embodiment of law and not of [their] more mundane, human [selves]."<sup>130</sup> Judges possess not only the power but also the popular authority to act in the notarial law-making field.

Unquestionably, the historic inertia of legislatures has contributed substantially to the expansion of the law-making of judges. As Professor Orth has observed: "Despite the seemingly democratic appeal of enacted statutes over decided cases as the source of law, American legislatures in the nineteenth century proved unable and to some extent unwilling to assume control over legal development."<sup>131</sup> That time frame is precisely when state legislatures passed most of the first meaningful legislation

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127. RESPECTFULLY QUOTED: A DICTIONARY OF QUOTATIONS 307 (Suzy Platt ed., 1993) [hereinafter PLATT].

128. This tendency of judges to show more courage and authority than politicians has been the case since early in American history. In writing about nineteenth century U.S. judges, Professor Friedman observed that their written opinions and their denials they were making law" provided magnificent camouflage," and served as "one reason why judges, even though elected, did not stand so naked before the partisan public as, say, governors and congressman did." FRIEDMAN, *supra* note 55, at 382. "The great [state court] judges were creative, self-aware, and willing to make changes." *Id.* at 135.

129. Berman, *supra* note 62, at 514. Similarly, Professor Heineman has remarked that "the American people have never seriously questioned the [U.S. Supreme] Court's power to exercise judicial review over the decisions of popularly elected officials." HEINEMAN, *supra* note 56, at 201.

130. John Brigham, *Politics and The Law*, in OXFORD COMPANION TO AMERICAN LAW, *supra* note 54 at 621.

131. Orth, *supra* note 57, at 126.

governing notaries, but such legislation was largely insufficient at the time and became increasingly outmoded with each passing year.<sup>132</sup> Unfortunately, most states have never undergone a true overhaul of their notary statutes. Broadly speaking, state and territorial legislatures have tended to display steadfast indifference to notarial issues.<sup>133</sup> Thus, that proverbial door is open even wider to the common law.

In point of fact, it was this very type of legislative inattention to revising and updating state notary law that actuated the Governor of Massachusetts and the Secretary of State of Mississippi to abandon the usual legislative route of statutory revision in favor of an entirely different method of modernizing the rules of operation for Massachusetts and Mississippi notaries. Massachusetts represents a particularly appropriate example. Prior to December of 2003, the sparse notary laws of Massachusetts were entirely inadequate, spread as they were across several state constitutional provisions as well as divergent statutory chapters.<sup>134</sup> In its totality, the notary law of Massachusetts was woefully outdated and incomplete. By executive order, in December of 2003, Governor Romney rewrote the state's notary rules in their entirety, bringing them in line with the most progressive notarial provisions of other states and the Model Notary Act of 2002.<sup>135</sup> The centerpiece of the new notary rules in Massachusetts is a comprehensive notary journal requirement.<sup>136</sup> It should be made clear that Governor Romney did not—and could not—repeal the state's notary statutes. Rather he supplemented them with his executive order imposing a code of conduct for notaries. Strong evidence of the need for his order lies in the fact that there has so far been little or no conflict reported between the rules in the executive order and the minimalist, archaic statutory provisions.

Because legislation (and executive edict) simply cannot be expected on the notary record-keeping issue in thirty-five more jurisdictions, the common law must fill the void. To the extent that the pronouncement of a common law standard requiring

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132. See *infra* notes 546-49 and accompanying text.

133. Such indifference is the attitude in most quarters. See Closen & Orsinger, *supra* note 64, at 547 (opining that “the 350 year history of notaries in the colonies and in this country has demonstrated widespread indifference to notarial ethics.”).

134. See generally ANDERSON'S MANUAL FOR NOTARIES PUBLIC, *supra* note 63, at 323-32 (showing Massachusetts notary matters treated in at least two constitutional provisions, thirteen statutory chapters, and one rule of civil procedure).

135. See FAERBER, *supra* note 15, at 531 (pointing that Massachusetts adopted substantial portions of The MODEL NOTARY ACT of 2002).

136. See Exec. Order No. 455 § 11; see also *infra* notes 194, 363, 379, 549, 705-06 and 769 and accompanying text.

notaries public to thoroughly journalize and safeguard their official acts reflects a modicum of change, such progress is in full keeping with the historic values of the common law system. In describing the common law process of deference to precedential legal cases, one contemporary encyclopedia explained that “[s]ubsequent cases, however, may reveal new and different facts and considerations, such as changing social or technological conditions. A common-law judge is then free to depart from precedent and establish a new rule of decision. . . . In this manner, common law retains a dynamic for change.”<sup>137</sup> Great value and confidence resides in a legal system inherently able to adapt to changing societal views of fairness and justice. Or, as Professor Sheldon Novick described it (in the course of his study of the views of Oliver Wendell Holmes): “[T]he purposes of law were not static. Law did not grow from some ideal and logical doctrine of government, but from changing historical circumstances.”<sup>138</sup>

Before concluding this section of the Article, we should note the fact that while many observers and experts have called for mandatory notary journal record-keeping due simply to its several advantages, at least two legal authorities have essentially endorsed our theory of the common law duty to journalize notarial acts, without having said so precisely and without having provided an extended explanation of the route which led to our mutual conclusions. Of course, we are delighted to be in their company on this matter. The first is attorney and notary scholar Peter Van Alstyne, who in his *Notary Public Encyclopedia* in 2001 wrote: “Perhaps one’s state’s notary laws do not require notaries to keep a notary journal. Journalizing every notarization is mandated as a standard of reasonable care. The lack thereof is arguably a form of negligence. It is wrongful to think it is discretionary.”<sup>139</sup> In succinct fashion, Van Alstyne’s references to “reasonable care” and “negligence” certainly suggest the common law as the source of a journal recording obligation for all notaries. The second is Judge Bernetta Bush of the Circuit Court of Cook County, Illinois, who in 2006 in deciding the complicated notary malpractice trial court case of *Vancura v. Katris*<sup>140</sup> concluded that there had been

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137. BRAM & DICKEY, *supra* note 35, at 50. “[T]he courts recognize that the inherent capacity of the common law for growth and change is its most significant feature.” Perovich, *supra* note 61, at 597.

138. Sheldon M. Novick, *Introduction to OLIVER WENDELL HOLMES, THE COMMON LAW* xii (Dover 1991) (1881). “The common law is therefore always slowly changing like the ocean and is never at rest.” BOLLES, *supra* note 67, at 2.

139. VAN ALSTYNE, *supra* note 7, at 187. “Perhaps in the absence of a statutory mandate for the keeping of Notary Journals, the duty to do so may arguably already exist.” PETER J. VAN ALSTYNE, *NOTARY LAW, PROCEDURES & ETHICS* 40 (1998).

140. See *infra* Part XI notes 880-911 and accompanying text.

negligence in part due to a notary's failure to create a proper journal and to safeguard it—in a state which does not statutorily require journalizing or safe-keeping of journals. Although that case represents an important precedent for our position, because it is a state trial court decision and because of the very peculiar circumstances of the case, it may not be regarded by some to be as impressive as if decided by the highest court of a state (or at least an intermediate appellate court) and as if its facts had been more mainstream. Importantly though, upon hearing expert testimony about the values served by the proper journalizing of notarizations and the safeguarding of notary journals, Judge Bush clearly saw merit under the common law for notarial journalizing and retention by notaries of such records, and she said so in her written opinion.<sup>141</sup>

### III. THE BACKGROUND TO THE CONTEMPORARY NEGLECT OF NOTARIAL RECORD-KEEPING

[C]ustoms and usages themselves are many and various; some are the result of careful thought and decision, while others arise from the kind of inadvertence, carelessness, indifference, cost-paring and corner-cutting that normally is associated with negligence.<sup>142</sup>

“Notaries appear to have existed as public officers from a period of remote antiquity,”<sup>143</sup> most commonly dated to about the first century B.C. in the Roman Empire.<sup>144</sup> “In England Notaries were known before the Norman conquest,”<sup>145</sup> and the first notary in the Americas was a Spanish civil law notary who arrived with Christopher Columbus on San Salvador in 1492.<sup>146</sup> The first colonial notary in what was to become the United States was appointed in 1639, and those colonial notaries reached the

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141. *Id.*

142. PROSSER & KEETON, *supra* note 36, at 194.

143. BROOKE'S NOTARY, *supra* note 100. See generally REYERSON & SALATA, *supra* note 100 (describing the notarial practice of Middle Ages notary Jean Holanie of the southern French town of Montpellier from 1327-1328). “Southern Europe enjoyed an extensive notarial culture in the Middle Ages.” *Id.* at 1.

144. Seth, *supra* note 27, at 864; Michael L. Closen & G. Grant Dixon, *Notaries Public From the Time of the Roman Empire to the United States Today, and Tomorrow*, 68 NOTRE DAME L. REV. 873 (1992). “The office of notary public is of ancient origin. It originated . . . in the early Roman jurisdiction.” *Kumpe v. Gee*, 187 S.W.2d 932, 934 (Tex. App. 1945).

145. BROOKE'S NOTARY, *supra* note 100, at 3. “The office of notary public . . . was recognized in England long before the Norman conquest.” *Kumpe*, 187 S.W.2d at 934.

146. See Ronni L. Ross, *The American Notary Celebrating a 350-Year Heritage*, NAT'L NOTARY, Nov. 1989, at 11 (pointing out the notary, Diego de Arana of Cordova, traveled with Columbus bearing a royal commission in order to record any gold that was discovered for reporting to King Ferdinand and Queen Isabella).

pinnacle of their authority and stature in the seventeenth and eighteenth centuries.<sup>147</sup> Thereafter, circumstances changed, and not generally for the better.

Since the later days of American colonial notaries and the first days of U.S. notaries, there has been a piecemeal, but steady, erosion of the importance of the functions of notaries public, resulting in the removal from their sphere of operations of the tasks most closely associated with or requiring the keeping of records.<sup>148</sup> Consequently, the inadvertent and unintended outcome in most of the states and territories has been the nearly complete neglect of notarial record-keeping. Further, to the extent that this neglect or omission of notarial record-keeping in the majority of U.S. jurisdictions might be characterized as customary, it certainly does not represent "learned custom,"<sup>149</sup> but instead is the type of undesirable habit described by the remarks of Prosser and Keeton which began this part of the Article.<sup>150</sup>

In early notarial times, when waxen seals and later the first

147. "The first person in the American colonies to bear the title of notary public was Thomas Fugill," who was appointed to that post on October 25, 1639 in the Province of New Haven. Seth, *supra* note 27, at 868; *see also* Ross, *supra* note 146, at 10 (noting that Fugill in 1639 was first to have the title of notary).

148. *See* Ross, *supra* note 146, at 10 (concluding that "the appearance [of the functions] of this 17th-century [notary] official was quite different from that of today's Notary."). "The first notary public in the American colonies was appointed in 1639, and he was soon removed from office because of fraudulent practices. Arguably, things have gone downhill since then" for the American notary. Michael L. Clozen, *Reform the Potential Attorney-Notary Conflict*, NAT'L L.J., July 6, 1998, at A24. By as early as 1904, the leading notary authority in this country observed that "often the office [of notary public] is looked upon as one of slight importance." EDWARD MILLS JOHN, *THE AMERICAN NOTARY AND COMMISSIONER OF DEEDS MANUAL* 6 (2d ed. 1904). "Notaries in this country have suffered a downhill regression commencing in about the second half of the Nineteenth Century. This unrelenting slide toward obscurity has been profound, and for most ordinary notaries the backward momentum may very well be irreversible." Michael L. Clozen & R. Jason Richards, *Notaries Public—Lost in Cyberspace, or Key Business Professionals of the Future?*, 15 J. MARSHALL J. COMPUTER & INFO. L. 703, 716 (1997).

149. In order to constitute "customs," common practices "must be so general, or so well known, that the actor must be charged with knowledge of them." RESTATEMENT (SECOND) OF TORTS § 295A cmt. a. And, such a custom should "conform [ ] to the community standard of reasonable conduct." *Id.* at § 295A cmt. b. Then, if a practice represents deliberate and prudent conduct, it would be a learned custom. We use the term learned custom, which we have derived from the phrase "learned reason." *See* the discussion in PROSSER & KEETON, *supra* note 36, at 193-96. A learned custom, thus, is to be distinguished from a negligent custom.

150. *Id.* A negligent notarial custom which results in a practice that diminishes the reliability of notarizations should not be permitted to continue. "[F]oolish traditions are tolerable as long as they are harmless." FRIEDMAN, *supra* note 55, at 24.

embosser seals were utilized to certify notarizations of signatures on transactional instruments,<sup>151</sup> there was virtually no risk of document forgery by imposters and little danger of document fraud by others for at least four important reasons. First, it was a relatively simple time when travel was more difficult and people did not move about so often, and notaries personally knew document signers appearing before them.<sup>152</sup> Second, the number of notaries was quite small (with often only one or a few notaries in each city, town, parish, or island),<sup>153</sup> and those notaries were men of experience and stature who diligently and capably performed their official certification duties on a relatively small

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151. See MERWICK, *supra* note 27, at 41 (noting the opportunity of colonial Albany notary Adriaen Janse in 1676 to “seal his clients’ documents with the finest sealing wax”); Douglas M. Fischer, *The Seal: Symbol of Security*, NAT’L NOTARY, Nov. 1995, at 10 (stating that “[t]here are two kinds of traditional Notary seals: the inked stamp and the vice-like metal embosser.”); See also A HISTORY OF NOTARIES IN CALIFORNIA, *supra* note 53, reprinted in CLOSEN, *supra* note 2, at 5 (explaining that “[e]arly California notary seals . . . were metal embossers, not rubber inking stamps, as became the practice in the mid-20<sup>th</sup> century.”).

152. “Identifying document signers . . . was rarely a problem for Notaries prior to the 20th century. Before the invention of cars, trains, telephones, or airplanes, Notaries typically notarized only for hometown residents—most of whom the Notary had personally known for years.” Ross, *supra* note 146, at 11. CLOSEN, *supra* note 2, at 6 (citing to A HISTORY OF NOTARIES IN CALIFORNIA, *supra* note 53) (summarizing notary practice in the late 1800s by saying that:

[a] Notary residing in a small town or community almost always personally knew any individual who requested a notarial act—or personally knew someone who could swear to that individual’s identity. People didn’t move around as much. It was not unusual for a person to spend an entire lifetime within a 50-mile radius. As a result, document fraud was not the problem it is today. Notaries weren’t constantly worried about strangers with phony IDs presenting forged documents. Without automobiles, there weren’t that many strangers around.)

See generally MERWICK, *supra* note 27 (describing how colonial notaries served a small area, such as a town or district, and how the people who were served were almost always local citizens such as native Americans, immigrant colonists, or soldiers stationed at local garrisons).

153. “[T]he states at first placed tight restrictions on the number of Notaries . . . . In Connecticut, for example, there were 15 Notaries in 1800, 32 in 1812, 64 in 1827.” Ross, *supra* note 146, at 11. See Armando Aguirre, *States Set Bar Low for Notary Applicants*, NAT’L NOTARY, July 2001, at 16 (reporting that in 1780 there were only about 15 notaries in all of Massachusetts). “The Texas Constitution of 1845 authorized the appointment of only six notaries per county.” *Bernal v. Fainter*, 467 U.S. 216, 224 n.12 (1984); see also A HISTORY OF NOTARIES IN CALIFORNIA, *supra* note 53, reprinted in CLOSEN, *supra* note 2, at 4 (pointing out that under an 1862 California notary law “two of Santa Clara County’s eight Notaries must live in Santa Clara township and one in Gilroy township” and that under an 1864 law “Catalina Island, in Los Angeles County, was to have its own Notary.”). See generally MERWICK, *supra* note 21 (noting that in colonial Albany there were only two or three active notaries in the period 1669 to 1686).



number of transactions.<sup>154</sup> Third, the substantial security of documents was virtually guaranteed by the old-fashioned wax and embosser seals that made it extremely difficult to tamper with and alter a notarial certificate or the transactional document to which the certificate was attached.<sup>155</sup> Fourth, the notary served as the actual keeper of the original documents in many instances.<sup>156</sup> “[T]he [early American] Notary may often have kept the original documents in his files and thus it was not necessary for him to record the details of the notarization in his record book.”<sup>157</sup> Thus,

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154. Additionally, notaries were men who necessarily could read and write at a time when many of those in the general population could not. “Most of the early [colonial American] settlers of the lower classes could neither read nor write.” *Colonial Life in America*, THE WORLD BOOK ENCYCLOPEDIA, *supra* note 35, at 640. It would have been almost impossible for people who could neither read nor write to attempt to perpetrate document frauds.

155. See *Pierce v. Indseth*, 106 U.S. 546 (1883) (discussing the historical progress of public seals from those impressed into wax, to those impressed onto wafers or other adhesive substances, and to those impressed by powerful metal embossers into paper). The court held that it “will take judicial notice of the seals of notaries public.” *Id.* at 549. Today, the most commonly used notarial seal in the U.S. is the ink stamp seal, primarily because it “imprints a photographically reproducible image on the [transactional] document.” Nevin Barich, *So Now You’re a Notary*, NAT’L NOTARY, Jan. 2005, at 38. On the other hand, the raised imprints in paper created by embosser seals often become flattened over time and do not readily allow for quality photocopying.

156. “During Roman times . . . it became the duty of a public stenographer called a *Notarius* to put documents in writing, witness their signing and hold them in safekeeping.” Ross, *supra* note 146, at 11. “It appears that [Thomas] Fugill’s role as notary public [in the New Haven Colony for several years after October of 1639] was to act as recorder or record-keeper for the colony, much as notaries did in England in ecclesiastical and admiralty courts.” Seth, *supra* note 27, at 869. See generally MERWICK, *supra* note 27 (pointing out repeatedly that colonial notaries were required to keep detailed records of their official acts, including the originals or exact copies of such documents as contracts, wills, deeds, powers of attorney, depositions, and so forth). In fact, Merwick quotes the oath of office of one colonial Manhattan Island notary who in 1674 pledged to “keep a proper register of everything that passes before me.” *Id.* at 2. It is also pointed out that such documents as powers of attorney, rental of lands, mortgages, and wills are “papers [that] must be properly notarized.” *Id.* at 25-26.

157. Ross, *supra* note 146, at 10. “During the 1800s, the office of recorder had not yet been established, so Notaries were responsible for holding the originals of documents they notarized.” Consuelo Israelson, *Working Together to Avoid Document Rejection*, NAT’L NOTARY, July 2000, at 16. Similarly, in the Middle Ages in southern Europe, rather than to use a notarial seal, a notary would sometimes affix “his notarial sign, unique to himself” to his official documents. REYERSON & SALATA, *supra* note 100, at 27. This procedure may well have been adopted because the overwhelming number of notarial documents remained with those civil law notaries in their notarial protocols or records. *Id.* at 1, 31-39. “[S]cholars . . . repeatedly point to the care [colonial New Netherland/New York] notaries were meant to take in the appearance and preservation of their protocols.” MERWICK, *supra* note 27, at 191. “The collection of [the] papers [of colonial Albany notary Adriaen Janse]

there was no need to record them separately in a notary register. This practice was in the tradition of the *notarius* of ancient Rome, as well as of the civil law notary and the English notary of both yesterday and today.<sup>158</sup> Consequently, there were few opportunities for frauds and imposters because notaries personally knew just about everyone for whom official services were provided in their local communities, and the diligent and competent notarial work served to deter any real thoughts of scoundrels to engage in impersonation and forgery. Further recording of notarizations was unnecessary as a means of protecting against document forgery and fraud in that simpler era. But, as times changed with sizeable growth in both the general population and the number of notaries, with much greater ease of mobility, and with vast expansion of the number of transactions, document security began to decline and has been seriously diminished over the generations. Hence, additional document protection in the form of record-keeping by notaries has been warranted for a very long time.

In early years in the colonies and then in the new country, there were few courts, judges, lawyers and governmental officials. There were virtually no recorders of deeds or county recorders. At first, real estate conveyances were performed in open courtrooms, where judges and their clerks, many of whom were notaries, recorded the transactions in court docket books.<sup>159</sup> As the country

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will be in the hundreds, ten inches high or more," and Janse had "a chest for storing his papers" and "locking them away." *Id.* at 5. There were at least 260 notarial records created by Janse during his tenure in Albany between 1669 and 1686. *Id.* at 6.

158. See Frankie Sue Del Papa, *Foreword*, in CLOSEN, *supra* note 2, at ix (explaining that "in history dating back to Roman times . . . [n]otaries put documents in writing . . . and held them in safekeeping."); see also BROOKE'S NOTARY, *supra* note 100, at 2 (pointing out that the ancient Egyptians and Greeks utilized the early predecessors of notarial officers in part for "keeping books"). "The general functions of [an English] Notary consist . . . in preserving originals or minutes of acts which, when prepared in the style and with the seal of the Notary, acquire the character of original acts; and in giving authentic copies of the same." *Id.* at 14; see also *supra* note 156 and accompanying text.

159. Closen & Dixon, *supra* note 144, at 876. Historically, going back at least to Medieval times, real estate sales contracts have been among the most important transactions prepared, recorded, and preserved by civil law notaries. "Real estate transactions were among the earliest ones committed to writing in the Middle Ages." REYERSON & SALATA, *supra* note 100, at 77. Examples of real estate sales contracts can be found in the 1327-28 notarial register of southern French notary Jean Holanie. *Id.* at 78-88. The documents drafted by ancient notaries "were sealed before a magistrate." Seth, *supra* note 27, at 865. See generally MERWICK, *supra* note 27 (describing the common colonial practice of conducting numerous kinds of transactions in magistrate court). In describing the practice in 1669 of colonial Albany notary Adriaen Janse, the following statement appears: "[T]here is a need for a

expanded and organized itself and as land transactions grew in number, the former process became too cumbersome. Notaries then became more instrumental in real estate conveyancing to lend their services in providing officiality, certainty as to the identification of the parties, protection against fraud, and security of recording. But, this level of involvement was shortlived, as the growing number of justices of the peace and of lawyers became increasingly involved, supplanting much of the role of notaries in the process. According to Professor Lawrence Friedman, “[T]he number of lawyers grew very rapidly after the [American] Revolution,”<sup>160</sup> and “[i]n the last half of the [19th] century, there was [an] even greater increase.”<sup>161</sup> In 1850, there were already nearly 22,000 lawyers; in 1880, about 60,000 lawyers; and by 1900, around 114,000 of them.<sup>162</sup> When the posts of recorders of deeds and county recorders were first created, those new officials took over most of what had remained in the field of notarial servicing of real estate transactions.<sup>163</sup> “Until [about the 19th Century], the notary was the official keeper of public and official documents. That function was replaced by the government office of recorders.”<sup>164</sup>

A similar fate befell notaries in another key field of involvement in early America. Notaries public had played a

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notary, even more than one. The scores of negotiations [for commercial transactions] that go forward each year must be in correct form before the courts.” *Id.* at 3. In 1788, in a newspaper advertisement for one Philadelphia notary, he called himself both a “Notary Public” and a “Conveyancer,” and among the instruments he said he would “draw” were “all Kinds of Deeds, Mortgages, [and] Leases.” *THE INDEP. GAZETTEER* (Philadelphia), May 17, 1788, at 4. A colonial notary would “frequently” appear before the magistrate courts in the course of standard notarial work in drafting and presenting transactional documents of parties appearing there. *MERWICK, supra* note 27, at 191. Moreover, a notary would often be retained by the courts to play other important roles related to judicial performance, such as acting as a court secretary or a court “counselor” (an assistant to review commercial documents, accounts, and evidence of the parties appearing before the magistrates). *Id.* at 192.

160. *FRIEDMAN, supra* note 55, at 633.

161. *Id.*

162. *Id.*

163. In describing the records of original documents kept by colonial American notaries, it has been noted that “[t]heir record books were roughly equivalent to the protocol books [of original documents] kept by civil law notaries to this day.” Seth, *supra* note 27, at 882. “Until the adoption of the United States Constitution in 1789, the work of American and English general notaries were virtually identical and consisted of drafting, authenticating and maintaining a record of documents for use in international commerce. After the adoption of the Constitution, English and American notaries began to go their separate ways.” *Id.* at 883. “The legal community began to assume more and more of the functions of the 19th Century notary, including the official record keeping of public documents.” *VAN ALSTYNE, supra* note 7, at 151.

164. *Id.*

central part in performing both bank (negotiable instrument) and marine protests in the 1700s and 1800s.<sup>165</sup> Two trends developed to effectively oust notaries from such involvement. First, as noted above, lawyers, justices of the peace, and judges became far more plentiful, and they took over the substantive and procedural aspects of the commercial protest arena.<sup>166</sup> Second, the processes of bank and marine protests later fell largely into disuse.<sup>167</sup> “[T]he most recent case involving [a marine] protest appears to be” a 1957-58 New York decision.<sup>168</sup> “Like marine protests, banking protests have become outdated.”<sup>169</sup> Hence, the drafters of the Model Notary Act of 1984 “eliminated banking [and marine] protests as an authorized notarial act.”<sup>170</sup> The commentary to the 1984 Act reports two basic reasons to abolish notarial protests: (1) that “[p]rotests are rarely performed today,”<sup>171</sup> and (2) that “protests generally require a degree of legal and financial

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165. See A HISTORY OF NOTARIES IN CALIFORNIA, *supra* note 53, reprinted in CLOSEN, *supra* note 2, at 5 (“[t]he protest was the first and most lengthily described of all the notarial acts in early California law.”). “The modern [California] Government Code § 8205(a)(1), empowering Notaries to perform protests, survives virtually verbatim from the 1853 law.” *Id.* at 4. See, e.g., *Richette v. Stewart*, 1 U.S. 317 (1788); *Richelien and Ontario Navigation Co. v. Boston Marine Ins. Co.*, 136 U.S. 408 (1890). In 1940, a leading practice manual for notaries public included an entire chapter of about eighty pages covering the law of negotiable instruments. MEIER, *supra* note 104, at 319-401. See generally *The Protest: The Notarial Act that Refuses to Die*, NAT’L NOTARY, Nov. 1986, at 21. In a 1788 newspaper advertisement, an enterprising Philadelphia notary, Edward Pole, called himself a “Notary Public” and “Mercantile Broker,” and he indicated that he would “draw” all “Kinds of . . . Protests, Charter Parties, [and] Bills of Bottomry.” THE INDEP. GAZETTEER, *supra* note 159, at 4. Similarly, in the 1890 edition of Brooke’s Notary, there was extensive coverage for the benefit of English notaries of the procedures both for protests of bills of exchange and promissory notes, and for marine protests. BROOKE’S NOTARY, *supra* note 100, at 52-119, 120-26, 139-49.

166. Specifically:

During the 1800s most Notaries public were authorized and empowered by law to perform certain acts and duties in connection with the notarization of negotiable instruments [bank protests]. . . . Today, these notarial acts are generally considered to fall within the province of the practice of law and banking. Not only have laws regarding negotiable instruments changed but also custom and practice.

RAYMOND C. ROTHMAN, NOTARY PUBLIC PRACTICES & GLOSSARY 22 (2d ed. 1998).

167. See A HISTORY OF NOTARIES IN CALIFORNIA, *supra* note 53, reprinted in CLOSEN, *supra* note 2, at 5 (referring to “the former importance of this now rarely seen form of notarization” known as the notarial protest).

168. CLOSEN, *supra* note 2, at 199. The case was *Mindell v. Stewart*, 169 N.Y.S.2d 627 (N.Y. Sup. Ct. 1957), *aff’d* mem. 170 N.Y.S.2d 983 (N.Y. App. Div. 1958).

169. CLOSEN, *supra* note 2, at 200.

170. *Id.*

171. MODEL NOTARY ACT Art. III, cmts.

expertise . . . most notaries do not have.”<sup>172</sup>

Preserving records of the commercial protests prepared by notaries had been an important feature of their work that was indirectly, but unequivocally, removed from the work of notaries. The record book of commercial protests kept and protected by notaries had served the essential purpose of assuring that proper notice of such protests had been given. One 1887 federal trial court described the procedure thusly:

When a marine protest is made before a notary, the notary enters in his notarial book the fact of a protest, and the reasons given for making the protest. The notary's book is never given out. That is a record of the notary's office, made there for the benefit of all whom it may concern. The benefit of this record is secured to those concerned by issuing a transcript from the book, certified by the notary to be correct, and in no other way is the protest made available.<sup>173</sup>

This record would also contain notations made after notifications had been issued to the parties, including descriptions of the manner of those notices.<sup>174</sup> In 1823, the United States Supreme Court expressed such confidence in notaries and their record books of bank protests that the Court allowed such a record into evidence, even though the notary record book constituted hearsay and even though the notary who had prepared the record entry had died before trial of the case and could not testify.<sup>175</sup> Unfortunately, the virtual death of commercial protests also contributed to the decline in the office of notary public and the abandonment of thorough notarial record-keeping. Curiously, because so many notary statutes originated so long ago and have not undergone thorough revision and updating, numerous present-day notary statutes continue to include archaic provisions authorizing and describing notarial participation in banking and sometimes even marine protests.<sup>176</sup>

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172. *Id.*

173. *The Gallego*, 30 F. 271, 275 (E.D.N.Y. 1887).

174. *Nicholls*, 21 U.S. at 330.

175. *Id.* at 332-33.

176. Even though circumstances have changed to generally remove notaries from their former involvement in regard to protests of negotiable instruments, “[i]n most states, the Notary laws have not been brought up to date to reflect the changes that have occurred in the banking industry and in negotiable instruments law.” ROTHMAN, *supra* note 166, at 22-23. For some of the state statutes still authorizing the notarial act of performing commercial protests, see FAERBER, *supra* note 15, at 11 (Alaska), 40 (Arkansas), 49 (California), 74 (Connecticut), 86 (Delaware), 92 (District of Columbia), 134 (Hawaii), 170 (Iowa), 178 (Kansas), 184 (Kentucky), 192 (Louisiana), 202 (Maine), 210 (Maryland), 242-43 (Minnesota), 270 (Montana), 276 (Nebraska), 284 (Nevada), and so on. Interestingly, even *Black's Law Dictionary* states that a notary still has authority to “perform acts in commercial matters, such as protesting negotiable instruments.” BRYAN A. GARNER (Ed.), BLACK'S LAW

Interestingly, a third area of former notarial practice was for notaries to preside over and transcribe the testimony at evidentiary-type depositions (especially at an early time when witnesses often would not have been available to appear at distant legal proceedings).<sup>177</sup>

Parenthetically, notaries could compel the attendance of witnesses at such depositions, and some notaries even possessed authority to cite witnesses who failed to appear or refused to answer questions with contempt and to impose fines on such witnesses or to commit them to jail.<sup>178</sup> Obviously, the accurate record-keeping of the testimony obtained during these depositions was an essential task of the notary public.<sup>179</sup> Again, this type of early notarial practice has been nearly abandoned with the passage of time due to the expansion of the judicial process and the increase in the number of attorneys, who took over the responsibilities of conducting both discovery and evidentiary depositions.

One more illustration of the antiquated content of notary statutes is the fact that many U.S. notary laws still contain fairly lengthy provisions authorizing notaries to conduct depositions.<sup>180</sup> But, ordinary notaries are neither judges nor lawyers and are utterly unqualified to preside over modern depositions, including the authority to rule upon evidentiary objections and to cite

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DICTIONARY 1085 (7th ed. 1999) [hereinafter BLACK'S LAW DICTIONARY].

177. For example, the notarial records of colonial Albany notary Adriaen Janse for 1670 show he presided over the taking of several depositions which he recorded and presented to the magistrate court. MERWICK, *supra* note 27, at 14-16. See ROTHMAN, *supra* note 166, at 22 (stating that in the 1800s most notaries were authorized to administer depositions); MEIER, *supra* note 104, at 197-318 (providing a lengthy 1940 chapter on the notarial responsibilities in connection with the administration of depositions).

178. See *Bevan v. Krieger*, 289 U.S. 459 (1933) (upholding the authority of a notary in connection with the taking of a deposition to cite a witness for contempt and to have that witness committed to confinement). In Connecticut, notaries can issue subpoenas for depositions in civil matters. FAERBER, *supra* note 15, at 74.

179. See MERWICK, *supra* note 27, at 14-16 (describing the precision with which colonial notary Adriaen Janse kept records of several depositions for use in magistrate court in Albany in 1670); MEIER, *supra* note 104, at 202-09 (pointing out in a 1940 notary practice manual the steps required in the deposition process in order to obtain an accurate written record of the testimony).

180. See Van Alostne, *supra* note 6, at 74 (reporting in 2001 that: "In some states, notaries are authorized to record and transcribe the deposition."). At least 22 jurisdictions still authorize notaries to preside over depositions. See FAERBER, *supra* note 15, at 11 (Alaska), 40 (Arkansas), 49 (California), 62 (Colorado), 74 (Connecticut), 144 (Idaho), 162 (Indiana), 184 (Kentucky), 210 (Maryland), 242-43 (Minnesota), 270 (Montana), 276 (Nebraska), 296 (New Hampshire), 320 (New York), 358 (Northern Marianas), 366 (Ohio), 416 (Rhode Island), 424 (South Carolina), 471 (Vermont), 480 (Virginia— notaries are authorized to certify depositions), 514 (Wisconsin), and 524 (Wyoming).

witnesses for contempt. This same opinion was expressed by the authors of the casebook *Notary Law & Practice* when they wrote: "Overseeing a deposition requires a great deal of legal skill. This fact can cause problems when a notary who is not a lawyer is presiding over the deposition, as illustrated"<sup>181</sup> in the 1966 Ohio case of *Nord v. McMillan*,<sup>182</sup> wherein the non-attorney notary public presiding over a deposition was faced with a witness who refused upon the advice of counsel to answer a series of questions. The case in question involved the difficult issue of alleged libel of a political candidate in a newspaper article, and the notary felt the need to interrupt the deposition and to refer thirty-six questions to the trial court judge for decision regarding the appropriateness of the refusal of the witness to answer.<sup>183</sup> Clearly, presiding over modern depositions is not within the competence of non-lawyer notaries.

The evolution of the simultaneous growth of influence of the American legal profession and the decline of the importance of the responsibilities of notaries public paralleled rather closely the transition that had also occurred in England.<sup>184</sup> There too solicitors swallowed up the functions of notaries to such an extent that in some quarters the opinion predominates that notaries public were rendered insignificant in English history.<sup>185</sup> Still

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181. CLOSEN, *supra* note 2, at 204. "The act of taking a deposition, or notarizing the jurat in connection with a deposition, is performed by Notaries Public who are attorneys or who have had special training in connection with their principal occupation." ROTHMAN, *supra* note 166, at 23. However, the notary statutes themselves are not written so as to limit the administration of depositions to those notaries who are qualified to do so, although an interesting caveat appears in connection with the authority of Montana notaries to administer depositions, only "if the notary is knowledgeable of the applicable legal requirements." FAERBER, *supra* note 15, at 270.

182. 215 N.E. 2d 919 (Ohio Ct. Com. Pl. 1966).

183. *Id.* at 921.

184. In describing the early history of notaries in the world prior to the settlement of the American colonies, it has been observed: "As the work of drawing up laws, contracts, and wills became more complicated, duties that had once been performed by Notaries Public were taken over by attorneys." ROTHMAN, *supra* note 166, at 2. "Since the Reformation, there has been a decline in the substantive functioning of the four categories of the English notary." Closen, Orsinger & Ullrick, *supra* note 105, at 177. *See generally* BROOKS, HEMHOLZ & STEIN, *supra* note 101.

185. "Much of [English notarial] work was taken over by solicitors, for there was not a sufficient volume of work to be done to allow individuals to serve full-time as notaries, except in London." Closen, Orsinger & Ullrick, *supra* note 105, at 177. "The notary public features only slightly in historical accounts of English law and institutions." BROOKS, HEMHOLZ & STEIN, *supra* note 101, at 1. "English notaries played a less important legal role in recording and authenticating commercial transactions," than did the notaries of southern Europe in the Middle Ages. REYERSON & SALATA, *supra* note 100, at 5-6; *see also* MERWICK, *supra* note 27, at 38 (remarking that in colonial Albany it was known to at least one individual "the English have little time for

today, almost all English notaries are solicitors.<sup>186</sup> The explanation especially justifying these role changes between notaries and lawyers in America and England is that much of the early work of notaries was of enough substance to constitute what today is understood to be the practice of law, and that practice is the exclusive realm of licensed attorneys.<sup>187</sup> In fact, and not at all surprisingly, many U.S. notary laws have been updated (due to pressure from the legal profession) at least enough to include express prohibitions against notaries engaging in the unauthorized practice of law.<sup>188</sup> In summary, notaries effectively

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[the post of notary public].”).

186. “[M]ost English notaries over time have also been solicitors.” Closen & Orsinger, *supra* note 64, at 519-20. In England, although ordinary individuals must serve long apprenticeships before they can qualify to be notaries, “[e]ven without any service as a Notary, a person being an Attorney or Solicitor may be specially appointed” as a notary. BROOKE’S NOTARY, *supra* note 100, at 11. Another major reason for the near monopoly of lawyers in the role of English notaries is the heightened substantive responsibilities which accompany the duties of notaries there (and in the civil law countries). See *infra* note 187 and accompanying text.

187. “[T]he English notary developed into a unique species of notarial officer.” Closen, Orsinger & Ullrick, *supra* note 105, at 176. “It is undeniable today, that notaries occupy but a small niche in English legal life.” BROOKS, HEMHOLZ & STEIN, *supra* note 101, at 2. See *supra* notes 172, 181-183 and accompanying text. A wonderful advertisement, complete with a graphic of a man’s hand holding a quill pen, for Philadelphia notary Edward Poole appeared in the early newspaper *The Indep. Gazetteer* in 1788. Pole’s advertisement called him a “Notary Public, Conveyancer, and Mercantile Broker,” and it pointed out he “Draws all Kinds of Deeds, Mortgages, Leases, Bonds, Wills, Petitions, Letters of Attorney, Protests, Charter Parties, Bills of Bottomry, and every other Kind of Instrument of Writing belonging to the said Office, with care, security and dispatch, and on the most reasonable terms.” THE INDEP. GAZETTEER, *supra* note 159, at 4. Today, the drafting of each of these specified documents would most assuredly constitute the unauthorized practice of law if undertaken by a non-lawyer; see also MERWICK, *supra* note 27, at 30 (reporting that colonial notary Adrian Janse of Albany, who was not an attorney but a schoolmaster, nevertheless “acted occasionally as attorney for townspeople”). In those colonial times, notaries functioned as draftsmen of legal documents such as powers of attorney, wills, leases and contracts, and mortgages. *Id.* at 21, 25-26.

188. See, e.g., ILL. ANN. STAT., Ch 5, § 312/6-104(h) (stating that “[n]o notary public shall be authorized to prepare any legal instrument, or fill in the blanks of an instrument, other than a notary certificate,” except for attorney-notaries); MO. ANN. STAT. § 486.390(1) (providing for injunctive relief “against any notary public who renders, offers to render, or holds himself out as rendering any service constituting the unauthorized practice of law.”); UTAH CODE ANN. § 46-1-11(1) (declaring that “[a] nonattorney notary may not provide advice or counsel to another person concerning legal documents or legal proceedings, including immigration matters.”). And, notaries have sometimes been charged with the unauthorized practice of law. See, e.g., Lorain County Bar Assn. v. Kennedy, 766 N.E.2d 151 (Ohio 2002); *In re Skobinsky*, 167 B.R. 45 (E.D. Pa. 1994); Fla. Bar v. Fuentes, 190 So. 2d 748 (Fla. 1966); *Biakanja v. Irving*, 320 P.2d 16 (Cal. 1958).



lost their original record-keeping responsibilities relating to three significant areas of notarial practice—real estate transactions, commercial protests, and evidentiary depositions—because notaries lost their real authority over the substantive elements of those three subjects.

Two additional features of the evolution of the U.S. notary office should be noted:

In the more than 350 years since the first appointment of a notary in the American colonies, undoubtedly the most significant developments in the notarial arena have been the drastic reduction in the importance of the functions performed by notaries, the substantial increase in the volume of documents required by law or private agreements to bear notarized signatures, and the exuberant growth in the ranks of notaries.<sup>189</sup>

Beginning in the late 1800s and especially in the early 1900s, women were allowed to become notaries, and they now constitute the far greater majority of U.S. notaries.<sup>190</sup> “Hundreds of new notaries are minted across the nation every day, and many of them do not have the faintest idea of the importance of their duties.”<sup>191</sup>

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189. Closen, Orsinger & Ullrick, *supra* note 105, at 183.

190. “Until the 1890s and early 1900s, women were actually prohibited from becoming Notaries in this country. Now . . . the overwhelming majority of American Notaries are female. In fact, 80 percent of the 4,700 Notaries who responded to the NNA’s 1988 membership survey were women.” Ross, *supra* note 146, at 12. See A HISTORY OF NOTARIES IN CALIFORNIA, *supra* note 53, reprinted in CLOSEN, *supra* note 2, at 6 (stating that “[o]ne of the most significant changes ever in California’s Notary laws occurred in 1891, when women were permitted to serve as Notaries—29 years before they were allowed to vote. Indeed, by the mid-20<sup>th</sup> century, women had gained a decisive majority in the ranks of Notaries in California and across the nation.”). “The single biggest factor contributing to the surge in the ranks of notaries was the opening of the office to women in the early 1900s.” Closen & Orsinger, *supra* note 64, at 529. Of course, that was the right thing to do, and it was long overdue. See generally Deborah M. Thaw, *The Feminization of the Office of Notary Public: From Femme Covert to Notaire Covert*, 31 J. MARSHALL L. REV. 703 (1998) (tracing the history of women in the post of notary from the time of their exclusion to the time of their attaining a majority role). Not surprisingly, in ancient history women were also denied eligibility to serve in the post of notary. For example, in southern Europe in the Middle Ages, “[m]en, not women, were admitted to the notariate.” REYERSON & SALATA, *supra* note 100, at 9; see also MERWICK, *supra* note 27 (describing the work of colonial American notaries in Albany between 1669 and 1686 and disclosing that no women were admitted to the notarial post, or to any other public office for that matter). We should observe that in the U.S. the opening of the office of notary to women coincided with the diminished roles that notaries were then playing, so that historically many women who were occupying subordinate positions (such as receptionists, clerks, bank tellers, secretaries and the like) were the employees who were required or encouraged to become notaries to service the business needs of their employers.

191. “The significance of the position [of notary public] has necessarily been diluted by changes in the appointment process and by the wholesale

Also throughout the twentieth century, the numbers of documents required to bear notarizations of signatures grew so dramatically that it has been estimated hundreds of thousands of such documents are produced or transmitted every business day in this country.<sup>192</sup> These factors will serve as helpful background information as we proceed.

Nowhere in American notarial history, however, does there appear to have been a conscious plan afoot to prohibit or discourage notary record-keeping. No state or territory forbids notary record-keeping. It simply happened that the shift in responsibilities resulted in notaries preparing predominantly certificates of notarization for document signers, and that those certificates were the sole notarial records created. The omission to maintain other records of notarizations is a backward and unfortunate custom that by sheer happenstance developed in the majority of American jurisdictions, and represents the kind of negligent custom described by Prosser and Keeton in the introduction to this section of the Article.<sup>193</sup> Such a tradition should be absolutely without persuasive force to influence its continuation. Indeed, an understanding of the background behind this custom should constitute the very best reason to reconsider the practice. Today, some twenty-one states and territories either statutorily or by executive order require their notaries generally to maintain journals, or follow the civil law notarial practice of having their civil law notaries keep detailed records of official acts or portfolios of original documents. Those jurisdictions include the following:

Alabama, Arizona, California, Colorado, District of Columbia, Guam, Hawaii, Louisiana, Maryland, Massachusetts, Mississippi, Missouri, Nevada, Northern Marianas, Oregon, Pennsylvania,

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proliferation of notaries." *Bernal*, 467 U.S. at 224 n.12. "Unfortunately, government-sponsored notary education, testing, certification, oversight, and discipline have not kept pace with the expansion of the notary population." Closen & Orsinger, *supra* note 64, at 531. "For the most part, notaries are seriously underinformed about the responsibilities." Michael L. Closen, *Why Notaries Get Little Respect*, NAT'L L. J., Oct. 9, 1995, at A23.

192. Since the late 1970s, one of the two most significant changes in circumstances in relation to notarial functioning is "that many more documents require the signatures thereon to be notarized." Closen, Orsinger & Ullrick, *supra* note 105, at 251. See Anderson & Closen, *supra* note 101, at 847 (referring to "the enormous volume of commercial and governmental instruments required to be notarized"). It may even be that "[m]illions of documents are notarized every day." Closen, *supra* note 148, at A24.

193. See PROSSER & KEETON, *supra* note 36. "The explosion of notary commissions since the mid-1800s has seriously diluted the quality of services rendered by notaries and destroyed the special stature of the office." Closen & Richards, *supra* note 147, at 757. "Official indifference fosters notarial misconduct." *Id.* at 751.

Puerto Rico, Tennessee, Texas, Virgin Islands, West Virginia.<sup>194</sup>

The notary populations of these twenty-one jurisdictions represent about 1,645,937 notaries or approximately just thirty-four percent of the more than 4.8 million U.S. notaries.<sup>195</sup> Interestingly, but mistakenly, *Black's Law Dictionary* in 1999 mentioned that the journal of notarial acts is "required by the law in most states".<sup>196</sup> Presumably, *Black's* was suggesting a majority of states require by express statutory provision that notaries maintain journals of official acts, and this may represent a common misconception. Actually only sixteen states (and five territories) do so—a distinct minority of states.

A brief mention of the special circumstances of the notaries public in Louisiana and Puerto Rico is in order, for notaries in those two jurisdictions are, of course, most closely aligned with the civil law nations of the world, especially of Europe and Central and South America. Not surprisingly, the notaries of those countries are civil law notaries, as are many of the notaries of

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194. See *Comparison of Notary Provisions*, *supra* note 21, at 35 (listing those U.S. jurisdictions which statutorily or by executive order require their notaries to maintain journal records). See generally FAERBER, *supra* note 15 (identifying on the last page of the entry for each state and territory whether notary journal record-keeping is required). The law of the District of Columbia is most peculiar in that it announces the general duty of notaries to keep records, but then proceeds to create exceptions for most notarial acts, such as acknowledgements, depositions, oaths and affirmations, and many affidavits. *Id.* at 97. This list includes Massachusetts, where the mandate of mandatory journal-keeping has its origin in the Governor's Executive Order that has been discussed here. *Id.* at 219. Also, this list includes both Louisiana and Puerto Rico, which because of their heritage are populated by many civil law notaries who follow the tradition of keeping extensive notarial records. "Rather than a journal of notarial acts, Notaries of Puerto Rico keep copies of the public documents they draft and certify in a 'protocol.' They also keep a registry of their affidavits." *Id.* at 414. The Tennessee law is also peculiar in that it requires each notary who desires to charge a fee for a notarization to record it in "a well-bound book." *Id.* at 447. Thus, if no fee is charged (and most notaries do not charge for their services), apparently no notarial record needs to be kept in Tennessee. West Virginia has been included because its law on notarial fees indirectly mandates notary record-keeping. *Id.* at 512 (pointing out that the fee law provides notaries charge for the "notarization of each signature and the proper recordation thereof in the journal of notarial acts.").

195. The number of notaries was derived by adding the notary populations of nineteen of the twenty-one jurisdictions listed above as requiring notary journal record-keeping. The two territories omitted were the Northern Marianas and the Virgin Islands, neither of which was included in the Official NNA 2007 Notary Census. However, the notary population of both places is, of course, quite small. Next, the percentage of the national notary population required to maintain notary records was obtained by dividing the number 1,645,937 by the total number of U.S. notaries which is 4,831,269. See *Official NNA 2007 Notary Census*, NAT'L NOTARY, July 2007, at 21.

196. BLACK'S LAW DICTIONARY, *supra* note 176, at 844 (emphasis added).

Louisiana and all of the notaries of Puerto Rico (where the notary public is known as notario publico).<sup>197</sup> Customary practice is for civil law notaries to retain the originals of the documents they prepare. The civil law notarial practices of extensive record maintenance and preservation will be discussed at length later.<sup>198</sup>

Presently, some thirty-five other states and territories have not enacted laws expressly mandating that notaries generally journalize their notarizations, and those jurisdictions include the following:

Alaska, American Samoa, Arkansas, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Michigan, Minnesota, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Rhode Island, South Carolina, South Dakota, Utah, Vermont, Virginia, Washington, Wisconsin, Wyoming.<sup>199</sup>

This significantly more sizeable group of places which do not by statute or executive order specifically require their notaries generally to maintain journals is home to about 3,185,332 notaries or some 66% of all of the more than 4.8 million U.S. notaries.<sup>200</sup> Remarkably, this list includes Florida, the state with the single largest notary population, as well as seven other of the ten states

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197. See FAERBER, *supra* note 15, at 192 (observing that “Louisiana Notaries are unique in the United States. Deriving their authority from statutes based on the French Napoleonic Code, they have broad powers to prepare documents and execute ‘authentic acts’”). Regarding Puerto Rico, “[b]ecause of the island’s Spanish heritage, [its] Notaries have the same general powers as Civil Law Notaries in the Latin Nations.” *Id.* at 409. “Puerto Rico, an American semi-colony since it was acquired from Spain after the 1898 Spanish-American War, could become a state, bringing with it a complete civil law system.” David S. Clark, *Civil Law In America*, in OXFORD COMPANION TO AMERICAN LAW, *supra* note 54 at 110.

198. See *infra* notes 446, 450 and 470-74 and accompanying text.

199. See *Comparison of Notary Provisions*, *supra* note 21, at 35 (listing the states and territories which do not by statute or executive order require their notaries generally to maintain journal records of their official acts). Some of the jurisdictions included on this list do require their notaries to record certain special types of notarial acts, such as wedding ceremonies, inventorying of abandoned bank lock boxes, commercial protests, and depositions. As examples, Kentucky, North Dakota and Ohio require only the recording of protests, and Maine requires only the recording of marriage ceremonies. *Id.* See generally FAERBER, *supra* note 15 (pointing out on the final page of the entry for each state and territory whether notary journal record-keeping is required and, if so, whether by statute or executive order).

200. The number of notaries not required by statute or executive order to journalize was derived by adding the notary populations of thirty-four of the thirty-five jurisdictions on the above list. The number of notaries for American Samoa was not available, but would be a very small number. The percentage was derived by dividing 3,185,332 by the total number of U.S. notaries which is about 4,831,269. See *Official NNA 2007 Notary Census*, *supra* note 195, at 21.

with the largest numbers of notaries (Georgia, Illinois, New Jersey, New York, North Carolina, Ohio, and South Carolina).<sup>201</sup>

The numeric estimates contained in the last few paragraphs must be tempered by some obvious facts of life about notarial practice. While some of the laws requiring record-keeping are detailed and thorough, others merely direct notaries to maintain "a fair record" of their official acts.<sup>202</sup> Such abbreviated legislation is likely to produce a variety of practices, some of which will be of little value. Certainly, even in jurisdictions which purport to expressly require notaries to journalize notarizations, some notaries will disobey altogether and many will perform the record-keeping responsibility incompletely and otherwise poorly.<sup>203</sup> The authors doubt that notary record-keeping is carried out very thoroughly even in jurisdictions which statutorily require journalizing. The states and territories do not presently attempt to enforce such record-keeping, and a number of official and anecdotal accounts over the years have led us to our conclusion.<sup>204</sup>

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201. Here are the notary populations for those 8 states: Florida – 436,655; New York – 273,669; New Jersey – 246,510; Ohio – 228,247; Illinois – 198,421; Georgia – 173,602; North Carolina – 164,070; and South Carolina – 134,701. *Official NNA 2007 Notary Census*, *supra* note 195, at 21. This group of 8 states represents about 1,855,875 notaries, or more than 38% of all of the U.S. notaries. Thus, if only this group of 8 could be added to the states already by statute or executive order requiring their notaries to journalize, such an addition would more than double (to about 72%) the number of notaries included among those required by statute or order to record their official acts. *See supra* note 194 and accompanying text.

202. *See, e.g.*, FAERBER, *supra* note 15, at 7 (in Alabama notaries are required to "keep a fair register" of official acts); at 218 (in Maryland notaries are to "keep a fair register," although the official Maryland Notary Public Handbook specifies several items to be included); at 258 (in Mississippi notaries are to "keep a fair register" of official acts, and the Secretary of State suggests certain items to be included); at 447 (in Tennessee a notary is simply required to "record" official acts, and the Tennessee Notary Public Handbook recommends certain information to be included).

203. *See supra* note 9 and *infra* note 205 and accompanying text.

204. No notary statute in this country requires notaries to submit their notary records for periodic review by oversight agencies. Nor are the authors aware that any state or territorial notary regulators or investigators ever really attempt to review the current record keeping of notaries within their jurisdictions. But, by statute in the Virgin Islands, "[t]he Lieutenant Governor may inspect the official record of any notary public at any time." FAERBER, *supra* note 15, at 494. Michigan statutory law also gives the Secretary of State authority to request and obtain an inspection of notarial records specified by the Secretary. *Id.* at 240. No state requires notaries applying for renewals of their commissions to submit copies of journals or journal entries for inspection as part of the process. Only Guam, according to its official Attorney General's Web site for notaries, requires notaries who are renewing their commissions to present their journals for inspection. FAERBER, *supra* note 15, at 131. Thus, statutory notary recordkeeping provisions go virtually unenforced. *See supra* notes 6-7, and *infra* notes 249, 892, and accompanying text.

Furthermore, in 1948, the leading notary scholar of his time, Richard Humphrey, had reached the same conclusion, and there is no reason for the circumstances to have improved. Humphrey wrote: "Extensive inquiry and observation lead to the belief that probably" laws requiring notary record-keeping are "not very well observed."<sup>205</sup> Just as certainly, some conscientious and capable notaries in the states and territories which do not statutorily require journals will nevertheless voluntarily maintain such records thoroughly and skillfully. For instance, the notaries of American Samoa "working for the private sector customarily keep records of notarial acts,"<sup>206</sup> although there are a very small number of notaries in Samoa. So, the estimation of numbers to describe the extent of notarial record-keeping is inexact. Yet, the numbers cited above provide a worthwhile overview of what is probably reasonably close to actual practice.

The long U.S. experience of patchy or non-existent notarial record-keeping constitutes a continuing mistake in business and government. But, the lessons of experience are supposed to protect against future mistakes. Why then has this disadvantageous situation persisted? Why do so few people seem to care about notarial record-keeping that there is no popular impetus for a change of policy? The reasons so few people, especially individuals in positions to do something about it, care so little about the failure of notaries to retain records of their notarizations are multiple. Lack of popular understanding of the true importance of notarization to document security is the major factor. Time is a factor, too. Time seems to be of the essence everywhere, so that busy customers, busy notaries, and busy employers of notaries do not want to take the extra time needed to create separate detailed records of notarial acts.<sup>207</sup> This attitude prevails particularly because almost none of those parties appreciates the fact that each of their interests would be far better

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Additionally, we have arrived at this conclusion, in part, from the substantial, but circumstantial, evidence of notary indifference, negligence and intentional wrongdoing in regard to other of their duties. After all, if notaries do not perform well in so many other important respects, why should we think they will be better at record-keeping?

205. RICHARD B. HUMPHREY, *THE AMERICAN NOTARY MANUAL* 235 (4th ed. 1948).

206. FAERBER, *supra* note 15, at 21.

207. "Counselors at the NNA's Information Service telephone hotline report that 'notary employees [are routinely] pressured, intimidated . . . [and] threatened' into 'expediting' transactions by ignoring the formalities of proper notarizations." John C. Anderson & Michael L. Closten, *A Proposed Code of Ethics for Employers and Customers of Notaries: A Companion to the Notary Public Code of Professional Responsibility*, 32 J. MARSHALL L. REV. 887, 901 (1999). A customer of a notary may urge "the notary to expedite the notarial process by omitting one or more steps in a thorough notarization simply to save time." *Id.* at 904.

served if such records were kept. And most importantly, as will be explained later, the maintenance of detailed journal entries requires only a couple of minutes for each notarization that is performed.<sup>208</sup>

Lack of real accountability also constitutes a significant reason why few people care about incomplete notarial records of notarizations. When notarial errors or notarial frauds occur, almost no one is savvy enough to understand, as stated earlier, that nearly all mistakes and fraud would be detected and prevented if notaries were to maintain detailed journals of their notarizations.<sup>209</sup> Thus, when notary errors or frauds happen, virtually no one blames state legislators or notary oversight agencies for their failure to insist upon notaries keeping effective records of notarizations because almost no one makes the connection. Furthermore, no one blames the employers of notaries who so often oppose and discourage notary record-keeping as a way to avoid a “paper trail” of unethical, illegal, and negligent notarial performance and business practice.<sup>210</sup> Yet, those politicians, government officers and notary employers are the very people who could most effectively do something about the problem. Of course, even if blame were directed at the politicians and government agents, there are more than enough of them to deflect much serious jeopardy—so they simply do not care about this matter.<sup>211</sup> In the end, the lowly notary gets almost all of the

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208. The information to be included in a detailed notary journal entry is neither lengthy nor complex, but its cumulative effect is to provide thorough documentation of the basic facts about the performance of the notarization, including the identification of the document signer. See *infra* notes 266-80 and accompanying text. In speaking about the duty of a public official in determining the identity of a signer of an acknowledgment, the court in *State v. Meyer*, 2 Mo. App. 413, 420 (Mo. Ct. App. 1876) commented that “no one is at liberty to practice courtesy or gain popularity, to indulge his own indolence, or avoid unpleasant things at the expense of others.” Thus, the slight extra time and effort needed by notaries (and document signers) to obtain the information necessary to complete thorough notary journal entries is a small inconvenience that is necessary to meet legal standards.

209. “It is also disturbing that so many employers fail to understand that strict compliance with notary laws and notary procedures is in the employers’ best interests.” Anderson & Closen, *supra* note 207, at 903. “[M]ore than 99% of all notarial errors and omissions would be either prevented, or immediately detected and corrected, if notaries everywhere would complete thorough journal entries for their notarizations.” Closen, *supra* note 231, at 675.

210. “The Notary Public Code [of Professional Responsibility] . . . acknowledges on numerous occasions the involvement of notary employers . . . in corrupting notaries . . . . Sometimes, notarial misconduct actually occurs under the direction or urging of the notary’s employer.” Anderson & Closen, *supra* note 207, at 896.

211. Government officials, especially professional politicians, seem to care most about their job security, and notary issues hardly rise to the magnitude of matters that would affect continued employment or reelection. “[F]or the

blame, sometimes shared by the notary's employer (the party with the far deeper pocket, and possibly insurance coverage) in lawsuits under the agency doctrine of vicarious liability.<sup>212</sup>

Inertia is one more reason for the disinterest in the topic of notaries failing to maintain detailed official records of their notarizations. Since this omission has served as the way of doing notary business in most of the U.S. for more than 150 years, and since there has not been a catastrophic outcome due to this particular failure, it does not provoke much concern. However, in light of the terrorist attacks of September 11, 2001, and the continuing battles against domestic and international crime and terrorism, interest in notary issues should have risen because notarial mistakes and misconduct can contribute to identify theft and impersonation by terrorists, as well as to more mundane commercial fraud and criminal activity.<sup>213</sup> Realistically though, distant observers, meaning the overwhelming number of people who do not feel directly affected, are unlikely to become and remain interested in such matters for any sustained period of time.

The absence of quantifiable data about notary errors and fraud is another reason for lack of interest in the subject of notaries neglecting to maintain records of their notarizations. After all, notary practice is not exciting to the general public. Notary law and procedure remain a mystery to nearly everyone. Hence, it is not surprising that reports of notary mistakes and fraud do not make the front pages or headlines of newspapers or top stories anywhere in the news media. A few hundred appellate court decisions relating to notary errors and fraud have been

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legislator personally, the primary goal is to obtain reelection." HEINEMAN, *supra* note 56, at 182. Most legislators and government bureaucrats probably do not know enough about notarial issues to understand that there are problems. Then, the old proverb applies: "If it ain't broke don't fix it." DALE, *supra* note 24, at 47. "[T]he view undoubtedly prevails behind the scenes in the legislatures and the notary oversight agencies that individual notaries cannot do much harm individually and appropriate damage control can protect against any major injury to the images of legislators and regulators (and that is what they care about most)." Closen & Orsinger, *supra* note 105, at 618.

212. "[Notary] liability may also extend to the employer of a notary under either common law vicarious liability principles or under the employer responsibility provisions of state notary statutes" [or both]. Closen & Richards, *supra* note 148, at 726; *see also* Closen, *Both Employer and Notary Liable*, *supra* note 17 (discussing the possible joint liability of notaries and their employers for notary malpractice).

213. *See supra* notes 20-21 and 46 and accompanying text. Another serious case in California in 2004 involved a notary who became an accessory in a double murder, by falsely notarizing property-related documents for a \$2000 fee that assisted the killers in obtaining possession of the victims' yacht. *See When Notaries Turn Bad*, NAT'L NOTARY, Mar. 2007, at 42.



published,<sup>214</sup> and thousands of other notary-related court cases have undoubtedly been settled or resolved in the state and federal trial courts. Thousands of notary error and fraud claims have certainly been quietly disposed of by bond and insurance companies.<sup>215</sup> But, there is no central registry of information about notary errors and fraud. Thus, the full extent of the problem cannot be known with specificity. However, it is clear that the problem is extensive and substantial.<sup>216</sup> Most importantly, it is preventable.

Even in the face of a steady decline in the variety of functions performed by modern U.S. notaries and of governmental disregard of all but the most minimal qualifications for commissioning,<sup>217</sup> notaries nevertheless continue to carry out significant responsibilities in both the public and private spheres of documentary transactions. The 2001 edition of *Anderson's Manual For Notaries Public* made reference to the fact that notaries "are held to high accountability and are relied upon by the public

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214. There have been so many hundreds of notary-related cases reported at the trial and appellate levels that a plentiful number were available from which to select for the publication of a law school casebook of 629 pages. See generally CLOSEN, *supra* note 2.

215. Bond companies are often fairly willing to efficiently settle claims against notaries, because the amounts of notary bonds are so small (generally only \$1,000 to \$10,000, and just \$15,000 in a few jurisdictions) and therefore not worth expensive legal battles to avoid paying, and because the bond companies can settle with claimants and then look the covered notaries for reimbursements. See Michael L. Clozen & Michael J. Osty, *Illinois' Million Dollar Notary Bond Deception*, ILL. POLITICS MAG., Mar. 1995, at 13 (discussing practices in the notary bonding industry, and pointing out that payouts on claims on notary bonds—unlike insurance claim payments—must be reimbursed by the covered notaries).

216. Notary authority Alfred Piombino commented about "the advanced stage of decay and neglect that the office of notary public has suffered." ALFRED E. PIOMBINO, NOTARY PUBLIC HANDBOOK xxii (Nat'l ed. 1996). The NNA noted a "crisis of responsibility" in the country generally and among notaries in particular. *The Crisis of Responsibility*, NAT'L NOTARY, May 1995, at 11. See generally Lee Berton, *It's a Proud Calling, But the Notary's Lot is Full of Indignities*, WALL ST. J., June 15, 1993, at A1 (examining a range of difficulties that distract and impede notaries in the performance of their duties); Michael L. Clozen, *Why Notaries Get Little Respect*, NAT'L L. J., Oct. 9, 1995, at A23 (same).

217. "The most significant, historic, substantive duties of notaries in Europe and the Americas have been gradually stripped away from United States notaries, leaving them with important but lesser responsibilities." Clozen & Orsinger, *supra* note 64, at 515. See Armando Aguirre, *States Set Bar Low for Notary Applicants*, NAT'L NOTARY, July 2001, at 16 (observing that "in many states . . . it's not hard to get a Notary commission. In fact, it can be ridiculously easy. In some states all you need to do is fill out some paperwork, get the endorsement of a government official, pay the fee, and you're a Notary."). In mid-2001, the director of notaries for Virginia reported "in the six years she has worked in the Notary Division no one has ever been denied a commission." *Id.* at 19.

because of the high degree of responsibility which they exercise.”<sup>218</sup> The 2006-2007 *U.S. Notary Reference Manual* stated that “daily, thousands of legal documents are sent from state to state—already notarized or to be notarized and returned.”<sup>219</sup> Cheryl A. Lau, the former Nevada Secretary of State, noted while she was in office the important responsibility of “Notaries to serve the people . . . by detecting and deterring document fraud.”<sup>220</sup> The United States Supreme Court in 1984 “recognize[d] the critical need for a notary’s duties to be carried out correctly and with integrity,” and cautioned that “considerable damage could result from the negligent or dishonest performance of a notary’s duties.”<sup>221</sup>

Nevertheless, notaries in this country commit large numbers of accidental errors and intentional faults in notarizing signatures on documents.<sup>222</sup> Compounding the reasons already described for indifferent and poor performance by notaries are several more ingredients for unsatisfactory conduct. Notaries tend to be among the lowliest employees on the company organizational charts, the ones who must become notaries because no one else wants to do so or because it is made part of their job descriptions.<sup>223</sup> Employers

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218. ANDERSON’S MANUAL FOR NOTARIES PUBLIC, *supra* note 63, at ix.

219. FAERBER, *supra* note 2, at v.

220. *Id.* at iv.

221. *Bernal*, 467 U.S. at 225.

222. There were certainly enough cases, with plenty left over, to fill a 629 page law school casebook. See CLOSEN, *supra* note 2 (especially Chapter 8, Civil Liability For Notary Misconduct [pp. 247-94]; Chapter 9, Criminal And Administrative Sanctions For Notary Misconduct [pp. 295-330]; Chapter 10, Employer Accountability For Notary-Employees [pp. 331-56]; and Chapter 12, Attorney Liability For Notary Misconduct [pp. 389-416]). According to notary expert Alfred Piombino, the facts that notaries commit so many mistakes and engage in so much misconduct and fraud serve as “evidence of the advanced stage of decay and neglect [of] the office of notary public.” PIOMBINO, *supra* note 216, at xxii. See Closen, *supra* note 59, at 664 (commenting that in a “time of declining ethics in this country . . . the profession of notary public has not been immune to the downward spiral toward the lowest common denominator of behavior”). See also Nevin Barich, *Creating a Paper Trail: The Journal as Evidence*, NAT’L NOTARY, July 2003, at 31 (relating the case of a Florida notary who allowed her sister to use her notary seal to perform fraudulent notarizations in a series of real estate frauds). “The majority of the [Pennsylvania notary] disciplinary actions continue to involve failure to notarize properly—i.e., lack of customer appearance, failure to properly identify the customer, failure to complete the document properly and the failure to keep or properly maintain a Notary register.” *Chatting with John Henderson of the Pennsylvania Department of State*, SUBSCRIPTIO, June 2005, at 3 (Newsletter of the Attorneys Section of the National Notary Association).

223. “In fact, notaries most often occupy the lowliest position at document signing ceremonies.” Anderson & Closen, *supra* note 207, at 895; see also *The Crisis of Responsibility*, *supra* note 216, at 11 (observing that “[t]he low fees and prestige of their office cause many Notaries to be cavalier and careless about their duties. Many begrudge their employers for making them take on

often pay the expenses for employees to become notaries and even prepare almost all of the application materials, so that one day employees are simply anointed notaries when they are handed their new notary seals.<sup>224</sup> The performance of many employee-notaries is compromised by their lack of understanding of the notarial post and by pressures exerted by their employers (who always out-rank them and often substantially out-rank them on the organizational charts, as many employers or immediate supervisors are bank officers, lawyers, certified public accountants, real estate brokers, licensed insurance agents, business owners, and the like).<sup>225</sup>

Employee-notaries tend to perform their official notarial work hastily because that is the only way they know how. Many of these ill-trained notaries actually take directions about performing notarizations from their document signers (who may include their friends and family) and from their employers, because notaries do not know any better.<sup>226</sup> And incidentally, many licensed business professionals know virtually nothing about proper notarial practices. In fact, attorneys tend to be among the worst offenders of proper notarial practices.<sup>227</sup>

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additional duties of notarization that always seem to impinge on their regular jobs at the most inconvenient times.”).

224. “Notaries may have become commissioned solely because of the requests of their employers, who may have paid all of the fees and costs of notarial commissioning; both the employers and the notaries may erroneously believe the notary position belongs to, or is owned by, the employers.” Anderson & Closen, *supra* note 207, at 898; *see also It's Your Commission*, NAT'L NOTARY, May 2003, at 41 (noting that many employers pay for notaries' seals, journals, bonds, notarial supplies, and/or commissioning fees).

225. “[F]ew members of the general public have a detailed understanding of just what it is the Notary does.” David S. Thun, *On the Clear Path to Professionalism*, NAT'L NOTARY, May 2005, at 20. According to Texas notary law instructor Bob North, due to requests from employers to notary-employees to perform improper notarizations in Texas, “Notaries are put in an awkward position every day all over the state.” *Notaries and Their Employers: Doing What's Right*, NAT'L NOTARY, July 2001, at 23. *See generally* Anderson & Closen, *supra* note 207 (describing the role of employers in contributing in various ways to notary misconduct).

226. Such directions, of course, often involve incorrect information and instructions to engage in notarial improprieties. *See* Aguirre, *supra* note 19, at 37 (concluding that “it is common for Notaries to have friends or employers ask that a signature be notarized without personal appearance” of the signer); Anderson & Closen, *supra* note 207, at 895 (observing that third parties are usually the ones who initiate notarial wrongdoing, not the notaries themselves).

227. “[L]awyers are perhaps the worst offenders of sound notarial practice and of notary public laws.” Michael L. Closen & Christopher T. Shannon, *The 10 Commandments of Notarial Practice for Lawyers*, FLA. BAR NEWS, June 1, 1999, at 32. “Heavy caseloads, impending deadlines and other demands of legal practice often tempt attorneys to take dangerous shortcuts relating to notarizations.” Closen, *supra* note 191, at A24.

When notaries fail to journalize their notarizations, their notarial performance suffers significantly. These notaries frequently notarize for absent document signers.<sup>228</sup> These notaries are too trusting of people, and regularly neglect to demand sufficient proof of identification from signers.<sup>229</sup> These notaries may agree to pre-date or post-date certificates of notarization.<sup>230</sup>

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228. "The most common failure of notaries is their willingness, in violation of every notary statute, to notarize the signatures of absent signers." Closen, Orsinger & Ullrick, *supra* note 105, at 196. "A Somerset County notary who notarized a signature on a title document without the signer present was suspended for 18 months and ordered to pay \$500 in fines by the Pennsylvania Department of State." *Notary Hit with Suspension over Absent Title Signer*, NOTARY BULL., Oct. 2007, at 3. See, e.g., *Estate of Bontkowski*, 785 N.E.2d 126 (Ill. App. 2003) (reporting a case in which a notary admitted notarizing signatures when she had never met the absent signer); *Leiffer*, 673 So. 2d 68 (pointing out that the notary admitted notarizing two signatures for two signers who did not personally appear); *Butler v. Comic*, 918 S.W.2d 697 (Ark. 1996) (setting out the facts of a case in which a notary notarized ten signatures of ten members of one family, when only two members of the family had appeared before the notary); *McWilliams v. Clem*, 743 P.2d 577 (Mont. 1987) (finding that a husband had persuaded a notary to notarize the alleged signature of his wife, where his wife did not personally appear before the notary and where the signature had been forged); *Glisson*, 532 S.E.2d 442 (illustrating another basic case in which the notary had notarized the signature of an absent document signer); *People v. Peters*, 82 P.3d 389 (Cal. 2003) (illustrating a case in which attorneys arranged for a notary to notarize the signature of an absent signer). See generally Charles N. Faerber, *Being There: The Importance of Physical Presence to the Notary*, 31 J. MARSHALL L. REV. 749 (1998) (examining the most fundamental of all duties of a notary—to insist upon a document signer's physical presence before the notary at the time of the notarization). "Identifying individual document signers is the most important function of the Notary Public," and that function cannot possibly be carried out if the signer does not personally appear before the notary for the notarization. NAT'L NOTARY ASSOC., *TWELVE STEPS TO A FLAWLESS NOTARIZATION* 12 (2d ed. 2002).

229. "Too often, Notaries fail to demand that signers produce identification documents." Closen, *Risk Management*, *supra* note 17, at 25. "Even lawyers are sometimes duped by imposters who sign documents and manage to obtain notarizations from lawyers or their staff members." Closen & Shannon, *supra* note 227, at 32. See, e.g., *Aquino*, 506 N.Y.S.2d 1003 (reporting a case where the notary had apparently not sought to document the identity of the signer). Of course, in each instance in which a notarization is performed for an absent signer, the notary has also failed to positively identify the document signer. See generally Peter J. Van Alstyne, *The Notary's Duty of Care for Identifying Document Signers*, 32 J. MARSHALL L. REV. 1003 (1999) (considering the notary's important role in protecting against imposters attempting to engage in document frauds). A reliable ID document should include at least three features about its bearer: (1) the individual's physical description, (2) the individual's signature, and (3) the individual's photograph.

230. "With all of the pressure from clients, bosses and other interested parties to backdate and predate documents, Notaries have their ethics and professionalism tested every day." *Some Things Never Go Out of Date*, NAT'L NOTARY, Sept. 2007, at 43. According to Ohio notary Cassandra Goodson, "I have had companies ask me to backdate documents" [but she has always

These notaries omit to administer oral oaths and affirmations to signers of affidavits, attestations and jurats.<sup>231</sup> And, these notaries make many negligent mistakes of omission and commission in filling out certificates of notarization.<sup>232</sup> The best evidence that journalizing would substantially improve notarial functioning is the fact that the authors are unaware of a single published legal opinion involving allegations of notary wrongdoing in any case in which the notary in question had made and retained a detailed journal entry regarding a particular notarial act—and the authors have reviewed hundreds of cases of alleged notarial errors.<sup>233</sup> The reason no such cases exist is that proper journalizing reduces dramatically the chances for innocent and intentional notary errors or misconduct to occur. Consistent with our conclusion is this understated remark from the official South Dakota Notary Public Handbook: “Most lawsuits against notaries

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refused to do so]. *When Notaries Turn Bad*, NAT'L NOTARY, *supra* note 213, at 42-43. See generally Michael Lewis, *Backdating: Temptation Runs Amok*, NAT'L NOTARY, May 2007, at 40-43 (examining the national corporate scandal in connection with the backdating of stock options, reporting the experience of one Florida notary signing agent who has been asked “to put the wrong date on loan documents,” and pointing out that “Notaries have always known there are pressures to backdate documents”).

231. See Michael L. Closen, *Oath is not Just Empty Ceremony*, NOTARY BULL., Feb. 2005, at 7 (pointing out that many notaries omit to administer required oral oaths and affirmations or neglect to thoroughly and properly administer them, and that these faults may invalidate notarizations). The failure of notaries to actually administer required oral oaths and affirmations is so commonplace that there has been at least one call for abolition of such oral oaths and affirmations, and for their replacement by written ones. See generally Michael L. Closen, *To Swear . . . or not to Swear Document Signers: The Default of Notaries Public and a Proposal to Abolish Oral Notarial Oaths*, 50 BUFF. L. REV. 613 (2002). See, e.g., *Gargan v. State*, 809 P.2d 998 (Alaska App. 1991) (illustrating a case in which the notary did not administer an oral oath to the document signer, where one should have been given).

232. According to Sheriff's Detective Chris Christopher of Los Angeles County, California, “The problem with the majority of the Notaries we contact in fraud cases is that crooks don't have to recruit them. They are negligent.” *Training, Good Journal Entries Help Stop Fraud—But More is Needed*, NOTARY BULL., Oct. 2007, at 13. See, e.g., *Florey*, 676 So. 2d 324 (pointing out that the notary had notarized an acknowledgement without talking with or asking the elderly purported signer—who was present—whether it was his signature to be notarized, and where his signature had been forged on the document by a family member who accompanied him); *Farm Bureau Fin. Co. v. Carney*, 605 P.2d 509 (Idaho 1980) (finding that the notary had apparently made accidental omissions of items from a notarial certificate). After all, notaries are human. “To err is human.” *Proverb*, MACMILLAN DICTIONARY OF QUOTATIONS, *supra* note 49, at 460.

233. Interestingly, there is a California case where a notary became an accomplice to a double murder by falsely notarizing documents supposedly signed by the victims and who “destroyed her Notary journal to get rid of key evidence.” *When Notaries Turn Bad*, *supra* note 213, at 42.

could be avoided if the notary kept a record.”<sup>234</sup> Why? Negligent and intentional notarial wrongdoing would be rendered nearly impossible.

#### IV. THE CONTENT AND PROCEDURE FOR JOURNALIZING NOTARIZATIONS

[J]ournals are essential to good notarial practice and decidedly in the public interest.<sup>235</sup>

There remain some doubts about the true nature of notary journals or recordbooks, including the exact contents and methods for executing journal entries and for safeguarding them in order to satisfy their intended purposes. This section of the Article will explore those subjects so as to resolve a number of the uncertainties and to at least spotlight the problematic aspects. It is with this portion of the Article that the values of journalizing notarizations will be detailed and emphasized, for the underlying theme of the Article is the enormous worth of notary record-keeping. The National Notary Association has determined: “The journal has long been one of the Notary’s most important tools. . . . [W]hile journals protect honest and conscientious Notaries, [journals] also protect the public from dishonest and negligent ones.”<sup>236</sup> Consistent with this statement from the NNA opining that the journal is merely “one of the Notary’s most important tools,” it can safely be concluded that the journal is the notary’s most effective self-defense technique. Also consistent with the NNA statement above, it could be concluded that the journal can be both the notary’s best friend and worst enemy, for it will prove the notary’s diligence and competence as readily as it will evidence inattention and dereliction.<sup>237</sup> In either event, the notary journal fosters the public interest, as suggested by the quotation that introduced this part of the paper.<sup>238</sup>

The American controversy about the nature of notarial records dates to the early colonial period. William Aspinwall, the first notary to have been appointed in the Massachusetts Bay Colony, declared upon his removal from that post in the 1640s that his notarial records were his private property and refused to turn them over to local governmental officials.<sup>239</sup> Only after some

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234. FAERBER, *supra* note 15, at 438.

235. MODEL NOTARY ACT ch. 7, general cmt. (2002).

236. Barich, *supra* note 222, at 30-31.

237. “Journals can be part of the Notary’s shield of protection against unwarranted lawsuits.” Consuelo Israelson, *The Power of the Written Word*, NAT’L NOTARY, July 2001, at 38; *see also* Barich, *supra* note 222, at 31 (commenting that “[t]he journal . . . shows whether the Notary followed proper procedures.”).

238. *See supra* note 235.

239. *See* Seth, *supra* note 27, at 872 (detailing that in 1644 William

amount of negotiation was a compromise of this dispute achieved, and Aspinwall reluctantly delivered his notarial records to the colony's leading clergyman.<sup>240</sup>

Notaries public serve as commissioned public officials.<sup>241</sup> They are not merely private parties licensed to perform specialized services, such as real estate brokers, lawyers, certified public accounts, private detectives, barbers, and so on. One of the consequences of the public official status of notaries is that any documents they create while serving in their official capacities seem to constitute public records or, at least, quasi-public records.<sup>242</sup> The commentary to the Model Notary Act of 2002 points out: "Notary journals have proven to be a controversial subject."<sup>243</sup> Even the characterization of those journals as public or quasi-public records is the subject of debate. Both the Model Notary Act of 1984<sup>244</sup> and the Notary Public Code of Professional Responsibility in 1998<sup>245</sup> declared the notary journal to be a "public record." However, the revised Model Notary Act of 2002 does not label the journal as public, quasi-public, or otherwise anywhere in its statutory language.<sup>246</sup> Rather, the commentary to the 2002 Act explains that "while notary journals should not be considered public records *per se*, their public utility should be recognized and limited access granted in certain situations."<sup>247</sup> The commentary goes on to state that the 2002 Act "rejects the view that the journal is a true public record. Instead, it takes the position that the journal is quasi-public in nature."<sup>248</sup> Regardless of the label attached, the important concerns about the notary journal (whether a public or quasi-public record) include what information is recorded and who may access the journal.

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Aspinwall was appointed the first notary in the Massachusetts Bay Colony). Aspinwall considered his notarial records not to be public, but rather, private records of his own. *Id.* at 873, 875.

240. *Id.* at 875; *see also* Closen, Orsinger & Ullrick, *supra* note 105, at 180 (noting that Aspinwall turned his notarial records over to the ranking colonial clergyman).

241. Many, many court decisions have concluded that notaries public are public officials or officers, sometimes holding offices of profit. *See, e.g., Moser v. Bd. of County Comm'rs of Howard County*, 201 A.2d 365 (Md. App. 1964). *See generally* Closen, *supra* note 59 (discussing the "Public Official Role Of The Notary").

242. "The official records of public offices and officers are inherently public records, including the journal of the notary." Van Alstyne, *supra* note 6, at 784; *see also infra* notes 243-248 and accompanying text.

243. MODEL NOTARY ACT ch. 7, general cmt.

244. MODEL NOTARY ACT § 4-101 (1984).

245. NOTARY PUBLIC CODE OF PROF'L RESPONSIBILITY Guiding Principle VIII (1998).

246. *See generally* MODEL NOTARY ACT §§ 7-1 to 7-5 (2002).

247. MODEL NOTARY ACT ch. 7, general cmt.

248. *Id.* § 7-4 cmt.

Before continuing, it should be emphasized that the personal identifier information recorded in poorly prepared and/or poorly secured notary journals can present serious risks of breaches of confidentiality and privacy. On the other hand, properly recorded and protected journals pose no such dangers. The state and territorial notary laws are characteristically silent about the labeling of notary journals as public or quasi-public records, as well as about issues of appropriate substantive content or effective security of notary journals.<sup>249</sup> However, an important footnote to the nationwide propensity to overlook this basic concern is the contrary approach adopted by a fairly recent Wisconsin statute. In 2000, pioneering legislation in Wisconsin declared notary records to be confidential, and it imposed highly restricted limitations upon the release of information in those records<sup>250</sup> (as will be reviewed below).<sup>251</sup>

In recent years, the media have regularly reported that concerns about domestic and international terrorism, individual privacy, document fraud and identity theft occupy the forefront of the ongoing public debate over secrecy versus openness of government records. However, the designation of records created and kept by government officials as “public records” does not make such documents community property and always available without exception to unbridled public inspection and copying. As societal demands change, the extent of accessibility to records in government custody must be open to reconsideration, so long as restrictions imposed do not result in sweeping blankets of secrecy adopted to promote the mere business or political interests of the beneficiaries of such exemptions. Whatever access the government grants to records, the government can take away.

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249. The authors are aware of few state or territorial statutes which expressly label notary records as “public records,” although several provide variously for public inspection or public access in the form of photocopies to be provided to individuals upon their request. *See, e.g.*, ARIZ. REV. STAT. ANN. § 41-313(B)(1) (West 2008) (requiring that notaries “[k]eep, maintain and protect as a *public record* a journal of all official acts.” (emphasis added)). Quite a number of states and territories direct their notaries to provide access to, and/or copies of, notary journal entries for members of the public upon request. *See, e.g.*, FAERBER, *supra* note 15, at 7 (Alabama), 37 (Arizona), 59 (California), 97 (District of Columbia), 131 (Guam), 141 (Hawaii), 208 (Maine), 258 (Mississippi), etc.

250. *See* FAERBER, *supra* note 15, at 515.

(a) Except as provided in par. (b), a notary public shall keep confidential all documents and information contained in any documents reviewed by the notary public while performing his or her duties as a notary public and may release the documents or the information to a 3rd person only with the written consent of the person who requested the services of the notary public.

*Id.* (quoting the Wisconsin statute).

251. *See infra* notes 412-15 and accompanying text.



As a result of the continuing debate about which information should legitimately be shielded from unlimited disclosure and copying, state and federal legislators are increasingly recognizing exceptions. In Florida, for example, one estimate places the number of statutory exceptions to accessibility of government records prior to 1985 to be about 250, whereas that number had grown to nearly 900 by early in 2004.<sup>252</sup> Responding to rising concerns about privacy issues and the risks of identity theft, in November of 2003, “the Florida Supreme Court . . . issued a [statewide] moratorium on placing documents on line,” although that moratorium “allows some official records and individually requested documents to be accessed electronically.”<sup>253</sup> One Ohio county clerk of courts has candidly commented that “every day” she sees “unsavory characters” in her office perusing the public records and that “criminals are [just] as likely to walk in and get information from the courthouse [files]” as they are “to download it [from the Internet] in the safety of their own home.”<sup>254</sup> The *American Bar Association Journal* reported in 2004 that “county clerks across the nation are facing anxious state and local officials seeking to slow or stop altogether the posting of public information on the internet. Those officials worry that the internet makes it too easy for criminals to obtain personal information.”<sup>255</sup> In 2007, it was reported that “[o]ne in four American consumers . . . had their financial or personal information stolen.”<sup>256</sup> The *ABA Journal* report went on to point out “the same [online] data would be available on paper,”<sup>257</sup> and we submit some of the paper presently accessible to criminals and terrorists in search of personal information about would-be victims and targets includes traditional hard-copy notary journals. Remarkably, instead of online sources being the biggest information security risk, “[o]ffline sources are where most of the information was taken to commit ID fraud last year [in 2006].”<sup>258</sup> Thus, both traditional and

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252. Lloyd Dunkelburger, *More Records Now Kept Secret*, THE LEDGER (Lakeland, Florida), Mar. 14, 2004, at A18.

253. Jason Krause, *Too Much Information*, A.B.A. J., Apr. 2004, at 24.

254. *Id.* (quoting the Clerk of Courts of Butler County, Ohio).

255. *Id.*

256. *One in Four Say Financial or Personal Information has been Stolen*, NAT'L NOTARY, Mar. 2007, at 16. According to Texas Attorney General Greg Abbott, “Identity theft is one of the fastest-growing crimes in the United States.” *Loan Company Ordered to Stop Dumping Customer Information*, NOTARY BULL., Oct. 2007, at 3. “Protecting personal financial and identity information has become one of the most pressing law enforcement and consumer issues facing the country.” Michael Lewis, *The Breakdown in Guarding Customer Information*, NOTARY BULL., Oct. 2007, at 1.

257. Krause, *supra* note 253, at 24.

258. Michael Mink, *The Paper Chase: ID Fraud Threats are Close to Home*, NAT'L NOTARY, May 2007, at 48. In a research study “of some 450 identity theft victims, of those who knew how their information was acquired, 81

electronic notary journals must be the focus of consideration relating to information security.

A glaring inconsistency regarding the treatment of record accessibility in the notarial system is this fact. Only one state, Wisconsin (as noted above), currently protects notary journal records from public disclosure.<sup>259</sup> Yet, a number of states prohibit access from public review to the applications of individuals who wish to become notaries.<sup>260</sup> Thus, although state legislators have demonstrated almost no concern regarding access to personal and financial information about ordinary citizens contained in notary journals, some of those legislators have shown considerable awareness of the privacy interests of fellow public officials holding the office of notary public. Moreover, the historic disregard of notary issues by legislatures suggests they will not soon develop any widespread interest in reconsidering notary record privacy and accessibility issues.

Several questions naturally arise about the precise nature of the records created by notaries. To what extent are notarial records available for inspection or copying by government agents and private parties? What uses may be made of the information contained in notarial records by notaries public, government agents, and private parties? Who owns such records, and what should become of those documents when the notaries who prepared them leave office or die? How long should notarial records be preserved before they are destroyed? The answers to these questions are not at all certain. There is very little law on these subjects, and there are no uniform practices in connection with these issues to inform us as to the answers. Nevertheless, we should at least consider the possible answers that await future resolution.

Parenthetically, it should be noted that the focus here will be upon notary journals in either paper or electronic formats. What

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percent reported that it was taken from offline sources." *Id.* "A national cash-advance lending chain [Check 'n Go of Texas] was ordered to change the way it disposes of records after several stores reportedly discarded documents with sensitive customer information in easily accessible trash cans." The discarded "records and bank statements . . . included the names, addresses, Social Security and driver's license numbers and checking account information of customers." *Loan Company Ordered to Stop Dumping Customer Information*, *supra* note 256.

259. *See supra* note 250 and *infra* notes 412-15 and accompanying text. Many "states (except one [Wisconsin]) leave notary records completely unregulated." Michael L. Cloisen & Trevor J. Orsinger, *Potential Identity Crisis*, CHI. DAILY L. BULL., Sept. 19, 2000, at 6.

260. *See, e.g.,* ARIZ. REV. STAT. ANN. § 41-312(F) (providing that "[e]xcept for the [notary] applicant's name and business address, all information on the [notary] application is confidential."); *see also* UNIF. NOTARY ACT § 2-206 (1976) (providing for the general confidentiality of the contents of notary applications, except for the names and addresses of applicants).

will be excluded from further consideration below are the certificates of notarization executed by notaries. These certificates most frequently take the forms of jurats and acknowledgments, although there are other types of notarial certificates known to the procedures of some states and territories.<sup>261</sup> The certificates of notarization are almost always attached to the governmental or commercial documents they support (such as deeds, powers of attorney, affidavits, titles, and the like) and accompany those documents.<sup>262</sup> Completed certificates of notarization are not retained by notaries public. Hence, certificates of notarization are affixed to other documents, some of which may be publicly filed (with county recorders, clerks of courts, government agencies, and so forth). But numerous certificates of notarization remain attached to private documents which are never publicly filed. As a practical matter then, although certificates of notarization can properly be called public or quasi-public records, many if not most of them never leave the private domains where they reside. Thus, further analysis of certificates of notarization as public or quasi-public records is beyond the scope of this paper. Moreover, far

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261. Numerous states and territories recognize a notarization known as a signature witnessing. See FAERBER, *supra* note 15, at 86 (Delaware), 92 (District of Columbia), 116 (Georgia), 134 (Hawaii), 154 (Illinois), 170 (Iowa), 178 (Kansas), and others. Many states and territories allow for the forms of notarization known as copy certification. *Id.* at 15 (American Samoa), 24 (Arizona), 40 (Arkansas), 62 (Colorado), 86 (Delaware), 101 (Florida), 116 (Georgia), 126 (Guam), 144 (Idaho), and others. A few states allow notaries to perform marriage ceremonies and to certify to such performance. *Id.* at 101 (Florida), 202 (Maine), and 424 (South Carolina). A couple of states authorize notaries to certify the contents of abandoned bank or safety deposit boxes. *Id.* at 101 (Florida), and 220 (Massachusetts). And, a miscellaneous array of other powers are granted to notaries in some jurisdictions. For instance, Florida notaries are authorized to verify motor vehicle identification numbers. *Id.* at 101. South Carolina notaries have power to take renunciations of dower. *Id.* at 424.

262. See *supra* notes 7-8 and accompanying text. "Not all documents a Notary encounters are going to have notarial wording, and those that do may contain wording that doesn't comply with notarial law in the Notary's state. That's why it's important to have appropriate acknowledgment and jurat certificates available when performing notarizations." Barich, *supra* note 255, at 39. One way to deal with the problem just noted is for the notary to have what are called "loose" notarial certificates on hand. "Sometimes a document does not contain any preprinted notarial certificate wording. In such cases, once the signer has determined what kind of notarization is required, the Notary may attach a loose certificate with appropriate wording to the document in order to complete the notarization." *Notarizing Documents: What You Can and Cannot Do*, NAT'L NOTARY, Jan. 2008, at 43. See also *Preprinted Certificates to Meet Your State's Requirements* [advertisement], NAT'L NOTARY, Jan. 2005, at 14 (listing the loose notarial certificates available for purchase from the NNA, including "all states" certificates as well as certificates for Arkansas, California, Florida, Hawaii, Massachusetts, Missouri, Nevada, New York, Texas and Washington).

more confidential personal identifier information is included in notary journal entries than in notarial certificates. Thus, the focus of this Article is upon the record of notarizations to be created and kept by notaries themselves in their journals.

Notary authority Peter Van Alstyne has pointedly and correctly noted: "Not all notary journals are alike."<sup>263</sup> Before launching the detailed discussion of the nature of notarial journal records, it would be beneficial to explore both the contents of journal entries and the procedures employed to create those entries, for this understanding will influence how one defines the nature of journal records. Notary journals serve valuable purposes at three stages—before particular notarizations are executed, during the performance of individual notarizations, and after notarizations have been completed. Before notarizations are performed, the common knowledge that journal entries will be created should produce a major deterrent effect on would-be scoundrels. Those scoundrels intent upon forgery or fraud would be less likely to attempt to solicit notarizations from notaries who scrupulously record official acts in effective written or electronic journals which are securely bound or electronically protected and which are contemporaneously and chronologically maintained—so that subsequently entry information cannot successfully be added, deleted or altered.<sup>264</sup> Would-be wrongdoers would also be deterred if notaries diligently journalize the details of every notarization—including the recording of information to identify document signers, including such items as signers' names, addresses, signatures, photographs and thumbprints. Additionally, meticulous notaries who keep detailed journals probably also closely scrutinize the documents of identification of all unknown signers, including those false IDs which would have to be produced by imposters attempting to obtain notarizations of forged signatures, and this common expectation would serve as a further deterrent.<sup>265</sup>

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263. Van Alstyne, *supra* note 6, at 783.

264. VAN ALSTYNE, *supra* note 7, at 194.

Notary journals are permanent records and therefore must be permanently bound volumes. A journal made from a spiral or loose-leaf notebook will not suffice. Their contents are easily lost or tampered with. Some notaries will photocopy their notarizations and store them in a file. This too will not suffice.

*Id.* "[K]eep it tamper-proof." *Id.* The Uniform Notary Act states that a "notary public shall provide and keep a permanently-bound journal of his notarial acts containing numbered pages" and "shall make a chronological list of all notarial acts in his journal." UNIF. NOTARY ACT §§ 4-101 to 4-102 (1973).

265. Photographs of document signers would be very helpful to include in notary journals, although pictures are not quite as reliable as thumbprints in identifying people. See *infra* notes 278-79 and accompanying text. Moreover, wrongdoers and criminals will not wish to leave evidence of their identities behind at the scenes of their offenses, which for document frauds would be the

A thorough journal entry in either the traditional paper method or the modern electronic format should include several pieces of information, that could number according to one expert as many as nineteen items.<sup>266</sup> Ordinarily, a journal entry will record at least the following data: (1) the date and time of the notarization;<sup>267</sup> (2) the title or type and date of the transactional

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documents themselves and the related notary journal entries. Completion of a thorough journal entry should demand that the notary observe one or more current documents of identification, and the preferred of such ID documents would be those which possess three useful features about their bearers, namely: (1) the photograph of the bearer; (2) the physical description of the bearer; and (3) the signature of the bearer. Notaries should not permit signers to simply provide ID document serial numbers for listing in the journal entry without the notary personally handling and examining the IDs. Part of the ID process should also include comparison of at least three signatures of each signer, namely: (1) the signature in the notary journal; (2) the signature on the transactional instrument being notarized; and (3) the signature on the ID document. "The very fact that you maintain such a detailed journal and that it contains a thumbprint speaks volumes about your conscientiousness as a Notary—especially if your state [statutorily] requires neither a journal nor a thumbprint. It's clear evidence of your reasonable care and proof that you bend over backwards to be prudent." JOURNAL THUMBPRINT, *supra* note 23, at 19.

266. ROTHMAN, *supra* note 166, at 31 (listing 19 specific items of information "some or all" of which could be entered in a notary's journal).

267. Of course, sometimes documents are date-sensitive and time-sensitive. The date and time of a notarization are very basic data that simply should be recorded, and may differ from the date and time of the document and even of the signature to be notarized (in the case of an acknowledgment, as pointed out *infra* notes 330-31 and accompanying text). In the 1890 edition of his treatise, Brooke notes that "[s]ometimes not only the day but the hour when the act is made is of the greatest importance." BROOKE'S NOTARY, *supra* note 100, at 45. Establishing the dates of authentic documents has always been one of the important general functions of English notaries as well. *Id.* at 14. The notarial certificate must always, without exception, bear the present date. However, the document might have a previous date. It might even bear a subsequent date. "Sometimes document dates do not indicate a date of signing or execution but rather a future effective date for the instrument. In such cases, of course, the document date may follow the date of notarization." *Simple Rules for Dates*, NAT'L NOTARY, July 2004, at 47. See also ROTHMAN, *supra* note 166, at 31-32 (suggesting that the journal notation of date and time of the notarization might help to determine which among multiple documents "was the authentic original."). He also pointed out that "[t]he date of the document or agreement and the date the parties signed need not always be the same. The parties may have signed the agreement several days before coming to the Notary." *Id.* at 32. Rothman also separately lists the date of the document and the date the parties signed it as items to enter in the journal. *Id.* at 31.

It is apprehended, that willfully certifying to any act as done on one day, when the [English] Notary knew that it had been done on another day, or anti-dating or post-dating any instrument in order to deceive, would be considered as an offence [punishable by being struck from the roll of notaries and being disqualified from practicing as a notary]. BROOKE'S NOTARY, *supra* note 100, at 8.

instrument notarized (such as a deed, power of attorney, automobile title, and so forth);<sup>268</sup> (3) the number of pages contained in the transactional instrument;<sup>269</sup> (4) the kind of notarization performed (a jurat, an acknowledgment, the inventorying of a safe deposit box, the performance of a wedding ceremony, and the like);<sup>270</sup> (5) an indication of whether an oath or affirmation was administered;<sup>271</sup> (6) the venue for the notarization

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268. One of the basic questions a notary should put to a would-be document signer is what type of document is being signed, because the notary has the responsibility to determine whether the document signer has at least a general awareness of the nature and consequences of her/his actions. "The Notary shall . . . carefully screen . . . to observe that each [signer] appears aware of the significance of the transaction requiring a notarial act." NOTARY PUBLIC CODE OF PROF'L RESPONSIBILITY Guiding Principle III (1998). See generally Klint L. Bruno & Michael L. Closen, *Notaries Public and Document Signer Comprehension: A Dangerous Mirage in the Desert of Notarial Law and Practice*, 44 S.D. L. REV. 494 (1999) (analyzing the extent of the notary's responsibility to judge the comprehension, rather than the legal competence, of the document signer); see also ROTHMAN, *supra* note 166, at 32 (stating that "[t]he record book will not, of course, be complete unless the kind of official act and the kind of document are noted.").

269. *Id.* at 33 (explaining that "[i]f the document contains more than one page, the Notary should count the number of pages . . . and record the number in his record book . . . . All parties to the agreement, including the Notary, should place their initials in the lower right-hand corner of each page of the document."). Rothman also suggests that for very important documents the Notary may place an impression of his/her seal on each page. *Id.* The purpose of all of these tactics is to minimize the prospect of successful document fraud. "This will help avoid the possibility of pages being added or eliminated after the document has left the office of the Notary. It will also provide additional protection in case illegally altered copies appear later." *Id.*

270. The type of notarization to be performed is significant, because in connection with document signings the kind of notarial act involved determines when the transactional document may be signed, whether that document must be signed in the notary's presence, and whether an oral oath or affirmation must be administered. See *supra* note 261 and *infra* notes 329-31 and accompanying text.

271. This item is one which does not appear on Rothman's extensive listing of the contents of notary journal entries. ROTHMAN, *supra* note 166, at 31. However, the oath/affirmation may prove critical to the validity of a challenged notarization and, in turn, to the validity of the underlying document and transaction. See *Sworn to Truthfulness*, NAT'L NOTARY, Sept. 1997, at 14 (concluding that "[b]ecause an oath may be a vital part of a notarial act . . . it should be recorded in the journal."); Adviser [column], NAT'L NOTARY, Sept. 1999, at 2 (recommending that "[l]ike any other notarial act, the administration of the oath or affirmation should be recorded in the Notary journal."). Many journals simply contain a column where a notary can check a box to show that an oath/affirmation was, or was not, administered. Jurat notarial certificates typically recite that the document has been "subscribed and sworn to before" the notary. Yet, without a notation in the journal entry, there is no indication on the face of a certificate of notarization that an oral oath/affirmation has really been administered, and it is well known that notaries frequently neglect to administer the oral oath/affirmation. See generally Closen, *supra* note 231 (discussing both the importance of oral

(the county and state where it is performed);<sup>272</sup> (7) the fee, if any, collected by the notary;<sup>273</sup> (8) the name (legibly written or printed) of the document signer and the signer's address, and telephone

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oaths/affirmations and the failure of so many notaries to actually administer them).

272. Surprisingly, Rothman's list of items for a thorough journal entry does not include the venue. See ROTHMAN, *supra* note 166, at 31. In a few U.S. jurisdictions, notaries continue to have only county-wide or parish-wide jurisdiction, as they did in the earliest days of this country. Now, almost all U.S. notaries enjoy state-wide or territory-wide jurisdiction. Closen & Dixon, *supra* note 144, at 886. In England as well "[t]he place where the contract is stipulated is most necessary. It fixes the . . . legality of the act of the Notary, as proving that he was acting within the limits of his jurisdiction." BROOKE'S NOTARY, *supra* note 100, at 45. It does sometimes happen that wayward notaries attempt to exercise their authority beyond the boundaries of their proper authority. See, e.g., *State v. Haase*, 530 N.W. 2d 617 (Neb. 1995) (presenting the case of an Iowa notary who attempted to notarize in Nebraska). According to one Indiana Notary, "We have Notaries . . . cross the border into Ohio to take depositions and perform notarizations [without authority to do so] . . . They're convinced that it's OK because everybody does it." *Notaries and Their Employers: Doing What's Right*, *supra* note 225, at 21. The venue recites the county and state where the official notarial act occurred, and is essential to the authority of a notary. That is why a journal entry ought to identify the site of the notarization in order to assure the notary was empowered to act in that place. See Adviser [column], NAT'L NOTARY, Nov. 2001, at 34 (explaining that "[l]eaving the venue blank constitutes a failure of the Notary to complete a notarial act in accordance with state law and will generally cause the document to be rejected, particularly by county recording agencies."). See generally Douglas M. Fischer, *Where Can I Notarize?*, NAT'L NOTARY, July 1997, at 10 (discussing the jurisdictional authority of U.S. notaries); Armando Aquirre, *Border Crossing: Using One, Sometimes Two Commissions, Notaries Operate Across State Lines*, NAT'L NOTARY, Mar. 2005, at 34 (discussing the opportunities of nonresidents to obtain notary commissions in neighboring states and pointing out that only in Montana, North Dakota, and Wyoming is it possible for a notary under appropriate circumstances [reciprocal laws] to notarize outside his or her state of commissioning); see also Closen, *supra* note 15, at 7 (pointing out that generally "Notaries are legally authorized to perform notarial acts only in their state of commissioning.").

273. Recording of any fee collected by the notary can serve as the documentation of notarial income for tax purposes, and can serve to help establish that the notary complied with the laws in many states and territories which set maximum notarial fees. See Nevin Barich, *Nuts & Bolts: Taxes*, NAT'L NOTARY, Mar. 2003, at 34 (discussing the income tax treatment of notary fees, and emphasizing the need to keep careful records of such fees); *id.* at 40 (also discussing tax reporting and payment issues relevant to notaries and notary signing agents). See also *Guide to Notary Fees*, NAT'L NOTARY, May 2006, at 36 (setting out the maximum fees allowed by statutes in the states and territories). It has been suggested that notaries may even charge a "fee for making and keeping a proper record book of the details of the notarial act." ROTHMAN, *supra* note 166, at 32. If a notary were also to charge and collect reimbursement for travel expenses and a fee for travel time, those items should also be itemized and recorded. If additional space were needed, most notary journals include an extra column or area where such other information may be recorded. *Id.*

number;<sup>274</sup> (9) the signature of the document signer;<sup>275</sup> (10) the method by which the document signer was identified—by the personal knowledge of the notary, by the personal knowledge of one or more credible witnesses, or by presentation of one or more documents of identification;<sup>276</sup> (11) if the signer's identity is

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274. The reason to obtain a legibly written or printed name for the document signer is because many individuals sign in such ways that their names cannot be deciphered. Sometimes, document signers are allowed, mistakenly, to sign their scroll-style names in the notarial certificates—where a typed or legibly written or printed name should be placed. Remember, the signature of the document signer should appear on the transactional document, not on the notarial certificate. The address and phone number are important in case the signer needs to be contacted for some reason, and in case government agencies need to investigate document fraud. See ROTHMAN, *supra* note 166, at 31 (suggesting that both the name and address of the document signer be “printed” in the record book).

275. The signature of the document signer in the notary journal is the most important element of the traditional notary journal entry (supplanted only by the thumbprint in more modern journals). The reason is that the capturing of a present signature means that the signer actually appeared at the time of the notarization. This fact cannot be definitively shown on the face of the notarial certificate, for the signer's signature on the transactional document might have been placed there before or after the completion of the notarial certificate. And, it is well known that many notaries allow documents to be pre-signed and post-signed, without the signers appearing at the notarial ceremonies. See generally Faerber, *supra* note 228 (considering the importance of the physical presence of the signer to the security of a notarization). The signature of the document signer in the notary journal is also significant, because if an imposter is to perpetrate a document fraud upon a notary, the imposter must sign a forged signature here—in the notary's journal. Then, for the jurat and signature witnessing types of document notarizations, the imposter would have to presently sign a second time—this time on the transactional document. This procedure more than doubles the opportunity for the imposter to be detected, for the two signatures can and should also be compared with one another—which may reveal the imposter.

The importance of this entry [the document signer's signature in the notary journal] . . . cannot be overemphasized . . . . Impersonators will not be inclined to sign a false name in the Notary's record book if they know that the Notary keeps the record book in his possession as proof of signature and identification if it is ever questioned . . . . After the Notary has obtained the signature of the party in his record book, he should carefully compare that signature with the signature on the document to assure himself that both signatures were made by the same party, who is the party appearing before him.

ROTHMAN, *supra* note 166, at 32-33. The notary should also compare those two signatures with one or more signatures on the IDs presented by the document signer, and recorded in the next item (#10) in the journal. *Id.*

276. “A Notary's most important duty is to positively identify each and every document signer to prevent forgery and fraud.” *SS Cards are not ID Cards*, NAT'L NOTARY, May 2003, at 41. “The Notary shall require the presence of each signer and oath-taker in order to carefully screen each for identity.” NOTARY PUBLIC CODE OF PROF'L RESPONSIBILITY Guiding Principle III (1998). See generally Van Alstyne, *supra* note 229 (addressing the notary's duty to positively identify document signers). There have traditionally been three



established by documents of identification or credible witnesses, the document types and their expiration dates, or the names, addresses, and telephone numbers of the witnesses;<sup>277</sup> (12) the right thumbprint of the document signer;<sup>278</sup> (13) a photograph of

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methods used by notaries under state statutes for identifying document signers: personal knowledge of the notary, identification by a credible witness, and use of ID documents to establish identity. Interestingly, California has recently become the first state to abolish the method of identifying signers by the personal knowledge of the notary. See *Legislative Watch*, NOTARY BULL., Feb. 2008, at 12 (noting that the new California law on this point took effect on January 1, 2008). We strongly believe this should be the law everywhere, and that all document signers should always be identified through documents of identification.

277. Some experts even refer to very high duties of notaries, above the duty to use reasonable care, to correctly identify document signers—such as a duty to positively identify signers—because those experts know that the first and foremost responsibility of notaries is to perform the identification function. See, e.g., Thaw, *supra* note 18, at 7 (opining that “it is [the Notary’s] duty to determine beyond the shadow of a doubt that the parties to a written agreement are who they claim to be.”). By recording this information in the journal, the notary provides powerful evidence that s/he employed due diligence in the effort to assure the correct identification of the document signer. If an imposter intends to attempt to forge a signature for notarization, requiring the recording of this information will deter some would-be imposters, and will force other more determined imposters to falsify other ID materials as well, or to involve other “credible witnesses” in their wrongdoing. “[F]or primary ID documents. . . . Notaries should rely on IDs that are government-issued and contain at least a photograph and a physical description of the bearer, plus the bearer’s signature. Almost any identification documents. . . could be used as supplemental ID.” *Tip Sheet: Close Doesn’t Count*, NAT’L NOTARY, July 2001, at 33. Diligent notaries should compare the likeness of a document signer described by the photographs and physical descriptions in IDs with the actual appearance of the live signer and should compare the signatures of the document signer on the transactional document, the notary journal entry and the IDs. Questions arise about whether notaries should rely upon other “ID” documents, especially ones that have expired. See Michael L. Closen, *Seniors Can Present Challenges*, NOTARY BULL., June 2004, at 7.

278. “In the Notary’s arsenal of tools and techniques to deter fraud, none is more powerful than the journal thumbprint.” JOURNAL THUMBPRINT, *supra* note 23, at 16-17. The thumbprint is so significant, of course, because its unique nature positively identifies a document signer, regardless of the name signed. A fingerprint or thumbprint is not only unique, but also not subject to change over time. “[A] fingerprint is both unique and permanent.” NAT’L NOTARY ASSOC., HOW TO FINGERPRINT 1 (2d ed. 1997) [hereinafter FINGERPRINT]. See generally Vincent J. Gnoffo, *Requiring a Thumbprint for Notarized Transactions: The Battle Against Document Fraud*, 31 J. MARSHALL L. REV. 803 (1998) (examining and urging the notary journal thumbprint requirement); see also *infra* notes 283-98 and accompanying text. It has even been recommended that each signer also affix a thumbprint next to her/his signature on every important document and that this process be overseen by notaries public. See Michael L. Closen, *Thumbprints on Documents Would End Identity Theft*, MIAMI HERALD, Dec. 6, 2004, available at 2004 WL 99610131.

the facial features of the document signer;<sup>279</sup> and, (14) any other information the notary should wish to include (such as any special circumstances that arose; any witnesses who were present; the representative capacity of the signer, if any; the reasons for declining to perform a notarization; and, a description of the procedure followed if the signer required physical assistance in signing, if the notary signed for the signer, or if the signer signed by a mark).<sup>280</sup>

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279. The notary journal, in either the traditional paper format, or the online electronic version, could and should include a head and shoulders photograph of the face of the document signer. Although traditional paper journals have not ordinarily been designed to readily permit the inclusion or attachment of such photographs, a Polaroid-type picture of the signer could certainly be affixed by staple, tape or glue to a page of a journal entry, and future versions of paper journals could be designed with spaces and fittings for such pictures. Technological advancement also allows the online notary journal to capture a photograph of a document signer, provided the notary has the appropriate and readily available camera equipment. See *infra* note 371 and accompanying text. Although a photograph is not as reliable as a thumbprint to the identification process, a picture can nevertheless be very useful. Physical appearances can be altered, but ordinarily only within limited boundaries. Certainly, a present photograph of an imposter posing as a document signer might well be useful, if publicized, in leading to information to identify and locate the scoundrel. *Id.*

280. The opportunity to have the flexibility to note other information of relevance is quite worthwhile, because when the need for such information arises it means that something out of the ordinary is occurring which should be recorded. “[W]hat happens when something out of the ordinary happens during a notarization? . . . From time to time, a Notary will notice a detail during a transaction that doesn’t easily fit into a neat or usual category . . . . It’s always best to write down any [such] detail in the [notary] journal that strikes you as unusual.” *Tip Sheet* [column], NAT’L NOTARY, Jan. 2005, at 48. For instance, this is the area of the page format where a notary would indicate an error in, or a correction to, a certificate of notarization or journal entry. See *infra* notes 332-34 and accompanying text. This area is the space where a notary would note the reason for a request for a copy of a journal entry. See Barich, *supra* note 222, at 31 (discussing a case in which an Illinois notary had kept a thorough journal, although the notary was not required to journalize under the state statute, and in which the notary had described the curious behavior of the elderly testatrix—contributing to the court’s conclusion invalidating her power of attorney). Since the legal competence of a document signer may be challenged, it is especially important to note matter regarding signings in which the signer has difficulty with physically executing the signature or is physically unable to execute the signature. See Michael L. Closen, *Techniques for Serving the Elderly*, NOTARY BULL., Aug. 2004, at 7 (discussing the procedures for notarization both for individuals who wish to sign by mark (such as an ‘X’) and who due to physical incapacity wish to have surrogates sign for them). See, e.g., *Smith v. Wharton*, 78 S.W.3d 79 (Ark. 2002) (upholding an acknowledgment before a notary of a signature by mark, which signature was also witnessed by three individuals). “If at any time, the Notary acquires knowledge or a reasonable suspicion that the notarial act he or she is being asked to perform is improper or illegal, the Notary should refuse or cease the notarization and note the reason in [the notary] journal.” *Tip Sheet*.

The above listing of information conforms almost identically with the current version of the notary journal published by the National Notary Association.<sup>281</sup> In defining the phrase “journal of notarial acts,” *Black’s Law Dictionary* also concurs with most of the components listed above, namely “the date, time, and type of each official act, the type of instrument acknowledged or verified before the notary, the signature of each person whose signature is notarized, the type of information used to verify the parties whose signatures are notarized, and the fee charged.”<sup>282</sup> A journal procedure requiring the notary to determine and record this many bits of detail would necessarily result in a more reliable notarization and a more secure transaction.

The inclusion of a thumbprint of a document signer in the notary journal would represent the single most important component of a journal entry,<sup>283</sup> although at present only California mandates thumbprinting in notary journals for signers of certain real estate instruments.<sup>284</sup> The fingerprinting or thumbprinting of an individual constitutes a “method of identifying a person with absolute certainty”<sup>285</sup> and “has proved to be an infallible method of identification.”<sup>286</sup> These conclusions

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281. The NNA record-book is printed in 8 1/2” x 11” format with the 11” length running across the page, so that when the book is opened there are 22” of space for 10 columns of data across two pages. See OFFICIAL JOURNAL OF NOTARIAL ACTS (2004) (having 10 columns for entries, including (1) month, day, year, and time of the notarization; (2) kind/type of notarization/certificate; (3) document date; (4) document kind or type; (5) name and address of signer; (6) identification of signer; (7) additional information; (8) notary fee; (9) signature of the signer; and (10) right thumbprint of the signer). The fourteen items listed here also correspond very closely with the journal components identified in The Model Notary Act. MODEL NOTARY ACT § 7-2(a) (2002).

282. BLACK’S LAW DICTIONARY, *supra* note 176, at 844. This listing of information to be included in the journal parallels closely the items suggested for inclusion in PIOMBINO, *supra* note 216, at 33-34.

283. “There’s one particular component of each journal entry that’s critical in deterring fraud: the thumbprint.” Nevin Barich, *Thumbprints*, NAT’L NOTARY, Nov. 2004, at 37. “The component of [the notarial journal] record most effective in deterring fraud is the signer’s thumbprint.” *Thumbprint Crucial Part of Journal Record*, NAT’L NOTARY, Sept. 2004, at 48; see also Gnoffo, *supra* note 278 (arguing for the adoption of a notary journal thumbprint requirement).

284. “[O]nly California requires a journal thumbprint of the signers of deeds, quitclaim deeds and deeds of trust affecting any real property.” Barish, *supra* note 283, at 39. Notaries in states other than California can ask document signers to submit to thumbprinting in their notary journals, but such signers would have the right to decline to be thumbprinted. “If [notaries] make it [their] constant policy to ask every signer for a journal [thumb]print, [notaries] would be justified in refusing to notarize for any signer who will not provide a print.” *Id.*

285. *Fingerprinting*, THE WORLD BOOK ENCYCLOPEDIA, *supra* note 35 at 108.

286. *Id.* “A fingerprint is the ultimate identifier.” FINGERPRINT, *supra* note 278, at 1.

follow from the facts that each person's fingerprints are unique and do not change as the individual grows older.<sup>287</sup> Other standard methods used to identify document signers are not so reliable. Signatures can be forged, and signatures may change as signers age.<sup>288</sup> Identification documents can be altered or counterfeited.<sup>289</sup> Physical appearances can be modified, and appearances change as people mature.<sup>290</sup> But, fingerprints are not subject to any of these faults or uncertainties.<sup>291</sup> Fingerprints are so reliable that it has even been suggested thumbprints should be included along with signatures on important transactional documents, similar to the various biometric security uses of fingerprints and thumbprints already being implemented in some commercial and governmental settings.<sup>292</sup> In California, the

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287. "Each person has an individual fingerprint pattern." THE WORLD BOOK ENCYCLOPEDIA, *supra* note 35, at 108. "No two persons have exactly the same arrangement of [fingerprint] ridge patterns, and the patterns of any one individual remain unchanged through life." *Fingerprinting*, FUNK & WAGNALLS NEW ENCYCLOPEDIA, *supra* note 35, at 177.

288. "Forgery . . . is deliberately tampering with a written paper for the purpose of deceit or fraud. Common kinds of forgery include fraudulently signing another person's name to a check or document. . . . Skilled forgers can imitate a person's handwriting almost exactly." *Forgery*, THE WORLD BOOK ENCYCLOPEDIA, *supra* note 35, at 350. "[S]ignatures may change over time or may be falsified." FINGERPRINT, *supra* note 278, at 5.

289. See generally NAT'L NOTARY ASSOC., 1996 I.D. CHECKING GUIDE (1996) (providing a source, which is updated annually, for checking various types of ID documents, such as U.S. and Canadian driver's licenses, official state ID cards, immigration cards, military IDs, Social Security cards, credit cards and so on—due to the concerns about fraudulent IDs). "ID fraud will usually involve one of these problems: 1) Counterfeit [documents]. . . 2) Altered [documents]. . . 3) Forged [documents]." *Id.* at 3. Of course, alteration and forgery of documents of identification are major problems for notaries in the performance of their duty to positively identify document signers. Maintenance and preservation of a detailed journal record of each notarial act helps dramatically to deter the efforts of imposters and wrongdoers and, if they choose to proceed, either to foil their efforts during the course of a notarization or to provide valuable investigative information to find them after-the-fact. *Id.*

290. "[A] criminal may resort to plastic surgery to change a face. It's impossible, however, to surgically forge a fingerprint." FINGERPRINT, *supra* note 278, at 1. Moreover, while one's physical appearance will change over time, one's fingerprints are "permanent." *Id.*

291. "The thumbprint is the one component of a journal entry that cannot be forged." Barich, *supra* note 283, at 37.

292. See Closen, *supra* note 278 (suggesting that the right thumbprint of each signer of all documents of importance should be affixed thereto). The National Notary Association publishes loose notarial certificates which are offered for sale and which contain an optional section where the signer's right thumbprint can be placed. See <http://www.NationalNotary.org>, Item No. 5952 [2004]. "Increasingly, businesses and banks are using fingerprints to combat check fraud . . . . Daycare centers and schools provide fingerprinting programs for children to aid in the identification of runaways and kidnap victims." FINGERPRINT, *supra* note 278, at 4. "More than 10 percent of laptop

requirement of notary journal thumbprinting has served as a significant deterrent to identity theft and fraud in the real estate arena.<sup>293</sup> After all, most criminals would not knowingly want to leave a thumbprint at the scene of a crime, as evidence of their identity and involvement.<sup>294</sup> Of course, the scene of the crime for document frauds would be the notarized transactional document itself and the related notary journal entry.<sup>295</sup>

The widespread mandating of thumbprinting in notary journals to deter forgers and provide evidence of their crimes is long overdue. In fact, the Chinese and other peoples were using thumbprints and fingerprints to sign and verify documents far earlier than the time of the birth of Christ.<sup>296</sup> In the 1850s, Sir William Herschel was employing fingerprinting for the British in India "to prevent impersonation then common among the

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computers sold in the U.S. now come equipped with fingerprint sensors for access, and technology is rapidly being developed to replace keys for entry to houses, cars and businesses." *Putting a Finger on Identity Security*, NAT'L NOTARY, Sept. 2007, at 13.

293. Because of the serious and growing problem of real estate fraud, California implemented an experimental notary journal thumbprint requirement for certain real estate transactions in Los Angeles County in the period 1993-95, and that program was made permanent and expanded to the entire state beginning in 1996 as the result of the program's effects of deterring and reducing real estate fraud. See FINGERPRINT, *supra* note 278, at 85 (noting this chronology for the California thumbprint legislation). The pilot notary journal thumbprint program in Los Angeles was a "remarkable success," and it "dramatically reduced fraud." *Thumbprinting: 'The Notary's Best Anti-Fraud Weapon' Now*, NOTARY BULL., June 1995, at 13.

294. "No forger in his or her right mind would willingly choose to leave behind evidence that a crime was attempted." FINGERPRINT, *supra* note 278, at 32. "[M]any forgers would be leery of leaving their own true [thumb]print for fear of leaving evidence of a crime." Barich, *supra* note 283, at 37. See Barich, *supra* note 222, at 30 (relating a case in which an imposter's thumbprint in a California notary's journal was used to track down the perpetrator of a real estate fraud).

295. The scene of the crime for document fraud and identity theft by an imposter who signs a forged signature for notarization is really three documents: the transactional document (which is signed by the document signer), the separate notarial certificate attached to that document, and the related notary journal entry (which should be signed by the document signer). Furthermore, a thumbprint of the document signer could and should be affixed on the transactional document (near the signature) or on the notarial certificate (as is encouraged by the NNA's format on its loose notarial certificate) and in the notary journal entry for the notarization.

296. "Fingerprints have been found on ancient clay tablets and on old official documents as a kind of rudimentary signature." FINGERPRINT, *supra* note 278, at 12. See FUNK & WAGNALLS NEW ENCYCLOPEDIA, *supra* note 35, at 177 (pointing out that both the Chinese and Assyrians in ancient times employed fingerprinting in the signing of documents); THE WORLD BOOK ENCYCLOPEDIA, *supra* note 35, at 108 (stating "[h]istorians believe that the Chinese used thumbprints to sign documents long before the birth of Christ.").

people.”<sup>297</sup> Thumbprinting in notary journals, in both paper and electronic versions, would be a simple and inexpensive method to significantly improve the integrity of documents.<sup>298</sup> Thus, notarial journal thumbprinting would help to move notaries forward in time, in order to keep pace with security needs and technological advancements.

Disappointingly few statutes of the some 21 states and territories which expressly require the keeping of notary records prescribe any guidance about the detail needed for such records. The laws of several of those 21 jurisdictions provide, as noted previously, only for the keeping of a journal or of a “fair register” by notaries, without any description or explanation of what is meant by that phrase.<sup>299</sup> The result of such vague references on the actual, everyday functioning of hundreds of thousands of untrained notaries is a wide range of unsatisfactory recording practices. While many notaries create their own homemade and inadequately detailed journals, some professionally printed forms of journals are also deficient in their formats and/or in the thoroughness of the information specified to be recorded.<sup>300</sup> No

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297. *Id.* at 109. See FUNK & WAGNALLS NEW ENCYCLOPEDIA, *supra* note 35, at 177 (noting that “[i]n the 1890s the police in Bengal, India, under the British police . . . began using fingerprints to identify criminals.”); see also FINGERPRINT, *supra* note 278, at 12-13 (tracing briefly the history of developments in fingerprinting from the 1680s in Italy to the first fingerprinting of prisoners in the U.S. in 1903 in New York and in 1904 in Kansas, including Herschel’s efforts in India in the 1800s).

298. See Barich, *supra* note 283, at 37 (discussing the technology currently available to easily capture a thumbprint, such as with an inkless pad for traditional paper thumbprinting and with a print-scanning pad for electronic journalizing; and describing the thumbprinting procedure as so easy that a child could do it).

299. These items comprise the standard elements of a notarial certificate. Samples of four of the most common forms of notarial certificates containing the listed elements can be found in CLOSEN, *supra* note 2, at 115-17, and three sample certificates can be found in VAN ALSTYNE, *supra* note 7, at 232 and 234.

300. See, e.g., NOTARIAL RECORD BOOK, Atlantic Bonding Company (Ft. Lauderdale, Florida), n.d. (containing 16 pages printed in 5½” x 8½” format, with the journal entries running along the 8½” length, and printed in just 6 columns: (1) notarization date/time/type; (2) description of document [date, type, title]; (3) signature or thumbprint of signer or principal; (4) name and address of signer or principal; (5) description of evidence of identity; and (6) fee charged.). This journal format is barely adequate, for its spaces are far too small for the amount of information to be recorded. It was being distributed in the early 2000s by the Atlantic Bonding Company. It provides for only a signature or a thumbprint of the document signer, not both. See also J. OF NOTARY PUBLIC SERVICES, Intermountain Notary Institute (Salt Lake City, Utah) (1991) (containing 68 pages printed in standard 8.5” x 11” format, with the journal entries running across each 8.5” page with 5 entries on each page and with each of those entries being only 2” in height). That format is far too small and too crowded. No space is designated or set aside for the venue, for

state, and only one territory (Guam), actually checks to determine that notaries are recording sufficient information to serve the purposes of journalizing notarizations.<sup>301</sup> We are reminded of the truth behind the principle of “Murphy’s Law” which pronounces that: “If there is a wrong way to do something, then someone will do it.”<sup>302</sup> How many “someone’s” might there be among the millions of notaries, many of whom are under-informed and indifferent about their roles?

On the other hand, a small number of jurisdictions have adopted laws which establish in considerable detail the component elements to be recorded in notarial journals. For instance, the notary law of Hawaii<sup>303</sup> and Texas<sup>304</sup> list at least eleven specified items of information to be recorded for each notarization. The notary statute of the Northern Marianas prescribes at least nine items of information to be included in each journal entry,<sup>305</sup> while the statute for Missouri requires the recording of at least eight bits of information.<sup>306</sup> The Nevada notary statute identifies at least seven items of information to be recorded.<sup>307</sup> California has enacted the country’s most comprehensive notary journal statutes, requiring at least seven items of information and most often

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the printed/typed name of the signer, for indicating whether an oath or affirmation has been administered, or for the photograph or thumbprint of the signer. For the section entitled “the manner in which the person was identified,” the instructions advise only to note the “type of written ID relied upon,” not the expiration date. *Id.* at 4. These two record-books are far smaller and less substantial than the recent forms of the Nat’l Notary Assoc. Official J. of Notarial Acts, such as the 1994 and 2004 versions.

301. However, some states do occasionally pursue complaints against notaries that result from their failure to journalize or that disclose their failure to notarize as part of a broad ranging official investigation. See John T. Henderson & Peter D. Kovach, *Administrative Agency Oversight of Notarial Practice*, 31 J. MARSHALL L. REV. 857, 875-76 (1998) (discussing administrative agency oversight and discipline for the failure of notaries to maintain accurate registers of their official acts, in those states which statutorily require the keeping of such records). Here is what the Guam Attorney General’s Web site announces about inspection of notary journals:

The journals of all notaries who are renewing applicants will be inspected for compliance in the notary’s presence as provided for by 5GCA 33404. Please bring your journal with you when you are submitting your renewal application. If for any reason our office cannot inspect your journal at that time, we will give you an appointment for a later date.

FAERBER, *supra* note 15, at 131.

302. PLATT, *supra* note 127, at 234.

303. FAERBER, *supra* note 15, at 141.

304. *Id.* at 460.

305. *Id.* at 363.

306. *Id.* at 268. Indeed, Missouri notaries are directed to keep “a true and perfect record” of their official acts. *Id.*

307. *Id.* at 292.

several more pieces of data.<sup>308</sup> The California law (as mentioned above) is the only statute to mandate that notaries record in their journals the thumbprint of document signers for certain real estate transactions.<sup>309</sup> As would be expected, the Model Notary Acts have demanded detailed record-keeping. The 1984 and 2002 Acts set out at least ten pieces of information to be kept in each journal entry.<sup>310</sup>

Among the states which by statute require their notaries to maintain records, a number of them have published notary handbooks or manuals or maintain Web sites describing in some detail what information to record.<sup>311</sup> Thus, Kentucky notaries are advised to record at least nine items of information,<sup>312</sup> and Maryland notaries are advised to record at least eight items.<sup>313</sup> Previously, the Mississippi Secretary of State had recommended that notaries record at least ten items of information, but with the April 2007 issuance of administrative rules by the Secretary of State (noted earlier), there are now required components for notary journal entries.<sup>314</sup> Oddly, even several jurisdictions which do not require their notaries by statute to maintain journals have nevertheless published handbooks or Web sites that describe the contents of notary journals in some detail. The Ohio Notary Handbook<sup>315</sup> and the Vermont Guidebook for Notaries Public<sup>316</sup> each lists at least five pieces of information to be included in each journal entry; the Tennessee Notary Public Handbook lists at least

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308. *Id.* at 59.

309. *Id.*

310. MODEL NOTARY ACT § 4-102 (1984); MODEL NOTARY ACT § 7-2 (2002).

311. *See, e.g.*, IDAHO CODE § 51-120 (West 2008) (providing that “[t]he secretary of state shall prepare a handbook for notaries public.”); N.J. STAT. ANN. § 52:7-17 (West 2008) (establishing that “[t]he Secretary of State shall . . . print and distribute “to each applicant . . . a manual prescribing the powers, duties and responsibilities of a notary.”); VA. CODE ANN. § 47-1-11 (West 2008) (providing that: “The Secretary shall prepare . . . a handbook for notaries public which shall contain the provisions of this title and such other information as the Secretary shall deem useful. Copies of the handbook shall be made available to persons seeking appointment as notaries public and to other interested persons.”). “Most states have . . . published Notary handbooks, available in hard copy or even online.” Closen, *supra* note 17, at 25. *See also* David S. Thun, *Finding Government and Notary Resources on the Internet*, NAT’L NOTARY, May 2003, at 32 (pointing out that “[m]any states provide Web pages with information on Notary commissioning, laws and procedures. Some even provide online handbooks and forms a Notary can download.”).

312. FAERBER, *supra* note 15, at 189.

313. *Id.* at 218.

314. *Id.* at 258; *see also Proposed Notary Laws Across the Nation*, NOTARY BULL., Oct. 2007, at 15 (reporting the adoption under Mississippi Administrative Regulations of notary journal requirements).

315. FAERBER, *supra* note 15, at 375.

316. *Id.* at 477.



seven items of information to be included;<sup>317</sup> and the Wyoming Notary Public Handbook lists at least eight pieces of data.<sup>318</sup> The South Dakota Notary Public Handbook suggests at least nine bits of data to record in notary journal entries.<sup>319</sup> However, there is uncertainty about how widely known are the state Web sites and manuals among notaries. Besides the concern that official notary handbooks and Web sites do not possess the same legal force as statutes<sup>320</sup> is the concern that few notaries may study and abide by the suggestions or directions in those sources. Again, no state or territory actually supervises notaries closely enough on an ongoing basis to determine whether their record-keeping is adequate to achieve the goals of journalizing.

Journalizing should be regarded as a critical step during the performance of a notarization. If done most thoughtfully, the completion of the journal entry will be accomplished first, before the document signer executes his/her signature on the transactional instrument or acknowledges that a pre-existing signature thereon is his/hers, and before the notary completes the certificate of notarization.<sup>321</sup> The rationale for journalizing immediately prior to completing the certificate of notarization is compelling enough that the territory of Guam requires this sequence by its notary statute,<sup>322</sup> and a number of states recommend this sequence in their official notary manuals or handbooks—including Florida,<sup>323</sup> Georgia,<sup>324</sup> and Iowa.<sup>325</sup> When

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317. *Id.* at 447.

318. *Id.* at 530.

319. *Id.* at 438.

320. Such handbooks and online sites produced by administrative agencies, because of their official status, will undoubtedly carry some weight among both juries and judges in common law court decisions. “[T]he jury represents the community and its values . . . . In many tort cases, community values form the basis for moral judgment about the parties’ fault and justifications.” DOBBS, *supra* note 58, at 35. The official state agency notarial publications may, like administrative regulations, have an influence not only upon notarial performance but also upon legal standards of care for notaries. “[A]dministrative rules may have some effect in the tort process.” DOBBS, *supra* note 40, at 28.

321. The Georgia Notary Handbook actually recommends that notaries “may want to [record the pertinent facts about the notarization in you recordbook] as a first step.” FAERBER, *supra* note 15, at 124. See CLOSEN, *supra* note 2, at 110 (listing the steps required for the notarization of a signature on a document, the first of which is to “complete a journal entry”); Nevin Barich, *Good Journal-Keeping*, NAT’L NOTARY, May 2004, at 33 (opining that “[i]t’s . . . imperative that the journal be the first part of any notarization.”). Otherwise, “the signer may grab the document and leave after” the notary seal is affixed and before the journal entry is completed. *Id.*

322. FAERBER, *supra* note 15, at 130.

323. *Id.* at 113.

324. *Id.* at 124.

325. *Id.* at 175.

the journal entry is prepared at the beginning of the notarial process, it serves as a guide for the achievement of a thorough and accurate notarization.<sup>326</sup> Mistakes tend to result from the performance of tasks more hastily without the benefit of individualized guidance, rather than from more rigorous and pronounced procedures revisited step by step on each occasion. All of the information about the document signer that subsequently is recorded in the certificate of notarization will have already been captured in the journal entry, including an original signature in the journal that can be compared with the signer's signature on one or more documents of identification and on the transactional instrument to which the notarial certificate is attached. Thus, in every thorough notarial procedure, a meticulous notary will have had the advantage of seeing at least three signatures of the document signer to compare in order to help confirm the signer's true identity (and at least one and perhaps two of those signatures will have been presently executed with the notary observing).<sup>327</sup> Furthermore, when the notary journal entry is completed first, a document signer is prevented (1) from surreptitiously obtaining a completed certificate of notarization and then abruptly departing before the notary can secure the personal identifier information and the signer's signature in the journal, or (2) from fleeing the scene after the notarization is refused and before the notary can secure the identifier information and signature in the journal.<sup>328</sup>

To put it differently, a notarization is complete and official

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326. See *supra* note 32 and accompanying text. "[Journalizing] directs the notary into notarizing properly and error-free in each notarization." VAN ALSTYNE, *supra* note 7, at 186. See generally *Journal Entry Is First*, NAT'L NOTARY, Mar. 2003, at 39 (examining the reasons to complete the journal entry as the first step in the notarial process).

327. "[H]elpful in identifying a party's signature is a comparison of all the signatures made by that party in the Notary's presence [which would include the signature in the notary journal and the signature on the transactional document] with those on his identification cards." ROTHMAN, *supra* note 166, at 16. "To check for possible forgery, the Notary should compare the signature that the person leaves in the journal of notarial acts against the signatures on the document and on the IDs." NAT'L NOTARY ASSOC., *THE 1996 CALIFORNIA LAW PRIMER* 15 (16th ed. 1995). "[A] journal entry allows a Notary to compare three signatures in most cases: the one on the [transactional] document, the one in the journal, and the one on the identification card." Barich, *supra* note 222, at 31. See also the discussion about the "acknowledgment" form of notarization. *Infra* notes 329-31 and accompanying text.

328. Performing the journal entry first "will also ensure that the signer will not suddenly leave before you have all the information needed for your records," according to the Georgia Notary Handbook. FAERBER, *supra* note 15, at 124. "A good policy for the Notary is to complete the journal entry—and this includes obtaining a [thumb]print—before completing the notarial certificate. Such a practice prevents a signer from grabbing the document and leaving before a positive identification is made by the Notary." FINGERPRINT, *supra* note 278, at 86.

only when memorialized in a certificate of notarization. Certainly, if a journal entry were completed, but no certificate of notarization were executed, there would be no true notarization. “[E]very act done by [a notary] in his official capacity, and every step taken, becomes effective only if and when it shall have culminated in his official certificate.”<sup>329</sup> The correct sequence, then, is for the journal entry to be completed first, followed by the certificate of notarization.

A brief discussion of the type of notarization known as an “acknowledgement” is in order here. In the case of acknowledgments, document signers may lawfully execute their signatures on their transactional instruments prior to their appearances before notaries. During the notarization process, those signers are then legally required only to “acknowledge” that the previously executed signatures are theirs, not to presently sign the instruments.<sup>330</sup> Thus, if no journal entry is presently recorded for an acknowledgment, the document signer would not necessarily have to sign the transactional instrument in front of the notary and would not be asked presently to sign a notary journal entry.<sup>331</sup> The performance of a notarization without a signature being affixed in the presence of the notary constitutes a weakened procedure for notarization, one that contributes to the opportunity for document fraud and forgery by an imposter

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329. HUMPHREY, *supra* note 205, at 10. See CLOSEN, *supra* note 2, at 110 (concluding that “a legal notarization comprises the steps necessary to complete the certificate of notarization and any required journal entry,” with the journal entry being done first).

330. See CLOSEN, *supra* note 2, at 116 (setting out a standard form version of an acknowledgment). “For acknowledgments, the document may already have been signed long before it is brought to the Notary, but the signer must appear in person at the time of the notarization, be identified by the Notary and acknowledge the signature as his or her own.” TWELVE STEPS TO A FLAWLESS NOTARIZATION, *supra* note 228, at 20. See *Simple Rules for Dates*, *supra* note 267, at 47 (pointing out that “for acknowledgments, the date of the document signing can . . . precede the date of the notarization.”). See also CLOSEN, *supra* note 2, at 117 (describing an acknowledgement—“the signing of the document does not necessarily occur in the presence of the notary, but rather the confirmation or adoption of the signature by the signer happens in the presence of the notary.”).

Acknowledgment is a proceeding provided by law whereby a person who has executed an instrument in writing may, by going before a competent court or officer and declaring it to be his act and deed, entitle it to be publicly recorded and to be received as evidence without further proof of execution.

HUMPHREY, *supra* note 205, at 112.

331. Standard procedure for the maintenance of a notary journal is to obtain a present signature of the document signer in the journal entry itself. See *supra* notes 275 and 281-82 and accompanying text; see also CLOSEN, *supra* note 2, at 117 (pointing out that “if the notary follows the recommended practice of maintaining a journal, the signer will be required to sign the journal entry at the time of the appearance before the notary.”).

because such a cavalier process would fail to challenge an imposter to presently forge the victim's signature under the watchful eyes of a diligent and concerned notary. Maintenance of notary journals that include present signatures of document signers helps protect the integrity of acknowledgments, as well as other forms of notarizations.

It should be emphasized that, as many transactions are date-sensitive and even time-sensitive, the problem of errors in notarizations can complicate the transactions. Mistakes in notarizations should be corrected, but notarizations cannot legally be corrected after-the-fact (with the occasional exception in some states of the mistake of forgetting to place a seal upon the notarial certificate, which error may be corrected through the next day—and duly noted in the notary journal).<sup>332</sup> Generally, unless a mistake is discovered and corrected during the course of the notarial process while the document signer and notary public are still together, a change may not be made to a completed certificate of notarization or to a notary journal entry. The only way to effect a correction would be to perform a new notarization, bearing the present date on which the new notarization is executed.<sup>333</sup> Thus,

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332. See *Notaries Have Responsibility to Correct Their Certificates*, NOTARY BULL., Ap. 2002, at 6 (pointing out that “[e]rrors in the notarial certificate are the Notary’s responsibility to correct.”). But, the “correction” must be done properly. “It’s acceptable for the Notary to line through any incorrect information on the certificate [of notarization], write in the appropriate information, and initial and date the correction.” *Notarizing Documents: What You Can and Cannot Do*, *supra* note 262, at 43. “If the Notary makes a mistake in his notarial certificate and corrects it, he and all the parties should also initial the correction.” ROTHMAN, *supra* note 166, at 34. Probably, the most frequent type of minor error in a notarization is a problem with the notary seal impression.

If a seal impression is illegibly smudged or incomplete, another imprint should be made nearby on the same sheet of paper. The Notary should not try to restamp over the original image or write in missing words with pen and ink, an almost certain cause for document rejection by many recorders.

TWELVE STEPS TO A FLAWLESS NOTARIZATION, *supra* note 228, at 40-41. “If an error is made [in a notary register entry], draw a single line through it. Never erase or completely cross out or use any type of correction fluid.” PIOMBINO, *supra* note 216, at 34. Regarding the mistake of neglecting to place a seal upon the notarial certificate during the performance of the notarization, under some circumstances, the notary in question may impress the seal upon the certificate even after the notarization has been completed. See Larner, *supra* note 62, at 550 (discussing the distinguishing circumstances).

333. See *Notaries Have Responsibility to Correct Their Certificates*, *supra* note 332, at 6 (noting that “[d]ating the correction is only necessary if it is done on a date different from the date of notarization.”). See, e.g., *Hurley v. Johnson*, 779 N.Y.S.2d 771 (illustrating a case involving the correction of a notarization on a divorce agreement [an acknowledgement bearing defective language], where a new notarization was performed after proper acknowledgment language was added to the agreement and the parties signed

an undetected, material mistake in a completed notarization could jeopardize the validity of that notarization, and in turn the validity of a date-sensitive or time-sensitive transaction intended to be supported by the notarization. Journalizing at the beginning of the notarial process minimizes the prospects that mistakes will occur at all, and if mistakes should happen journalizing usually results in their immediate detection and correction while notarizations are still in progress.

Incidentally, a mistake subsequently discovered in a notarial certificate and brought to the attention of the notary who performed the erroneous notarization should be noted in the notary's journal, even though the original notarization cannot be changed and even though such a notation would not cure the defect in the original notarization. This notation in the journal should appear as a separate entry bearing the date the mistake was brought to the notary's attention and should cross-reference the earlier entry for the erroneous notarization. Also, the notary should add a note to the previous journal entry for the erroneous notarization to cross-reference the subsequent journal entry that records the circumstances about the mistake. If a new notarization is performed to correct the erroneous one, the details of that new notarization should be recorded in the journal.<sup>334</sup> Generally, these steps constitute the most that can be done to document a notarial mistake, and they represent the procedure an honorable notary would follow (even though it may amount to a confession of notarial negligence).

Once the journal entry has been completed (which signifies that the document signer has been satisfactorily identified and that the signer possesses the requisite volition and understanding

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and had their signatures notarized). Of course, a new notarization performed for the purpose of "correcting" an erroneous one must be noted by making a separate journal entry, with the two journal entries cross-referencing one another. See *infra* note 334 and accompanying text,

334. See *Correcting Mistakes*, NAT'L NOTARY, Mar. 2003, at 39 (discussing the procedure for correcting or re-notarizing when a mistake occurs in a notarial certificate, and emphasizing that "[r]egardless of the changes [notaries] make, whether correcting the certificate or re-notarizing the document, they should be noted in [the] Notary journal."). "Such requests [to correct or re-do a notarization] may be obliged, but only by performing a brand *new* notarization in the presence of the original signer, since there is really no such act as a 'renotarization' . . . . A new journal entry should also be completed, and the reasons for the second [notarization] of the same document should be noted under 'Additional Information.'" *Tip Sheet: 'Reacknowledgment'?*, NAT'L NOTARY, Sept. 1997, at 20. If an error were made in a journal entry itself and not discovered until the related notarization had been completed, then the journal could not be corrected. Instead, a separate journal entry should be made explaining the error, with the two journal entries cross referencing one another. *Id.*

of the nature of the instrument being signed),<sup>335</sup> the remaining two or three steps in the process can be carried out. If an oath or affirmation is to be orally administered to the signer by the notary, that ceremony should next be conducted.<sup>336</sup> Then, the document signer should sign or acknowledge her/his signature on the transactional instrument.<sup>337</sup> Finally, the notary should assure that the certificate of notarization is complete, including (1) the venue, (2) the date and time of the notarization, (3) the name of the document signer, (4) a description of the notarial act performed, (5) the signature of the notary, and (6) the notarial seal impression (as well as the expiration date of the notary commission if that information is not included in the seal impression).<sup>338</sup> Part of this final step is to fill in any of this

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335. According to the South Dakota Notary Public Handbook, "A notarization provides verification of a document signer's willingness to sign, his competence to sign, and that the signer is, indeed, the person identified by the signature." FAERBER, *supra* note 15, at 433. "Very simply, notarization functions to serve three purposes: take the signer's acknowledgment of an act and deed as willingly made and with an awareness of the import; ensure the signer's personal appearance before the Notary; and identify the signer." Deborah M. Thaw, *Notaries Face the Growing Challenge of 'True Identities'*, NAT'L NOTARY, Nov. 2007, at 9. The concept of document signer awareness should be distinguished from the legal standard of competency. *See generally* Klint L. Bruno, Comment, *To Notarize, or Not to Notarize... Is Not a Question of Judging Competence or Willingness of Document Signers*, 31 J. MARSHALL L. REV. 1013, 1043 (1998) (examining the duties of notaries and concluding that notaries are not authorized to undertake a legal analysis of the capacity of document signers or their volition when signing); Closen & Bruno, *supra* note 268, at 549-51 (1999) (concluding notaries should judge document signers' comprehension of the nature of their acts, not their legal competency.).

336. *See supra* note 271 and accompanying text. *See generally* Closen, *supra* note 231 (discussing the importance of, and procedures for administering, notarial oaths and affirmations, as well as the widespread failure of notaries to take the oath and affirmation administration responsibilities seriously).

337. *See supra* notes 330-31 and accompanying text (regarding the acknowledgment form of notarization).

338. *See* ROTHMAN, *supra* note 166, at 13-17 (discussing the elements of a certificate of acknowledgment). *See also* CLOSEN, *supra* note 2, at 110 (noting that these six elements are the standard features of notarial certificates in most jurisdictions). Notarial certificate forms vary from place to place. In some jurisdictions, certificates will refer to the manner in which the signer has been identified, and/or will refer the signer acting freely. For instance, regarding the acknowledgment form of notarization, it has been required that the voluntary nature of the act of signing be indicated in the notarial certificate. "The usual phrases are 'acknowledged that he executed the same as his free act and deed,' or 'acknowledged the signing thereof to be his voluntary act and deed.' Failure to include such statement will render the acknowledgment invalid." MEIER, *supra* note 104, at 27. Notice that if a journal entry is completed initially, the information sought in the certificate (other than the notary's signature and seal) will already appear in the journal.

information that does not already appear in the certificate.<sup>339</sup> As pointed out previously, the notarial certificate is most often permanently affixed as a continuation of the final page of the transactional instrument. However, sometimes a separate or so-called "loose" notarial certificate will be attached (usually by staple) to the transactional instrument.<sup>340</sup> A critical purpose of the notarial certificate is to identify the original instrument which bears the notarization of the signer's signature. Opportunities for document fraud are reduced substantially when the journal entries and certificates of notarization prevent the switching of the transactional instruments to other certificates of notarization, or vice versa.<sup>341</sup>

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339. Some of the information to be included in the notarial certificate may already have been typed or written by the document signer or someone other than the notary, but the notary ultimately bears responsibility for all information in the certificate—so the notary must review any language placed in the certificate by anyone else. "When filling out the certificate . . . if the venue is preprinted and incorrect, the Notary must line through the incorrect state and/or county, write in the proper site of the notarization and initial and date the change." NAT'L NOTARY ASSOC., THE 1996 CALIFORNIA NOTARY LAW PRIMER (16th ed. 1995), at 17. "The notary is under a duty of law to ensure every word of the acknowledgment certificate is true. . . . Once it has been signed and sealed, [the certificate of notarization] becomes the notary's own work product." VAN ALSTYNE, *supra* note 7, at 7. "[T]he notarial certificate is the notary's written attestation to the facts asserted therein. . . . The notary is personally liable for the accuracy, completeness and validity of the notarial certificate." *Id.* at 241.

340. No state law prohibits the use of loose or standard form notarial certificates. "It is a valid procedure in every state for the notary to create a notarial certificate on a separate page and attach it to the signer's document." VAN ALSTYNE, *supra* note 7, at 18. A few jurisdictions—such as California—encourage or require their use in some circumstances. A number of steps in the completion of journal entries and notarial certificates help to identify the original document. It will bear the original signature of the document signer which has been notarized. Its pages should be numbered, and the total number of pages will appear in the journal entry. The notary certificate will be attached to it, with that certificate bearing an original signature and an original seal impression of the notary. If an embosser seal is utilized it can be impressed through the multiple pages of a document, or the impression of an ink-stamp seal could be placed upon each of the pages of a multiple page document. Some notaries in states which mandate the use of ink-stamp notary seals will also utilize embosser seals to stamp through multiple page—especially the last page of the transactional document and its notarial certificate—making it exceedingly difficult for a scoundrel to forge or switch pages. Curiously, Van Alstyne recommends against the practice just described. "Your notary seal may not be used to indicate your notarization belongs to a documents [instead, it is the content of the notarial certificate which does so]. An unwise and forbidden practice many follow is to affix the notary seal on every page of the document along with the notarial certificate." *Id.* at 21.

341. See VAN ALSTYNE, *supra* note 7, at 21 (noting the possibility that a loose notarial certificate could be lost or stolen, and placed elsewhere than on its intended document). See also THE 1996 CALIFORNIA NOTARY LAW PRIMER,

Those are the three or four stages in a full and proper notarization of a document signer's signature. Note that what is notarized is the signature of the document signer; it is *not* the document which is notarized.<sup>342</sup> Realistically, a valid notarization should serve three principal purposes: (1) it should record the correct present date of the notarization; (2) it should identify the original transactional document to which the signature notarization applies; and (3) it should establish with a reasonable degree of certainty the true identity of the document signer, as well as the signer's volition in signing and understanding of the nature of the document that is signed. Each of these features is highly valuable to protection against document fraud.

The proper maintenance by notaries of journals of notarizations would virtually eliminate the most serious fault occurring in U.S. notarial practice, which is the notarizations of signatures for absent document signers.<sup>343</sup> Such notarizations are absolutely improper because they permit imposters and scoundrels to readily perpetrate document fraud. Most importantly, it is impossible for notaries to perform their utmost responsibility to verify the identity of signers who are not even present at notarizations. The law everywhere in the U.S. demands that document signers personally appear in the presence of notaries at the time notarizations are performed, with only the most trivial of historic exceptions.<sup>344</sup> Nevertheless, underinformed and

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supra note 339, at 17 (suggesting methods to "deter fraudulent removal and reattachment of a loose certificate.").

342. It has been said many times that notaries are not document police; they notarize signatures, not documents. The notarial certificate "is a state document created by [the notary] to authenticate the signature of a person on their document." VAN ALSTYNE, *supra* note 7, at 19. "A major reason most people incorrectly assume the notarization is part of their document, that it verifies its legality or enforceability, is because it traditionally appears immediately adjacent to the customer's signature." *Id.* at 20. "[N]otaries do not notarize instruments; they notarize the signatures on instruments." Closen & Orsinger, *supra* note 64, at 513. One reason for the confusion is that in ordinary conversation and writing, people tend to use the shorthand reference to "notarizing a document," rather than the longer and precise phrase "notarizing the signature on a document." And, we have undoubtedly been guilty of employing that shortcut in this paper.

343. Since the most important duty of the notary public is to positively identify document signers, notarizations for absent signers preclude notaries from honoring this most serious responsibility. See David S. Thun, *A Call to Action*, NAT'L NOTARY, Nov. 2004, at 21 (calling the personal appearance by the document signer "the most essential feature of notarization"). "Without the signer's physical presence, a Notary has no way of determining whether the signer is being coerced or is signing the document willingly, or even whether the person claiming to be the signer is actually who he or she claims to be." *Id.*

344. "[E]very Notary statute requires the presence of document signers at notarizations." Closen, *supra* note 17, at 25. Historically, there was a



indifferent notaries regularly allow themselves to become the pawns of imposters and scoundrels who falsely claim to be presenting documents previously signed by the absent individuals and to be doing so with the authority of those individuals.<sup>345</sup> Even more incredible is that notaries sometimes prepare certificates of notarization for unsigned instruments.<sup>346</sup>

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questionable notarial practice known as proof of execution by a subscribing witness, in which a document signer did not have to appear before a notary at all, provided another individual appeared and vouched under oath that a signature already present on a document belonged to the signer whose name was signed. For instance, California notaries, at an earlier time, were authorized to perform notarizations through the use of subscribing witnesses. THE 1996 CALIFORNIA NOTARY LAW PIMER, *supra* 339, at 24. Obviously, this troublesome procedure allowed the witness to be a kind of quasi-notary, and opened the door to serious risks of abuse and fraud. "Because of their high potential for fraudulent abuse, proofs [of execution by subscribing witnesses] should only be used as a last resort." *Id.* at 35. Thankfully, this antiquated notarial procedure has been abolished in nearly all jurisdictions. As examples, various forms of the subscribing witness procedure are permitted in Pennsylvania, Tennessee, Virginia and the Virgin Islands. See FAERBER, *supra* note 15, at 400 (PA), 441 (TN), 480 (VA), 494 (VI).

345. "[I]n fraud cases . . . crooks don't have to recruit [notaries]. [The notaries] are negligent . . . [so they play into the hands of the crooks]," according to San Bernadino County Sheriff's Detective Chris Christopher. David S. Thun, *Training, Good Journal Entries Help Stop Fraud—But More Is Needed*, NOTARY BULL., Oct. 2007, at 13. As a result of a 1989 survey of 220 New York notaries, "[I]t was reported that the overwhelming majority of [their notarial] acts were performed in a cavalier manner." PIOMBINO, *supra* note 216, at xxii. See ATLANTIC BONDING COMPANY, NOTARY PUBLIC STATE APPROVED EDUCATION COURSE 31 (2002) (stating that in Florida "[t]he majority of the complaints [filed against notaries], about 75 percent, are violations of the presence requirement."). See, e.g., *Glisson*, 532 S.E. 2d 442 (illustrating a case in which a notary confessed to notarizing for absent document signers on a number of occasions); *Leiffer*, 673 So. 2d 68 (demonstrating a case where a notary notarized for absent document signers); *Yerkes v. Asbery*, 938 S.W.2d 307 (Mo. Ct. App. 1997) (representing a case in which a notary notarized the signature of an absent signer on a real estate deed); *Eason v. Bynon*, 781 So. 2d 238 (Ala. Civ. App. 2000) (sending a case to trial in part on the question of whether the notary notarized for an absent document signer, where the signer denied having signed in the presence of the notary). For additional examples of the many other reported cases of notaries notarizing for absent signers, see *Howe v. Johnston*, 660 N.E.2d 380 (Mass. App. 1996); *McWilliams v. Clem*, 743 P.2d 577 (Mont. 1987); *Butler*, 918 S.W.2d 697; *Florey*, 676 So. 2d 324; *Butler v. Olshan*, 191 So. 2d 7, 16 (Ala. 1966); *Iselin-Jefferson Fin. Co.*, 549 P.2d 142; *Commw. v. Am. Sur. Co. of N. Y.*, 149 A.2d 515 (Pa. Super. Ct. 1959); see also *The Cost of Carelessness*, NAT'L NOTARY, Nov. 2001, at 31 (discussing a lawsuit filed due to an alleged \$600,000 fraud perpetrated after a son succeeded in getting a notary to notarize his absent mother's signature on a power of attorney as a favor because his "mom can't come"); *Attorney General Alleges Scam Violated Notary Laws*, NOTARY BULL., Apr. 2002, at 9 (reporting a series of alleged frauds in which signatures of consumers were subsequently notarized without the signers being present).

346. According to Sheriff's Detective Chris Christopher of San Bernadino

When only certificates of notarization are completed to evidence notarizations, there is virtually nothing on the faces of those certificates to verify that the signers were really present at the times of the notarizations.<sup>347</sup> The signatures of document signers might have been executed before, or even after, the notarial certificates were completed. Since the notarial certificates and the underlying documents to which they are attached usually originate from sources other than the notaries and are always removed from the possession of the notaries, it is possible for forged document signers' signatures to be affixed before or added after notarizations if notaries are lax in their duties. Remarkably, this serious fault happens so often that notarizing for absent document signers is one of the most frequent complaints brought to the attention of notary oversight agencies.<sup>348</sup> Similarly, it appears that one of the most frequent notarization-related complaints brought against attorneys before lawyer discipline agencies is the notarization for absent document signers.<sup>349</sup>

However, if notary journal entries are prepared, the personal

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County, California, "[Some] Notaries will stamp [notarize] 150 blank deeds at a time for an employer. It may seem efficient, but it's illegal and perpetrates fraud." Thun, *supra* note 345, at 13. See generally *Kennedy*, 766 N.E. 2d 151 (finding that a notary had affixed notarizations on documents before they were even signed).

347. In all of the many instances cited throughout this paper in which notaries were found to have notarized for absent document signers, it was never the case that the signer's absence was revealed by something on the face of the notarial certificate. Rather, the evidence of the signer's absence was always found elsewhere, such as from the testimony of the notary, of the signer or of a third party. See *supra* notes 228 and 345 and accompanying text.

348. "The most frequent and most serious omission by Notaries is the failure to require the presence of document signers. This glaring failure permits imposters and other scoundrels to commit fraud." Closen, *supra* note 17, at 25. See Marc A. Birenbaum, *Enforcing the Law*, NAT'L NOTARY, Sept. 1997, at 11, 13 (reporting that among complaints filed against notaries in administrative agencies, "[m]any were prompted by the lack of personal appearance of a signer and, typically, involved allegations of forgery or fraud", and that for the year 1995 in Pennsylvania the second most frequent violation among notaries found by the Department of State was the "failure to require personal appearance").

349. See Charles N. Faerber, *Law Text a Landmark*, NAT'L NOTARY, July 1997, at 8 (concluding that "[a] dilemma well-known to many practicing Notaries is that of the attorney who insists on the performance of an improper notarial act—typically, notarization of the signature of an absent person."); *Maintaining Ethics While Notarizing for Clients*, NOTARY BULL., Feb. 2003, at 13 (quoting attorney Hal Lieberman as concluding that "the most common type of improper notarization that occur[s] among attorneys" is "[n]otarizing a signature when the signer has not in fact executed the document in front of the Notary/attorney."). See also *Notary Pays For Mistake*, NAT'L NOTARY, May 2003, at 39 (reporting the case of Louisiana attorney-notary Elbert Guillory who admitted "he notarized signatures of persons not present").

appearance of document signers for notarizations is almost absolutely guaranteed. Proper notary journals are permanently bound or electronically secure and chronologically created,<sup>350</sup> and they capture signatures of present document signers.<sup>351</sup> Since notary journals belong to the notaries and remain in their sole possession, the signatures of document signers in these chronologically kept journals virtually assure that the signers actually appeared at the times the notarizations were performed. Proper notary journal entries would not be subject to forgery, tampering, or completion out of chronological sequence.

A signature fraud involving, both a certificate of notarization and a notary journal, could only be successfully completed if there was a wantonly negligent notary who was not a co-conspirator in the fraud. First, a previously signed instrument or an unsigned instrument of an absent signer would have to be presented to a notary willing to notarize the signature or the blank signature space.<sup>352</sup> Second, the notary would also have to be willing to prepare a partial journal entry, leaving the document signer's signature space (as well as any spaces for the signer's photograph and thumbprint) blank at the time of the notarization. Third, the notary would have to accept the assurance of the party tendering the previously signed or unsigned document that the absent signer (really an imposter) had approved of the procedure and would subsequently appear and sign the journal entry.<sup>353</sup> Fourth, the purported absent signer would have to in fact appear at a later time and actually sign a forged signature into the journal (and perhaps to pose for a photograph and to leave an original thumbprint), and the signature would need to appear reasonably similar to the one rendered originally on the document at the time of the notarization.<sup>354</sup> All of this would be highly unlikely. What

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350. See *supra* note 264 and accompanying text.

351. See *supra* note 275 and accompanying text.

352. Unfortunately, notaries have been quite willing to notarize under these improper circumstances. So, this first step would not be unlikely to occur. See *supra* notes 343-46 and accompanying text. However, these improper notarizations are rarely coupled with truly fraudulent or criminal intentions of the notaries involved to injure or damage the parties involved, as would be required for a number of the subsequent steps to occur. Instead, notaries are often duped by clever wrongdoers, or notaries are simply so indifferent and uninformed about their duties that errors and omissions occur.

353. This step and the next one would be so extreme as to be highly unlikely to occur. For one thing, notary journals are permanently bound and chronologically kept, so that if the absent signer never appeared the journal entry either would remain incomplete or would have to be forged. This incomplete or forged paper journal would then constitute solid written evidence of misconduct.

354. This step seems virtually out of the question. What criminal is going to return to the scene of the crime? There would be the twofold danger either of being detected and captured, or at least of leaving additional incriminating

criminal imposter is going to voluntarily return, and submit to photographing and/or thumbprinting? No case like it, or even remotely like it, is known to have occurred.

After notarizations have been performed, journal entries can prove valuable to notaries, the parties to notarial challenges, and to government agents investigating document fraud and identity theft. Journal entries can serve as written reminders, both inside and outside of courtrooms, to refresh the recollections of notaries about notarizations previously performed, sometimes months and often years before.<sup>355</sup> Moreover, journal entries would constitute admissible evidence of what transpired at the earlier notarizations. Journal entries qualify for admission under the business record exception to the evidence rules against hearsay, provided such journals are regularly kept in the course of the official work of the particular notaries involved.<sup>356</sup> Similarly, the completion routinely and thoroughly of journal entries would tend to demonstrate that the notaries who had prepared them had exercised reasonable care and had not been negligent.<sup>357</sup> As Professor Michael Saks explained, “[a] person’s habit or the routine practice of a business are admissible [under the law of evidence] as tending to prove they behaved in a particular way on

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evidence—especially if a photograph or thumbprint were sought and obtained.

355. *Meyers v. Meyers*, 503 P.2d 59, 63 (Wash. 1972), (noting that the court wrote that a notary could testify from “his recollection, refreshed by records kept” about his business habit regarding the method used to identify document signers. See *Barich*, *supra* note 321, at 33 (referring to the possible need for a notary “to rely on a complete journal entry to jog your memory in a deposition or trial”). “If a Notary is asked to recall a notarial act from months or years earlier, a journal entry can refresh the Notary’s recollection of a particular notarization.” *Closen*, *supra* note 17, at 27. “An accurate [notary] record could be critically important, especially if a number of years had passed since the notarial act was performed.” *PIOMBINO*, *supra* note 216, at 34. See Fed. R. Evid. 803(5) (setting forth the “recorded recollection” hearsay exception). In the case discussed at length in Part XI, more than five years had elapsed after the notarization in question and before the discovery of the document fraud and filing of a lawsuit, and nearly ten years had passed between the time of the challenged notarization and the trial. *Infra* notes 880-911 and accompanying text.

356. The Washington Supreme Court stated that the business habit of a notary as to the notary’s method of identifying document signers could be shown “by the introduction of his records under the Uniform Business Records Act.” *Meyers*, 503 P.2d at 63. See FED. R. EVID. 803(6) (creating a hearsay exception for records of regularly conducted business activity).

357. “Completing a journal entry establishes that a Notary acted with reasonable care to avoid negligence.” *Closen*, *supra* note 17, at 27. “Faithful journalizing establishes one’s reputation and credibility as a competent and accurate notary.” *VAN ALSTYNE*, *supra* note 7, at 186. Evidence of a notary’s journalizing in the form of the journal itself is far more persuasive than mere statements from a notary claiming diligence in performing notarizations. As the famous proverb recites: “Actions speak louder than words.” *DALE*, *supra* note 24, at 17.

a particular occasion.”<sup>358</sup> The written information in journal entries can also be utilized to cure defects in certificates of notarization, including not only to supply information omitted from such certificates but also to correct information recorded erroneously in them.<sup>359</sup> Notarial certificates attached to transactional instruments may be rendered illegible in whole or in part, or such certificates may be lost entirely (such as can happen with loose notarial certificates or with instruments the last pages of which contain only the notarial certificates). The entire original transactional document along with the certificate of notarization may be lost or destroyed. In such instances, notary journal entries can confirm that valid notarizations were performed.<sup>360</sup> Moreover, when notaries die, move out of the state of their commissioning, or otherwise become unavailable to testify, their notary journals—duly and regularly kept in the course of their official functioning—should be housed in the files of their state notary oversight agencies and should be available to serve as evidence about the circumstances surrounding notarizations they had performed.<sup>361</sup> Lastly, the detailed information contained in journal

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358. Saks, *supra* note 98, at 281. See FED. R. EVID. 406 (stating: “Evidence of the habit of a person . . . is relevant to prove that the conduct of the person . . . on a particular occasion was in conformity with the habit or routine practice.”).

359. See *Eveleigh v. Conness*, 933 P.2d 675 (Kan. 1997) (holding that defective language in a notarial certificate can be cured by evidence from another source—in this case testimonial proof of the actual administration of an oath, although mere acknowledgment wording rather than jurat wording had been included in the certificate). “[V]arious kinds of evidence may be available to cure or minimize the fault or faults in a notarization.” such as where “the notarized document or the journal entry contains information sufficient to convince a court that an error should be overlooked.” Michael L. Closen, *Must Notaries Be Perfect? The Truth Is, Courts Sometimes Forgive Errors*, NOTARY BULL., Apr. 2004, at 7.

360. “[L]et it be remembered that often such instruments [as deeds] are lost or destroyed before filing for permanent record, and thereupon the notary’s record becomes the only official one of the instrument’s execution.” HUMPHREY, *supra* note 205, at 233. According to the South Dakota Notary Public Handbook, “If a notarization certificate is lost or damaged, a notary can refer to the journal entry to verify prior existence and purpose.” FAERBER, *supra* 15, at 438. The North Dakota Notary Public Handbook explains: “If a notarized document is lost or altered, or if certain facts about the transaction are later challenged, the journal becomes valuable evidence that can both protect the rights of property owners and help notaries defend themselves against false accusations.” *Id.* at 356. See, e.g., *Schwab v. GMAC Mortgage Corp.*, 333 F.3d 135 (3d Cir. 2003) (illustrating a case in which the original mortgage document had been lost, thereby preventing the determination of whether it bore the required notarization).

361. “In the event that a Notary resigns, fails to renew his notarial commission, vacates his office, is removed from his office, or dies, his official record book . . . should be forwarded to the city, county, or state office responsible for keeping records of Notaries Public.” ROTHMAN, *supra* note

entries can be of great assistance to police, prosecutors, and other government officers who investigate wrongdoing in connection with document forgery and fraud.<sup>362</sup> Particularly useful to investigators might be the information about purported signers' addresses, telephone numbers and identification documents, and their photographs, thumbprints and handwriting samples (in the form of their purported signatures). In regard to the notary journal requirement contained in the 2003 Massachusetts Governor's Executive Order on Standards of Conduct For Notaries Public, the NNA concluded, "[t]his requirement is widely recognized as a critical element in helping law enforcement prosecute forgers and other imposters."<sup>363</sup>

The detailed information contained in journal entries will clearly indicate that notarizations have been properly performed (or at least performed in substantial compliance with legal requirements),<sup>364</sup> or to the contrary that notarizations have been invalidly done. Either way, the presence of journal entries will tend to preempt or resolve disputes about the validity of notarizations and to avoid protracted legal battles. Most commonly, journal entries will support the legitimacy of notarizations, which will culminate in outcomes consistent with the good faith intentions of document signers and notaries public to uphold notarizations in almost all cases.<sup>365</sup> That result fosters

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166, at 35-36. See *infra* notes 420-38 and accompanying text. The relevant notary journal record of a deceased notary was admitted into evidence in the landmark case of *Nicholls*, 21 U.S. 326.

362. See generally Thun, *supra* note 345, at 13. (setting out the high praise of San Bernadino Sheriff's Detective Chris Christopher for the value of meticulously kept notary journals in assisting law enforcement officers in investigating document fraud). "[P]rosecutors may be aided by the journal evidence in bringing forgers to justice." MODEL NOTARY ACT § 7-2 cmt.

363. Armando Aguirre, *Massachusetts Governor Enacts Sweeping Changes to Notary Laws*, NAT'L NOTARY NEWS RELEASE, Dec. 23, 2003, at 1.

364. The general rule is that notarial acts need not be perfectly performed, but rather that they need only be performed in substantial compliance with legal requirements. Thus, one or more technical flaws in a notarization may not invalidate it. See, e.g., *In Re Medlin*, 201 B.R. 188 (Bankr. E.D. Tenn. 1996) (holding that a notarization on a deed of trust was not invalidated by the omission of its date); *Waldrop v. Commw.*, 478 S.E.2d 723 (Va. Ct. App. 1996) (finding that a jurat notarization was effective even though no oral oath had been administered by the notary because the written form stated it was signed "under penalty of perjury"); *Gargan v. State*, 809 P.2d 998, 998 (Alaska App. 1991) (finding that an oral oath not necessary to make the notarized statement a sworn statement); *Farm Bureau Fin. Co. v. Carney*, 605 P.2d 509, 509 (Idaho 1980) (illustrating a case in which more than one notarial error was insufficient to invalidate the notarization). *But see In Re Marsh v. Fleet Mortgage Group*, 12 S.W.3d 449 (Tenn. 2000) (finding the absence of a notary seal to be a fatal defect in a document notarization). See generally Closen, *supra* note 359, at 7 (discussing the substantial notarial compliance doctrine).

365. There is a well-established legal doctrine called the presumption of validity of the acts of public officials, including notaries public. See Closen,

commerce and the public interest, and as well supports notaries and the notarial system.

While progress in technology has enhanced the opportunities of wrongdoers to optimize their efforts at identity theft, commercial fraud, and domestic and international terrorism, these same technological advances have provided the basis for better security of instruments and transactions and for improved investigation and prosecution of high-tech criminals.<sup>366</sup> In 2003, under the registered trade name of ENJOA, which stands for Electronic Notary Journal of Official Acts, the National Notary Association introduced an electronic record-keeping system that includes all of the features and benefits of traditional paper-bound notary journals, as well as several advantages beyond the technological capability of paper journals, and that has been upgraded since then.<sup>367</sup> At its most basic level, ENJOA allows notaries to record the very same data that can be written in paper

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*supra* note 59, at 681-85 (discussing the presumption of validity of the acts of notaries public). The outcome of this presumption is to uphold notarial acts, which is presumably what document signers desire when they obtain notarizations of their signatures. "The party requesting the notarization has come before the Notary because he wants his oath or acknowledgment to have special significance." ROTHMAN, *supra* note 166, at 30-31.

366. See Howard P. Segal, Automation And Computerization, OXFORD COMPANION TO UNITED STATES HISTORY (2001), at 56 (noting that "[a]t the end of the twentieth century" some see "technological progress . . . as, at best, [having] profoundly mixed blessings."). "[S]ophisticated fraud techniques have been out-pacing fraud-deterrent measures that may have worked in 1903 but are ineffective in 2003." Milton Valera, *Respecting the Past, Embracing the Future*, NAT'L NOTARY, July 2003, at 20. See also Deborah M. Thaw, *Technology Leads Us to a Brighter Future*, NAT'L NOTARY, July 2003, at 7 (opining that if the 4.5 million U.S. notaries used the ENJOA, "document fraud could be virtually eliminated."). "eNotarization is safer and more secure than traditional paper notarization because the documents are rendered tamper-evident after the Notary's electronic signature and seal are affixed. Interested individuals also can validate the Notary's signing credential in real time by checking an online registry." Kelly Rush, *The Real Seal*, NAT'L NOTARY, Jan. 2008, at 39.

367. See generally David S. Thun, *Into the Future of Notarization*, NAT'L NOTARY, July 2003, at 18 (describing the ENJOA procedure and pointing out its benefits) [hereinafter *ENJOA*]; Valera, *supra* note 14, at 20 (discussing the advantages of ENJOA). ENJOA "offers all Notaries right now a practical and secure way to record their official acts." *ENJOA*, *supra* at 21. ENJOA is "compliant with notarial recordkeeping laws in every state." *Id.* "ENJOA walks the Notary step by step through the signer identification and recordkeeping processes." Valera, *supra* note 14, at 20. ENJOA will not permit the recording of an entry to proceed unless each step is properly completed. *ENJOA*, *supra* at 23. The latest version of ENJOA is ENJOA 3.0, which is "More Than an Electronic Journal . . . It's an eNotarization Platform!" *ENJOA 3.0 Is Here*, NAT'L NOTARY, July 2007, at 3. The MODEL NOTARY ACT of 2002 specifically approves of the maintenance of an electronic notary journal. MODEL NOTARY ACT § 7-5.

journals.<sup>368</sup> Furthermore, like bound paper journals, ENJOA entries are made and dated chronologically to insure authenticity and to help protect against subsequent tampering, and ENJOA entries include electronic signatures of document signers to guarantee that such signers personally appear before notaries at the times of the notarizations.<sup>369</sup> Also, like many paper journals which include designated areas to obtain thumbprints of document signers, ENJOA has the capacity to capture an electronic version of a thumbprint.<sup>370</sup> It can also capture a photograph of a document signer.<sup>371</sup>

Because of its computer-based technology and Internet-linking potential, ENJOA outperforms the standard paper notary journal in a number of important respects. ENJOA is programmed to prohibit a notarization from proceeding unless and until each step in the record-keeping process is completed. It also prevents any changes to notarial entries once they are saved.<sup>372</sup> Notarizations should, therefore, be more accurate and secure. Because ENJOA allows notaries to obtain electronic signatures, thumbprints and photographs of document signers, it should deter imposters and forgers from attempting to commit document frauds or identity thefts.<sup>373</sup> Storage and transmission of ENJOA's electronic data will be far less cumbersome and costly than is the case with hardbound paper journals.<sup>374</sup> With ENJOA in place, legitimate accessing of data will be better facilitated and protected against unintentional disclosure, unauthorized retrieval, and

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368. *ENJOA*, *supra* note 367, at 21. With ENJOA, "the Notary can . . . use the computer to type in journal information . . . much like a traditional paper journal entry." *Id.* at 25.

369. Valera, *supra* note 14, at 20; *ENJOA*, *supra* note 367, at 19, 21.

370. *Id.* at 19.

371. *See id.* at 27 (explaining that ENJOA has the capability to permit document "signers to write their signatures electronically in the journal," to record "a signer's fingerprint electronically for journal entries," and "to take a photograph of the signer for the record.")

372. Valera, *supra* note 14, at 20; *ENJOA*, *supra* note 367, at 21, 23. "To keep Notaries from accidentally missing a step and inadvertently omitting critical journal information, ENJOA halts the process and warns the Notary when any necessary data has not been entered." *Id.* at 25. "[I]nformation [recorded by ENJOA] is electronically saved and encrypted so that no one can gain access without a password, allowing entries to be viewed and printed out, but not altered. Only the Notary, through a thumbprint scan, may create an entry." *Id.* at 27. The step-by-step ENJOA system for making a journal entry "ensures a proper entry each time." *Id.* at 25.

373. *ENJOA*, *supra* note 367, at 19. "If every Notary utilized ENJOA, the process of notarization would be a virtual guarantee that the execution of any document would be free of fraud. What imposter would knowingly leave a thumbprint and photo at the crime scene?" Valera, *supra* note 14, at 20.

374. Valera, *supra* note 14, at 20. It is predicted that in the future ENJOA will allow notaries to send journal entries from their databases through secure channels to county recorder's offices. *ENJOA*, *supra* note 367, at 25.



misuse of confidential information (as will be more fully addressed below).<sup>375</sup> ENJOA is being used, and it appears that ENJOA is becoming the accepted mode of record-keeping for more and more notaries.<sup>376</sup> Most significantly, whether a notary elects to utilize the standard paper-bound journal or the Electronic Notary Journal of Official Acts, the primary concern expressed in this paper will have been remedied, namely that the government official who performs notarizations will have prepared and retained a detailed record of those official acts.

May notaries maintain more than one active journal at the same time?<sup>377</sup> Perhaps, some notaries want to keep one journal at the office, and another at home without having to carry one journal book back and forth. Maybe, in this age of the electronic notary journal, some notaries may have computer access at the workplace, but not at home, or some notaries may not have laptop computers to carry back and forth. These notaries may want to keep an electronic journal at work and a traditional paper record book at home. It might seem at first glance that each of the notaries just described would then have two active journals. Yet, if a notary prepares his/her journal properly, there can be just one active journal.

Notaries should not simultaneously maintain two or more active journals. Two journals pose twice the risk of loss and twice the risk of breach of the security of confidential information recorded therein. The keeping of more than one journal might also more readily permit unscrupulous notaries to falsify the dates and/or times of notarizations to perpetrate frauds or cover up

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375. *ENJOA*, *supra* note 367, at 21. "ENJOA allows a Notary to create a printed hardcopy of [individual] journal entries." *Id.* at 25.

376. "In the year since the NNA's ENJOA was introduced, Notaries around the country increasingly are using the device to keep their official records. Some of these 'e-journalists' are signing agents." Charles N. Faerber, *Notary Signing Agents Are Already Taking E-Journals on the Road*, NOTARY BULL., June 2004, at 5. The step-by-step ENJOA system for making a journal entry "ensures a proper entry each time." *ENJOA*, *supra* note 367, at 25. See CLOSEN, *supra* note 2, at 22 (observing that "[t]echnology advances, and then the law responds or reacts."). "As new methods of communication have been introduced and applied on a wide scale to commerce, legislatures and courts have been called upon to set the standards for commercially reasonable and fair practices." *Id.* Some jurisdictions are moving to expressly recognize the authority to maintain electronic journals in their notary statutes. See, e.g., FAERBER, *supra* note 15, at 460 (Texas), 470 (Utah). The MODEL NOTARY ACT of 2002 also expressly permits notaries to create and maintain electronic notary journals. MODEL NOTARY ACT § 7-5.

377. The NNA correctly and strenuously suggests that each notary should maintain one, and only one, active notary journal, for this procedure constitutes the only way that a notary can maintain a chronologically secured record of his/her notarizations. The MODEL NOTARY ACT of 2002 and the notary law of Arizona, California and Massachusetts take the same position. See *infra* notes 378-79 and accompanying text.

mistakes and wrongdoing.<sup>378</sup> Arizona, California and Massachusetts law, as well as the Model Notary Act of 2002, limit notaries to the maintenance of one, and only one, active journal.<sup>379</sup> Incidentally, the limitation to one active journal does not prohibit notaries from maintaining a back-up record of an electronic journal<sup>380</sup> or from retaining their old notarial records.<sup>381</sup> The way to maintain a single notary journal, even if entries appear in more than one record book, computer site, or combination thereof is for the notary to number each entry sequentially, in only one sequence, regardless of how many places entries may be recorded.<sup>382</sup> Of course, each entry will also bear the present date and time, and thus the numerical sequence will match the chronology of the date and time of the entries. The fact that ENJOA automatically notates date and time heightens the security with electronic records.<sup>383</sup> The joint sequential numbering

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378. See *No Multiple Journals*, NAT'L NOTARY, July 1997, at 8 (concluding that "if recordkeeping is divided between two or more journals, no single journal can show a true and complete chronology of the Notary's official acts."). "[T]wo journals double the problem of safeguarding the official record of notarial acts." *Id.* at 21.

379. MODEL NOTARY ACT § 7-1 (c) (2002) (announcing that "[a] notary shall keep no more than one active journal at the same time."); see also FAERBER, *supra* note 15, at 36 (Arizona), 228 (Massachusetts—by executive order) and 59 (California). Interestingly, Oregon law expressly allows notaries to maintain "one or more chronological journals of notarial acts." *Id.* at 395.

380. Standard procedure for cautious individuals to is back-up important computer files, in order to guard against the loss of data through human error or technological faults. Even the maintenance of an exact duplicate copy (photocopy) of a traditional paper journal would not be considered a violation of the rule against keeping more than one active notary journal, because its nature as a duplicate would be conspicuous and because it would not provide an avenue to unscrupulous individuals to tamper with the chronological sequence of journalizations. See MODEL NOTARY ACT § 7-1(c) (providing that "a back-up record of an electronic journal may be kept to offset potential loss of the original journal."). This provision "recognizes that since electronic records are subject to loss or impairment due to the vagaries of computer operation, a notary may create a back-up record." *Id.* § 7-1 cmt.

381. Of course, when traditional paper journals are utilized, once a record-book is filled to capacity, another journal must be opened. The filled books are no longer "active" in the sense that they continue to receive new data entries, but the filled books constitute important records which must be securely kept.

382. To illustrate, let us say a notary uses ENJOA at work and performs and records three notarizations electronically numbered 1-3 on a Friday. Then, at home that weekend, the same notary executes one notarization and records it in the notary's traditional paper record book at home as entry number 4. The next Monday at work the notary would record the next notarization as number 5 in ENJOA. And so forth.

383. Obviously, with traditional paper journals, the notary inputs the data about the date and time of the notarization, which allows for human error and intentional wrongdoing (although minimized by the chronological order of recording in a securely bound journal). Further, some notaries do not record the time (but only the date) of a notarization in their paper journals. None of

system indicates that the notary has but one active journal system for all of the notary's official acts.

Access to the contents of traditional and electronic notary journal entries constitutes a particularly troublesome modern issue because of concerns ranging from violations of the rights of individuals' privacy, to the misuse of information to commit ordinary commercial fraud, identity theft, and even stalking and the violence potentially related thereto.<sup>384</sup> Scoundrels bent on doing their misdeeds could make use of several items of data contained in standard notary journal entries, including individuals' names, addresses, telephone numbers, replica signatures, transaction types and dates, and information from documents of identification. Incidentally, some underinformed notaries obtain identification document information that should not be recorded for ID purposes in journal entries, such as Social Security numbers, driver's license numbers and credit card numbers, because that kind of information could be especially valuable to criminals in search of victims.<sup>385</sup> Contributing to

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these faults can occur with ENJOA.

384. "Because a notary is a commissioned public official, there is considerable confusion about whether their journals become public records that are therefore open to public view and copying." Closen & Orsinger, *supra* note 259, at 6. After all, it has generally been thought that public officials create public records, and that public records are available to the general public. "Public records are generally open to view by the public." BLACK'S LAW DICTIONARY, *supra* note 176, at 1279. The official commentary to the MODEL NOTARY ACT of 2002 is replete with remarks about such privacy and confidentiality concerns. Regarding notary journals, the Act's commentary asks, "what entries are appropriate," and "who should have access to a journal"? MODEL NOTARY ACT ch. 7, general cmt. The commentary goes on to point out "[t]he Act . . . recognizes that there is a tension between principals' privacy rights and the right of the public to access information." *Id.* The Act, for example, prohibits notaries from recording Social Security and credit card numbers of signers. MODEL NOTARY ACT § 7-2 (b). "The drafters believe that this proscription is a prudent and necessary step toward protecting principals from identity theft and the concomitant hardships it can cause." *Id.* § 7-2 cmt. What ultimately is to become of the notary journal of a notary who leaves his/her employment, or who resigns or fails to renew the notary commission? "The journal should not be kept by another notary, or by the former notary's successors in interest. To do so would compromise the privacy rights of principals and others whose actions are recorded in the journal." MODEL NOTARY ACT § 7-4(h) cmt. See also David S. Thun, *Staying Ahead of Identity Theft*, NAT'L NOTARY, May 2003, at 11 (expressing concern that notaries might discard notary journals containing confidential information in such a way that criminals could obtain them through "dumpster diving" and use them to commit identity thefts).

385. "What could be more valuable to a crook bent on perpetrating forgeries and frauds than a replica signature to practice copying, a key financial identifier like a Social Security or credit card number, or the full name and address of the victim?" Closen & Orsinger, *supra* note 259, at 6. "Social Security cards are coveted by criminals and used to commit identity theft." *SS Cards Are Not ID Cards*, *supra* note 276, at 41. As recently as only a few

potential privacy concerns is the fact the usual format of traditional paper notary journals is such that multiple notarizations are recorded on each page of the journal and, thus, each page contains confidential information about multiple signers.<sup>386</sup> According to a recent version of the official Oregon Notary Public Guidebook, “[n]otaries should not allow ‘fishing expeditions,’ or possible malicious attempts to view private information, such as addresses or signatures” contained in notary journal entries.<sup>387</sup> For those jurisdictions having statutory notary record-keeping requirements, there are a wide ranging array of practices regarding access to those records. Some of those laws include no provisions whatsoever addressing accessibility issues, which leave notaries in those places with no guidance about potentially material and sensitive information that may have been transcribed.<sup>388</sup> This neglect is dangerous because it may allow forgers, imposters, thieves, stalkers or terrorists to acquire and exploit valuable confidential personal and financial information about document signers. Equally unsettling is the fact that most of the remaining statutes expressly allow or mandate unrestricted

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years ago, before the surge in identity thefts and commercial frauds, standard practice was to urge notaries to record in their journals the serial and account numbers from ID documents in order to evidence notarial diligence and to prove that notaries had actually asked for and observed signers’ identification documents. Now, instead, notaries are instructed to record only the types of IDs and expiration dates for IDs.

386. “Because a single journal page can contain sensitive information about many signers, Notaries may sometimes find it difficult to meet legitimate requests for access to a particular journal entry without accidentally exposing other information.” *ENJOA, supra* note 367, at 21. “To maintain the privacy of other clients’ data recorded in the [journal] book, the notary public should fashion a makeshift ‘veil’ to shield other entries in the book, while allowing an interested person to inspect the required record.” *PIOMBINO, supra* note 216, at 34. *ENJOA*, on the other hand, addresses this issue, because particular single entries can be printed in hardcopy. *ENJOA, supra* note 367, at 21.

387. CHARLES N. FAERBER, 2004-2005 U.S. NOTARY REFERENCE MANUAL (2004), at 357. The most recent version of the Oregon notary public Web site conveys essentially the same message when it cautions: “It is reasonable for a customer to see his or her own entry recorded in the notary journal, but the entries above and below should be covered to protect the privacy of those individuals.” FAERBER, *supra* note 15, at 397. See also Michael L. Closen, *Protecting the Signer’s Privacy*, NOTARY BULL., Dec. 2004, at 7 (comparing notaries to fiduciaries and concluding that notaries owe some of the same duties as fiduciaries, such as the duty not to use confidential information about document signers and not to disclose such information to unauthorized persons or entities). A corollary duty would be to keep notary journals secure to protect against unauthorized accessing of the personal information about document signers. *Id.*

388. “People are gambling with their identities when they go to their local notaries in Illinois and just about every other state [due to the risk of disclosure of the confidential information in notary journals].” Closen & Orsinger, *supra* note 259 at 6.

access to notary journal entries.<sup>389</sup> These mandatory disclosure provisions are holdovers from a progressive and enlightened era that favored openness and have been on the books as part of numerous notary statutes for many years—predating this more recent age of serious and worsening dangers of commercial fraud and identity theft.<sup>390</sup> Some notary laws actually require notaries to provide copies of journal entries to anyone upon request,<sup>391</sup> thereby potentially providing clerical help to wrongdoers who simply need to ask for such assistance. Of course, since most jurisdictions do not statutorily require notary journalizing of official acts, not surprisingly most notary laws remain absolutely silent about access to notary journals (for those notaries who act prudently and maintain such records even in the absence of statutory directives).<sup>392</sup> It is imperative that the states and territories reconsider the outdated laws that ignore the issue of access to notary journals and, on the other extreme, that grant *carte blanche* access and copying.

Some notaries mistakenly photocopy documents of identification of signers and retain those copies in the belief that notaries will then have proof of their diligence.<sup>393</sup> This procedure,

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389. These statutes tend to speak in terms of a right of public access with no limitations noted, except perhaps the payment of a fee to the notary and/or perhaps the notary must be present during the inspection of the journal. See FAERBER, *supra* note 15, at 7 (Alabama), 71 (Colorado), 97 (District of Columbia), 141 (Hawaii), 218 (Maryland), 228 (Massachusetts, by Executive Order), 258 (Mississippi), 292 (Nevada), 470 (Utah), and 494 (Virgin Islands).

390. See Closen, Orsinger & Ullrick, *supra* note 105, at 250 (discussing the lack of identity theft threats during the colonial days through the 1800s).

391. The statutes which require notaries to provide copies of journal entries, upon request, tend not to describe any details being required of such requests, and tend not to indicate that such requests must be journalized as well. See FAERBER, *supra* note 15, at 7 (Alabama), 71 (Colorado), 97 (District of Columbia), 218 (Maryland), 258 (Mississippi), 407 (Pennsylvania—although the official Notary Public Pamphlet advises notaries not to include confidential identifier information in their journals unless specifically required by law), 461 (Texas), and 494 (Virgin Islands).

392. Many states do not appear to have addressed the journal access issue at all—either in their notary statutes or in notary handbooks or web sites. See FAERBER, *supra* note 15, at 18 (Alaska), 21 (American Samoa), 45-46 (Arkansas), 83 (Connecticut), 90 (Delaware), 113 (Florida), 124 (Georgia), 151 (Idaho), 160 (Illinois), 168 (Indiana), 175 (Iowa), 182 (Kansas), 189 (Kentucky), 240 (Michigan), 249 (Minnesota), 274 (Montana), 282 (Nebraska), 299-300 (New Hampshire), 317 (New Mexico), 328 (New York), 345 (North Carolina), 356 (North Dakota), 375 (Ohio), 384 (Oklahoma), 422 (Rhode Island), 428 (South Carolina), 438 (South Dakota), 447 (Tennessee), 477 (Vermont), 488 (Virginia), 504 (Washington), 512 (West Virginia), and 530 (Wyoming). “The privacy of all that personal and financial data in notary journals is simply too important to be left to the chance that an untrained and indifferent notary will do the right thing.” Closen & Orsinger, *supra* note 385, at 24.

393. See Closen, *supra* note 387 at 7 (advising notaries not to “keep photocopies of the signer’s IDs or transactional instruments”). According to

however, amounts to overkill in the identification process and needlessly exposes signers' personal information to being lost, misplaced, further disseminated, and misused. Thus, the only evidence created by this misguided procedure may be proof of misunderstanding and mishandling of record accessibility and confidentiality issues. Loose photocopies of identification documents (such as driver's licenses, Social Security cards, passports, credit cards, and others) are far less secure than permanently bound notary journals because copies which are loose may become separated and lost. Loose photocopies of notarized documents are not equivalent to permanently bound traditional journals or secure electronic notary journals, both of which are also contemporaneously and chronologically kept. An individual document can be altered, forged, added, deleted, lost or destroyed with minimal risk of detection, whereas an individual entry in a proper journal of all notarial acts is almost completely secure from those dangers.

Notaries must not record or photocopy signers' Social Security cards, credit cards, or bank account numbers because such serial and account numbers constitute the most prized captures of identity thieves and other criminals. It is crucial for notaries to examine important ID documents such as driver's licenses and passports, and perhaps alternatively or additionally, Social Security cards, credit cards, and other IDs (if notaries feel the need to further confirm identifications). But, sensitive serial numbers and account numbers should not need to be recorded, and must not be photocopied, by notaries.

In keeping with reasonable privacy concerns in the contemporary world of document fraud, identity theft, stalking, and domestic and international terrorism, limitations on the recording and accessing of certain identification data about document signers must be honored by notaries. Thus, the Model Notary Act of 2002<sup>394</sup> as well as the 2003 Massachusetts Executive Order on Standards of Conduct for Notaries Public,<sup>395</sup> specifically prohibits a notary from "record[ing] a Social Security or credit card number in the journal." The Model Act's commentary points out that "[s]ophisticated criminals can exploit this information for

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the North Carolina Web site for notaries, "Notaries are not authorized to keep copies of the documents they notarize." FAERBER, *supra* note 15, at 345. The same should be true for ID documents. See also VAN ALSTYNE, *supra* note 7, at 311 (noting that "keeping photocopies of signer's ID is inappropriate and futile"). Obviously, if notaries create and retain journals, notaries would not feel the need to create and retain photocopies of transactional documents or ID documents. "Notaries must protect the privacy of consumers of notarial services, or risk legal liability for unauthorized breaches of confidentiality." *Risk Management*, *supra* note 17, at 27.

394. MODEL NOTARY ACT § 7-2(b).

395. Exec. Order No. 455 § 11(d).

illegal purposes,”<sup>396</sup> and other data regularly included in journal entries need to be reconsidered and perhaps restricted from disclosure as well. Such information as addresses, telephone numbers, driver’s license numbers, and signatures can help those with unlawful motives to target victims.<sup>397</sup>

Generally, legitimate requests to access the data in notary journal entries would not include the need to obtain personal identifiers for document signers. Rather, the reason a third party would seek access to a given notary journal entry would be to determine whether a valid notarization had been performed, and that determination would not ordinarily turn upon detailed information about the document signer. The question of the validity of a notarization would most often depend upon the accuracy and thoroughness of the notarial certificate, and specifically the correctness of the date of the notarization, confirmation that the signer appeared to understand the nature of the transaction and to act willingly at the time of the notarization, and possibly that an oath or affirmation had been administered.<sup>398</sup>

Only if the notarization were challenged on the ground of fraud in that the signature of an alleged imposter had been notarized would the identification information about the document signer become relevant.<sup>399</sup> Furthermore, if detailed notary

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396. MODEL NOTARY ACT § 7-2(b) cmt.

397. “A Notary’s journal often contains exploitable information such as the home addresses and driver’s license numbers of signers.” David S. Thun, *Staying Ahead of Identity Theft*, NAT’L NOTARY, Sept. 2004, at 11. “Notary journals . . . are important because they contain confidential information about document signers such as addresses, or driver’s license, Social Security, bank account or credit card numbers.” *Risk Management*, *supra* note 17, at 27. See also David S. Thun, *Staying Ahead of Identity Theft*, NAT’L NOTARY, Mar. 2003, at 11 (explaining that “[a]ll it usually takes is a name, address, Social Security number or other stolen data, and an ID thief can set up a phony account or delete a real one by creating bogus identity documents such as driver’s licenses.”).

398. For two reasons, revealing of this information should not involve much risk. First, this information is rather benign. It is not personal identifier information. Second, the party seeking such information should be someone with a legitimate interest in the notarized instrument—its real signer (perhaps who had developed second thoughts about the wisdom of the underlying transaction), a third party who had detrimentally relied upon the notarized transactional instrument, or a third party adversely affected by the notarized transactional instrument (such as a family member or other person who had somehow expected to be a beneficiary of the true signer). These parties would not be wrongdoers attempting to obtain personal identifier information for unlawful purposes.

399. To state the obvious, the party making the request for access to notary journal information would most likely be the party whose purported signature appears on a document and whose purported signature was notarized by the notary in question. And, that party would certainly know from the outset whether her/his signature had been forged and could indicate so. That party would be the victim here, and that party would not be a wrongdoer trying to

journals are scrupulously maintained, there should rarely be legitimate doubts about, and challenges to, notarizations, and therefore rarely would the substantive information contained in such journals need to be released.

Reasonable concerns about release of the confidential information recorded in notary journals warrant effective restrictions on the matters of who may access the contents of journal entries and of what information recorded in such entries may be revealed. As already noted, state and territorial notary laws overwhelmingly direct, or by their silence permit, notaries to provide photocopies of paper journal entries to all those who simply request them.<sup>400</sup> Regrettably, this practice is convenient for miscreants who seek to obtain confidential information about document signers, including replica signatures which imposters can practice forging.<sup>401</sup> A key starting point is to prohibit illicit fishing expeditions for confidential information, including protections against unwarranted disclosure of adjacent journal entries in traditional paper journals.<sup>402</sup> All requests to access

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steal someone else's identity. To the contrary, the personal identifier information recorded in a journal entry should have been about that party, but instead will perhaps serve as evidence of the true identity of the imposter and/or an accomplice. The only other party who would have a legitimate basis for requesting personal identifier information in a notary journal would be a third party victim with an interest in the true identity of a document signer (who had forged a signature and then had it notarized) because this third party had relied upon the notarized instrument. Most often the third party would be a business entity such as a bank or mortgage company. And, it would be an easy matter for such a third party to provide evidence of its involvement with the underlying transaction. Again, this party would be a victim, not a wrongdoer seeking to obtain confidential information.

400. *Supra* notes 391-92 and accompanying text.

401. The role of one's signature as a key component in the document signer identification process is obvious. Notaries should insist on seeing IDs with signatures to compare with the signatures of document signers in the notary journal entries and on the transactional instruments. Imposters would be delighted to have sample signatures to study and practice copying. "Crooks bent on perpetrating forgeries and frauds would like nothing more than to obtain a signature replica to practice copying." Closen, Orsinger & Ulrick, *supra* note 105, at 164. *See also supra* notes 275, 277, and 327 and accompanying text.

402. "In the notary's presence, any person may inspect an entry in the official journal of notarial acts during regular business hours, but only if: . . . (3) the person specifies the month, year, type of document, and name of the principal for the notarial act or acts sought; and (4) the person is shown only the entry or entries specified." MODEL NOTARY ACT § 7-4(a). "In an effort to preserve the privacy rights of principals and eliminate 'fishing expeditions,' [The MODEL NOTARY ACT] requires that the request to inspect be quite specific." *Id.* § 7-4 cmt. *See also supra* notes 398-99 and accompanying text. *See supra* note 386 and accompanying text (regarding the concerns about multiple journal entries appearing on a single page of a traditional paper journal, which are avoided when ENJOA is utilized).



journal entries should be required to be in writing, accompanied by complete identification data for everyone making those requests, including the execution of a present signature and obtaining of a present photograph and/or thumbprint. Authorities should scrupulously determine the identities of persons requesting access to journal entries and record the relevant identification data so as to deter criminal acts.<sup>403</sup> Written requests for access should have to specify certain transactional details for the journal entries requested (including the dates of the notarizations, types of documents, and the document signers' names) and should have to provide lawful reasons for accessing the journal entries.<sup>404</sup> The granting of inspection of a journal entry or the provision of a copy of a journal entry should itself be journalized.<sup>405</sup> This procedure for granting public inspection of notary journal entries is basically in keeping with the relevant sections of the Model Notary Act of

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403. "In the notary's presence, any person may inspect an entry in the official journal of notarial acts . . . but only if: (1) the person's identity is personally known to the notary or proven through satisfactory evidence; (2) the person affixes a signature [and thumbprint or other recognized biometric identifier,] in the journal in a separate dated entry." MODEL NOTARY ACT § 7-4(a). Under both Guam and Northern Mariana's law, a party requesting inspection of a notary journal entry must be identified and must sign the notary's journal. FAERBER, *supra* note 15, at 131, 363.

404. According to Arizona law, any member of the public may view a journal entry, or obtain a copy of it, "but only upon presentation to the notary of a written request that details the month and year of the notarial act, the name of the person whose signature was notarized and the type of document or transaction." FAERBER, *supra* note 15, at 37. California law includes a very similar provision. *Id.* at 59. In Guam and the Northern Marianas, a notarial journal entry may be inspected by any member of the public "who specifies the notarial act sought." *Id.* at 131, 363. Maine law includes an almost identical provision. *Id.* at 208. See also *supra* note 402 and accompanying text. "[A]ccess to the [notary] journal is a privilege not a right. Thus, a person seeking to inspect the journal must be willing to give up some privacy in order to gain access." MODEL NOTARY ACT § 7-4(a) cmt. Although The Model Notary Act does not expressly include among its requirements for journal access that the requestor provide a legitimate reason for seeking to inspect, the Act does appear to open the door to the notary to ask the reason for a request to access a journal entry. "If the notary has a reasonable and explainable belief that a person bears a criminal or harmful intent in requesting information from the notary's journal, the notary may deny access to any entry or entries." *Id.* § 7-4(b).

The drafters' intent was to allow a notary to deny or limit access in those situations where the notary has prior knowledge or is able to formulate a compelling opinion regarding the request. . . . Regarding the latter, when asked by the notary why the journal information is needed, the person might not be able to give a plausible response. In these situations the notary is alerted to potential misuse of the information and should proceed with caution.

*Id.* § 7-4 cmt.

405. *Id.* § 7-2(d).

2002.<sup>406</sup> Importantly, Section 7-4(b) of the Model Act provides: “If the notary has a reasonable and explainable belief that a person bears a criminal or harmful intent in requesting information from the notary’s journal, the notary may deny access to any entry or entries.”<sup>407</sup> Of course, the refusal of access to a journal entry should itself be recorded as a separate journal entry.<sup>408</sup> To put it differently, we need to move away from a presumption in favor of disclosure and copying of notary journal entries, and toward the contrary presumption.

An even more stringent process has been recommended. Under that suggested procedure, written access requests should have to be filed with and processed by the governmental agency overseeing notaries in the particular state or territory.<sup>409</sup> Those agencies would transmit legitimate access requests to the notaries involved, who would photocopy standard written journal entries or print hard copies of electronic journal entries and transmit those copies to the oversight agencies for possible release to the persons making the requests.<sup>410</sup> This process would remove ordinary notaries from the decision-making process about the release of information from their journals and centralize the decision-making in agencies that presumably would be more capable of exercising sound judgments regarding the propriety of accessing of notary journal data. The oversight agencies would have discretion to redact confidential and personal identification information to reasonably protect signer privacy and prevent identity theft.<sup>411</sup>

Wisconsin, as previously mentioned, is the only state which declares notary records to be confidential in nature.<sup>412</sup> Its notary statute restricts disclosure of the contents of notary journals (that Wisconsin notaries are not required to maintain in the first place), to instances in which the document signers for whom notarizations were performed and about whom records were created agree in writing to reveal.<sup>413</sup> The Wisconsin law reads, in part, as follows: “[A] notary public shall keep confidential all documents and information contained in any documents reviewed by the notary public while performing his or her duties as a notary public and may release the documents or the information to a 3<sup>rd</sup> person only with the written consent of the person who requested the services.”<sup>414</sup> This provision is somewhat problematic and has been

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406. *Id.* § 7-4(a)-(d).

407. *Id.* § 7-4(b).

408. *Id.* § 7-2(c)-(d) (2002); *see also supra* note 403 and accompanying text.

409. *See* Closen, Orsinger & Ullrick, *supra* note 105, at 244-46.

410. *Id.* at 245.

411. *Id.* at 245-46.

412. *Id.* at 241-44; FAERBER, *supra* note 15, at 515.

413. Closen, Orsinger & Ullrick, *supra* note 105, at 241; FAERBER, *supra* note 15, at 515.

414. Closen, Orsinger & Ullrick, *supra* note 105, at 241; FAERBER, *supra*

criticized for being too restrictive.<sup>415</sup> Yet, the Wisconsin statute represents a major step in drawing attention to the issue of accessibility of the contents of notary journals, a step in the right direction.

In addition to the pioneering approach of Wisconsin on the issue of access to, and confidentiality of, the notary journal, reconsideration of the traditional view of the notary journal as a fully accessible public record has been raised in two other states, and in the Model Notary Act of 2002. Senate Bill 102 was introduced in Utah in 2004.<sup>416</sup> It would have required notaries to maintain journals of their notarizations and would have declared that such journals were not to be treated as public records, but the bill died in committee.<sup>417</sup> Additionally, Oregon has begun to show an awareness of the privacy concerns implicated by the recording of personal identifiers and other private information in notary journals. The official Oregon Notary Public Web site addresses, in part, the questions of whether a notary journal qualifies as a public record and under what circumstances it can be accessed. It provides as follows:

Most notaries public are exempt from disclosing the notary journal contents . . . . If the notary journal is in the possession of the Secretary of State's office, or if the notary public is a public official or public employee, then the notarial journal falls under the public record disclosure laws . . . . It is reasonable for a customer to see his or her own entry recorded in the notary journal.<sup>418</sup>

Oregon's brief treatment of the confidentiality and disclosure issues surrounding notarial record-keeping needs thoughtful and more thorough explanation. Moreover, it must be remembered that the above coverage of this difficult and important subject appears merely in the state's notary public Web site, rather than in its notary statute. Finally on this point, recognizing "a tension between principals' privacy rights and the right of the public to access information," the drafters of the 2002 Model Notary Act decided, as we have noted previously, to avoid labeling notary journals as public or even quasi-public records and to impose two very timely qualifications upon the access to notary journal records—namely, to restrict what substantive content may be disclosed, and to limit the circumstances under which disclosure will be permitted.<sup>419</sup> Thus, the renewed airing of access issues has

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note 15, at 515.

415. Closen, Orsinger & Ullrick, *supra* note 105, at 242-44.

416. See *Legislative Watch*, NOTARY BULL., Apr. 2004, at 15 (describing Utah Senate Bill 102, and noting that it died in the legislature).

417. *Id.*

418. FAERBER, *supra* note 15, at 397.

419. MODEL NOTARY ACT ch. 7, general cmt. See *supra* notes 246-48 and accompanying text.

only just begun.

Nearly all jurisdictions have ignored or neglected the issue of the physical security of notary records.<sup>420</sup> Consequently, notary journals and other forms of records can be left lying about, readily at risk for loss, theft, tampering, forgery, and unauthorized viewing and copying. The sensitive personal and proprietary information contained in many notary journal entries is of such a nature that it may well tempt the unscrupulous to pilfer or access those unsecured records for a criminal purpose.

Encouragingly, however, a few places such as California<sup>421</sup> and Massachusetts<sup>422</sup> now require notaries to keep their journals protected in their exclusive custody or under lock and key, as is similarly provided in the Model Notary Act of 2002.<sup>423</sup> The careful safeguarding of notary journals is actually in keeping with the historic custom of American notaries of the 1600s, 1700s, and 1800s to protect their records of the commercial protests they had performed. Those old record books stayed in the exclusive possession of the notaries, who would not release their record books but who would provide certified copies of an individual entry upon request to any party with an interest in the underlying transaction.<sup>424</sup>

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420. As recently as 2001, it was reported that “[o]nly one state has adopted legislation which mandates any kind of physical security for notarial journals during the term of a notary’s commission.” Closen, Orsinger & Ullrick, *supra* note 105, at 216. Yet, concerns about the security and preservation of notary records date to ancient times. In colonial Albany, notary Adriaen Janse had “a chest for storing his [notarial] papers . . . locking them away.” MERWICK, *supra* note 27, at 5. Janse or his survivor was required to deliver “to a town secretary” his official notarial papers in the event “of his death or resignation,” or else to be fined. *Id.*

421. “The journal shall be kept in a locked and secured area, under the direct and exclusive control of the notary.” FAERBER, *supra* note 15, at 59.

422. “When not in use, the journal shall be kept in a secure area under the exclusive control of the notary public, and shall not be used by any other notary nor surrendered to an employer upon termination of employment.” Exec. Order No. 455 § 12(f).

423. MODEL NOTARY ACT § 7-4(f). See also Nevin Barich, *Take Care of Your Tools*, NAT’L NOTARY, July 2004, at 37 (suggesting that “[e]ven if not required by law in your state, prudent Notaries will inform any Notary regulating authorities in writing if their journal of official acts is lost or stolen”).

424. This description conforms to the findings of the courts in *Nicholls*, 21 U.S. at 330-31 and *The Gallego*, 30 F. at 275, and to the practices of colonial American notaries. Indeed, in *Nicholls*, the Supreme Court was highly taken by the diligence of notaries engaged in the practice of protesting commercial notes. “[W]e all know, in point of fact, that notaries are very commonly employed in this business . . . . The practice has, doubtless, grown up from a sense of its convenience, and the just confidence placed in men who, from their habits and character, are likely to perform these important duties with punctuality and accuracy.” *Nicholls*, 21 U.S. at 331. In 1887, it was observed by one of the leading authorities on notarization: The notary public is “an officer recognized by the whole commercial world . . . [I]n all civilized

There is great variation among the jurisdictions on the matter of how long notary records are to be preserved (if they are to be created at all). The notary statutes of most jurisdictions do not directly cover this subject at all, although in several places the laws provide that the journals of former notaries are to be deposited with state or local governmental agencies (again, with no indication of how long those agencies are supposed to maintain the records).<sup>425</sup> Even numerous states and territories which by statute require the keeping of notarial records do not address in those statutes the topic of the duration during which notary records are to be retained.<sup>426</sup> Hence, "it can be expected that notarial records are not securely preserved for long periods by most notaries."<sup>427</sup> Among the small number of statutes which treat the duration point, the time period required for a journal to be retained is just five years or seven years.<sup>428</sup> The 2003

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countries, by the commercial law, the seal of a notary, affixed to a protest in a foreign State, is accepted as authentic, without any other proof or verification." JOHN PROFFATT, A TREATISE ON THE LAW RELATING TO THE OFFICE AND DUTIES OF NOTARIES PUBLIC ¶ 136 (1887). See generally MERWICK, *supra* note 27 (reporting the recording and record preservation practices of colonial Albany notary Adriaen Janse between 1669 and 1686). Janse "recorded . . . hundreds [of notarial acts which] he archived in a chest or trunk." *Id.* at xv. Moreover, this procedure of recording and preserving those records of notarial acts should have been expected because that was the approach of ancient civil law notaries as well. See generally REYERSON & SALATA, *supra* note 100 (relating the practices of notaries of the Middle Ages in southern Europe, and especially the conduct of southern French notary Jean Holanie regarding his register of 1327-1328). Similarly, the notarial register books of olde English notaries were "generally preserved with care, and often handed down from one generation of Notaries to another." BROOKE'S NOTARY, *supra* note 100, at vii.

425. In Alabama, journals of former notaries are to be delivered to the county probate courts. FAERBER, *supra* note 15, at 7. In Arizona, journals of notaries who vacate their office are to be delivered to the county recorders. *Id.* at 35. In Arkansas, journals of notaries whose commissions are revoked must be turned over to the Secretary of State. *Id.* at 46. In California, county clerks are to receive the journals of former notaries. *Id.* at 57. One of the only laws imposing a prescribed time period for retention of notary journals by a governmental agency, a county recorder in this instance, is found in Arizona, where that time is five years. *Id.* at 36. County clerks in California must retain the journals of former notaries for 10 years. *Id.* at 57.

426. "[T]he overwhelming majority of states have no regulations requiring notaries to turn their journals or other records over to state agencies or to maintain such records for prescribed periods of time." Closen, Orsinger & Ullrick, *supra* note 105, at 218.

427. *Id.*

428. See, e.g., FAERBER, *supra* note 15, at 36 (Arizona – 5 years), 113 (Florida – 5 years, as recommended in the Department of State Web site), 218 (Maryland – 5 years, as recommended in the official Web site), 240 (Michigan – 5 years), 292 (Nevada – 7 years), 345 (North Carolina – 5 years, as recommended by the Secretary of State's Web site), 396 (Oregon – 7 years). Incidentally, an interesting question is when these specified periods begin – as

Massachusetts Executive Order on Standards of Conduct for Notaries Public prescribes that notaries must retain their notarial journals for seven years after the termination of their commissions.<sup>429</sup> However, any duration less than at least ten to twenty years is simply too short a time to retain notary journals.

Although there is not a generally accepted view of the correct duration during which notary journals should be retained, such records should be preserved for a very long time. The Notary Public Code of Professional Responsibility has recommended a ten-year time frame for the safekeeping of journals.<sup>430</sup> Some observers have suggested that notaries retain their journal records for at least twenty years,<sup>431</sup> and Van Alstyne has urged each “notary to personally retain his or her journal for life.”<sup>432</sup> These long lengths of time correspond most reasonably to the periods during which important kinds of documents bearing notarizations of signatures may be involved in disputes and legal challenges.<sup>433</sup> Among those instruments of consequence would be real estate documents (such as sale contracts, deeds, and titles), estate planning documents (such as wills, trusts, and powers of attorney), litigation documents (such as affidavits), and other commercial documents (such as mortgages, promissory notes, and various contracts).<sup>434</sup>

The substantive contexts in which important instruments bearing notarizations of signatures are utilized are such that disputes relating to them often do not surface until years after they are executed and regularly take years to resolve, especially if protracted litigations occur.<sup>435</sup> In actuality, even ten years may not constitute a long enough period for retention of journals, because some statutes of limitation (including their provisions on

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of the time of the notarization in question, as of the time of the last entry in the notary’s journal, or as of the time of the expiration or termination of the notary’s commission. Other kinds of statutorily-mandated record-keeping often require such records to be preserved for comparable periods of time. *See, e.g.,* FLA. STAT. ANN. § 320.303(4)(f) (LexisNexis 2008) (specifying that minutes of meetings of homeowners’ associations and their boards of directors are to be preserved for 7 years).

429. Exec. Order No. 455 § 13(b).

430. NOTARY PUBLIC CODE OF PROF’L RESPONSIBILITY VIII-C-2 (1998).

431. Closen, Orsinger & Ullrick, *supra* note 105, at 219 (suggesting “notary journals . . . should be kept for long periods of time, perhaps a minimum of twenty years”).

432. Van Alstyne, *supra* note 6, at 790.

433. “The notarization is effective, valid and binding as long as the document it appears upon remains effective and valid . . . often for decades.” STATE OF WYOMING, NOTARIES PUBLIC HANDBOOK 5 (June 1999).

434. *See* Closen, Orsinger & Ullrick, *supra* note 105, at 218 (noting the different types of documents that are not challenged for a number of years).

435. “Disputes about transactions, including challenges to the validity of notarizations on documents supporting such transactions, may not arise until years (often many years) later.” *Id.*

belated discovery and fraudulent concealment) could extend a controversy or litigation well beyond ten years.<sup>436</sup> So, notaries should be encouraged to safeguard their journals for even longer than ten years. To be precise, the Notary Public Code of Professional Responsibility announces, "In the absence of official rules for the disposal of the journal of notarial acts, the former Notary shall store and safeguard each journal *at least* 10 years from the date of the last entry in the journal".<sup>437</sup> Additionally, governmental agencies which acquire notary journals from former notaries and the estates of deceased notaries should retain those journals for at least ten to twenty years, and hopefully even longer.<sup>438</sup>

This lengthy review of both the nature of, and the procedures for the creation and safeguarding of, notary journals should confirm the two principles announced in the quotation which introduced this part of the paper. In that statement, the Commentary to the 2002 Model Notary Act opined the keeping of a detailed journal is "essential to good notarial practice," and concluded that the keeping of a detailed journal is "decidedly in the public interest."<sup>439</sup> For thousands of years, this view has truly dominated around the rest of the world. In 1948, U.S. notary authority Richard Humphrey also expressed this prevailing view when he wrote that "it is in the public interest that a written or printed record of [official notarial] acts be preserved."<sup>440</sup> That conclusion is unquestionably correct, and it is time for all U.S. jurisdictions to join the universe of international notaries complying with this sound standard of notarial practice.

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436. "[T]he statutes of limitations on legal cases revolving around such [estate and commercial] documents do not begin to run until disputes arise or problems about transactions are discovered, and such statutes are virtually always at least one year in length, and more often at least a few years long." *Id.* at 218-19. For example, "[i]n Illinois, the statute of limitations on actions on written contracts is ten years, and on the recovery of real estate ranges from seven to twenty years." *Id.* at 219.

437. NOTARY PUBLIC CODE OF PROF'L RESPONSIBILITY VIII-C-2 (1998) (emphasis added).

438. Certainly, notary journal records are important and should be retained for very long periods of time, regardless of whether such records are in the possession of individual notaries or of governmental notary oversight agencies. See *supra* note 425 and accompanying text.

439. MODEL NOTARY ACT ch. 7, general cmt.

440. HUMPHREY, *supra* note 205, at 233.

## V. THE HISTORIC TRADITIONS OF NOTARY RECORD-KEEPING

[A]s the rules of evidence are founded upon general interest and convenience, they must, from time to time, admit of modifications, to adapt them to the actual condition and business of men, or they would work manifest injustice; and Lord Ellenborough has very justly observed, that they must expand according to the exigencies of society. The present case [in which an exception to the general rule against the admission of hearsay to allow evidence of the record book entry of the protest of a promissory note made by a since deceased notary public] affords a striking proof of the correctness of this remark.<sup>441</sup>

With this portion of the Article, the co-factors that influence the imposition of common law standards of care will be considered individually. First, we will discuss the history of notary record-keeping. Second, we will examine notarial statutes (Part VI). Third, we will review customary practice while focusing upon the methods and technology for notary record-keeping (Part VII). Fourth, we will address the contemporary developments affecting notarial practice (Part VIII). Fifth, we will explore the most important feature—the role of public policy concerns upon the proposed standard requiring notary record-keeping (Part IX).

History functions as the heart and pulse of law development in this nation, or as Professor Harold Berman has said, “[I]ts history is built into it.”<sup>442</sup> He further wrote that “[i]t is the historical dimension of the American legal system that serves best to unravel its complexities.”<sup>443</sup> Oliver Wendell Holmes expressed it famously this way: “The life of the law has not been logic; it has been experience.”<sup>444</sup> Importantly, the realistic definition of history incorporates the obvious limitation that commonly-understood history necessarily reflects events which are known and remembered.<sup>445</sup> Yet, as will be explained below, nearly all of the

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441. *Nicholls*, 21 U.S. at 332.

442. Berman, *supra* note 62, at 509.

443. *Id.*

444. HOLMES, *supra* note 36, at 1. Holmes was basically applying a well-known proverb to the field of jurisprudence, for it is well-accepted that: “[e]xperience is the mother of wisdom.” DALE, *supra* note 24, at 99. “The doctrine of precedent inherently brings legal history to bear upon current judicial decisions.” PROSSER & KEETON, *supra* note 36, at 20.

445. “History, in its broadest sense, is the totality of all past events although a more realistic definition would limit it to the known past.” *History and Historiography*, FUNK & WAGNALLS NEW ENCYCLOPEDIA, *supra* note 35, at 126. “Many of the events of our own times will surely be forgotten in a hundred years.” *History*, THE WORLD BOOK ENCYCLOPEDIA, *supra* note 35 at 232; see also HOLMES, *supra* note 444 (saying—contrary to what has happened in the notary arena—that “old times . . . shall never be forgot.”). In the notary field, the real history of extensive notarial record-keeping is recited in the depths of a few old treatises on notary law and practice and in a small number



real history of the widespread early and habitual notarial record creation and preservation has been all but forgotten (silently residing in a small number of seldom explored fragile archives, antique law cases, and academic style treatises and articles).

For centuries now, there have been three distinct kinds of notaries in the world: (1) the civil law notary—the earliest and most prestigious notary and the type known today throughout the world outside of Great Britain and the United States;<sup>446</sup> (2) the English Notary—the second oldest type, limited to only about 1100 notaries almost all of whom are solicitors in England and Wales;<sup>447</sup> and (3) the United States notary—whose ranks have exploded especially in the last 30 years to include more than 4.8 million individuals of widely varying levels of education, experience, and knowledge of notary practices, ethics, and law.<sup>448</sup> The creation and continued development of the U.S. notary have been influenced by—though unfortunately not strongly enough—the models of both civil law and English notaries. Civil law and English notaries existed long before the United States notary was born, and they have almost always been required to be legal professionals as well.<sup>449</sup> Extensive record-keeping has always been a central

of equally dated and virtually forgotten court decisions.

It is a serious thing, for a branch of history, to lack a general treatment.

It means there is no tradition, no received learning, no conventional wisdom. But tradition is needed: to define what is important and what is not, to guide students, researchers, other historians—and the general public. Without tradition, there is no framework, no skeleton.

FRIEDMAN, *supra* note 55, at 11. “To be ignorant of what happened before you were born is to remain always a child.” THE FORBES BOOK OF BUSINESS QUOTATIONS, *supra* note 25, at 632 (quoting Cicero)

446. See Seth, *supra* note 27, at 884 (explaining that “there are three distinct groups of notaries practicing in the world today: civil law notaries, English notaries and United States notaries.”). Modern “[c]ivil law notaries are lawyers who, after specialized training and a period of apprenticeship, are eligible for appointment . . . as a notary.” *Id.*

447. See Seth, *supra* note 27, at 885 (estimating that presently “[t]here are some one thousand notaries in England and Wales”). Today’s “English notaries are . . . highly trained legal professionals who have passed strict examinations and have served a period of apprenticeship.” *Id.* “[M]ost English notaries over time have also been solicitors.” Closen & Orsinger, *supra* note 64, at 519-20; see also *infra* notes 464-69 and accompanying text.

448. Of course, with more than 4.8 million of them, the U.S. notary public outnumbers the combined total of all other notaries of the world. See *supra* note 2 and accompanying text. In the United States today, “[a]ppointment [as a notary] is virtually automatic after submission of an application and payment of a modest fee.” Seth, *supra* note 27, at 885.

449. To state the obvious, the first notaries were the forerunners of the modern civil law notaries. They influenced the development of the small number of English notaries. Then, the English notary had a significant impact on the development of the U.S. notary because of the arrival here of English settlers in colonial times. “In most countries, Notaries are legal professionals with functions similar to attorneys.” David S. Thun, *A Brave*

feature of the work of both civil law notaries and English notaries.<sup>450</sup> The reasons for such vigilant record-keeping were the obvious ones of prudence and reasonableness in commercial practice. If history would have better served its highest purpose, namely to teach in order to avoid the errors of the past and to advance effective and worthwhile processes,<sup>451</sup> it would have instilled even more firmly in U.S. notaries the instinct to keep records of their official acts.

In fact, the first notary to set foot in the Americas was a civil law notary who arrived with Columbus in 1492.<sup>452</sup> Certainly, the Spanish and French explorers and settlers in parts of the area that was to become the United States were familiar with the civil law notary customs and laws of Europe.<sup>453</sup> The civil law notary

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*New World: International Notaries*, NAT'L NOTARY, Nov. 2007, at 34. In keeping with the international standard that notaries tend almost always to be lawyers, especially in the civil law countries, the two U.S. states (Alabama and Florida) which have adopted legislation creating a kind of civil law notary practitioner require individuals appointed to that special post to be attorneys. *Id.* at 35. "Unlike the U.S. notary . . . notaries in most overseas jurisdictions are legal professionals." Stewart Baker & Theodore Barassi, *The International Notarial Practitioner*, A.B.A. INT'L LAW NEWS [Newsletter of Section of International Law & Practice], Fall 1995, at 2.

450. See REYERSON & SALATA, *supra* note 100, at 31-98 (describing the extensive record-keeping of the notaries of southern Europe during the Middle Ages, and detailing the record-keeping of southern French notary Jean Holanie from 1327-1328). In the Middle Ages in Southern Europe, "[t]he notary emerged as a notetaker [and] precision recordkeeper." *Id.* at 1. As a result, thousands of notarial registers of the notaries of southern Europe from the Middle Ages have survived and are available for study. *Id.* at 6-8. "Holy Roman Emperor Frederick II (1215-50) promulgated a peace statute in 1235 which provided that all justiciars have notaries to record writs, judicial proceedings, judgments issued, and all documents regarding outlaws. King Philip IV of France (1285-1314) even created a department of royal notaries to record official documents." *Id.* at 5; see also BROOKE'S NOTARY, *supra* note 100, at vi-vii (discussing the historic care with which notarial record books were maintained and preserved by olde English notaries). An ordinance of January of 1843, governing French civil law notaries, refers to "the minutes belonging to" such notaries. REYERSON & SALATA, *supra* note 100, at 9. See generally MERWICK, *supra* note 27 (explaining how colonial notary Adriaen Jansse of Albany diligently maintained detailed records of his official notarial documents (keeping either the originals or exact copies) during his notarial tenure from 1669 to 1686). Still today, notaries in other countries "often are responsible for drafting, authenticating and archiving important documents related to real estate transactions." Thun, *supra* note 449, at 34.

451. "At its best, history is studied and taught so that people may learn the lessons of the past and gain the knowledge to deal with the problems of the present and future." THE WORLD BOOK ENCYCLOPEDIA, *supra* note 35, at 234.

452. "In 1492 when Columbus set foot on San Salvador Island, a royally appointed Notary, Diego de Arana of Cordova, verified the event for posterity—ensuring also that any discovered gold was duly reported to King Ferdinand and Queen Isabella." Ross, *supra* note 146, at 11.

453. It simply follows that explorers and colonists in the early Americas would be most familiar with the customs and laws of their native

predominated in the Louisiana territory due to the Spanish and French presences there, and still today a type of civil law notary practices in Louisiana.<sup>454</sup> Spanish and Spanish-Mexican civil law influenced the development of Florida and a number of western states, including Texas, New Mexico, California and others.<sup>455</sup> The U.S. territory of Puerto Rico, with its Hispanic heritage, is another place where a form of the civil law notary, the *notario publico* (who must also be a licensed attorney), continues to practice.<sup>456</sup> Further, in recent years, a movement has arisen to attempt to bridge the commercial gap between most of the U.S. and the

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countries—whether England, France, Mexico or Spain. “[S]ome of the American republic’s founding fathers were familiar with European civil law and Roman legal history.” Clark, *supra* note 197, at 108. Moreover, the “civil law influence in England was significant.” *Id.* “Each cultural group [of settlers to America] had brought in its own law.” FRIEDMAN, *supra* note 55, at 19. See also DOBBS, *supra* note 40, at 27 (commenting that “[t]he Spanish conquerors of Mexico and settlers in what is now the American West left a legacy of the civil or code-oriented law. The French version of civil law likewise came to those areas settled by the French.”).

454. “Louisiana still retains much of the Code Napoleon, which was in force when the state was a possession of France.” THE WORLD BOOK ENCYCLOPEDIA, *supra* note 35, at 120. See Clark, *supra* note 197, at 108 (commenting that in Louisiana “Spanish and French traditions were strong and would not yield easily to the common law.”). See also Seth, *supra* note 27, at 885 (observing that contemporary Louisiana “notaries follow civil law practice”). “Because Louisiana is a civil law jurisdiction, its Notaries have different powers and duties than Notaries in common law states.” Jennifer S. Navarrete, *West Feliciana Parish’s Unique Heritage and History*, NAT’L NOTARY, July 2003, at 32.

455. See Clark, *supra* note 197, at 108 (pointing out that “Spanish (and later Mexican) law flavored the territories the United States absorbed after the 1846-48 Mexican-American War: Texas, New Mexico, California, and other western states.”); A HISTORY OF NOTARIES IN CALIFORNIA, *supra* note 53, reprinted in CLOSEN, *supra* note 2, at 3 (explaining that “[p]rior to [California] statehood [in 1850], the only official Notaries the territory had seen were [Latin Notaries] commissioned by Spain and, later, Mexico, when the land was a Mexican province”). “[A] few states where the early settlers were Spanish, such as California and Texas, still have traces of Spanish law.” THE WORLD BOOK ENCYCLOPEDIA, *supra* note 35, at 120.

456. See Clark, *supra* note 197, at 110 (referring to Puerto Rico as having been “acquired from Spain after the 1898 Spanish-American War” and as having “a complete civil law system with Spanish as an official governmental language”); USCIS Targets Utah Imposter ‘Notarios’, NOTARY BULL., Oct. 2004, at 12 (reporting that “[i]n Spanish-speaking countries, Notarios have attorney-like powers.”). See also Seth, *supra* note 27, at 885 (pointing out that Puerto Rican “notaries must be attorneys.”). See generally Pedro A. Malavet, *Counsel for the Situation: The Latin Notary, a Historical and Comparative Model*, 19 HASTINGS INT’L & COMP. L. REV. 389 (1996) (analyzing the role of Latin notaries); Guillermo F. Margadant, *The Mexican Notariate*, 6 CAL. W. L. REV. 218 (1970) (discussing the performance of Mexican notaries); D. Barlow Burke & Jefferson K. Fox, *The Notaire in North America: A Short Study of the Adaptation of a Civil Law Institution*, 50 TUL. L. REV. 318 (1976) (explaining the work of civil law notaries).

practice of civil law notaries in almost all of the rest of the world by creating a unique post of civil law notarial practitioner, to be occupied solely by a licensed attorney with sufficient experience to undertake an expanded notarial role.<sup>457</sup> Two states, Alabama<sup>458</sup> and Florida,<sup>459</sup> actually adopted special legislation to create the position of civil law notarial practitioner. The seminars and publications of notary education providers in this country regularly address the practice of the civil law notary because of the historic worldwide influence the civil law notary has wielded.<sup>460</sup>

Great Britain, as well, through the procedures in certain of its specialized courts that functioned upon a civil law framework provided an important source of civil law influence upon the American colonies and, in turn, upon the United States.<sup>461</sup> Professor David Clark explained that the “civil law influence in England was significant, continuing in important ways in the seventeenth and eighteenth centuries, and providing a basis for further civil law transplantation into America after United States independence.”<sup>462</sup> And, Professor Orth has reminded us that even “in Britain the Scottish legal system has (and remains) a civil law system with its own distinct forms and terminology.”<sup>463</sup>

The English notary had an even greater influence on the early

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457. In order to give American notarial documents international standing, the U.S. Council for International Business and the American Bar Association have proposed the creation of a class of international attorney-notaries whose training would be comparable to that of English notaries.” Seth, *supra* note 27, at 886; Baker & Barassi, *supra* note 449, at 1. See generally Pedro A. Malavet, *The Foreign Notarial Legal Services Monopoly: Why Should We Care?*, 31 J. MARSHALL L. REV. 945 (1998) (reviewing the extensive, monopolistic roles of legal professionals as foreign notaries).

458. See ALA. CODE §§ 36-20-50, 51, 52, 53, 54 (1975) (creating and authorizing the “Alabama international notary”).

459. See FLA. STAT. ANN. § 118.10 (West 2008) (creating and authorizing the Florida “civil-law notary”). Also, similar legislation had been proposed in Illinois. See *Legislation around the Nation*, NOTARY BULL., Oct. 2004, at 14 (reporting that Illinois House Bill 4689 was proposed in 2004 to create the post of civil law notary).

460. The NNA’s annual conferences have regularly included programs about the civil law notary. For example, at the 2003 NNA Conference in Orlando, Florida, an attorney’s workshop (CLE) program addressed the practices of the civil law notary. *The National Notary Association’s Conference 2003*, NAT’L NOTARY, May 2003, at 13, 16. Incidentally, the 2003 NNA Achievement Award was presented to Florida attorney Todd Kocourek who was a key facilitator of adoption of Florida’s Civil Law Notary post. *Civil Law Notary Pioneer*, NAT’L NOTARY, May 2003, at 28.

461. English “[n]otaries acted as registrars and deputy registrars in the ecclesiastical courts. . . . Notaries also acted as registrars in the courts of admiralty which dealt with maritime matters. Both of these courts followed the procedure of Roman civil law.” Seth, *supra* note 27, at 868.

462. Clark, *supra* note 197, at 108.

463. Orth, *supra* note 57, at 126.

development of the U.S. notary than the civil law notary had.<sup>464</sup> The English notary has even been characterized as the “older brother” of the American notary.<sup>465</sup> After all, with the widespread colonial settlement by the British on the East coast, it was to be expected that some English notaries would immigrate to the colonies here, and that notary posts created in those colonies would be fashioned at least somewhat after the model of the English notary.<sup>466</sup>

Both things happened. Some English notaries bearing commissions from the Archbishop of Canterbury came to America and practiced briefly as notaries.<sup>467</sup> Also, each of the colonies proceeded to create its own form of notary through judicial practice and legislation, and the notaries of the British colonies bore some resemblance to English notaries.<sup>468</sup> The founders of the one other colony, New Netherland, were certainly familiar with the continental civil law notaries of the time, and notaries appointed in that colony were affected by the civil law tradition.<sup>469</sup>

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464. “Until the adoption of the United States Constitution in 1789, the work of American and English general notaries were virtually identical and consisted of drafting, authenticating and maintaining a record of documents for use in international commerce.” Seth, *supra* note 27, at 883.

465. Of course, during that era in history all notaries in Great Britain, the American colonies, and then in the U.S. were men. See Closen, Orsinger & Ullrick, *supra* note 105, at 251 (noting that “[i]n colonial times, when the American notary began to develop a different role than its older brother, the English notary, it did so to accommodate a burgeoning young country.”).

466. See Seth, *supra* note 27, at 863-64 (explaining that “[t]he development of the notarial office differed somewhat in each of the thirteen colonies, but, with the exception of New Netherland, all developed from the practice of seventeenth century English notaries.”).

467. “Early American colonial Notaries still received their authority through [the Archbishop of] Canterbury.” Ross, *supra* note 146, at 11. See Seth, *supra* note 27, at 869-70 (pointing out that in the Royal Colony of Connecticut prior to the Revolution, the commissions of notaries originated in England).

468. See Deborah M. Thaw, *Useful Skills in the Fight Against Terrorism*, NAT’L NOTARY, Nov. 2004, at 7 (pointing out that notaries have “been screening [document] signers since long before the office became a mainstay of civil life in the original 13 colonies.”). Thus, the methods of colonial American notaries were undoubtedly modeled after notaries of some earlier origin. See *supra* notes 464-65.

469. See Seth, *supra* note 27, at 864 (observing that “New Netherland is of great interest because of the light it sheds on seventeenth century Dutch notarial practice which was based on Roman law, and because of the contrast it presents to English notarial practice.”). “The Dutch . . . lost their New Netherland colony to the English in 1664. The English renamed the colony New York.” THE WORLD BOOK ENCYCLOPEDIA, *supra* note 35, at 656. Indeed, the notary knowledge and experience of immigrants from many areas would influence America’s colonial notarial practice. “Among those who came [as Europeans to colonize America] were French, Spaniards, English, Dutch, Swedes, Finns, Germans, Irish, and Scots.” *Id.* at 630. See generally MERWICK, *supra* note 27 (tracing the notarial tenure of colonial notary Adriaen Janse of Albany, New Netherland/New York from 1669 to 1686,

Since the inception of the *notarius* and other comparable posts in ancient Rome,<sup>470</sup> a major function of the notary public has been record-keeping.<sup>471</sup> At that early time most of the population was illiterate, so that the first civil law notaries were men of education who, because they could read and write, were appointed as government officials to record public proceedings, to draft private documents, to register or authenticate written instruments, and to serve as keepers of these records.<sup>472</sup> Indeed, civil law notaries have been likened to public record offices because of their responsibilities to prepare and preserve written instruments, and to provide authenticated copies of those documents upon appropriate requests.<sup>473</sup> Although modern civil law notaries no longer function as scribes for public proceedings, the other duties mentioned still continue, importantly for our purposes herein including their record-keeping roles.

A fascinating bit of historic notary trivia is of particular relevance here. In 1857, in French novelist Gustave Flaubert's most famous work, *Madame Bovary*, this line appears: "[I]n a corner of every notary's heart lie the moldy remains of a poet."<sup>474</sup>

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including repeated references to documents passing back and forth between the colony and Europe). Merwick noted that Janese's "occupation put him somewhere within the Dutch legal system" and that "he earned his living by writing legal papers in Dutch." *Id.* at xv.

470. Other Latin names for a notary public include *actuarius*, *registrarius*, and *scrinarius*. BROOKE'S NOTARY, *supra* note 100, at 7.

471. In "the Roman office of notary . . . [t]he *notarius* recorded the dictation of private parties and governmental officials in notebooks." REYERSON & SALATA, *supra* note 100, at 2. Notaries of southern Europe in the Middle Ages provided original copies of contracts to the parties if they wished "legal proof of contractual obligations." *Id.* at 22.

472. "The first forerunners of the modern notaries were scribes who were men of learning at a time when most of the populace was illiterate." Closen, Orsinger & Ullrick, *supra* note 105, at 174. In ancient times as the first notarial posts were developing, "[w]riting was not widespread . . . [and] trusted souls were needed to write out important documents . . . . Because most lay persons were unable to write, signatures as they are commonly known today were all but impossible." Closen & Dixon, *supra* note 144, at 875.

473. The civil law "notary acts as a kind of public record office. He is required to retain the original of every instrument he prepares and furnish authenticated copies on request." Seth, *supra* note 27, at 866-67; *see also* MERWICK, *supra* note 27, at 5 (noting that colonial notary Adriaen Janse took a notary oath by which he was "sworn to guard his [notarial] papers, to make them available for clients but otherwise to maintain them in strict confidentiality"). Also, Janse was required by notarial rules of the age to "make copies upon request" of his official notarial records. *Id.*

474. JOHN BARTLETT (Ed.), *FAMILIAR QUOTATIONS* 583 (15th ed. 1980). Ancient Europeans would have had considerable experience with, or knowledge of, the work and writings of civil law notaries. Noting the existence in the Middle Ages of thousands of notaries in Italy, for example, it has been opined that "[t]hese numbers alone suggest the tremendous impact of notarial

In order for readers of the mid-1800s to have appreciated this passage, they must have had some familiarity with the work of civil law notaries, and specifically with the substantial volume of commercial writing in which those notaries were engaged. Only then would readers have understood and accepted the suggestion of Flaubert—that although notaries performed a great deal of technical writing they aspired to the loftier work of poets.

English notaries also know no other way of conducting their business than to thoroughly document it. Perhaps this approach derives as much from the fact that nearly all English notaries are solicitors<sup>475</sup> as it does from the nature of the notarial post itself, but the result is the same—rigorous documentation and record preservation. According to Richard Brooke, author of the 1838 treatise on English notarial practice (published also in several subsequent editions), and the preeminent authority of the time on that subject:

The usages and practice of the Notaries of England may, in some measure, be considered as traditional, because they are not defined by published Rules of the Court of Faculties [of the Archbishop of Canterbury], or by Statute. But that is only true to a certain extent, for they are not only transmitted by oral communication from Notary to apprentice, and from senior to junior Notary, but the Notarial Register Books, and the Protest and Noting Books, which are generally preserved with care, and often handed down from one generation of Notaries to another, contain valuable information respecting the forms used in times past, and the practice of those, who have since been removed from active pursuits, or from existence, by time or death. This is, in fact, one of the principal causes of the uniformity in the practice of Notaries, which is in general so observable throughout England.<sup>476</sup>

An interesting footnote to English notarial history is the feature that over time many ecclesiastical notaries were appointed to document church affairs and to maintain those records for the church.<sup>477</sup> Today's English notaries do not serve in the

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culture on medieval Europe.” REYERSON & SALATA, *supra* note 100, at 3-4. The notary “register of 1327-28 [of Middle Ages notary Jean Holanie of southern France] contains [the written records of] over 860 acts” or transactions. *Id.* at 16. The very large number of notarial acts performed between July 7, 1327, and April 3, 1328, was the result of the fact that “people of medieval southern Europe went to the notary much more often than do modern Americans.” *Id.* at 9.

475. See *supra* notes 447 and 449 and accompanying text.

476. BROOKE'S NOTARY, *supra* note 100, at vi-vii.

477. “In the ecclesiastical courts, notaries prepared documents and kept records of court proceedings.” Seth, *supra* note 27, at 867. The ecclesiastical courts of England were important because they “had jurisdiction over all matters having to do with marriage, divorce, and testamentary affairs.” *Id.* at 868. See also BROOKE'S NOTARY, *supra* note 100, at 10 (excluding from coverage in his treatise of the “functions which a Notary either was formerly

proceedings of the church and do not play a very important part in government and commerce.<sup>478</sup> But to the extent that English notaries do occupy a position in commerce, it is in connection with foreign trade, and the instruments they prepare are scrupulously recorded.<sup>479</sup>

These several historic influences caused colonial American notaries and early U.S. notaries to abide by the practice of detailed notarial record-keeping. This fact is further established by reference to the relatively few colonial notary records which have survived<sup>480</sup> and to the discussion of early notarial record-keeping in reported judicial opinions.<sup>481</sup> Such early American notary records were created and preserved by notaries themselves as corollaries to the records in the possession of document signers and other individuals who were the subjects of official notarial acts. This Article has already described such situations in which early American notaries had engaged in extensive record-keeping and record preservation in the areas of real estate transfers, the taking of depositions and the procedures for protests in the banking and marine commerce fields.<sup>482</sup>

One other virtually universal practice influenced notarial record-keeping here and elsewhere. From the time of the earliest ancient origins of the notarial post, notaries around the world have affixed a seal to documents as an essential element of the notarization process.<sup>483</sup> Among the oldest versions of notary seals

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or is now [in 1890] empowered to perform, of an ecclesiastical character.”)

478. “The notary in England never became an integral part of the common law system.” Seth, *supra* note 27, at 867. And consequently, “[i]n Scotland, the intermission of Notaries is much more required than in England.” BROOKE’S NOTARY, *supra* note 100, at 17.

479. Most of the work of present day English notaries “consists of preparing documents for use abroad.” Seth, *supra* note 27, at 885. And, that was the concentration of the work of early English notaries as well. *Id.* at 883. “The main function of the English notary today remains the preparation and authentication of legal documents intended to take effect outside the United Kingdom.” BROOKS, HEMHOLZ & STEIN, *supra* note 101, at 136.

480. See Seth, *supra* note 27, at 873 (explaining that notary Aspinwall considered his notarial records to belong to him and not to be public records). Interestingly, the notarial record of Aspinwall for the period 1644 to 1651 “is the only known book of seventeenth century notarial records from any of the English colonies” to survive. *Id.* See generally MERWICK, *supra* note 27 (pointing out that fairly numerous notarial documents of colonial Albany notary Adriaen Janse (who served from 1669 to 1686) have survived, and disclosing the substantial detail with which those notarial records were drawn).

481. See, e.g., *The Gallego*, 30 F. 271 (describing the notarial record book for a marine protest); *Nicholls*, 21 U.S. 326 (describing notarial record-keeping for the protest of a promissory note).

482. See *supra* notes 159-83 and accompanying text.

483. See Lerner, *supra* note 62, at 555 (referring to the common law requirement for the use of a notary seal on notarized instruments). See



were metal rings or disks that could be impressed into molten wax.<sup>484</sup> Additionally, when the oldest forms of multiple-page documents included notarizations, the common practice was to secure those pages with string or ribbon and for the notary to pour or drip molten wax over those primitive bindings in order to assure the security of the pages of the documents.<sup>485</sup> In more modern practice, notaries have used embosser seals, ink-stamp seals, and today's electronic seals.<sup>486</sup> Hence, the faithful affixation of seals to instruments from the historic beginnings of notarial service served the central purposes of both security and identification with regard to record-keeping, along with the related goal of

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generally Karla J. Elliot, *The Notarial Seal—The Last Vestige of Notaries Past*, 31 J. MARSHALL L. REV. 903 (1998) (tracing the evolution of the notary seal). The notary seal has truly served as a visual symbol of the integrity of the signatures on documents. "One of the main reasons each jurisdiction in the United States has seen fit to create the office of notary public was so that when a person sees a notary seal and signature on a document, that person can accept the validity of the signature on the document without further question." Henderson & Kovach, *supra* note 301, at 876-77.

484. In ancient times, because many people could neither write nor sign their names, "many people, often those of some wealth, used a metal or clay disk which was engraved with the family coat of arms. After hot wax was dripped on a page, the crest was impressed upon the wax and served as a signature for that individual." Closen & Dixon, *supra* note 144, at 875. "[A]t common law, a notarial seal must be impressed upon wax, wafer, or other tenacious substance." Lerner, *supra* note 62, at 555.

485. There have always been heightened security risks with multi-page documents, such as insertion of extra pages, deletion of pages, or replacement of pages with forgeries. Wax, which had been in use since ancient times, dripped on the bindings of multi-page instruments prevented such tampering. See *supra* note 151 and accompanying text. However, this security measure was awkward because the second and subsequent pages could not be efficiently accessed without damaging the brittle wax. The embosser seal solved that difficulty. The metal embosser notary seal is "a press-like device that imprints an image in relief on a paper surface." Barich, *supra* note 222, at 38. Embosser seals are particularly effective when imprinted through two or more pages of multi-page instruments, because the seal impressions on each page not only must be identical but also must align exactly in order to prove an absence of tampering and thus prove authenticity. "Seal embossers offer excellent security . . . They're especially effective for loose Notary certificates." *Help Deter Fraud!* [advertisement], NAT'L NOTARY, Jan. 2005, at 44.

486. In one 1965 encyclopedia, the only reference in the description of the notary public to the notary's official seal is to the embosser-type seal. "The Notary Public Seal is pressed into paper with a small hand stamp." *Notary Public*, THE WORLD BOOK ENCYCLOPEDIA, *supra* note 35 at 428. See also Fischer, *supra* note 151, at 10 (concluding that "[t]he embosser [notary seal] allows one to differentiate between the original and a fraudulent photocopy."). "The seal and wax method adopted from England by the early colonists transformed to the familiar raised embosser. The increased use of photocopying created problems identifying notarized originals from copies, thus bringing about the introduction of the even more familiar inked stamp." Elliott, *supra* note 483, at 907.

preservation of those records.<sup>487</sup> It was, after all, in ancient times when additional forms of recording of notarizations would have been quite difficult and time consuming. And, it was a simpler time when the presence of the unbroken wax of the notary seal, and perhaps the unbroken waxed binding, nearly guaranteed the authenticity of documents.<sup>488</sup> With the exception of a relatively small number of U.S. states in modern times that have mistakenly abandoned the requirement of affixing seals as part of the notarization procedure,<sup>489</sup> the use of the official seal by notaries continues to be practiced around the world by both English notaries and civil law notaries,<sup>490</sup> as well as by most U.S. notaries (although the presence of a notary seal no longer provides the same level of guarantee of document authenticity in the U.S. as it first did). That continued employment of the notary seal is one more indication of the historic focus of the occupants of the office of notary public upon the creation and preservation of tangible and effective records of their official acts, records which are not easily vulnerable to loss, destruction or tampering.

Contemporary civil law notaries predominate throughout most of the world—in the Americas, Europe, Africa and Asia—and their record-keeping tradition continues. In Great Britain, the notarial record-keeping custom survives as well. The fundamental

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487. See Fischer, *supra* note 151, at 10 (concluding “[t]he affixing of a notarial seal has a utility that goes beyond the traditional function of imparting integrity, ceremony and closure to a notarized document.”). As noted earlier, in 1883 the U.S. Supreme Court even went so far as to hold that it would “take judicial notice of the seals of notaries public.” [in this case from a foreign country]. *Indseth*, 106 U.S. at 547.

488. See *supra* notes 151 and 155 and accompanying text.

489. See Fischer, *supra* note 151, at 10, 12 (pointing out that in 1995 some 13-14 states did not mandate the use of notary seals in the performance of notarizations); *NNA Study Shows ID Standards Deficient in Majority of States*, NOTARY BULL., Feb. 2003, at 5 (reporting that “24 percent [of U.S. jurisdictions] do not require use of a seal or stamp for every notarial act performed.”). Thankfully, the number of U.S. jurisdictions which do not require their notaries to use a notary seal has declined to 10. *Comparison of Notary Provisions*, *supra* note 21, at 35 (listing Connecticut, Kentucky, Louisiana, Maine, Michigan, New Jersey, New York, Rhode Island, Vermont and Virginia in that category).

490. See BROOKE’S NOTARY, *supra* note 100, at 44 (stating that “[b]y a notarial act, is meant the act of authenticating or certifying any document or circumstance, by a written instrument, under the signature and official seal of [an English] Notary.”) See also Baker & Barassi, *supra* note 449, at 2 (noting that “a common role of notaries both in the United States and abroad” is to sign and seal documents). “For documents leaving the United States, American Notaries must use an official seal of office regardless of whether or not required by the local commissioning jurisdiction. Simply writing or typing “Notary Public” or “seal” is not legally recognized outside the United States, and could potentially cause grievous damage.” Timothy S. Reiniger, *International Teamwork Redefines Global Security*, NAT’L NOTARY, Jan. 2008, at 23.

reasons for such widespread international adherence to notary record-keeping are those already noted, namely that journalizing is essentially part of the official act of proper notarization and that the welfare of the public is far better served by notaries who journalize than by those who do not. In all of the world, it is only the some thirty-five identified states and territories of the U.S. which depart from rigorous record-keeping and record-safeguarding practices.

Unquestionably, there has survived throughout the rest of the globe an uninterrupted historical tradition of notary record-keeping, and even in this country there had existed a fundamental notarial function of record-keeping, previously detailed in this paper,<sup>491</sup> but now lost in most U.S. states and territories. Oliver Wendell Holmes wrote, "There are no times like the old times,—they shall never be forgot!"<sup>492</sup> But, he and others who have spoken of similar theories of remembrances were mistaken when it comes to recall of the record-keeping customs from ancient notarial history. That historic custom has been largely forgot, and disregarded when it has been known. However, just because this real history has been lost among the multitude of notaries public and members of the general public does not diminish its true meaning upon the question of whether the common law should recognize a duty of notaries to journalize their official acts. Judges, once informed of the depth of the record-keeping custom, should tend to show more reverence for it. After all, judges have been immersed in the history of custom and law since their days in law school, and many of them hear about custom and history regularly in their courtrooms and in judicial education programs. Moreover, judges are adherents to the process of reasoning from historic precedents in the form of earlier judicial opinions.<sup>493</sup> That helps explain why the omniscient Mark Twain observed, "Laws are sand, customs are rock,"<sup>494</sup> and why learned historic custom is so important to the common law.

On the other hand, if the current practice of neglecting to create and retain notarial records arises out of lost history, should it possess such strength of devotion? It has been keenly observed: "[T]he past that influences our lives does not consist of what happened, but of what men believe happened."<sup>495</sup> Lost or forgotten

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491. See *supra* notes 159-83, 450, and 470-76 and accompanying text.

492. PLATT, *supra* note 127, at 341. See *supra* note 445 and accompanying text (concerning the need for history to be remembered).

493. "Precedent is commonly considered one of the basic concepts of the common law." FRIEDMAN, *supra* note 55, at 21. "Stability in the common law is provided by judicial reliance on previous court decisions, or precedents." HEINEMAN, *supra* note 56, at 193.

494. THE FORBES BOOK OF BUSINESS QUOTATIONS, *supra* note 25, at 441.

495. See *id.* at 633 (quoting Gerald W. Johnston); see also *supra* note 445 and accompanying text.

history is just that—lost or forgotten and worthless as a guide to avoiding the errors of the future. Consequently, the long custom of neglecting notary record-keeping in thirty-five states and territories does not constitute a compelling reason to continue it. It is not reasoned custom. The total and undisturbed ignorance of the real history of the notarial record-keeping custom anchors most notaries to the substandard performance of their roles. It attempts to justify the unjustifiable. Further postponement of mandatory notarial record-keeping cannot be allowed to rest upon such depth of ignorance—upon this lost history.

Curiously, even numerous states, which do not statutorily require notaries generally to maintain journals, regularly appear to recognize the worth of notary record-keeping and to mandate such record-keeping by statute or custom for certain types of notarial activities. Only three states authorize their notaries to officiate at marriage ceremonies. For instance in Florida where the notary statute does not expressly require journalizing, notaries may preside over wedding ceremonies, and the notaries who do so are required to complete a portion of the marriage license and to transmit it to the appropriate governmental office for filing.<sup>496</sup> Likewise, in Maine “a Notary Public is required to keep and make a record of all marriages performed.”<sup>497</sup> South Carolina also does not generally by statute require its notaries to retain notary records, but it does allow its notaries to preside over wedding ceremonies,<sup>498</sup> the completion of which must necessarily be documented by the state. Thus, a governmental officer (whether the notary or another state official) retains a record of the completion of each of the marriage ceremonies in those states.

Also, Florida<sup>499</sup> and South Carolina<sup>500</sup> are among the states authorizing notaries to conduct the inventorying of the contents of bank lock boxes or safe deposit boxes of delinquent lessees, and in so doing notaries are required to prepare an original and a duplicate inventory and to deposit the original with the inventoried contents and to send the copy to the delinquent lessee.<sup>501</sup> Again, more than one copy of the document complying

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496. FAERBER, *supra* note 15, at 101 (noting that Florida notaries are authorized to perform marriage ceremonies). “[N]otaries are official witnesses on behalf of the state to certain transactions, among which in [Florida, Maine and South Carolina], is the entering into the oaths of marriage.” VAN ALSTYNE, *supra* note 7, at 213. “When the notary has performed the marriage, the marriage certificate is signed by the notary and is properly recorded as specified by the respective state laws.” *Id.* at 214.

497. FAERBER, *supra* note 15, at 208.

498. *Id.* at 424.

499. *Id.* at 101.

500. S.C. CODE ANN. § 34-19-70 (2008).

501. See CLOSEN, *supra* note 2, at 212-13. For a discussion of the notarial practice of inventorying bank lock boxes (a duty in only a few jurisdictions).

with the inventory procedure is completed. In at least 18 states which do not generally by statute require notaries to journalize their official acts (Alaska, Arkansas, Connecticut, Idaho, Indiana, Kentucky, Minnesota, Montana, Nebraska, New Hampshire, New York, Ohio, Rhode Island, South Carolina, Vermont, Virginia, Wisconsin and Wyoming), notaries are authorized to preside over depositions and are required to record or certify those proceedings in writing and to provide copies for the courts and/or for the parties involved in the litigations.<sup>502</sup> It would be unthinkable for just one copy of a deposition to be created. So, there is always a back-up record to document the contents of a deposition (even if one version is merely the shorthand transcription or tape recording of the deposition). In at least seven states which do not statutorily require their notaries to generally create and retain notarial records (Kentucky, Maine, Minnesota, New Jersey, North Dakota, Ohio and Oklahoma), notaries continue to be authorized to engage in the antiquated procedure of protesting bills and notes, and their notaries are required to keep records of such protests.<sup>503</sup> Maine even retains a provision in its notary law on the virtually extinct practice of issuing marine protests, and requires its notaries to record such protests.<sup>504</sup> Back-up evidence is at the heart of the protest procedure which necessitates notice of the protest to be given and documented. Hence, in connection with the notarial acts of performing wedding ceremonies, inventorying lock boxes, presiding over depositions and administering commercial protests, notaries are required to create and preserve records of those acts. If the twenty-three states just identified consider the process of record-keeping to be important enough to be required for each of the four notarial acts listed, then why not for all official notarial acts? The answer is clear; there is no sound reason to differentiate between notarial acts; and notaries should create and retain records to document all of their official acts.

One of the most unusual of state statutory provisions in regard to notary record-keeping appears in the laws of Maine and provides in part as follows: "The Secretary of State shall *recommend* that every notary public keep and maintain records of all notarial acts performed."<sup>505</sup> While it appears peculiar that legislators would acknowledge the value of notary record-keeping,

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502. See FAERBER, *supra* note 15, at 11 (Alaska), 40 (Arkansas), 74 (Connecticut), 144 (Idaho), 162 (Indiana), 184 (Kentucky), 242-43 (Minnesota), 270 (Montana), 276 (Nebraska), 296 (New Hampshire), 320 (New York), 366 (Ohio), 416 (Rhode Island), 424 (South Carolina), 471 (Vermont), 480 (Virginia—authorizing notaries to "certify" depositions), 514 (Wisconsin), 524 (Wyoming).

503. *Id.* at 189 (Kentucky), 208 (Maine), 249 (Minnesota), 307 (New Jersey), 356 (North Dakota), 375 (Ohio), and 384 (Oklahoma).

504. *Id.* at 208.

505. ME. REV. STAT. ANN., Tit. 4, § 955-B (2008) (emphasis added).

but would proceed only to *recommend* rather than mandate such record-keeping, the even more surprising provision comes in the very next sentence of the same section of the law, which reads: "The notary *shall* safeguard and retain exclusive custody of those records."<sup>506</sup> Thus, in Maine the worth of a notarial journal record is so well known that its notary statute encourages Maine's notaries to maintain such records and obligates its notaries to safeguard such records. And recall that Maine's notaries are required to maintain separate records when they perform marriages and marine or commercial protests. But, Maine's notaries are not otherwise generally required by statute to create journal records. In light of those curious circumstances in Maine, the omission to statutorily require notary journalizing does not seem to make good sense or good policy.

The importance and value of notary journals are so well understood that several jurisdictions which do not statutorily require journal record-keeping, nevertheless have enacted statutes which variously provide for the safeguarding of notary journals and for the disposition of those journals upon a notary's death or the termination of a notary's commission. To illustrate, the notary statute of Arkansas includes a section dealing with the preservation of notarial journals of notaries whose commissions become revoked,<sup>507</sup> and the laws of North Carolina,<sup>508</sup> Utah<sup>509</sup> and Wisconsin<sup>510</sup> also contain provisions for the protection of notary records. But, the statutes of Arkansas, North Carolina, Utah and Wisconsin do not direct their notaries to create journal records in the first instance. The Michigan notary statute mandates that the records of notaries public be deposited with county clerks when notaries vacate their positions, and it further directs that "[t]he county clerk *shall* receive and safely keep all the records and papers of notaries public. . .",<sup>511</sup> and Montana law includes very similar provisions.<sup>512</sup> The Florida statute includes a section making it a misdemeanor to unlawfully possess papers relating to notarial acts, which would include journal entries voluntarily kept by Florida notaries.<sup>513</sup> But again, neither the Florida, Michigan nor Montana statute expressly requires that notaries generally prepare records of their official acts. It seems fair to suggest that such laws do, however, implicitly endorse the worth of notary record-keeping and, furthermore, that they do show how very close

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506. *Id.* (emphasis added).

507. FAERBER, *supra* note 15, at 46.

508. *Id.* at 345.

509. *Id.* at 470.

510. *Id.* at 515.

511. MICH. COMP. LAWS ANN. § 55-116 (West 2008) (emphasis added).

512. MONT. CODE ANN. § 1-5-420 (West 2008).

513. FAERBER, *supra* note 15, at 113.

those just-named seven states have come in their notary statutes to the ultimate position advocated in this paper—the requirement that notaries prepare and preserve detailed journals of all of their official acts (except that we suggest this standard already exists under the common law).

Finally, consider this. Today, every jurisdiction publishes a notary handbook or manual, and/or maintains an informational notary Web site, originating from the administrative agency that oversees the functioning of notaries public.<sup>514</sup> While these official publications and electronic postings do not have the same legal force of statutes, they do nevertheless represent official agency policy, which may prove influential upon courts in setting tort law standards of care. Many of those publications and sources endorse notary record-keeping, even in jurisdictions which by statute do not expressly mandate general notarial record-keeping. Certainly, the legislatures of each of those states and territories are aware, or should be aware, of the contents of their official notary handbooks and Web sites. Those legislatures have allowed recommendations in favor of notary record-keeping to continue, and therefore, those legislatures have implicitly accepted the administrative agency recommendations. And, once more, thank goodness that no jurisdiction has taken what would be the ultimate step on an even more terrible path by statutorily prohibiting notarial journalizing.<sup>515</sup>

The list of examples of states which do not statutorily mandate notary journalizing but which officially recommend the practice is long, but it is important to our position to discuss this long list. By our count, twenty-six such states endorse such record-keeping—which represents about 46% of all U.S. jurisdictions and which represents about 74% of the jurisdictions that do not statutorily require it.<sup>516</sup> Of the twenty-six states that endorse notary journalizing, twelve of them strongly or very strongly recommend it. The fourteen states that simply recommend notary journalizing include: Idaho, Kansas, Kentucky, Michigan, Nebraska, New Jersey, New Mexico, North Dakota, Oklahoma, South Carolina, South Dakota, Vermont, Washington, and Wisconsin.<sup>517</sup> The twelve states that strongly or very strongly

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514. See FAERBER, *supra* note 15 (noting that every state and territory has produced a notary handbook/manual and/or Web site, and these are referenced on the first page of the entry for each state and territory).

515. “No jurisdiction specifically outlaws the practice [of notarial journalizing].” MODEL NOTARY ACT ch. 7, general cmt.

516. We arrived at the 46% figure by dividing 26 by 56, which gave a result of .46428. We got the 74% figure by dividing 26 by 35, which provided a result of .74285.

517. See FAERBER, *supra* note 15, at 151 (Idaho), 182 (Kansas), 189 (Kentucky), 240 (Michigan), 282 (Nebraska), 307 (New Jersey), 317 (New Mexico), 356 (North Dakota), 384 (Oklahoma), 429 (South Carolina), 438

recommend it include: Alaska, Arkansas, Connecticut, Florida, Georgia, Iowa, Maine, Minnesota, Montana, New Hampshire, North Carolina, and Wyoming.<sup>518</sup> Some of the recommendations are emphatic. For instance, Alaska's notary manual comments that the importance of journalizing "cannot be emphasized enough."<sup>519</sup> The Arkansas handbook calls journalizing an "excellent way of recalling past notarial acts."<sup>520</sup> The Wyoming Notary Public Handbook states: "Wyoming statutes do not require keeping a journal but it is wise and *highly recommended* by the Secretary of State."<sup>521</sup> According to the Florida Governor's Reference Manual For Notaries, although "the Governor's Task Force On Notaries Public in 1989 recommended the mandatory use of journals... the Legislature did not follow that recommendation," but the Florida Manual For Notaries "strongly endorses the policy of recording every notarial act in a journal."<sup>522</sup> The Minnesota Secretary of State's Web site (Notary Handbook) describes the making of a journal entry to be one of the "three critical steps that a Notary Public should always follow" in performing a notarization.<sup>523</sup> Since the legislatures in all of these twenty-six states should be aware of the contents of official state publications, and since those twenty-six legislatures have seen fit to allow the official endorsements of the worth of notary journalizing to continue, those twenty-six states named in this paragraph should be added to the list of twenty-one states and territories which statutorily require notary journalizing—making a total of some forty-seven jurisdictions, or about 84% of all U.S. jurisdictions, that have officially endorsed the practice.<sup>524</sup>

There are only eight states and one territory of the fifty-six U.S. jurisdictions which do not statutorily require notary journalizing and do not officially endorse the practice in their

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(South Dakota), 477 (Vermont), 504 (Washington), and 521 (Wisconsin). Incidentally, in the Michigan situation, the Secretary of State's Office merely notes that "many notaries find journals to be an effective method for keeping records." *Id.* at 240. We regard this statement to be an endorsement, because the Secretary would not even have said that much if the agency were opposed to journalizing.

518. *Id.* at 18 (Alaska), 45 (Arkansas), 83 (Connecticut—very strong recommendation), 113 (Florida), 124 (Georgia), 175 (Iowa), 208 (Maine), 249 (Minnesota), 274 (Montana—very strong recommendation), 299 (New Hampshire), 345 (North Carolina), and 530 (Wyoming—highly recommended). The notary Web site for North Carolina opines: "The best way to document your notarial acts is by keeping a journal." *Id.* at 345.

519. *Id.* at 18.

520. *Id.* at 45.

521. *Id.* at 530. (emphasis added)

522. *Id.* at 113.

523. *Id.* at 249.

524. We arrived at the 84% figure by dividing 47 by 56, which gave us the number .83928.



official notary publications. Those nine places include American Samoa, Delaware, Illinois, Indiana, New York, Ohio, Rhode Island, Utah, and Virginia.<sup>525</sup> Yet, the notary statutes of Delaware, New York and Rhode Island still authorize their notaries to perform commercial protests.<sup>526</sup> The notary statutes of Indiana, New York, Ohio and Rhode Island still empower their notaries to preside over depositions.<sup>527</sup> Would notaries who undertake the administration of commercial protests and the recording of depositions not be obliged to create duplicate or back-up records to document those official acts?<sup>528</sup> To fail to do so would be irresponsible. Tragically, the nine identified jurisdictions (which account for about 16% of all U.S. states and territories)<sup>529</sup> neither statutorily mandate notary journalizing nor officially commend it to their notaries public, thereby leaving their notaries with no guidance whatsoever about this critical historic feature of notarial functioning. Moreover, those nine jurisdictions (which include three of the ten states with the largest notary populations)<sup>530</sup> are homes to more than 993,000 notaries,<sup>531</sup> who are given virtually no official encouragement about notarial record-keeping that would both heighten the performance of those notaries and better protect notaries public, notary employers and document signers.

This segment of the Article began with a passage from an 1823 U.S. Supreme Court decision of importance to our thesis.<sup>532</sup> It was a common law decision of the country's highest court, recognizing the reliability of the record book of a notary public because he had maintained regular and comprehensive entries of the commercial protests that he executed.<sup>533</sup> At that stage in our

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525. See FAERBER, *supra* note 15, at 21 (American Samoa), 90 (Delaware), 160 (Illinois), 168 (Indiana), 328 (New York), 375 (Ohio), 422 (Rhode Island), 470 (Utah), and 477 (Virginia). At least both the Illinois and Utah sources mention that notaries "may" maintain journal records. *Id.* at 160 and 470.

526. *Id.* at 86 (Delaware), 320 (New York), and 416 (Rhode Island).

527. *Id.* at 162 (Indiana), 320 (New York), 366 (Ohio), and 416 (Rhode Island).

528. For instance, the statute in Ohio requires its notaries to maintain records of any commercial protests which they perform. *Id.* at 375.

529. We arrived at the 16% figure by dividing 9 by 56, which resulted in the number .16071.

530. Those three states among the ten largest in notary populations include New York, Ohio and Illinois. See *Official NNA 2007 Notary Census, supra* note 195, at 21.

531. We obtained the 993,000 number by adding the notary populations of Delaware (8,945), Illinois (198,421), Indiana (122,950), New York (273,669), Ohio (228,247), Rhode Island (21,000), Utah (20,237), and Virginia (120,000), which yielded a total of 993,469. *Id.* In addition, there would be a small number of notaries in American Samoa.

532. See *supra* note 441.

533. *Nicholls*, 21 U.S. 326. The daughter of the deceased notary testified at "her deposition, that her father kept a regular book of his notarial acts, and uniformly entered, in a book kept by himself, or caused the deponent

nation's history, U.S. notaries appeared far more closely aligned with ancient civil law and English notaries than they resembled what were to become the U.S. notaries of the twentieth and twenty-first centuries. The continuing influence of ancient notarial record-keeping habits upon modern notary practice around the rest of the globe was to be expected, in light of the wide array of other historical developments that have caused lasting effects. Consider advances within the range of all major societal institutions, such as art, business, communications, educational methods, transportation, written language forms, music, government systems, architecture, technology, medical procedures, law and religious practices. Every major achievement of progress has had lasting consequences, as should be expected.<sup>534</sup> Once a step forward has been achieved, there should be no abandonment or reversal of that progress. The highest purpose of the study of history is to lead us forward. Regrettably though, thirty-five U.S. jurisdictions have actually moved backward in regard to notarial record-keeping. The habit of ancient civil law and English notaries of engaging in comprehensive record-keeping continues its influence today, except in those thirty-five U.S. jurisdictions where this part of notarial history has been forgotten and reversed. As the Supreme Court correctly concluded in the 1823 case, when notaries were meticulously recording their official acts of performance of commercial protests, the lessons of such notarial record-keeping warranted reliance upon notarial books, for "the actual condition and business of men" constituted a societal concern justifying legal approval of and reliance on those thorough records.<sup>535</sup> The true history of civil law notaries, English notaries, and even early U.S. notaries cries out for common law recognition of a duty of detailed notarial record-keeping.

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[daughter] to do it, exact copies of the notes, bills, [etc.]; and in the margin opposite to the copy of the protest made memorandums after notification to endorser, if any, of the fact of such notification." *Id.* at 330.

534. For instance, in the field of fine art, it has been said that the "influence [of surrealism] can be detected in all the major art movements that have come into being since 1945." JAMES MACKAY (Gen. Ed.), *WORLD FACTS* 375 (1999). As another example, the history of written language is replete with instances of the borrowing of parts of earlier writing systems by subsequent ones. See *Writing*, FUNK & WAGNALLS NEW ENCYCLOPEDIA, *supra* note 35, at 19-21. This truism should really require no citation to authority. However, in order to consider even more examples, see generally Robert Dolezal, Ed., *Inventions that Changed the World*, READER'S DIG. (1999); COMPTON S. SUPPLEMENT, *MILESTONES OF THE 20<sup>TH</sup> CENTURY* (Success Publishing Group 1999); FELIPE FERNANDEZ-ARMESTO, *IDEAS THAT CHANGED THE WORLD* (2d ed. 2007).

535. *Nicholls*, 21 U.S. at 332.

## VI. INCOMPLETE NOTARY PRACTICE LEGISLATION

By a course as devious and unpredictable as the tracks of a beagle hound cold trailing a jackrabbit, we think we have found some law authorizing a notary public to administer an oath in excess of those included in [the Kentucky notary statute].<sup>536</sup>

Statutes, of course, are not the end-all step in the lawmaking process due to their frequent post-enactment need for interpretation.<sup>537</sup> According to the authors of *Notary Law & Practice*, the country's only law school textbook on that subject, "Notaries draw their authority from traditional law sources—custom and usage of the law merchant, common law and statute."<sup>538</sup> In the thoughtful view of Professor Orth, "The common law way with [early] statutes was to treat them very much like precedents, subject to close reading and extended or distinguished in keeping with judicial notions of public policy."<sup>539</sup> This approach continues. Because of the brevity and therefore incompleteness of some old statutes, Professor Orth has written that they "were little more than invitations to the judges to develop the common law in certain directions."<sup>540</sup> Early in the nation's history, states tended to allow law, in the opinion of Professor Berman, "in large part, though . . . not entirely, to be developed case by case by the state courts rather than by legislation."<sup>541</sup> From the time of the beginnings of the nation's legal system, courts have possessed and exercised the legitimate authority to expand upon American statutory law through the process of legal interpretation. In 1803, the United States Supreme Court decision in the foundational case of *Marbury v. Madison* declared in now-famous language that "it is emphatically the province and duty of the judicial department to say what the law is."<sup>542</sup>

As the new country advanced in the late 1700s and early 1800s, one of the difficulties was the development of law to govern exploding populations in expanding geographical regions. After all, "Colonial America [had been primarily] a coastal country," that

536. *Owsley v. Ky.*, 428 S.W.2d 199, 201 (Ky. Ct. App. 1968).

537. "Even though a rule [of law] is written in the form of a statute, difficult problems often arise in deciding exactly what the statute means. . . . Such questions are decided by the courts in accordance with common-law traditions after careful study of the statute." THE WORLD BOOK ENCYCLOPEDIA, *supra* note 35, at 117. The ambiguities or loopholes in statutes have become the subject of well-accepted proverbs, such as: "Every law has its loophole." DALE, *supra* note 24, at 182.

538. CLOSEN, *supra* note 2, at 59.

539. Orth, *supra* note 57, at 129.

540. *Id.*

541. Berman, *supra* note 62, at 511.

542. 5 U.S. 137, 178 (1803).

had soon “crept far inland.”<sup>543</sup> With the westward growth into new territories that were to become new states, the natural tendency was for the statutes of the original or older states to serve as models for new jurisdictions. In fact, the Northwest Ordinance of 1787 authorized officials in the new districts to “adopt and publish . . . laws of the original States” to govern in these new regions.<sup>544</sup> In the notary field in particular, this modeling after the old laws of the eastern seaboard colonies, and then states, carried with it the disadvantage of perpetuating the faults of those old laws. The original notary laws were dedicated to procedure that was somewhat antiquated and woefully incomplete even for the times.<sup>545</sup> The resulting backwardness of effect on early notary performance spread widely and became so profound that it continues to inhibit contemporary notary practice. This view of notarial functioning remains cancerously difficult to correct in large measure because it deceptively seems so simple that it is often taken for granted by state legislators who author notary statutes. Yet, its significance in government and commerce should belie this fateful attitude of the legislatures.

Historically, much of the legislation creating and empowering notaries has been skeletal at best, causing many ambiguities.<sup>546</sup> In many respects in many states and territories, notary statutes have not progressed with the times nearly as well as they should

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543. FRIEDMAN, *supra* note 55, at 157. In the eighteenth century, “[n]o doubt custom and case law slowly seeped from colony to colony.” *Id.* at 92.

544. *Id.* at 157-58. “[N]ewer settlements found it convenient to borrow laws from older neighbors.” *Id.* at 92.

545. The governmental and commercial practices in the American colonies, and in the early United States, lagged behind the more sophisticated nations of Europe. “Many of [the U.S. notary laws] were passed during the late Eighteenth and Nineteenth Centuries and, to a large extent (despite subsequent modifications), still reflect the commercial and cultural needs of that era.” UNIF. NOTARY ACT, Preface (1976). “The earliest United States notary statutes were quite brief, leaving numerous matters of consequence unaddressed. . . . To illustrate, the 1837 North Carolina law contained only three one-sentence paragraphs, while the 1840 Vermont notary statute contained just four one-sentence paragraphs. . . . The 1828 Illinois notary law contained only six short paragraphs.” Closen & Orsinger, *supra* note 64, at 526.

546. “[S]tate Notary laws can vary widely between jurisdictions. . . . [A] state’s laws may not clearly define what is permissible in certain situations.” *Ethical Behavior is a Notary’s Compass*, NAT’L NOTARY, May 2005, at 23. According to one notary hotline counselor, “Notary regulations and statutes often do not address every aspect of notarization.” Mel Prescott, *Our Recommendations May Evolve as the World Changes*, NAT’L NOTARY, Jan. 2008, at 45. See Thaw, *supra* note 468 (referring to “the ambiguities of the Notary office”). The Massachusetts law prior to 2003, for instance, was incomplete and therefore ambiguous, as indicated by the statement in the Preamble to the Executive Order on Notaries of December 19, 2003 to the effect that “notaries public currently lack specific guidance as to the nature and scope of their duties.” Exec. Order No. 455 Preamble.

have. In 1998, the Notary Public Code of Professional Responsibility accurately observed that “in few offices are the guiding statutes so scant and inadequate” as in the notary field.<sup>547</sup> According to the Commentary to the Model Notary Act of 2002, “Many state notary laws are carry-overs from antiquated statutes [citing the statutes of Delaware, Hawaii and South Dakota], some are quite minimalist [citing the laws of Alabama, Vermont and Massachusetts], and others a patchwork product of numerous unrelated legislative amendments [citing the statutes of California, Indiana, and Louisiana].”<sup>548</sup> Indeed, it was primarily the incompleteness of the notary law of Massachusetts that prompted Governor Romney to supplement it through his Executive Order on Standards of Conduct For Notaries Public in December of 2003.<sup>549</sup>

In many other substantive fields, the existence of statutes may be regarded as preempting those fields so as to bar executive or judicial actions to supplement or modify the law under the statutes. But, preemption should have little place in the notary arena. Moreover, ordinarily when statutes omit to mandate specific standards of behavior, the failure to include such directives for appropriate conduct may be interpreted as meaningful omissions. Again, however, such an interpretation is out of place in the notary field. Notary statutes tend to be so antiquated and inadequate that they should not preempt the notary field, nor should the failure of such notoriously old and incomplete laws to cover the notary journal subject be considered as learned opposition to a journal requirement. As mentioned, not one of the thirty-five states and territories in question has enacted laws to prohibit notary journalizing. Importantly, most legislators suffer from a profound indifference and lack of knowledge about notary issues, and those traits represent the major reasons for lack of reform of notary statutes in general and for lack of implementation of statutorily mandated notary record-keeping in particular.<sup>550</sup>

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547. NOTARY PUBLIC CODE OF PROF'L RESPONSIBILITY Introduction (1998).

548. MODEL NOTARY ACT § 1-2, cmt; see also *NNA Study Shows ID Standards Deficient in Majority of States*, NOTARY BULL., Feb. 2003, at 5 (reporting that “about 31 percent of the jurisdictions have not significantly updated their Notary statutes in 15 years.”).

549. The Preamble to the Executive Order states: “Whereas, notaries public currently lack specific guidance as to the nature and scope of their duties.” Exec. Order No. 455 Preamble.

550. “[T]he 350 year history of notaries in the colonies and in the country has demonstrated widespread indifference to notarial ethics . . . . Indeed, the laissez-faire notarial system in this country promotes unethical performance by notaries.” Cloisen & Orsinger, *supra* note 64, at 547. As one extreme example, “[m]any jurisdictions [listing 26 states and the District of Columbia] have failed to enact legislation specifically prohibiting notaries from

Because of the inadequacies of notary statutes, courts have been required to confront issues not fully explained, and have necessarily had no recourse but to supplement the incomplete legislation through statutory interpretation. The specifics of numerous notarial functions had been ignored by many early legislatures. For instance, the task of identifying document signers constitutes a most central role of notaries, but the description of what notaries were to do in that regard had been largely neglected by the legislatures.<sup>551</sup> It was left to the courts to define when document signers were “personally known” to notaries and to determine what notarial methods were sufficient to identify other unknown document signers.<sup>552</sup> Courts imposed the obligation upon notaries to exercise reasonable care in identifying document signers, thereby rejecting the notion that notaries become the guarantors of the identities of signers for whom notarizations are performed.<sup>553</sup> That standard of care, therefore, originated in the common law, not in notary statutes (although numerous statutes have now adopted this identification standard).<sup>554</sup>

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notarizing their own signatures or from notarizing instruments in which they are named.” *Id.* at 571-73. In this age of the Internet and instant global communications, “[n]otary legislation lags behind the rapidly advancing technology.” Closen, Orsinger & Ullrick, *supra* note 105, at 251. “[L]egislators are not ordinarily discouraged by the fact that they do not fully understand everything that they are legislating about.” MUNROE H. FREDMAN, UNDERSTANDING LAWYERS’ ETHICS 2 (1990). Recall that Alfred Piombino has referred to “the advanced stage of decay and neglect that the office of notary public has suffered.” PIOMBINO, *supra* note 216, at xxii.

551. Notary statutes remain insufficient on the subject of the identification of document signers. See *NNA Study Shows ID Standards Deficient in Majority of States*, *supra* note 548, at 5 (reporting that “27 percent of U.S. jurisdictions lack [notary] ID standards altogether”; “39 of the 55 states and U.S. territories [or almost 75 percent] lack adequate identification standards for Notaries”; and “76 percent [of jurisdictions] have not updated ID standards significantly in at least 15 years.”).

552. See *Anderson v. Aronsohn*, 184 P. 12 (Cal. 1919); see also *Meyer*, 2 Mo. App. 413; *Levy v. Western Cas. & Sur. Co.*, 43 So. 2d 291 (La. Ct. App. 1949).

553. “It is well-accepted that notaries are not guarantors of their notarizations, in that notaries cannot be expected to establish absolutely that document signers are really who they purport to be.” CLOSEN, *supra* note 2, at 247. See Closen & Dixon, *supra* note 144, at 888 (commenting that “[t]he standard for liability of a notary public is one common to tort law. The notary must act as a reasonably prudent notary would act in the same situation.”). “Notaries are not held to be guarantors of the identities of signers as long as they have taken reasonable care to identify signers.” Closen, *supra* note 17, at 25. See, e.g., *James Inc. v. Carr*, 14 P.2d 1113 (Wash. 1932) (declaring that a notary is not a guarantor of the correctness of the identification of a document signer as indicated in the notarial certificate, but is liable only for incorrect identification due to notarial negligence).

554. The model notary laws, dating back to the 1970s, have led the way to inclusion of legislative provisions to help assure the proper identification of

Other illustrations of common law additions to the statutory authority and obligations of notaries abound. For instance, many courts concluded that notaries were public officials (thereby implicating the rights and responsibilities generally borne by public officers and public servants).<sup>555</sup> Under the common law, some courts declared that notaries had the responsibility to decline to notarize in connection with transactions in which the notaries had financial or beneficial interests.<sup>556</sup> As further examples, particular courts found notaries to possess the common law authority to administer oaths to document signers,<sup>557</sup> to determine the competence of document signers to execute instruments,<sup>558</sup> to cite deposition witnesses for contempt for

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document signers by notaries. Sections of the early version of The Uniform Notary Act included requirements for the journal recording of the names and addresses of documents signers, of the evidence displayed to notaries to prove identification (including in those days the serial or account numbers for ID cards of signers), and of the present signatures of document signers. UNIF. NOTARY ACT §§ 4-102, 4-103. The most recent model notary law contains far more extensive treatment of the methods for identifying document signers. See MODEL NOTARY ACT § 2-13 (defining personal appearance of document signers), 2-14 (defining personal knowledge of identity), 2-17 (defining satisfactory evidence of identity), 7-2(a) (requiring the journal recording of the signer's name, address, present signature, and thumbprint). These model notary laws have served as guides for numerous jurisdictions to adopt additional and updated provisions regarding the identification of document signers.

555. In *Kip v. People's Bank & Trust Co.*, the court noted: "That the office [of notary] is a public office has been judicially held in numerous instances." 164 A. 253, 255 (N.J. 1933), (citing 8 cases). In *Moser v. Bd. of County Comm'rs of Howard County*, the court wrote that "[a] vast majority of the courts in other jurisdictions have held that the office of notary public is a public office." 201 A.2d 365, 368 (Md. App. 1964) (citing 11 cases). See also *People v. Rathbone*, 40 N.E. 395, 396 (N.Y. 1895) (stating that "[t]he very designation of 'notary public' indicates a relation which the incumbent of the office sustains to the body politic.").

556. "[We are] not aware of any statute law in this state prohibiting a notary from taking the acknowledgment of a conveyance of property in which he has an interest. We must therefore resort to the general law upon that subject, and it is uniform that no such thing can be legally done." *Lee v. Murphy*, 51 P. 549, 551 (Cal. 1897). "The intention of the law is that the certificate of acknowledgment shall be the official act of a disinterested officer." *Ogden Bldg. & Loan Ass'n. v. Mensch*, 63 N.E. 1049, 1052 (Ill. 1902). "The authorities are in substantial agreement that an officer is disqualified from taking an acknowledgment if he is directly interested in the transaction to which the instrument relates, either financially or beneficially, the rule being founded on public policy." *Musselshell Valley Farming & Livestock Co. v Cooley*, 283 P. 213, 216 (Mont. 1929).

557. See, e.g., *Wicker*, 47 S.E. at 966-67 (although also observing that "there is great conflict in the decisions as to whether a notary public has the inherent power to administer an oath.").

558. See *Poole v. Hyatt*, 689 A.2d 83 (Md. 1997) (finding that a notary has a non-statutory or common law duty to determine a document signer is competent and understands the nature of the document).

refusing to answer questions,<sup>559</sup> and to effectively serve as international officers whose notarizations would be recognized across national borders.<sup>560</sup> The quoted language of the Kentucky Court of Appeals that introduced this part of the Article represents one more instance in which judges found the authority for notaries to undertake a notarial function (administering of oaths) not expressly granted in the notary statute, and in which a court was uncharacteristically candid about what it described as the “devious and unpredictable” method utilized to arrive at its result.<sup>561</sup>

The duty of notaries to maintain detailed journal records is a prime candidate for the judicial approach of supplementing incomplete legislation. Notary statutes are incomplete when they omit a requirement for notaries as public officials to take the traditional, reasonable and critical step of keeping records of their official acts. The NNA has quite correctly expressed “the belief that all responsible and businesslike public servants should keep a record of their official activities.”<sup>562</sup> Notary statutes are incomplete in describing how notaries are to most effectively go about the task of identifying document signers if such laws do not require notaries to complete journal entries to assist in that regard.<sup>563</sup> Notary statutes are incomplete in describing how

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559. See, e.g., *Bevan*, 289 U.S. 459; *Gall v. St. Elizabeth Med. Ctr.*, 130 F.R.D. 85 (S.D. Ohio 1990).

560. In *Simpson*, the court found the 1722 English case of *Walrond v. Van Moses*, holding that an affidavit attested before a notary of Holland would be received in a court in England. 47 S.E. at 966-67. See also *Wood v. St. Paul City Ry. Co.*, 44 N.W. 308, 308 (Minn. 1890) (concluding that “[a] public notary is considered not merely an officer of the country where he is admitted or appointed, but as a kind of international officer, whose official acts, performed in the state for which he is appointed, are recognized as authoritative the world over.”); *Pierce*, 106 U.S. at 549 (1883) (same).

561. *Owsley*, 428 S.W.2d at 201.

562. NOTARY PUBLIC CODE OF PROF'L RESPONSIBILITY § VIII-A-1 [The Professional Choice] (1998). “Record keeping is an implied duty in almost every walk of life.” VAN ALSTYNE, *supra* note 7, at 187.

563. The most important function of notaries is to properly identify document signers, so that other parties can reasonably rely upon notarized signatures. “[T]he notary public makes it possible for the public-at-large to rely upon the authenticity of the person’s signature. . . . [T]he primary functions of the notary public are to identify the signer and witness his signature on the document.” UNIF. NOTARY ACT Art. III cmt. (1976). Journalizing a notarization significantly heightens the reliability of the identification of the document signer. It better assures that the signer will actually appear for the notarization, because a present signature must be executed in the chronologically and secure journal. That signature provides one additional signature specimen for the notary to compare to assist in protecting against forgeries, and it may deter a would-be forger who may not want to risk executing another satisfactory looking forged signature. “By requiring . . . that the person whose signature is being notarized sign in the notary’s journal, the forger and/or imposter must duplicate his forgery at the time of the notarial act on the document to be notarized and in the notary’s



notaries are to most effectively go about the task of identifying the original documents to which notarial certificates are attached if such laws do not require notaries to complete journal entries to assist in that respect.<sup>564</sup> Notary statutes are incomplete in describing how notaries are to most effectively assure that necessary oral oaths and affirmations are actually and properly administered if such laws do not require notaries to complete journal entries to assist and document the administration of those oaths and affirmations.<sup>565</sup> Notary statutes are incomplete in describing how notaries are to most effectively affix the present dates and times to the notarizations they perform if such laws do not require notaries to confirm and document the present dates and times by entering them in journal entries for all notarizations.<sup>566</sup> Notary laws are incomplete in describing how

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journal." *Id.* at Art. IV cmt. The journal recording of the name and address of the signer, as well as the observing of ID cards and recording of limited data about them, should also assist the notary in identifying a document signer and in deterring a would-be forger who must also falsify ID cards. Finally, the capturing of a present photograph and/or thumbprint of a signer would guarantee that the signer has been accurately identified—regardless of the name and signature s/he might use. Only the process of journalizing a notarization provides this complete signer identification procedure.

564. One of the important incidental functions of a notarization is to identify with certainty the transactional instrument which is the subject of the notarization, and simultaneously to prevent the notarial certificate from being negligently or fraudulently switched to a different instrument. There are instances in which exchanges of notarial certificates can be accomplished, especially where the notarial certificates appear on separate pages at the ends of documents (such as also occurs with loose notarial certificates). Staples, paper clips, glue and other fasteners cannot be relied upon to positively secure notarial certificates and to positively identify the documents to which they relate. However, notary journal entries can heighten the assurance that switching will be thwarted. A proper journal entry will include the type of transactional instrument, its date, and its number of pages, as well as several items of information about the notarial certificate (such as the type of notarial act, the venue, the name of the document signer, the name and signature of the notary, and the seal impression of the notary).

565. One of the functions of a notary critical to the validity of a notarization is to administer oral oaths and affirmations to document signers of affidavits and jurats, because those types of notarizations require that the signers swear or affirm the truth of the contents of the instruments which are attached to the notarial certificates. The certificate forms for both affidavits and jurats should include language which recites that an oath or affirmation has been administered, but the reality is that a very substantial number of notaries neglect to really administer the oral oaths and affirmations. The unfortunate results are at least twofold. *See generally* Closen, *supra* note 231 at 613 (discussing the whole range of issues relating to notarial oaths and affirmations).

566. Many transactions are date and time sensitive, so that the date and time of their notarizations become the key reference points for specifying that the transactional instruments were executed within the date and time deadlines. The obvious reason for reliance upon the date and time of the

notaries are to most effectively account for fees assessed to document signers and to most effectively assure that excessive fees are not assessed if such laws do not require notaries to complete journal entries to record their fees.<sup>567</sup> “Every statute . . . leaves gaps . . . in its prescription of applicable law. Inevitably, it falls short of answering all questions about the subject matter it addresses. . . . [T]he responsibility for answering the unanswered questions falls to the courts.”<sup>568</sup>

Remarkably, notary statutes either do not even define “notarization” or “notarial act,” or define those terms in the same almost meaningless and condescending way that sources such as *Black’s Law Dictionary* do so, namely, by stating that a notarial act or notarization is an act of a notary public, or the act of

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notarial certificate is that it is executed by an impartial public official, the notary, who notes the date and time. However, notaries have frequently made errors, both negligently and intentionally, in noting the dates and times on certificates of notarization. Notaries have been known to pre-date and to post-date notarizations, at the request of notary-employers or of notary customers. Because it is easy to mistakenly note the date and/or time (as all of us have experienced), notaries sometimes simply include the wrong date and/or time in the notarial certificate. If a notary journal is maintained, a notary would have to record the wrong date and/or time twice in order for the error to go unnoticed. Further, with a secure and chronologically kept journal, there would often be entries before and after the notarization in question—and as a result, a chance exists that those entries would limit the time frame within which the notarization in question had really been performed. Thus, the maintenance of a notary journal improves the prospect that a notary will get the date and time of a notarization correct in the first instance, and if an error is made on the notarial certificate, the journal record may serve to correct the mistake.

567. Many jurisdictions have statutory maximum fee schedules for notaries. *See Guide to Notary Fees, supra* note 273, at 36 (pointing out that only about 8 jurisdictions have no statutory notary fee limits of any kind). Even in jurisdictions without statutory notary fee limits, the notary—as a public officer sworn to provide a public service—would be ethically bound to charge no more than a reasonable fee for the notarial service. *See* NOTARY PUBLIC CODE OF PROF’L RESPONSIBILITY Guiding Principle I (1998) (announcing that “[t]he Notary shall, as a government officer and public servant, serve all of the public in an honest, fair and unbiased manner,” which would clearly implicate the assessment of fair and honest fees). Notary certificates have not traditionally included any reference to the amount of the notary fee, if any, assessed. Indeed, we have never seen a notarial certificate which includes a reference to the fee charged for the notarization. But, the standard notary journal format includes a space in which the amount of the fee paid can be recorded, or to the contrary, in which the notary can indicate that no fee was assessed. Thus, the maintenance of a notary journal would serve dual purposes—to help assure that notaries do not charge excessive fees and to provide a record of notarial income to help assure compliance with income tax laws. After all, with more than 4.8 million notaries performing many millions of notarizations each year, the total notary fees assessed would be substantial.

568. PROSSER & KEETON, *supra* note 36, at 19.

“placing a seal on an affidavit.”<sup>569</sup> Notarization is so much more than that. A statute that does not even fully define the term “notarization” or the phrase “notarial act” is incomplete. Effectively, the contention of this Article is that journalizing is part of the official act of notarizing, and the common law should declare the process of journalizing to be an obligatory part of the notarization process itself. That is, the common law should supplement these incomplete notary laws by defining “notarization” to include the full steps in the notarial process, including the recording of the official act in a ledger or journal.

The notary statutes of several states and territories include a fascinating very old provision granting powers to notaries, and perhaps sometimes imposing duties upon notaries, on the basis of domestic as well as international customary law and general commercial practices.<sup>570</sup> Once in a while, these curious provisions are associated exclusively with the antiquated and narrow subject of notarial involvement in marine and/or commercial protests, such as the protesting of bills of exchange and promissory notes.<sup>571</sup> Each of these provisions seems to have been written somewhat differently from all others. Regularly, the source of the customary authority thereby granted to notaries is said to be the “law merchant” or more often the “law of nations,” both of which are part of that great body of common law and both of which rest

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569. Notarial act is defined as “[a]n official function of a notary public, such as placing a seal on an affidavit.” BLACK’S LAW DICTIONARY, *supra* note 176, at 1084. Even the model notary laws include narrow definitions that state the obvious. “‘Notarization’ means the performance of a notarial act.” UNIF. NOTARY ACT § 1-105(b) (1976). “‘Notarial act’ and ‘notarization’ mean any act that a notary is empowered to perform under this [Act].” MODEL NOTARY ACT § 2-8 (2002).

570. *See, e.g.*, ALA. CODE § 36-20-5(4) (1975) (providing notaries shall have authority to “[e]xercise such other powers as, according to commercial usage . . . may belong to notaries public”); ALASKA STAT. § 44.50.060 (1) (1961) (stating the notary shall “exercise the other powers and duties which by the law of nations and according to commercial usages, or by the laws of any other state, government, or country, may be performed by notaries”); D.C. CODE ANN. § 1-807 (1997) (declaring notaries “shall have authority . . . to exercise such other powers and duties as by the law of nations and according to commercial usages notaries public may do”).

571. *See, e.g.*, CAL. GOV’T. CODE § 8205(1) (2000) (providing “[i]t is the duty of a notary public . . . with regard only to the nonacceptance or nonpayment of bills and notes, to exercise any other powers and duties that by the law of nations and according to commercial usages, or by the laws of any other state, government, or country, may be performed by notaries”). Similarly, the District of Columbia provision quoted just above is captioned “Foreign bills of exchange.” D.C. CODE ANN. § 1-807. The Maine provision is captioned “Demand and notice on bills and notes,” and it concludes by stating that a notary public may “do all acts which may be done by notaries public according to the usages of merchants and authorized by law. He shall record all mercantile and marine protests by him noted and done in his official capacity.” ME. REV. STAT. ANN. tit. 4, § 953 (1989).

largely upon well-established commercial customs and usages.<sup>572</sup> Among the jurisdictions which have enacted these old provisions expressly granting customary authority to notaries are some places that statutorily require notaries to keep records of their official acts.<sup>573</sup> More relevant to our thesis here, at least seven states which do not statutorily mandate general notary journalizing have adopted versions of these notary laws on customary practices, including Alaska, Maine, Michigan, Nebraska, New York, Oklahoma, and Wisconsin.<sup>574</sup>

Certainly, in regard to the provisions associated with notarial participation in marine and banking protests, the keeping of thorough records of such protests by notaries was always the practice. The American courts of the 1700s and 1800s spoke of the custom of notaries to perform those commercial protests and to maintain complete records of them. Importantly, such elevated practices of the respected notaries of those centuries proved highly influential upon the courts, including even the U.S. Supreme Court. In 1823, for example, the Supreme Court's decision in *Nicholls* was clearly affected by the positive view of the conscientious record-keeping by a notary public of the details of

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572. "Those acts performed by a notary public which fall within the rules of the law merchant have always been respected under the law of nations." *Kumpe v. Gee*, 187 S.W.2d 932, 935 (Tex. App. 1945). "The statutes, which define the powers and duties of a notary public, frequently grant the notary the authority to do all acts justified by commercial usage and the 'law merchant.' The law merchant, or custom of merchants as it is occasionally called, is the general body of commercial usages which have become an established part of the law of the United States and England and which relate chiefly to the transactions of merchants, mariners, and those engaged in trade." MEIER, *supra* note 104, at 7. "Those acts performed by a notary public which fall within the rules of the law merchant have always been respected under the law of nations." Larner, *supra* note 62, at 523. "The law merchant has long been recognized as part of the common law . . . originat[ing] under long-established custom and usage." Perovich, *supra* note 61, at 606. "The common law forms much the largest part of the great body of law under which we live." ALBERT S. BOLLES, PUTNAM'S HANDY LAW BOOK FOR THE LAYMAN 2 (G.P. Putnam's Sons) (1925). "Custom and usage under the law merchant conferred certain authority upon notaries which was recognized worldwide," and which "was considered convenient to commerce." CLOSEN, *supra* note 2, at 59. "The law merchant was international; its rules were derived from the general customs and law-sense of European traders." FRIEDMAN, *supra* note 55, at 28; *see also* BROOKE'S NOTARY, *supra* note 100, at v-vi (remarking that "the general practices of a Notary in England . . . are in accordance with and are governed by usage and the Law Merchant, except where there have been legislative enactments.").

573. Alabama, California and the District of Columbia are examples of such places. *See supra* notes 570-71.

574. ALASKA STAT. § 44.50.060(1) (1961); ME. REV. STAT. ANN. Tit. 4, § 953 (1989); MICH. COMP. LAWS ANN § 55.112 (2006); NEB. REV. STAT. § 64-107 (2007); N.Y. EXEC. LAW § 135 (2001); OKLA. STAT. ANN. Tit. 49, § 6 (2008); WIS. STAT. ANN. § 137.01(5) (2001).

the banking protests performed by him.<sup>575</sup> Just as the trial court judge had done, the Supreme Court permitted the record book entry of the notary public to be entered into evidence even though the notary had died before the trial and therefore was unavailable to testify.<sup>576</sup>

Examples of the basic forms of these provisions granting customary authority and taken from notary statutes which do not generally require record-keeping would be illustrative. For instance, the Alaska notary statute provides: "A notary public *shall . . . exercise* the other powers and *duties* which by the law of nations and according to commercial usages, or by the laws of any other state, government, or country, may be performed by notaries."<sup>577</sup> The Michigan law announces: "Notaries public *shall have authority . . . to exercise* such other powers and duties as by the law of nations, and according to commercial usage, or by the laws of any other state, government or country, may be performed by notaries public."<sup>578</sup> Similarly, the Nebraska notary statute provides in part:

A notary public *is authorized* and empowered, within the state: . . . to exercise and perform such other powers and duties as by the law of nations, and according to commercial usage, or by the laws of . . . any other state or territory of the United States, or of any other government or country, may be exercised and performed by notaries public.<sup>579</sup>

The quoted Alaska law appears most strongly to direct its notaries to perform customary notarial functions expected in international law. Notice the italicized language in these passages, and consider the following facts about their contents.

Foremost among the points of interest about the above provisions is their references to the "law of nations," more modernly called international law or customary international law, which supplement international treaties and the civil codes that predominate throughout almost all of the world.<sup>580</sup> It has been

575. *Nicholls*, 21 U.S. at 330-31.

576. *Id.* at 331-33, 337.

577. ALASKA STAT. § 44.50.060 (1) (emphasis added).

578. MICH. COMP. LAWS ANN. § 55.112 (emphasis added).

579. NEB. REV. STAT. § 64-107 (4) (emphasis added).

580. Thus, the well-established practices of the great number of countries carry persuasive weight in the international arena, as they should, for they undoubtedly reflect the international community's devotion to principles of equality and reciprocity. See Anthony D'Amato, *International Law, in OXFORD COMPANION TO AMERICAN LAW*, *supra* note 54 at 423 (discussing the doctrines of equality and reciprocity, and describing international law as the "rules, norms, and principles that apply to nations in their dealings with one another"). "If the controversy is not covered by a treaty, the parties look to customary international law." *Id.* at 424. "[C]ustomary international law. . . [is the] pervasive body of law, which may be viewed as the default rules of

said that the law of nations constitutes “those rules of conduct in accordance with which, either in consequence of their express consent, or in pursuance of the usage of the civilized world, nations are expected to act . . . [It is] the moral code of nations.”<sup>581</sup> This doctrine, particularly private international law, necessarily encompasses the behavior of the individuals, especially collectively, of those nations—such as their notaries public. Significantly, customary practices are important sources of international law which result in mutual obligations of nations,<sup>582</sup> for genuine traditions find their roots in the well-established conduct and standards of prudent and honorable business people and government agents.<sup>583</sup>

Regarding notarial functioning, the rest of the world (in those nations which utilize the notarial post at all) universally expects and demands thorough notary record-keeping, including the safeguarding of those records. Particularly in connection with notarial protesting of marine and commercial notes and instruments, including foreign bills of exchange, detailed record-keeping has absolutely been the historic norm, along with appropriate preservation of those records. As noted earlier, the old and nearly uniform practice of affixing notarial seals to documents (throughout those countries which utilize notaries) supports this

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international law . . . similar to common law, except that it developed through the practice of states and not through judicial decisions.” *Id.* For example, “[g]eneral principles of law,’ reflecting the laws of most states, have been used as sources of procedural rules for international courts and tribunals.” *Id.*

581. “[I]nternational law was acknowledged to comprise rules binding nations in their relations with one another.” Jane M. Picker, *International Law*, in OXFORD COMPANION TO AMERICAN LAW, *supra* note 54 at 391. “International law is the body of rules which are usually observed by civilized nations in their relations with one another.” *International Law*, THE WORLD BOOK ENCYCLOPEDIA, *supra* note 35 at 268.

582. “Under the principle of equality, state A has the same rights and obligations under international law as state B.” D’Amato, *supra* note 580, at 423. “Some international laws have developed through long years of custom . . . Many of the customs of international relations have existed for hundreds of years.” THE WORLD BOOK ENCYCLOPEDIA, *supra* note 35, at 268. See Picker, *supra* note 581, at 391 (describing one source of international law to be “international custom,” defined “as evidence of a general practice accepted as law.”). Picker further noted “[c]ustoms accepted as binding by nations are . . . a developing source of international law.” *Id.* at 392.

583. “Custom” and “tradition” are used interchangeably to describe a time-honored practice. One encyclopedia defines “custom” to be “a specific act that follows the traditions of past generations.” THE WORLD BOOK ENCYCLOPEDIA, *supra* note 35, at 958. It later defines “tradition” as “the passing down from generation to generation of ideas, customs, beliefs, and stories.” *Tradition*, THE WORLD BOOK ENCYCLOPEDIA, *supra* note 35 at 289. Additionally, the next Part VII of this paper will address at length the subject of domestic customs. See also D’Amato, *supra* note 580, at 424 (describing customary international law as the “pervasive body of law” which is “similar to common law, except that it is developed through the practice of states.”).

conclusion, for the age-old affixation of notary seals has contributed to both the record-keeping and record preservation purposes. We have already in this Article traced the global tradition of modern civil law and English notaries to extensively create and preserve records of their official acts.<sup>584</sup> Thus, the law of nations on the narrow matter of notary record-keeping would unflinchingly expect it to be mandated and practiced.

Moreover, general commercial usage in the United States and abroad expects thorough record-keeping in all aspects of business, and this would include notarial functioning. Evidence of ancient business dealings recorded on primitive clay tablets, accompanied by the fingerprints of the ancient entrepreneurs impressed into the clay and dating to thousands of years ago, demonstrate the deeply-rooted concern to record and preserve those records of commercial transactions.<sup>585</sup> As soon as the earliest kinds of parchment and paper became available, they were put to use to record commercial dealings. And, almost immediately, security measures were employed—such as signatures, waxen seals, witnessing, and notarization of signatures. High on the list of effective security measures were the copying and recording of instruments.

Curiously, it appears that none of the notarial provisions on customary international law and commercial usage has ever been considered or analyzed at any length in any published judicial decision. Yet, the absence of such consideration may well be the consequence of the failure of advocates to discover the provisions, to realize their potential significance, or to present them to courts in the course of legal arguments.<sup>586</sup> These provisions cannot be superfluous and purposeless; they mean something. One of their meanings is that notaries are expected, even perhaps required, to maintain detailed records of their official acts. Since notaries effectively serve as international officers whose official acts are recognized by other nations, comprehensive notarial record-keeping is expected because all of the other nations which have created the office of notaries public and which are therefore homes to either English notaries or civil law notaries demand it.

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584. “[A]ll Notaries Public are public officials who authenticate documents and act as trusted record-keepers.” Armando Aguirre, *Historic Collaboration*, NAT’L NOTARY, Mar. 2005, at 21.

585. “The ancient Assyrians and Chinese utilized the first recorded fingerprints in conjunction with the signing of legal documents for the purposes of identification. Similarly, the Babylonians pressed fingerprints into clay to identify the author of writings and to protect against forgery.” Gnoffo, *supra* note 278, at 806.

586. This is the way of the common law. “[T]he common law does not look kindly on hypothetical or future cases. It confines itself to actual disputes. If no one brings up a matter, it is never decided.” FRIEDMAN, *supra* note 55, at 22.

Although this interpretation of these obscure U.S. notary provisions on commercial usage and the law of nations is clearly novel, it may simply be the case that these provisions have laid unnoticed and dormant for generations, and such happenstance stands as no real objection to our interpretation.

Another pragmatic political feature about notary legislation must be confronted in order to gain a full understanding of the complexity of the background that has hampered efforts to mandate notary journalizing in modern times. As already noted, the facts are that several states adopted and subsequently repealed legislation to require notaries to journalize their official acts,<sup>587</sup> and that legislative proposals to adopt notary journal-keeping requirements have been introduced in numerous states without being enacted there.<sup>588</sup> Although the rejection of a statutory procedure or a piece of proposed legislation by a state or territorial legislature sometimes represents a meaningful public policy position against the substance of the procedure or proposal, that conclusion cannot necessarily be drawn with regard to the legislative failures of mandatory notary record-keeping in U.S. jurisdictions. The failures of contemporary legislatures to act positively upon proposed legislation can most often be explained by a host of bases not grounded in reasoned opposition to a specific proposal, such as adoption of mandatory notary record-keeping. The two-house structure of state legislatures and raw politics, including the profound indifference about all things notarial, is regularly paramount among those explanations. Timing and the relative infrequency of sessions of legislative bodies play a role. The legislative committee systems, inadequate staff resources, budgetary constraints on the study of legislative proposals and the inability to adequately educate legislators about notarial matters hinder thoughtful decision-making. Pressure from groups with vested interests against reform measures can be quite influential, and with so many lawyer-legislators in office who object to record-keeping, their inside influence is especially damning to notary record-keeping proposals (as will be addressed at length in part X of this Article). Therefore, the political and practical barriers to passage of notary reform laws, including mandatory notary journal keeping, are substantial.<sup>589</sup>

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587. See *supra* notes 104, 121-25 and accompanying text.

588. See *supra* notes 105-11 and accompanying text; see also *Sweeping Bill Poses Notary Code Revisions*, NOTARY BULL., June 1997, at 1 (reporting about proposed legislation that would have included a notary journal requirement for Illinois).

589. Interest groups supported by banking associations, mortgage companies, real estate agencies, bar associations and other commercial entities most often oppose notary journalizing proposals because they do not appreciate the advantages such record-keeping would have for their industries. "Interest groups funded variously by citizens or businesses play an



Moreover, probably the single largest reason that little can be concluded from the failure of proposed notary journalizing to win enactment is that it is virtually never offered as stand-alone legislation.<sup>590</sup> Proposals for mandatory notary journalizing have almost always been part and parcel of larger notary reform packages<sup>591</sup> which may encounter sufficient opposition to their other elements to doom the entire draft legislation. Therefore, the failure of a legislature to pass a proposed notary journalizing

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influential role in the legislative process at both the state and local levels." Middleton, *supra* note 54, at 517. See generally HEINEMAN, *supra* note 56, at 102-20 (discussing interest groups). "Because of their size and the complexity of the issues before them, legislative bodies have to institute some sort of division of labor in order to get business done [the committee system]. No major legislative body can require that all of its members give careful consideration to every proposal." *Id.* at 187.

The traditional theoretical justification for an upper house is that it can exercise a moderating and delaying influence on legislation by the lower house and thus restrain the effects of impulsive or excessive fluctuations of public opinion . . . . The tendency in most modern governments has been toward increasing assumption of legislative power by administrative officials, with a consequential weakening of the legislatures.

*Legislature*, FUNK & WAGNALLS NEW ENCYCLOPEDIA, *supra* note 35, at 45. See also Deborah M. Thaw, *Notary Laws Expose Idiosyncrasies*, NAT'L NOTARY, May 2004, at 11 (noting that some state legislatures "do not meet throughout the year.").

590. See *States Consider New Legislation*, NOTARY BULL., Apr. 2002, at 14 (reporting that Florida House Bill 929 in 2002 would have required notaries to maintain and then preserve journals for 5 years from the date of each notarization, along with three other statutory changes—(1) elimination of the notary fee schedule and replacement with a reasonable fee; (2) increasing to \$10,000 of the required notary bond; and (3) allowing substitute language for the notary seal in the case of an electronic notarization). Regarding proposed legislation in 2002 in New York (Assembly Bill 9590 and Senate Bill 6065), the law would have required the keeping of a notary journal, as well as (1) defining "personal knowledge" and "satisfactory evidence" of identity, and (2) exempting certain persons such as police officers from having to pay notary fees when seeking public service related benefits. *Id.*

591. In 2004 in New York, two bills (Assembly Bill 1552 and Senate Bill 821) each contained several notary components, including (1) definitions of the phrases "satisfactory evidence of identity" and "personal knowledge of identity"; (2) exemptions for military veterans, police officers and others from paying notarial fees when seeking retirement benefits; and (3) a requirement for notaries to keep journals of their official acts. *Legislation around the Nation*, NOTARY BULL., Oct. 2004, at 15. In 1997, proposed legislation in Illinois would have adopted several changes in its notary law, such as a longer term of office, increases in fees for notarizations, a mandatory journal provision, and others. *Sweeping Bill Proposes Notary Code Revisions*, *supra* note 588, at 1. In 2004 in Florida, House Bill 337 and Senate Bill 432 would have required notaries to maintain journals and included other unrelated notary law changes. Both bills died in committee. *Legislative Watch*, NOTARY BULL., Aug. 2004, at 14. In New Jersey in 2004, Assembly Bill 1368 would have required notaries to keep journals and would have defined "satisfactory evidence" of identity. *Id.*

requirement does not necessarily signal genuine state or territorial policy against mandatory journalizing. We cannot repeat too often that no state or territory prohibits notaries from voluntarily journalizing their official acts. Furthermore, recall the important point made previously that in many states which have no express statutory notary journal requirements, those states have published recommendations on official government websites and notary guidebooks and manuals advising their notaries to journalize notarial acts.<sup>592</sup> Thus, there is often a conflict between the legislatures and the executive agencies about the policy of the jurisdictions regarding notary journalizing, a conflict about which the legislatures presumably have knowledge and about which the legislatures have done nothing to override. This omission represents tacit legislative approval of notary journalizing in those jurisdictions.

Lastly, it has often been observed that the common law “should be viewed as a living thing, filling the gaps left by the legislature.”<sup>593</sup> There are essentially two kinds of these gaps. The more basic gap is the narrower one, an omission within a particular statute which can be filled by simply looking to the specific words and subject-matter of the law and drawing upon similar and parallel concepts in order to expand upon it. The other type of gap is the much broader one, that goes beyond the words of the particular statute and that can be filled only by appreciating the full context or “big picture” of which the legislation is a part and by deriving guidance as suggested by the overall substance of the worthwhile but nevertheless incomplete legislation. Thus, courts may derive general policy or guidance on standards of conduct which transcend the boundaries of the specific language of particular statutes.<sup>594</sup> Even though many notary statutes are sadly lacking in the scope of their coverage of the specifics of contemporary notarial issues, all of them at least

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592. See *supra* notes 105-25 and accompanying text. The official state notary handbooks and Web sites seem akin to administrative regulations, and it has been opined that “administrative rules may have some effect in the tort process.” DOBBS, *supra* note 40, at 28.

593. From the time of its transfer by English settlers to North America, the common law has had great influence upon and authority over statutory law in some importance ways. “Many colonial assemblies passed explicit reception statutes declaring the common law in force.” Orth, *supra* note 57, at 127. Statutes of the 1800s to the early 1900s were often so general and so incomplete as to be “little more than invitations to the judges to develop the common law.” *Id.* at 129. “The common law way with statutes was to treat them very much like precedents, subject to close reading and extended or distinguished in keeping with judicial notions of public policy.” *Id.*

594. “In spite of the preeminent importance of case decisions in the common law of torts, many statutes affect tort law today. Statutes may indirectly affect tort law by setting some standard that courts adopt.” DOBBS, *supra* note 40, at 28. See *infra* notes 595-98 and accompanying text.

convey notions of the significance of the subject of notarization to document security and of the resulting obligations of due diligence and faithful performance by notaries public, who should generally be held to the standards of conduct of other public officers. "Notarial powers listed in statutes are not always exclusive and notaries are frequently obliged to perform all duties incumbent upon them."<sup>595</sup>

To illustrate, in 1904 the Georgia Supreme Court confronted a case on the issue of whether notaries possessed the authority (not expressly granted by Georgia statute) to administer oaths and to attest affidavits, and the court concluded that due in part to "the legislation generally" and "from their supposed customary powers" notaries did have power to administer oaths.<sup>596</sup> The Supreme Court of Washington in 1972 also adopted this approach in a notary case involving the notarization of forged signatures where the state notary statute set out "no specific standards of conduct for the notary to follow" in identifying document signers, and where the court observed, "It is clear, however, that the legislature intended to make notaries official public officers, required to perform their statutory function in the same manner as any other public official."<sup>597</sup> Since Colonial times in America, the role of the notary public has been touted as vital to the functioning of business and government. The universal adoption of notary legislation in U.S. jurisdictions would certainly appear to establish official governmental policy generally consistent with the proposal of this Article, namely that the notary public "has a duty to take reasonable precautions to assure that [none of his or her official acts or omissions] will be the vehicle by which a fraudulent transaction is consummated" and that none of his or her official acts or omissions will be the vehicle which will cause the invalidation of an otherwise legitimate transaction.<sup>598</sup> The failure to journalize a notarization can contribute to the success of a fraudulent transaction, and the failure to journalize can contribute to the loss of documentation to support a legitimate transaction. "Any other public official" (in the words of the Washington Supreme Court) would be expected and required to maintain records of their official acts. Notaries can be no exception under the common law.

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595. Larner, *supra* note 62, at 538.

596. *Wicker*, 47 S.E. at 967.

597. *Meyers*, 503 P.2d at 61.

598. We have borrowed part of this most thoughtful language, but have preserved its concept. The full passage reads: "[T]he notary, as a public officer, has a duty to take reasonable precautions to assure that his seal will not be the vehicle by which a fraudulent transaction is consummated." Larner, *supra* note 62, at 551.

There can be no question but that notary legislation is incomplete in detailing specifically how notaries are required to most effectively carry out their vital document security functions, and there is also no doubt that the creation and retention of detailed journal records of notarizations constitutes the most helpful strategy to assist notaries in their roles in protecting document security. Recognizing these tenets, the common law has the responsibility to assure that the legislatures' intentions—though inartfully and incompletely expressed—are achieved.

## VII. CUSTOM AND THE AVAILABILITY OF METHODOLOGY AND TECHNOLOGY

[A] whole calling may have unduly lagged in the adoption of new and available devices. Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission.<sup>599</sup>

The historic impact of technology upon society, including both commercial and social policy, can hardly be put into mere words. "Technology has been a dialectical and cumulative process at the center of human experience."<sup>600</sup> Written language, leading to "[t]he invention of the printing press . . . set off a social revolution that is still in progress."<sup>601</sup> The customary practices in business and government which have followed from technological advances have been at least as dramatic in shaping society, including public policy and law.<sup>602</sup> As Professor Colleen Dunlavy perceptively remarked, "Few forces have more profoundly shaped the American experience than technology."<sup>603</sup>

Both the methodology and technology to permit notaries to create and maintain records for themselves of the notarial acts they perform were available before the time the first ancestors of today's civil law notaries began to practice in ancient Rome. Over time, the manner and mode for keeping such records have

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599. *The T.J. Hooper*, 60 F.2d 737, 740 (2d Cir. 1932), *cert. denied sub. nom.* (per Judge Learned Hand); *Eastern Transport Co. v. Northern Barge Co.*, 287 U.S. 662 (1932).

600. *Technology*, FUNK & WAGNALLS NEW ENCYCLOPEDIA, *supra* note 35, at 168.

601. *Id.* at 172-73.

602. It is no accident that custom is often listed first and foremost among the influences on law and policy. "Where do we find the rules which are enforced by the government? They are found in customs, in constitutions, in legislation by lawmaking bodies, in the decisions of judges, in the orders of administrative agencies." THE WORLD BOOK ENCYCLOPEDIA, *supra* note 35, at 116. Blackstone suggested that "the ultimate, highest source of law was . . . 'general custom,' as reflected in the decisions of the common-law judges." FRIEDMAN, *supra* note 55, at 21.

603. Colleen A. Dunlavy, *Technology*, in OXFORD COMPANION TO AMERICAN LAW, *supra* note 54 at 765.

improved tremendously, culminating presently in the development of electronic notary journals which are being described as the new technique of choice for technology savvy notaries.<sup>604</sup> The common law tends not only to approve of the use of proven technological advances as appropriate ways of conducting commercial and governmental affairs, but also to demand the use of such advances as the appropriate standards of care in those instances in which it would be reasonable to expect their adoption to protect people from personal or economic injury. So held Learned Hand in the above-quoted passage.<sup>605</sup>

There have existed primitive systems of written language as well as the writing implements and surfaces with which to record them since about 3100-2900 B.C.<sup>606</sup> Hence, the technology for notarial record-keeping was developed well before the origin of the ancient Roman *notarius* in about the first century B.C.<sup>607</sup> Since the early times when the *notarius* and other forerunners of the modern notary public began to serve, it was possible with old-fashioned writing materials for notaries to either make copies of the documents on which they executed notarizations or to make notations in record books about the details of such notarizations. In fact, as already noted in this Article, civil law notaries often retain the originals of the documents involved in their notarial functioning.<sup>608</sup> In modern times, a few overzealous U.S. notaries have kept copies of the documents on which they have performed notarizations or have kept copies of the documents of identification used to prove the identities of signers for whom notarizations have

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604. "In the history of written communications, one can count a handful of significant innovations. Following the development of writing, there was the advent of paper, the Gutenberg press, movable type and, in the present day, the computer and the Internet." Valera, *supra* note 14, at 20. In a nutshell, that was the sequence of developments allowing for the journal recording of notarizations. See *supra* notes 367-76 and accompanying text.

605. See *supra* note 599 and accompanying text.

606. See *Writing*, THE WORLD BOOK ENCYCLOPEDIA, *supra* note 35 at 425 (stating that "[t]he Sumerians, who lived in southern Mesopotamia, were the first people to reach the stage of a primitive word writing, about 3100 B.C."); FUNK & WAGNALLS NEW ENCYCLOPEDIA, *supra* note 35, at 19-23 (noting that "[t]he earliest known writing dates from shortly before 3000 B.C. and is attributed to the Sumerians" and that "Egyptian hieroglyphic writing is known from about 100 years later."). "The earliest form of Western writing was cuneiform, made by pressing an angular stick . . . into soft clay that was then baked, making these wedge-shaped marks permanent." *Id.* at 21.

607. Notaries, of course, were not needed until society and commerce advanced to the point that records of events and transactions were needed. See also Fitzgerald, *supra* note 19, at 2 (observing that notaries "have been in demand since paperwork was invented.").

608. See generally REYERSON & SALATA, *supra* note 100 (describing the practice of one civil law notary, Jean Holanie, in southern France in the Middle Ages (1327-1328) and showing the numerous original documents retained in the notary's files [especially at 31-98]).

been performed. Those practices are to be discouraged and avoided due to the security risks involved, for important and confidential personal and commercial information about many millions of document signers would otherwise be warehoused in loose form in the often insecure files of millions of ordinary notaries.<sup>609</sup> The proper and prudent method for notaries is to execute a journal entry for each notarization performed, which paper or electronic journal entry can be securely kept under lock and key.<sup>610</sup>

Since the early time of the advent of the technology for printing and bookbinding, it has been possible to produce a securely and permanently bound ledger to record in chronological sequence the details about the notarizations conducted by a given notary. Importantly, it was not too long before this simple technology advanced to the point that journal record-keeping was quite cost effective, even inexpensive. Since at least as early as the 1800s, in keeping with the recognition of the value of the notary journal and of the commonly known technology for preparing such a journal, some U.S. notary statutes have required the maintenance of more or less detailed notary records. For example, in 1821 Maine adopted legislation mandating that each notary “note and record at length, in a book of records kept for the purpose, all acts, protests, depositions, and other things . . . done in his official capacity.”<sup>611</sup> In 1850, California’s notary statute declared that its notaries were required to maintain “a fair record” of their official acts.<sup>612</sup> Some twenty U.S. jurisdictions have adopted statutes currently requiring the keeping of notary records, and the Governor of Massachusetts recently mandated that his

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609. According to the official North Carolina notary Web site, “Notaries are not authorized to keep copies of the documents they notarize. The best way to document your notarial acts is by keeping a journal.” FAERBER, *supra* note 15, at 345. See *supra* note 393 and accompanying text. Obviously, the transactional instruments themselves contain far more confidential financial and personal information about the parties to such instruments than do the mere notary journal entries (which, of course, include information only about the signers who seek notarial services). “From time to time, notaries assume that if they make photocopies of all their notarizations and keep them in a file, it will prove the validity and correctness of their notarizations. This is false and has no merit to it. It is impossible for the photocopies to adequately substitute for the probative value of notary journal entries.” VAN ALSTYNE, *supra* note 7, at 311. Journal entries contain some information which is not included in notarial certificates.

610. One California case has held that, where a statute requires a notary to maintain a journal of notarizations performed, the retention by the notary of copies of the transactional documents notarized is not a lawful substitute. *Bernd v. Fong Eu*, 161 Cal. Rptr. 58 (Cal. Ct. App. 1979).

611. 1821 Me. Laws 424.

612. A HISTORY OF NOTARIES IN CALIFORNIA, *supra* note 53, reprinted in CLOSEN, *supra* note 2, at 5.

state's notaries maintain detailed journal records. As noted earlier, in recent times the development of the ENJOA represents the state of the art technology for creating and safekeeping computerized records of notarizations.<sup>613</sup> Undisputedly for a very long time, the methodology has been known and the technology has been available to allow for cost-effective and sophisticated record-keeping by notaries public.

Obviously, both technology and methodology must be known in order for customary practice incorporating it to develop. The simple technology for notary journalizing has been known for centuries. Nevertheless, the unfortunate customary practice that has resulted in at least thirty-five U.S. jurisdictions is to omit to demand creation and retention of notary journal records. There has been a good deal of opposition to such journalizing for all the wrong reasons, and from some seemingly unlikely quarters. Under-informed and cavalier notaries and their employers oppose the requirement of journalizing notarizations, either because they remain unaware of its benefits or because they are quite aware of what it would reveal about their incomplete and sloppy practices.<sup>614</sup> Even members of the banking, mortgage, real estate and legal communities regularly oppose journalizing, contending it will take too much of the valuable time of themselves and their staffs—when in fact it takes very little additional time and is worth every minute that it takes.<sup>615</sup>

Unfortunately, the custom of omitting to journalize continues in some thirty-five states and territories, and the old adages about custom and habit are further reinforced in those places. “[W]e act according to custom.”<sup>616</sup> “Custom governs the world.”<sup>617</sup> “The chains of habit are too weak to be felt until they are too strong to be broken.”<sup>618</sup> But, there are good customs and habits, and there are bad ones. Popular practices are not always the most effective ones; they may be simply the most expedient ones. “Some

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613. See *supra* notes 367-76 and accompanying text.

614. In answer to the question why so few notaries bother to journalize, Peter Van Alstyne proposed it may be “due mostly to an unawareness of the idea of a journal . . . And it is not uncommon for employers of notaries to prohibit journal keeping because it ‘inconveniences customers.’” VAN ALSTYNE, *supra* note 7, at 191.

615. According to the Vermont Guidebook for Notaries Public, “(G)ood recordkeeping of notarial acts will always repay the time it takes to note down what you did as a notary on a particular day.” FAERBER, *supra* note 15, at 477. Notary expert Van Alstyne estimated that a “journal entry should take less than 45 seconds to complete.” VAN ALSTYNE, *supra* note 7, at 192. While that estimate may be slightly on the short side, it certainly should take no longer than a minute or two to complete a journal entry.

616. THE FORBES BOOK OF BUSINESS QUOTATIONS, *supra* note 25, at 375 (quoting Francis Bacon)

617. *Id.* (quoting John Bartlett).

618. *Id.* at 376 (quoting Johnson).

[customs] are the result of careful thought and decision, while others arise from the kind of inadvertence, neglect, or deliberate disregard of a known risk which is associated with negligence.”<sup>619</sup> The resolute unawareness about and indifference to record-keeping within the U.S. has caused many in the notarial system to have “unduly lagged,” in the above words of Judge Learned Hand that introduced this part of the Article.<sup>620</sup> It constitutes negligence.

The above-quoted passage from Judge Hand was taken from one of his most famous tort decisions, *The T. J. Hooper*, imposing an industry-wide standard of conduct,<sup>621</sup> and is comparable to the result the common law should announce for the backward notarial system. Indeed, it has been called the “best-known case” illustrating a situation in which an existing industry-wide custom was found to constitute negligent performance.<sup>622</sup> By the late 1920s, the technology had been developed to allow sea-going tugboats to carry inexpensive radio receivers to warn of weather conditions, but there had not yet developed a general practice for those tugs to carry such radio receivers.<sup>623</sup> Some carried them but many did not—just as today some jurisdictions require notary record-keeping but most do not. In the tugboat case, commercial damage was caused in part because severe weather warnings were not heard on the tugs since their owners had not equipped them with radio receivers<sup>624</sup>—just as the failure of notaries to journalize their notarizations can contribute to commercial injuries due to faulty or fraudulent notarizations, or to the inability to document valid notarizations. Judge Hand and his colleagues concluded that the tugboat industry’s failure to generally use radio receivers, although its then-current custom, could not be determinative of what was reasonably prudent. Hand wrote that the tugboat industry “may never set its own tests” of what constituted reasonable conduct,<sup>625</sup> but instead concluded that the “[c]ourts must in the end say what is required”<sup>626</sup>—just as the common law should announce the appropriate record-keeping standard for notaries. The tugboat owners were found negligent, meaning that the court had imposed a duty upon the owners to utilize the available technology to help protect against commercial losses.

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619. RESTATEMENT (SECOND) OF TORTS § 295A cmt. c.

620. *Supra* note 599.

621. *The T.J. Hooper*, 60 F.2d 737; *Eastern Transport Co.*, 287 U.S. 662. See, e.g., *Grant v. Graham Chero-Cola Bottling Co.*, 97 S.E. 27 (N.C. 1918); *Morrison v. Kan. City Coca Cola Bottling Co.*, 263 P.2d 217 (Kan. 1953).

622. DOBBS, *supra* note 58, at 397.

623. *The T.J. Hooper*, 60 F.2d at 739.

624. *Id.*

625. *Id.* at 740.

626. *Id.*



Significantly, the principle of Hand's theory of the insufficient industry-wide standard of conduct exposed and reversed in *The T. J. Hooper* has been adopted by the *Restatement (Second) of Torts* § 295A<sup>627</sup> and has been applied to features of notarial practice by both the Arizona Supreme Court and the Washington Supreme Court. In 1989, in *City Consumer Services Inc. v. Metcalf* the Arizona court heard the case of an attorney-notary who notarized the signature of a woman not known to the attorney-notary.<sup>628</sup> The sole basis for the identification of the female signer was that she was accompanied by a business acquaintance of the attorney-notary and the acquaintance claimed she was his wife.<sup>629</sup> According to the acquaintance, her signature had already been affixed to the document in question.<sup>630</sup> The attorney-notary did not ask her to acknowledge that the signature was hers, and the attorney-notary did not ask for any documents of identification to determine her true identity.<sup>631</sup> She was not the wife, and the signature was a forgery.<sup>632</sup>

In his defense in the negligence case against him, the attorney-notary presented the testimony of three Arizona notaries, each of whom, "in effect, [concluded that the attorney-notary] conducted himself as a reasonable notary public."<sup>633</sup> The jury, however, found the attorney-notary guilty of negligence.<sup>634</sup> In affirming the finding of negligence, the Arizona Supreme Court wrote that "even if [the attorney-notary's] actions here conformed to the custom of Arizona notaries public, the jury could still find his actions negligent," and it cited *The T. J. Hooper*.<sup>635</sup> Thus, the Arizona Supreme Court held that the customary practice of notaries could fall below the standard of reasonable care. Additionally, we cannot resist the opportunity to add that the attorney-notary obviously had not completed a journal entry for the above notarization, or else this forgery could not have been accomplished in the first place. Unfortunately, there was no argument about the customary neglect of notarial record-keeping in the Arizona case that could have opened the door to adoption of the position advocated in this Article.

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627. See RESTATEMENT (SECOND) OF TORTS § 295A ("In determining whether conduct is negligent, the customs of the community, or of others under like circumstances, are factors to be taken into account, *but are not controlling where a reasonable man would not follow them.*"). See especially *Id.* at § 295A cmt. c, illus. 2.

628. 775 P.2d 1065 (Ariz. 1989).

629. *Id.* at 1066.

630. *Id.*

631. *Id.*

632. *Id.*

633. *Id.* at 1069.

634. *Id.* at 1066.

635. *Id.* at 1069.

In *Meyers* in 1972, the Washington Supreme Court heard the case of a notary who had notarized forged signatures on an acknowledgment.<sup>636</sup> The notary had not kept a journal of her official acts, and not surprisingly, “she could not remember from her personal knowledge what evidence she required of [the forgers’ identities] before affixing her signature to the [notarial] certificate.”<sup>637</sup> The court’s decision turned upon an evidentiary question involving the proper manner of proving notarial compliance with the standard of reasonable care, because the court held “if it is established that a notarized signature is forged, the burden of persuasion shifts to the notary to prove by a preponderance of the evidence that [she] exercised reasonable care in ascertaining the identity of the person whose signature is notarized.”<sup>638</sup> While the court concluded that “the practices of other notaries are probative of whether the procedures used by a notary, in establishing the identity of the persons whose signatures [she] certifies, are reasonable,”<sup>639</sup> the court refused to accept such evidence of traditional practice to be invariably dispositive. The court wrote: “[M]ere conformity with custom is not necessarily to be equated with the exercise of reasonable care, because the custom itself may not meet the ‘reasonable man’ standard.”<sup>640</sup> Although neither *The T.J. Hooper* nor the *Restatement (Second) of Torts* § 295A were cited in support of the court’s position, they could have been. Importantly, the Washington Supreme Court found that the significance of customary practice to the question of a notary’s compliance or non-compliance with the standard of reasonable care is a question of fact, not one of law. “[T]he ultimate question of whether the procedures used by the notary on the occasion of the forgery in question were reasonable remains for the trier of fact.”<sup>641</sup>

One more fascinating coincidence makes Judge Hand’s decision in *The T.J. Hooper* case especially comparable to the present argument for the common law notarial duty of record-keeping. In *The T.J. Hooper*, an existing statute required tugboats to carry radio transmitters (but not receivers), so that tugs could send distress calls for assistance.<sup>642</sup> Clearly, the legislators who adopted the statute requiring transmitters must have been well aware of the availability of receivers. After all, transmitters function effectively only if there are receivers to hear the messages, and as the court’s opinion pointed out, radio receivers

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636. *Meyers*, 503 P.2d 59.

637. *Id.* at 61.

638. *Id.* at 62.

639. *Id.* at 63.

640. *Id.*

641. *Id.*

642. *The T.J. Hooper*, 60 F.2d at 740.

had by that time become readily available, and some tugs actually carried them.<sup>643</sup> Thus, the court announced a common law industry-wide standard of conduct covering a matter about which there was closely-related, but inadequate, legislation. The notarial backdrop is the same. There are notarial record-keeping statutes in twenty states and territories and the methodology and technology for notary record-keeping is readily and inexpensively available. The failure of some thirty-five jurisdictions to have enacted mandatory notary record-keeping provisions cannot preclude the common law from announcing just such a responsibility. The *Restatement (Second) of Torts* might have been referring to the notarial community of those thirty-five jurisdictions where it explained: "No group of individuals and no industry or trade can be permitted, by adopting careless and slipshod methods to save time, effort, or money, to set its own uncontrolled standard at the expense of the rest of the community."<sup>644</sup>

Furthermore, strict deference to industry custom would allow an industry to set its own standards of practice, with the dangers inherent in such an inbred arrangement. The fox would be guarding the chicken coop. "And if the only test is to be what has been done before, no industry or group will ever have any great incentive to make progress in the direction of safety."<sup>645</sup> Safety here would take the form of notary record-keeping, and an independent judiciary occupies a far better perspective to consider and announce a notarial record-keeping standard than either the notarial community (including the employers of notaries) or the politicians in state legislatures and administrative agencies. Customary practice and legal precedent are essentially akin to one another. They both attain strength from the fact of their longevity of adherence. Although the guidance of precedent is certainly a central feature of the common law, "American judges have always assumed power to overrule an earlier case, if they considered it egregiously wrong," or "to 'distinguish' an embarrassing precedent."<sup>646</sup> Similarly, customary practice not based upon reasoned and prudent experience will not only fail to persuade judges to endorse it, but rather should also persuade them to reverse it.

The vast advantages of the ENJOA over traditional paper journals have already been identified and include improved

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643. *Id.*

644. RESTATEMENT (SECOND) OF TORTS § 295A cmt. c.

645. *Hooper*, 60 F.2d at 740; *see also* RESTATEMENT (SECOND) OF TORTS § 295A cmt. c (stating that "[i]f the only test is to be what has always been done, no one will ever have any great incentive to make any progress in the direction of safety.").

646. FRIEDMAN, *supra* note 55, at 21-22.

accuracy and reliability of the step-by-step notarial procedure, heightened security of the confidential information recorded in electronic journals, substantially better deterrence of imposters and would-be perpetrators of document frauds, and far greater benefits to police and prosecutors in tracking down criminals guilty of identity theft and document frauds and in proving their guilt once they are caught.<sup>647</sup> This advanced ENJOA technology is worthy of the common law's sanction, as an equally acceptable format for satisfying the required common law notarial record-keeping responsibility. Just as other technologies have served as fundamental influences upon the common law throughout legal history, the proven worth of ENJOA should command similar common law endorsement as the means by which U.S. notaries satisfy their legal duty to thoroughly and securely perform and record their official acts. Moreover, unlike so many instances in which the law has lagged far behind technology, and has only very belatedly embraced it, in regard to ENJOA and the fostering of more effective notarial record-keeping, the common law may have the opportunity to side with ENJOA early in its existence rather than very late.

There is also an international aspect to the concern about notarial record-keeping and customary practice, to which we briefly alluded previously. In the prologue to his *History of American Law*, Professor Friedman pointed out: "Modern communications and technology have made the world smaller. They have leveled many variations in world culture. Yet people still speak different languages, wear different clothes, follow different religions, and hold different values dear. They are also subject to very different laws."<sup>648</sup> Among the common international values we in the U.S. share with business people and government agents of other nations is the justifiable and routine recognition of our notarizations abroad. However, as Friedman noted, law may differ from country to country. It does in the important respect which is the focus of this Article—notarial record-keeping. The rest of the world does it, but some thirty-five U.S. jurisdictions do not statutorily mandate it. Modern U.S. notarizations have suffered internationally because our notarizations fall short of the substantive meaning of those performed by civil law and English notaries and because our notaries fall far short of the qualifications and stature of civil law and English notaries.<sup>649</sup> The failure of so many U.S. notaries to maintain records of their official acts detracts from document security and from transnational recognition of U.S. notarizations.

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647. See *supra* notes 367-76 and accompanying text.

648. FRIEDMAN, *supra* note 55, at 17.

649. See Closen, *supra* note 191, at A24 (noting the difference between American and foreign countries respective views of notaries).

Whether to grant recognition internationally to foreign judgments and official acts including foreign notarizations on documents, is governed largely by the doctrine of comity.<sup>650</sup> The comity doctrine depends upon the exercise of discretion by government authorities (as opposed to the mandate of interstate recognition of notarizations within the U.S. that is expressly included in the federal constitution).<sup>651</sup> While the U.S. has correctly tended to quite regularly recognize foreign country notarizations, the propensity has been for other countries to be more reluctant to approve U.S. notarizations.<sup>652</sup> Nevertheless, to the extent there is transnational recognition of notarizations, notaries public effectively serve as international officials, which the United States Supreme Court held in 1883 when it concluded

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650. "[A]s a matter of international comity, American courts recognize foreign country judgments that meet the requirements for recognizing sister-state judgments, but also reserve the right to refuse recognition on certain grounds" such as where "it offends the recognizing court's public policy." Symeon C. Symeonides, *Conflict of Laws*, in OXFORD COMPANION TO AMERICAN LAW, *supra* note 54 at 141. Certainly, at a minimum, in order for an official act of a foreign country to be recognized in a second nation, the act in the first country should have been legally performed there, and if so, the second country may recognize the official action. "In order that a foreign authentication may be held sufficient before a Court of Justice in England, it must have been done according to the forms and solemnities prescribed by the laws of the country where it was made." BROOKE'S NOTARY, *supra* note 100, at 49.

651. See Closen, *supra* note 15, at 7 (discussing the mandate of recognition of notarial acts and records under the Full Faith and Credit Clause of the U.S. Constitution). "The full faith and credit clause does not apply to foreign-country judgments, and thus American courts are not constitutionally compelled to enforce them." Symeonides, *supra* note 650, at 141. Of course, if a foreign notary were to be called to testify (and since such notary would undoubtedly have detailed records to assist with recollection about the details surrounding the notarial activities), the notary's testimony would most certainly be accorded great weight. "[T]he Notary is allowed to be a kind of international officer, to whose testimony all civilized states give credit." BROOKE'S NOTARY, *supra* note 100, at 46.

652. Of course, this consequence is somewhat the result of the vast substantive difference between U.S. notarizations and the notarizations of civil law and English notaries. But, it is also somewhat the result of the diminished qualifications of so many U.S. notaries. See *supra* note 649 and accompanying text. For example, the Canadian Trademark Opposition Board rejected an affidavit executed before a U.S. notary in a 1978 proceeding due to the failure of the U.S. notary to have jurisdiction in Ontario, Canada. See *C.I.S. Ltd. v. Sherren*, 39 C.P.R. 2d 251 (1978), reprinted in CLOSEN, *supra* note 2, at 465. In a 1990 international arbitration, one arbitrator commented negatively about the reliability of oaths before U.S. notaries as follows: "Because of the . . . laxness characterizing the administration of oaths at a nominal fee by the ever ready notary public . . . [scattered throughout the United States] affidavits have been subject to widespread abuse." Arbitrator Noori, *Time Int'l Inc. v. Iran*, Award No. 473-357-1, 24 Iran-U.S. Cl. Trib. Rep. 121 (1990), reprinted in CLOSEN, *supra* note 2, at 466.

that notaries “are officers recognized by the commercial law of the world.”<sup>653</sup>

As the global business community grows,<sup>654</sup> it will be increasingly valuable to readily, and even routinely, achieve transnational recognition of U.S. notarizations in both traditional and electronic formats. Obviously, the public interest will be fostered if international transactions with the U.S. are encouraged as a natural corollary to the international recognition of U.S. notarizations. The requirement of record-keeping by all U.S. notaries would constitute a step in the right direction, for as the reliability of U.S. notarizations and the instruments to which they are attached improves, the likelihood of satisfying the discretionary comity standards of business people and authorities abroad will be enhanced as well. Moreover, if U.S. notaries are to carry out their responsibilities as international officers, they must abide by the expected practice of all other international notaries to thoroughly prepare and preserve records of their official acts.

In summary, the failure to create and retain separate detailed notary records of official acts represents a negligent custom within a sizeable segment of our notarial community, and it cannot under the watchful view of the common law be allowed to persist. Pronouncement of the common law duty to journalize notarizations will raise notarial practice to the threshold of reasonable care in this fundamental regard, and it will improve both the domestic and international image of performance by all U.S. notaries public.

## VIII. CHANGING NOTARIAL CIRCUMSTANCES

[T]he significance of the position [of notary public] has necessarily been diluted by changes in the appointment process and by the wholesale proliferation of notaries.<sup>655</sup>

Change is inherent and inevitable in the common law generally, and in tort law in particular.<sup>656</sup> Change is necessary

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653. *Pierce*, 106 U.S. at 549; *see also Wood*, 44 N.W. 308 (finding that a “notary public is considered . . . as a kind of international officer”); BROOKE’S NOTARY, *supra* note 100, at 46 (concluding that “the Notary is allowed to be a kind of international officer”).

654. *See supra* note 648 and accompanying text.

655. *Bernal*, 467 U.S. at 224 n.12.

656. This American experience of constant change in the common law should have come as no surprise, for “English law was never static.” FRIEDMAN, *supra* note 55, at 29. There is an old truism to the effect that: “There is nothing permanent except change.” DALE, *supra* note 24, at 261. “Old rules of law and old legal institutions stay alive when they still have a purpose . . . [L]aw moves with its times and is eternally new.” FRIEDMAN, *supra* note 55, at 18. “It is a striking fact that the tort law revolution was mostly made by judges.” *Id.* at 685. “The law of torts is anything but static, and the limits of its development are never set.” PROSSER & KEETON, *supra* note 36, at 2.

and advantageous, for it allows the law to keep pace with the times.<sup>657</sup> Just as legislatures sometimes update and supplement statutes, or draft statutes anew in response to modern needs, courts must sometimes modify or overrule existing precedents, or author new decisions to address current controversies.<sup>658</sup> Changing circumstances demand changing the common law to identify reasonable standards of conduct appropriate to the contemporary context.

Over roughly the past 50 years, a number of dramatic developments have occurred to impact the practice of notaries public in this country. While some of these changes have been quite positive, a few have been seriously detrimental to the performance of notarial services. Recognition of the common law duty of notaries to maintain paper or electronic journals would constitute the surest method to address the undesirable trends and to effect immediate and substantial improvement in the public service of notaries. Common law announcement of the journalizing duty would also be consistent with the most recent and most progressive developments in notarial practices. After all, the current fork in the road of the notarial system presents only two choices—the lower path spiraling toward more mediocre performance, or the higher road to improved practice and a more significant notarial role in the future of both traditional and electronic document transactions.

The first topic to consider must be the size of the notary population. Certainly, there are advantages to be derived from the existence of sizeable numbers of well qualified notaries, as the NNA has recently pointed out. Its Executive Vice President Deborah Thaw, in writing about the notarial community generally, commented that “one of our strengths is in our numbers, the more of us available to the community, the more the community will rely on that availability.”<sup>659</sup> Of course, in her position at the NNA,

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657. “History of law is not—or should not be—a search for fossils, but a study of social development, unfolding through time.” FRIEDMAN, *supra* note 55, at 19. “In a very vague general way, the law of torts reflects current ideas of morality, and when such ideas have changed, the law has tended to keep pace with them.” PROSSER & KEETON, *supra* note 36, at 21. In 1816, Thomas Jefferson wrote that “laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths discovered and manners and opinions change, with the change of circumstances, institutions must advance also to keep pace with the times.” PLATT, *supra* note 127, at 38-39.

658. “[P]recedents are usually regarded as important guides, to be taken seriously but not necessarily slavishly followed . . . . Precedents may also be modified because with time and experience judges come to perceive that the precedent was stated too broadly or too narrowly.” DOBBS, *supra* note 58, at 28. See also Orth, *supra* note 57, at 126 (referring to “the common law’s flexibility. . . to deal with the unprecedented new realities.”).

659. Deborah M. Thaw, *Business Attracts More Business*, NAT’L NOTARY,

Thaw certainly was speaking of numbers of well-qualified notaries who would be taught notary ethics, law, and practice and who would be tested thereon prior to their commissioning. As examples of the growing community dependence upon notarial services, consider that the country's increasing numbers of real estate transactions, including mortgage refinancings, and electronic commercial transactions have caused heightened needs for qualified notaries in both areas. Indeed, a specialized form of notarial position, called the Notary Signing Agent, has been created to help facilitate real estate refinances and closings in many states.<sup>660</sup> With expanded roles for an increased number of qualified notaries, Thaw noted "the better it is for the visibility and credibility of all Notaries."<sup>661</sup> Most assuredly, in a nation with millions of daily commercial and governmental documentary transactions, there exists a need for a sizeable number of capable notaries, but that has not been the true situation.

By far the single worst development to impact the notarial system in about the last thirty to forty years has been the incredible jump in the size of the notary population while maintaining the most nominal eligibility requirements. Keep in mind that by mid-twentieth century, the U.S. notary rolls had grown only to about 500,000.<sup>662</sup> But, then the numbers began to grow almost exponentially. In about the last thirty years, the number of U.S. notaries more than doubled. There were approximately 1.83 million U.S. notaries in 1972; 3.30 million in 1982; 4.16 million in 1992; and 4.52 million notaries in 2002.<sup>663</sup> So, the notary population was nine times larger by about the end of the century than it had been at about mid-century. With the current notary population at more than 4.8 million, there is one notary for every sixty-two people in this country, and we have more notaries than there are people in thirty-nine states and eighty-eight foreign countries.<sup>664</sup> Moreover, the number of

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Mar. 2004, at 11.

660. See *The Emergence of the Notary Signing Agent*, NAT'L NOTARY, July 2002, at 12 (examining the role of a new notarial position, known as Notary Signing Agent). There has been an "historic confluence of economic and social developments," including "the staggering national volume of home loans now being transacted, particularly refinancings, fueled by low interest rates and heightened competition among lenders," as well as "the ever-increasing reach, reliability and refinement of electronic communication." *Id.* See generally THE COMPLETE HANDBOOK OF LOAN DOCUMENTS AND TRANSACTIONS: THE NOTARY SIGNING AGENT'S ILLUSTRATED GUIDE TO COMMON AND UNCOMMON FORMS AND HOW TO NOTARIZE THEM (National Notary Assn. 2006) (providing an extensive practice manual for notary signing agents).

661. Thaw, *supra* note 659, at 11.

662. HUMPHREY, *supra* note 205, at 15.

663. Keith Jajko, *The 2002 Notary Public Census*, NAT'L NOTARY, May 2002, at 13.

664. 2007 Notary Census, *supra* note 2, at 20.



notaries has continued to rise, and it will likely reach five million in the not too distant future.<sup>665</sup> In a system which imposes the most minimal requirements on notary eligibility, the swelling of the notary ranks can mean only trouble in the forms of increased indifference and diminished performance. Among notaries generally, concern and diligence have declined, honor and integrity have suffered, and understanding and performance of even the most basic notarial functions have deteriorated.<sup>666</sup>

Notary eligibility is far too lax. Almost anyone seems to be able to become a notary public.<sup>667</sup> Borrowing from a cynical remark of author Robert Louis Stevenson, it seems that service in politics and as notaries are “the only profession[s] for which no

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665. We know the number of notaries has grown to more than 4.8 million, and some are predicting that the number will soon reach 5 million. See generally 2007 Notary Census, *supra* note 2, at 20 (setting out the detailed numbers from this census, and subtitled: *Knocking on the Door of 5 Million*). Since the NNA reported its first notary census in 1972, “the number of Notaries has increased 169 percent.” *Id.* Between 2002 and 2007, California experienced an increase of 83% in its notary population. *Id.* at 23. In that same time frame, New Jersey had a 64% increase, and Hawaii has doubled the number of its notaries. *Id.* at 24. South Carolina has one notary for every 31 of its residents, and New Hampshire has one notary for every 33 residents. *Id.* at 25. “[W]e [in the United States] continue to commission more [notaries] every business day.” Closen & Orsinger, *supra* note 64, at 530.

666. “It is alarming that this largely unregulated recordkeeping function is being undertaken by a vast array of untrained and indifferent individuals bearing government commissions.” Closen, Orsinger & Ullrick, *supra* note 105, at 190. “For the most part, notaries are seriously underinformed about their responsibilities.” Closen, *supra* note 191, at A23. “Notary-related dishonesty appears to be on the rise . . . . Notaries commonly backdate documents and witness signatures for people who do not appear before them personally. In the case of employee-notaries, they tend to do whatever their employers direct them to do, even if shortcuts and misconduct are involved.” *Id.* “The apathy [among notaries] is a result of minimal eligibility standards, poor notary training or no training at all, the lack of state-mandated testing, and a general disrespect for the office.” Closen & Orsinger, *supra* note 64, at 517; see also *The Crisis of Responsibility*, *supra* note 216, at 11 (observing that “[t]he low fees and prestige of their office cause many Notaries to be cavalier and careless about their duties. Many begrudge their employers for making them take on additional duties of notarization that always seem to impinge on their regular jobs at the most inconvenient times.”).

667. According to “Ed Rybczynski, former owner and president of Baltimore, Maryland-based Liberty Title who spent time in federal prison for mortgage fraud,” several factors contribute to the proliferation of fraud schemes. Among them: the complacency of settlement agents [Notary Signing Agents] who abuse their Notary privileges and the ease with which people can obtain a Notary commission or seal.” Kelly Rush, *The Real Seal*, NAT’L NOTARY, Jan. 2008, at 39. See Michael L. Closen & R. Jason Richards, *Cyberbusiness Needs Supernotaries*, NAT’L L. J., Aug. 27, 1997, at A19 (referring to “the historic underqualification of notaries in this country”); Closen & Orsinger, *supra* note 64, at 533 (referring to the “atmosphere of . . . cavalier credentialing [of] notaries”).

preparation is thought necessary.”<sup>668</sup> There is woefully little prescribed and mandatory notary education, and even less closed book notary testing.<sup>669</sup> There is almost no mandatory continuing education for notaries, or retesting upon recommissioning.<sup>670</sup> Thus, the great bulk of U.S. notary applicants undergo no notary education and no notary testing. So long as applicants do not admit on their applications that they are convicted felons, they nearly automatically become notaries with no real background checks of their character or integrity.<sup>671</sup>

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668. PLATT, *supra* note 127, at 267. “The office of notary public has traditionally been abused and trivialized [in this country].” Closen & Richards, *supra* note 667, at A19. By contrast, appointment as a notary public in England requires one to complete an apprenticeship or clerkship of 5 or 7 years. BROOKE’S NOTARY, *supra* note 100, at 10-11.

669. Only about 5 jurisdictions require any sort of notary education, including California, Florida, Missouri, North Carolina and Pennsylvania. *Guide to Notary Commission Eligibility*, NAT’L NOTARY, May 2006, at 34. See CLOSEN, *supra* note 2, at 81 (stating that only “[a]pproximately 20 percent of the states currently require notary applicants to pass a written exam.”). “Notaries are required to have only minimal qualifications, usually including no training or testing on their duties.” Closen & Richards, *supra* note 667, at A19. In 2006, the following 14 jurisdictions, or 25% of all U.S. jurisdictions, were listed as requiring an examination of their notary applicants: California, Connecticut, District of Columbia, Guam, Hawaii, Louisiana, Maine, Nebraska, New York, North Carolina, Ohio, Oregon, Puerto Rico, and Utah. *Guide to Notary Commission Eligibility*, *supra*, at 34. However, few of those exams are both closed-book and proctored. A wise old proverb suggests, “A man’s studies pass into his character.” DALE, *supra* note 24, at 333. Unfortunately, most notaries therefore have a large void in their professional characters. This deficiency is particularly disadvantageous for notaries, who lack adequate knowledge of notarial law and procedure, and who therefore lack the power to effectively stand up to attorneys, employers and others who attempt to obtain incomplete or incorrectly performed notarizations. After all, “[k]nowledge is power.” *Id.* at 270.

670. Only California requires its notaries to submit to re-testing upon each renewal of their commissions. *Id.* Obviously, without mandatory continuing education and re-testing upon renewals of commissions, notaries may obtain their original commissions and merely renew them for many years without having to keep abreast of new developments in the notary field and of changes in notary laws. “On the job training is available, but few notaries make use of it. There are periodic [voluntary] seminars held throughout the country, but compared with the number of commissioned notaries in the area, attendance is generally very sparse.” Closen, *supra* note 191, at A23.

671. “The qualifications are minimal—literacy in the English language and an absence of serious criminal convictions are common requirements. And even these are not taken seriously. All the applicants need do is indicate on the form that they know the language and have no disqualifying criminal record. There is generally no attempt to verify the information. The only other absolute requirement is payment of a small application fee. As soon as that is done, yet another notary is born.” *Id.* See A HISTORY OF NOTARIES IN CALIFORNIA, *supra* note 53, reprinted in CLOSEN, *supra* note 2, at 7 (pointing out that in 1977 the first full-time notary investigator in the country was hired in California, “whose sole responsibility was to screen applicants and enforce

Only one state imposes any kind of general education requirement on notaries, and that is a mere eighth grade education requirement in Wisconsin.<sup>672</sup> Additionally, the U.S. Virgin Islands requires its notaries to have attained high school educations.<sup>673</sup> It seems that in the full circumstances in which this country and the world find themselves, it would be advantageous for U.S. notaries to be required to have attained a more substantial general education—perhaps as evidenced by a college degree of some kind. If notaries public are to accept greater responsibilities and to join the ranks of other professionals (such as lawyers, doctors, dentists, therapists, certified public accountants, architects, engineers, and numerous others), then like those others they must attain substantial general and specialized educations, pass proctored written examinations and earn appropriate continuing education credits. However, state politicians who control the notary commissioning process generally do not seem to care enough about notary credentials. Those politicians appear much more focused upon the revenue generated by notary commissioning fees, which nationwide total probably exceeds thirty-five to forty million dollars annually.<sup>674</sup>

The more than 4.8 million U.S. notaries, the great number of whom possess no substantial notarial qualifications, constitute a preposterously high number. It is a testament to the lack of concern of state legislators about the notary public system. We

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Notary laws.”). Things have not improved much in this regard around the country since then. See Armando Aguirre, *States Set Bar Low for Notary Applicants*, NAT’L NOTARY, July 2001, at 16 (reporting that California “is the only state in the nation to employ full-time investigators to conduct background checks of [notary] applicants and require them to submit fingerprints.”).

672. *Guide to Notary Commission Eligibility*, *supra* note 669, at 34.

673. *Id.*

674. See Closen, Orsinger & Ullrick, *supra* note 105, at 185 (opining that “[a] conservative estimate [in 2001] is that notaries pay more than \$28 million annually to state and local governments in commissioning fees”). Ten years ago, “[t]he average commissioning fee for the 50 states and the District of Columbia [was] approximately \$26.91.” Closen & Richards, *supra* note 148, at 720 n.99. If about one quarter of all notary commissions come up for renewal each year, that means about 1.2 million notary fees are paid annually, totaling more than \$32 million under decade old fee schedules. Even a slight adjustment for the number of additional notaries and for inflation in the year 2008 would put this estimate easily at \$35-40 million or more. Incidentally, the surety bond companies which sell notary bonds are also quite pleased to have such a large number of notaries, many of whom pay premiums for the virtually no-risk and worthless notary bonds. See generally Closen & Osty, *supra* note 215, at 13; Michael J. Osty, *Notary Bonds and Insurance: Increasing the Protection for Consumers and Notaries*, 31 J. MARSHALL L. REV. 839 (1998) (explaining that some executives and agents of the bond companies have served in the state legislatures or have lobbied the legislatures on notary issues).

have more modestly qualified notaries than we have police officers, fire personnel, school teachers, lawyers, or doctors, and more than twice as many notaries as we have active duty and reserve members of the armed forces.<sup>675</sup> More than twenty years ago, the United States Supreme Court even noted the trend and warned of its consequences, when it wrote (in the language that introduced this portion of the article) of the ease of the “appointment process” and “the wholesale proliferation” in the number of notaries.<sup>676</sup>

Additionally, the states and territories largely continue to disregard the protection of the general public against notary malpractice by refusing to require liability insurance of notaries or to mandate notary bonding at meaningful levels.<sup>677</sup> A total of about twenty-one states and territories have no indemnity bond requirement at all for notaries, and all the rest have set their notary bond levels at \$10,000 or less, except for three jurisdictions with \$15,000 notary bonds.<sup>678</sup> A total of some thirty-six states and territories have either no required notary bonds or set notary bond levels at \$5,000 or less.<sup>679</sup> A mere \$5,000 bond today is trivial and misleading, and even a \$15,000 bond in the year 2009 is woefully inadequate. Not one state or territory has demonstrated either

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675. “We have more notaries than we have elementary and secondary school teachers, police officers, active-duty military personnel, doctors and dentists—and lawyers.” Closen, *supra* note 191, at A23. “There are now two times as many Notaries as there are service men and women in the U.S. armed forces—active duty and reservists.” 2007 Notary Census, *supra* note 2, at 20.

676. See *supra* note 655 and accompanying text.

677. “The general public is misled because at best they appreciate only that notaries have to be bonded. Seldom do members of the public know the trivial amount of the required bond.” Closen & Osty, *supra* note 215, at 13. Notaries have full personal liability for damages caused in whole or in part by their notarial misconduct, and notary bonds will not protect notaries. The bonds are too low in amounts, and if the surety bond companies have to pay third parties for claims against notaries, the sureties will simply look to the notaries for reimbursement. See Closen, Orsinger & Ullrick, *supra* note 105, at 187 (opining that “many of these [entry-level notaries] are virtually judgment-proof.”).

678. *Comparison of Notary Provisions*, *supra* note 21, at 35. The three jurisdictions with \$15,000 notary bonds are California, Nebraska and Puerto Rico. *Id.*

679. *Id.* (pointing out there are 21 jurisdictions with no notary bonds and 15 jurisdictions with bonds of \$5000 or less). See, e.g., *McWilliams v. Clem*, 743 P.2d 577 (Mont. 1987) (holding a notary personally liable for \$18,950 above and beyond the state’s mandatory \$1000 notary bond); *Iselin-Jefferson Fin. Co.*, 549 P.2d 142 (holding a notary personally liable for more than \$71,000 above and beyond the state’s mandatory \$5000 notary bond); *McDonald*, 12 Cal. App. 3d 374 (Cal. Ct. App. 1970) (holding a notary personally liable for more than \$16,000 above and beyond the state’s mandatory \$5000 notary bond). “If notaries engage in the kind of misconduct that amounts to intentional torts or intentional violations of statutory provisions, the notaries could be held accountable for both compensatory and punitive damages.” CLOSEN, *supra* note 2, at 258 n.2.

enough foresight or enough gumption to mandate liability insurance for its notaries,<sup>680</sup> leaving the general public at grave risk of being unable to recover any relatively suitable amount in the event substantial damages are caused by notary malpractice. The dynamic growth of the notary population without increased screening of candidates and improved oversight of practices can be likened to a chronic cancer eating away at the foundation of the notarial system.<sup>681</sup> The common law recognition of a duty upon notaries to create and preserve records of their notarizations would help to counter these most unfortunate continuing developments in the notary arena, and would require even mediocre notaries to perform tasks that would guarantee their better functioning during the performance of notarizations and would better protect against notarial errors and document fraud after the fact.

Curiously, on the other hand, some of the most significant and promising developments in the entire history of U.S. notarial practice have also taken place in the last 20 to 25 years. Importantly, each of these monumental advancements to be discussed below squarely endorses the notary journal requirement. First and foremost in the line of recent progress was publication of the Notary Public Code of Professional Responsibility in 1998.<sup>682</sup> Prior to that time, while seemingly nearly all of the rest of the world of business and governmental functionaries had formulated meaningful codes of ethics,<sup>683</sup> the notarial community had lagged

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680. "E & O' insurance [is] not required in any state." Barich, *supra* note 19, at 39. "No state requires Notaries to carry errors and omissions or any other liability insurance." Closen, *supra* note 17, at 27.

681. At the heart of the analogy is the slow process that seems to be eating away at the notarial system, with apparently no hope for a reversal of that course. "Unfortunately, the notarial office in this country has suffered a steady and serious decline throughout most of the last 150 years." Closen, *supra* note 231, at 642. See Closen, Orsinger & Ullrick, *supra* note 105, at 251 (observing that "[t]he explosion of the notary population has been likened to an uncontrolled cancer."). Recall also the comment of Piombino about "the advanced stage of decay" suffered by the office of notary. PIOMBINO, *supra* note 216, at xxii.

682. See NOTARY PUBLIC CODE OF PROF'L RESPONSIBILITY (1998), reprinted in 32 J. MARSHALL L. R. 1123 (1999). See generally Michael L. Closen, *Ethics Code Key to Professionalism*, NAT'L NOTARY, Feb. 2007, at 7 (explaining the importance of the *Notary Public Code*). THE NOTARY PUBLIC CODE OF PROF'L RESPONSIBILITY "represents the most important event in the development of ethics standards for notaries in the more than 350 years of their presence in North America." Closen & Orsinger, *supra* note 64, at 541.

683. See generally RENA A. GORLIN (ED.), CODES OF PROF'L RESPONSIBILITY (2d ed. 1990) (setting out the ethics codes for numerous professions, such as accountants, arbitrators, architects, bankers, dentists, engineers, journalists, lawyers, medical doctors, and nurses); see also *Notary Public Code of Ethics*, NAT'L NOTARY, July 2001, at 7 (discussing the release and review of the preliminary draft of what became the NOTARY PUBLIC CODE OF PROF'L

behind. The lengthy, thorough, and thoughtful Notary Public Code filled that enormous void. Construction of the Notary Public Code was a project of the NNA, which selected a highly qualified and diverse drafting committee of national experts on notarial practice, including state officials and notary regulators, lawyers and law school professors, business representatives, and past and present notaries.<sup>684</sup>

After some two years of active drafting, meetings, and revisions, the Notary Public Code was published, with ten "Guiding Principles," followed by eighty-five standards of conduct, each with its own illustration and explanatory note.<sup>685</sup> That amounts to a total of more than 250 descriptive statements to guide notaries in their performance of official acts. Furthermore, the Notary Public Code includes an extensive legal commentary prepared by the Code's reporter, Professor Malcom Morris, one of the country's leading notary scholars.<sup>686</sup> The breadth and depth of the Notary Public Code marks what is truly the most significant advancement in history in support of the performance and professionalism of U.S. notaries.<sup>687</sup>

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RESPONSIBILITY of 1998, and characterizing it as providing "the nation's Notaries with their first comprehensive set of ethical guidelines").

684. See *The Drafting Commission of the Notary Public Code of Professional Responsibility*, appearing at the end of the NOTARY PUBLIC CODE OF PROF'L RESPONSIBILITY (1998) (listing the names and affiliations of the members of the drafting commission); see also *Notary Public Code of Ethics*, *supra* note 683 (listing the names, positions, and affiliations of the 25-member drafting commission which ultimately produced the NOTARY PUBLIC CODE OF PROF'L RESPONSIBILITY of 1998). The *Notary Public Code* "is the direct work-product of a blue ribbon commission appointed to draft it." Anderson & Closen, *supra* note 207, at 891.

685. See generally NOTARY PUBLIC CODE OF PROF'L RESPONSIBILITY (1998). "The *Notary Public Code* is based upon ten 'Guiding Principles,' with eighty-five accompanying 'Standards of Professional Responsibility.'" Anderson & Closen, *supra* note 207, at 890. "[I]t contains illustrations and explanations of ethical choices." *Id.* at 891.

686. The Notary Public Code contains "extensive legal commentaries and citations to statutory authority." *Id.* Professor Morris is a co-author of the country's only law school casebook on notary issues entitled *Notary Law & Practice: Cases and Materials* (1997); has authored a law review article on notaries appearing at 32 J. MARSHALL L. REV. 985 (1999); was also the reporter for *The Model Notary Act of 2002*; and has regularly served as an instructor at CLE programs on notary law and ethics for practicing attorneys. He has been honored as a recipient of the NNA's prestigious annual March Fong Eu Service Award and was included among those individuals identified as among "The 50 Most Influential People In Notarization In The Last 50 Years." See Ray, *supra* note 6, at 34.

687. "[I]t may be that a group or occupation cannot truly achieve 'professional' status without developing and adhering to an ethical code." Anderson & Closen, *supra* note 207, at 891. The Notary Public Code "represents a truly monumental advancement of the office of notary public." *Id.* "With this Code in place, the Notaries of this nation have the potential to

The Notary Public Code emphasizes the role of the notary journal in the official functioning of notaries and declares that notaries bear the ethical responsibility not only to prepare journal entries but also to preserve the resulting records of notarizations. Its Guiding Principle VIII reads as follows: "The Notary shall record every notarial act in a bound journal or other secure recording device, and safeguard it as an important public record."<sup>688</sup> This position is grounded in the viewpoint that "favors the use of journals in all jurisdictions," including those whose statutes do not expressly mandate such record-keeping.<sup>689</sup> The Code also demands that the journal record must be a detailed one, containing at least nine items of information.<sup>690</sup> As the official comment to the Code observes, the journal "helps deter fraud by requiring the Notary to obtain important information incident to the notarization that imposters may not be able to produce"<sup>691</sup> or may not be willing to produce (such as a photograph or thumbprint).

The central theme of a code of ethics is, of course, to identify a set of effective and moral best practices describing the conduct and functions of a specific group of practitioners.<sup>692</sup> For the Notary Public Code to have pronounced its position demanding journal record-keeping by notaries constitutes a major development, for this pronouncement does not mark the adoption of a new standard of practice but instead the recital in unison with nine other Guiding Principles of the Code's ten pre-existing ethical truths.<sup>693</sup>

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earn a place among other professionals." Closen, *supra* note 682, at 7. During an interview upon the celebration of the 50th anniversary of the NNA, its President Milton Valera singled out the Notary Public Code (along with The Model Notary Acts) as one of "[t]wo accomplishments of the NNA in particular [that have] contributed immensely to establishing a firm foundation for the American Notary office." Phillip W. Browne, *Fifty Years of Leadership, Professionalism and Trust: The National Notary Association*, NAT'L NOTARY, Nov. 2006, at 18. Consider where the notary field would be without this extensive ethical code. Earl Warren eloquently observed: "In civilized life, law floats in a sea of ethics. Each is indispensable to civilization. Without law, we should be at the mercy of the least scrupulous; without ethics, law could not exist." FRED R. SHAPIRO, *THE OXFORD DICTIONARY OF AMERICAN LEGAL QUOTATIONS* 132 (Oxford University Press 1993). Of course, civil law and English notaries are regarded as professionals. See BROOKE'S NOTARY, *supra* note 100, at 9 (referring to English notaries as "the members of the profession.").

688. NOTARY PUBLIC CODE OF PROF'L RESPONSIBILITY Guiding Principle VIII (1998).

689. *Id.* at Guiding Principle VIII general cmt.

690. *Id.* at VIII-A-2 [Essential Components of Entry].

691. *Id.* at VIII-A-2 general cmt.

692. "The professions have long carried distinct moral obligations with respect to public and private decisionmaking and behavior." Frances B. Thomas, *Foreword* to GORLIN, *supra* note 683, at v.

693. "[A] code of professional responsibility does not invent or create new

It is, therefore, careless, unreasonable, indifferent, unprofessional, antithetical—unethical—for notaries anywhere to fail to journalize their notarizations. After all, there should have been no surprise whatsoever upon the announcement of this position, for there were only two possible choices faced by the Code's drafters—to journalize, or not to journalize. Moreover, in notarial practice those two choices are confronted not by private citizens, but by commissioned public officials sworn as public servants to serve the public interest.<sup>694</sup> Most significantly, notaries are public officials whose principal role is concerned with documents, with document security and with preventing document fraud. How incongruous for notaries not to create and retain documents to assist them, especially when those records would serve to deter or prevent fraud and mistakes.

Consider what causes notaries to omit to journalize their notarizations. Some notaries are so ignorant of notarial functioning that they remain totally unaware of the practice of maintaining journals. Others know of the practice but are indifferent about the whole business of their service as notaries. Some notaries possess too little business sense and are routinely careless in their practices. Other notaries are driven by the shortsighted desires to save time, money, and effort. And worst of all, some notaries knowingly choose to partially conceal their official conduct by omitting to create journal records of it. Each of these reasons not to journalize is faulty and unethical.<sup>695</sup>

Some employers even dissuade their notary-employees from maintaining journals of notarizations for the same reasons just recited. However, it is no defense for notaries, who are the ones to

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guidelines of conduct, but instead, it publishes what is already generally understood by fair, prudent, experienced and thoughtful professionals to represent standards for ethical performance of their functions." Closen, *supra* note 682, at 7. See *Purpose of the Code*, in NOTARY PUBLIC CODE OF PROF'L RESPONSIBILITY (1998) (stating the majority of the Code's standards "are principles, policies and practices that have proven over the years to be effective in helping Notaries perform their primary function of detecting and deterring fraud").

694. "[T]he need for [ethical] guidelines is particularly acute with persons holding the office of Notary because of their unusual status as both public and private functionaries." NOTARY PUBLIC CODE OF PROF'L RESPONSIBILITY *Introduction* (1998).

695. Not only can the journal be the best friend to a notary, but also it can be the notary's worst enemy, for the journal can just as easily contain evidence (sometimes by omission) to show neglect or misconduct by the notary. For instance, in one Florida case, notary Ruth Bowen and others engaged in several real estate frauds, in which the notary and her sister knowingly performed false notarizations on forged instruments but then recorded those notarizations in the notary's journal. "Florida investigators said they were able to use Bowen's Notary journal against her, since the sisters logged their forgeries." Barich, *supra* note 222, at 31.



hold the public commissions, to lay blame for this faulty behavior upon their employers. Rather, at that point, notaries and their employers share a relationship more closely resembling co-conspirators in their corrupted notarial enterprise. Certainly, employers are vicariously responsible to honor the ethical standards to which their employees—especially those who are commissioned public officials—are lawfully bound.<sup>696</sup> Those who justify the continuing neglect of expanded notarial record-keeping based on savings of time and cost commit a second blunder. It is not a reasoned opposition, but rather an unadulterated excuse for shallow-minded unwillingness.<sup>697</sup>

Undoubtedly the next most significant development in the notarial arena in the last generation has been the drafting and publication of model legislation in the form of the Model Notary Act of 1984<sup>698</sup> and the expanded and improved version, the Model Notary Act of 2002 (with a further revision planned for release in 2009).<sup>699</sup> Both the 1984 and 2002 model laws are comprehensive in coverage and contemporary in their treatment of substantive

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696. Employers of notaries must be bound to the ethics code of their notary-employees for a number of reasons. First, employers are often the actual source of the wrongdoing of their notary-employees because employers direct or encourage misconduct. “Business people, their staffs and their clients will sometimes engage in cost-cutting and timesaving [notarial] shortcuts.” *Risk Management*, *supra* note 17, at 25. See Maureen Rozmus, *An Unhealthy Atmosphere*, NAT’L NOTARY, May 2004, at 13 (describing the author’s experience as a Michigan notary at the health care facility where she worked and where her supervisor would criticize and write-up diligent notaries who refused to notarize for patients without sufficient documents of identification). Employers represent one of the principal groups that discourage notarial record-keeping. “Notary record-keeping is often discouraged.” Valera, *supra* note 14, at 20. Second, many notary-employees become notaries solely because they are required to do so by their employers in order to service their employers’ business needs and/or customers. See Closen, Orsinger & Ullrick, *supra* note 105, at 187 (noting that “many notaries tend to be entry-level employees, such as clerks, secretaries, paralegals and the like because no one else wants to perform the menial notarial function.”). Third, under the law, employers have virtually always been held vicariously responsible for the wrongdoing of their notary-employees, due to the above reasons and the close relationship the employer has to the notarial work of these employees. Indeed, it has even been proposed that a supplementary code of ethics should be adopted to specifically govern the employers and customers of notaries. See generally Anderson & Closen, *supra* note 207.

697. “Although the maintenance of such a journal undoubtedly doubles the time occupied by each notarization ceremony, the small amount of extra time expended is a small price to pay for the assurance of a correct and valid notarization.” Anderson & Closen, *supra* note 207, at 920.

698. See generally MODEL NOTARY ACT (1984).

699. See generally MODEL NOTARY ACT (2002); see also Michael L. Closen, *Model Laws Encourage Uniformity*, NAT’L NOTARY, June 2007, at 7 (praising *The Model Notary Acts*, and predicting that “[i]n the next several years, we can expect the 2002 Act to have an ever-broadening impact on state [notary] laws across the nation.”).

issues, and both models are accompanied by extensive commentaries. Again, as with the Notary Public Code of Professional Responsibility, Professor Malcolm Morris served as reporter to the 2002 Model Act and penned its authoritative comments.<sup>700</sup> Both of these model laws have proven of great value to the progress and advancement of sound notarial practices. Again, as happened with the Notary Public Code, the NNA was responsible for initiating the process of authoring the model laws, for selecting the highly qualified drafting committees that advised the NNA regarding both laws, for contributing substantially to the content of both models, for circulating and publicizing the substance of the models, and for encouraging state and territorial governments to adopt the model laws.<sup>701</sup> As would be expected when an independent, non-profit, educational organization which is the leading national institution in its field proposes an entire model statute, such a law is likely to be ahead of its time. The NNA has certainly had an advantage over the state and territorial legislatures and administrative agencies in terms of its devotion of resources and expertise to complete such thorough and thoughtful drafting projects for the benefit of all states.

The proof of the validity of the numerous superlative testaments to the NNA's Model Notary Acts is that both have been highly influential. Numerous provisions of the 1984 Act were progressive and groundbreaking at the time of their drafting, but over the years the Act has been adopted in whole or in part by many of the states and territories.<sup>702</sup> The territories of Guam and the Northern Marianas enacted the Model Notary Act of 1984 "virtually in toto."<sup>703</sup> Already, Massachusetts, Mississippi,

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700. See MODEL NOTARY ACT *Foreword* (2002) (by Professor Malcolm L. Morris, Reporter); see also *supra* note 686 and accompanying text (explaining Professor Morris' qualifications).

701. NNA President Milton Valera has praised the NNA's Model Notary Acts for "contribut[ing] immensely to establishing a firm foundation for the American Notary office." Browne, *supra* note 689, at 18. "In the Notary field, the NNA has had a long history of advocacy for law reform, including leadership roles in the drafting and publishing of three substantial Notary law prototypes, The UNIFORM NOTARY ACT of 1973 [with amendments in 1976], The Model Notary Act of 1984, and The Model Notary Act of 2002." Closen, *supra* note 699, at 7.

702. "Legislators and Notary-regulating officials have borrowed extensively from the [Model Notary] Act in reforming state and territorial Notary laws." Browne, *supra* note 689, at 18. "All [of the Model Notary Acts] have been highly influential in that many states and territories have adopted significant portions, if not virtually all, of one or more of these models." Closen, *supra* note 699, at 7. "To date, the vast majority of states, along with the territories of Guam and Northern Marianas, have enacted some part of the [Uniform Notary Act of 1973] or [Model Notary Act of 1984 or 2002]." Michael Mink, *The Uniform Notary Act Changed the Landscape*, NAT'L NOTARY, Jan. 2008, at 24.

703. FAERBER, *supra* note 15, at 531-32.

Nebraska, New Mexico, North Carolina and Virginia have adopted substantial segments of the Model Notary Act of 2002.<sup>704</sup> Numerous sections of the 2002 Act have been followed in the unprecedented step taken by the Governor of Massachusetts in his Notary Public Executive Order of December 19, 2003. On that date, Governor Mitt Romney announced new standards of practice for the more than 130,000 notaries public who are commissioned in Massachusetts. In his remarks on that day, and with both the President and the Executive Director of the NNA at his side at the podium, Governor Romney declared that his order “establishes, for the first time in Massachusetts, comprehensive Standards of Conduct for Notaries Public . . . . Today’s Order will improve the quality of Notary services in Massachusetts and will strengthen our ability to rely on signatures, whether in commerce or in the courts.”<sup>705</sup> The press release issued by the Governor’s Office on the day the Executive Order was signed into law specifically acknowledges: “Many of the provisions of this Executive Order are based on the Model Notary Act that is published by the National Notary Association.”<sup>706</sup> As already noted, that Executive Order established three essential notary journal requirements for notaries—to create the journal in the first place, to maintain a detailed journal record, and to preserve and protect the journal record. When the Secretary of State in Mississippi modified the state’s Administrative Regulations in 2007, adopting numerous provisions of the 2002 Model Notary Act, notaries (who were already statutorily required to maintain journals) were directed to keep detailed journals (to include at least seven items of information about each notarization).<sup>707</sup>

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704. *Id.* (showing that “substantial parts” of The Model Notary Act of 2002 have been adopted in Massachusetts, New Mexico and North Carolina). “[S]ignificant parts of the [2002 Model Notary] Act have already been adopted in New Mexico, Massachusetts, North Carolina and Virginia, either by legislative enactment or gubernatorial order.” Closen, *supra* note 699, at 7. See Romney Signs Executive Order, *supra* note 47, at 2 (referring to “[T]he MODEL NOTARY ACT of 2002 from which the Governor’s executive order drew many of its provisions”); New Mexico Notary Public Act, effective July 1, 2003. In Mississippi, “major provisions of The Model Notary Act of 2002” were incorporated in the Secretary of State’s changes to the state’s Administrative Regulations, effective July 1, 2007, according to the NNA Web site synopsis of those rules. See also Armando Aguirre, *Legislation Watch*, NOTARY BULL., June 2004, at 14 (pointing out that Nebraska Legislative Bill 315 which became effective as law on July 16, 2004, “adopts numerous provisions of the NNA’s Model Notary Act”).

705. Notary Public Executive Order Remarks [Governor Romney’s Comments], at 3 (Dec. 19, 2003).

706. Press Release, Romney Establishes New Standards For Notaries Public, *supra* note 46, at 2.

707. Regarding the Mississippi Administrative Regulations, effective July 1, 2007, notaries are required to record for each notarization:

“(1) the date and time of the notarial act; (2) the type of act; (3) the type,

The Model Notary Acts of 1984 and 2002 each include a provision requiring notaries to prepare and preserve detailed journals of their official acts. The 1984 law provided in its Section 4-101 as follows: "A notary shall keep, maintain, protect as a public record, and provide for lawful inspection a chronological, permanently bound official journal of notarial acts, containing numbered pages."<sup>708</sup> The 2002 law incorporates a slightly modified version of the above declaration and invites the use of an electronic journal. Section 7-1(a) of the 2002 model law provides: "A notary shall keep, maintain, protect, and provide for lawful inspection a chronological official journal of notarial acts that is [either: (1)] a permanently bound book with numbered pages [; or (2)] an electronic journal of notarial acts as defined in Section 14-4."<sup>709</sup> The basic stand of Sections 401-1 and 7-1(a) of the Model Notary Acts seems never to have been in doubt among the experts during the drafting process, for as noted previously the commentary to the 2002 law observes, "the drafters have adopted the view that journals are *essential* to good notarial practice and *decidedly* in the public interest."<sup>710</sup> Those words represent powerful support for the contemporary worth of the notary journal.

One central truth has not changed in the more than 50 years since notary authority Richard Humphrey wrote that the office of notary public is "indispensable to the carrying on of modern business."<sup>711</sup> That invaluable and essential notarial purpose remains. But, changes are happening in the world of government and commerce and in the notarial system. To keep pace with these changes, the common law should recognize the obligation of notaries to maintain detailed journals of their official acts. It is one of the great advantages of the common law that it possesses the flexibility to change with the times, to reflect what is the just course in a temporal context. To recognize a common law duty to journalize would confront the serious concerns about deteriorating qualifications and substandard performance of the growing number of U.S. notaries, and would be congruent with the most esteemed recent developments in notary ethics and model

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title or description of the document or proceeding; (4) the printed name and address of each principal; (5) the fee charged, if any; (6) the address where the notarization was performed, if not the Notary's business address; and (7) if the person is not personally known to the Notary, the Notary may require the principal to sign the journal and record the type of satisfactory evidence used to identify the signer."

Synopsis of Mississippi Administrative Regulations, NNA Web site, para. 50., available at <http://www.nationalnotary.org/law/index.cfm?text=notaryUpdate&notaryUpdateID=43>.

708. MODEL NOTARY ACT § 4-101 (1984).

709. MODEL NOTARY ACT § 7-1(a) (2002).

710. *Id.* ch. 7, general cmt. (emphasis added).

711. HUMPHREY, *supra* note 205, at 9.

legislation, both of which expressly support mandatory and detailed notary record-keeping and record preservation.

### IX. FOSTERING OF SOUND PUBLIC POLICY

The office of notary public is a public office . . . . Public offices are created for the purpose of effecting the end for which government has been instituted, which is the common good. . . . [T]he office of notary public. . . [is] indispensable to the carrying on of modern business. The functions of the Notary's office are called into action throughout the country far more often than those of any other public officer.<sup>712</sup>

Since notaries, as the above statement details, play a vital role in so many transactions of importance to the collective "common good" of society, public policy interests and notarial practices necessarily intersect. Moreover, there can be no doubt that public policy drives the development of the common law. In Oliver Wendell Holmes' *The Common Law* of 1881, in what has been described as one of the "great contributions to learning" which "represents essentially the first work of American jurisprudence that explicitly acknowledges the public policy interests that legal principles must reflect,"<sup>713</sup> Holmes repeatedly references the role of public policy as a factor "in determining the rules by which men should be governed."<sup>714</sup>

When the common law undertakes consideration of what constitutes the standard of reasonable care in particular circumstances, the paramount concern has almost always been and should almost always be the furthering of sound public or social policy. Professor Friedman explained: "[D]espite a strong dash of history and idiosyncrasy, the strongest ingredient in American law, at any given time, is the present: current emotion, real economic interests, concrete political groups."<sup>715</sup> Each time important judge-made decisions in the tort field have been rendered creating or modifying controlling doctrines (such as proximate cause, foreseeability, contributory and comparative negligence, *res ipsa loquitur*, assumption of risk, the fellow servant rule, and so forth), the greater good of the public has

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712. *Id.* at 7, 9. "American case law teems with references to the indispensable role notarizations play in our society." VAN ALSTYNE, *supra* note 7, at Introduction. "The public is entitled to rely upon the truth of a notary's certificate." ANDERSON'S MANUAL FOR NOTARIES PUBLIC, *supra* note 63, at 17-18.

713. Schweich, *supra* note 36, at xvii, xxiii.

714. HOLMES, *supra* note 36, at 1. See also DOBBS, *supra* note 40, at 12, 22 (discussing the idea that tort law is based on social policy which "works toward the good of society" and the goal of judges through tort law is to "formulate and apply rules to obtain both justice and public policy goals.")

715. FRIEDMAN, *supra* note 55, at 21.

served as a critical guidepost. In speaking of the early role of English common law judges, Friedman has remarked, "In theory, the judges drew their decisions from existing principles of law; ultimately these principles reflected the living values, attitudes, and ethical ideals of the English people."<sup>716</sup> In our country both historically and today, the same has been true of our judges and their deference to the views of what is best for our people.<sup>717</sup> Professor Orth has noted a fundamental way in which public policy views are introduced into judicial decision-making: "The principal purpose of legal rules is to direct the attention of the judge away from the particularities of the parties and the specifics of the given dispute and toward the generalized social problem involved in the case."<sup>718</sup> In short, the public interest prevails. This approach is as it should be, for to do otherwise would elevate form, inflexibility, and technicalities of law above broader substantive considerations. While this approach also has its shortcomings, in the way of some uncertainty and vulnerability to alteration over time, and of some awkwardness arising because judges are overwhelmingly unwilling in their written decisions to openly admit to their intense dedication to the good of society,<sup>719</sup> no one has described a more effective and desirable decision-making system for our country's judicial system.

Indeed, almost all of the leading commentators praise and advocate the flexibility inherent in our common law. Friedman proclaims in the prologue to his treatise *History of American Law*, "[T]he theory of this book is that law moves with its times and is eternally new."<sup>720</sup> He also concludes: "Law, by and large, evolves; it changes in piecemeal fashion."<sup>721</sup> He is correct in both

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716. *Id.*

717. Holmes held essentially the same opinion. "The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do with the syllogism, in determining the rules by which men should be governed." HOLMES, *supra* note 36, at 1.

718. Orth, *supra* note 57, at 129.

719. In the field of agency law and vicarious liability of employers for the torts of their employees, as just one particularly convincing example, judges have steadfastly refused for the most part to admit that the deep pocket theory drives the outcome of the vast number of cases, and that is control by public policy. "The law of agency did not have to be to the effect that the principal/master is accountable for the actions of his agent/servant . . . . Probably the greatest reason for the development of the general rule is the so-called deep-pocket theory." MICHAEL L. CLOSEN, AGENCY, EMPLOYMENT, AND PARTNERSHIP LAW 4 (1984). "Even though the deep-pocket theory is the most popular basis for the devotion to the general rule of accountability of principals/masters, it is the theory least often articulated by court opinions." *Id.* at 5.

720. FRIEDMAN, *supra* note 55, at 18.

721. *Id.*

statements. "Social and economic factors in the torts process," according to Professor Feinman, "shape the workings of the law . . . as much as the rules of law themselves."<sup>722</sup> Even the common law relating to notarial practice in particular has quite consistently favored sound public policy outcomes, though no court has yet announced the standard advocated in this Article. However, because of the tremendous value of journal record-keeping to the central purposes of notarization (to deter and detect those who would commit document fraud) and because of the resulting value to societal good, we would hope these positive experiences resulting from notary record-keeping would become more solidly and generally appreciated, with the result being greater willingness by those in the executive and legislative branches of government to endorse and adopt this heightened practice. As Holmes observed (for the second time in this paper), "The life of the law has . . . been experience."<sup>723</sup> The difficulty is that it might take an extremely long time to obtain such experience and to act upon it in thirty-five jurisdictions. Judicial action, with its interstate precedential value, could occur far more swiftly.

In regard to notary procedures and obligations, numerous common law decisions on a variety of issues have proven consistent with endorsements of effective notary practices and, therefore, with the public good. A few examples should suffice to support the point. To illustrate, judges have honored the public's interest in seeing to it that most notarizations are determined to be valid by invoking the substantial compliance doctrine and the presumption of validity to test faulty notarizations.<sup>724</sup> In other words, the common law does not demand perfect practice by notaries, but rather the lesser standard of substantial compliance

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722. Feinman, *supra* note 61, at 807.

723. HOLMES, *supra* note 36, at 1.

724. See *Kirksey v. Bates*, 31 Am. Dec. 722 (Ala. 1838) (dealing with the issue of whether a notarial seal which was not engraved with the arms of the state constituted a sufficient notarial seal and holding that under the circumstances it was sufficient). "Cases like [*Kirksey*] confronting technicalities in the form of early notarizations, have certainly paved the way for the modern cases, which sometimes recognize notarial acts based upon the doctrines of substantial compliance or de facto notaries." CLOSEN, *supra* note 2, at 10. Numerous cases have applied the substantial compliance doctrine to notarial acts. See, e.g., *Bell v. Renar Dev. Co.*, 811 So. 2d 780 (Fla. Dist. Ct. App. 2002); *Gargan*, 809 P.2d 998; *Farm Bureau*, 605 P.2d 509; *Herron v. Harbour*, 182 P. 243 (Okla. 1919). See also VAN ALSTYNE, *supra* note 7, at 233 (stating that as "long as the certificate is in substantial compliance with the minimum requisite information prescribed by state notary law, the certificate shall be deemed valid."). But see these cases in which courts rejected the view that there had been substantial compliance with notarial requirements: *In re Crim v. EMC Mortgage Corp.*, 81 S.W.3d 764 (Tenn.App. 2002); *Friedrich v. APAC Georgia Inc.*, 595 S.E.2d 620 (Ga.App. 2004).

with statutory requirements. The common law presumes the acts of public officials, such as notaries, to be validly done.<sup>725</sup> Even if done with some faults, the notarization is likely to be upheld. Thus, if a certificate of notarization contains omissions or errors,<sup>726</sup> or if a notary negligently fails to administer an oral oath or affirmation when one should have been recited aloud,<sup>727</sup> the common law decisions tend to validate the challenged notarizations where the notaries involved had at least achieved substantial compliance. The underlying policy point is a very simple one. When people seek out notarial services, those people want and expect to obtain notarizations that are complete and correct and that would, therefore, withstand any and all challenges.<sup>728</sup> The presence of a thorough and proper journal entry in support of a notarization virtually guarantees the validity of such notarizations, and, thus, advances the public interest.

Like doctors who have as their foremost responsibility to do no harm to their patients, notaries possess the ethical obligation to avoid risking the integrity of their notarizations.<sup>729</sup> Unlike physicians, notaries serve as commissioned public officials and

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725. "Case law regularly recites the adage that the acts of public officials enjoy the presumption of validity. Since notaries are public officers, the case opinions have announced that notarial activities are entitled to the presumption of validity as well." Closen, *supra* note 59, at 681. "[T]he law presumes that public officials, including Notaries, have carried out their duties in good faith and, therefore, presumes the acts of these officials to be valid." Closen, *supra* note 359, at 7.

726. See, e.g., *Farm Bureau*, 605 P.2d at 509.

727. See, e.g., *Gargan*, 809 P.2d at 998 (finding substantial compliance with the requirements of a jurat notarization where the notary had not administered an oral oath or affirmation to the signer, but where the signer had signed the document above the notarial certificate which contained the standard jurat wording to the effect that it had been signed under oath).

728. This steadfast, though unstated, intention of document signers and their notaries is at the heart of the reliance that we place upon documents bearing notarizations. "A document under [notarial] seal is presumed to speak the truth." Lerner, *supra* note 62, at 550. "Notarial certificates mean what they say, and are to be taken literally. They are statutory instruments of law and evidence and bear significant legal weight, under which the legal and financial stakes can be high." VAN ALSTYNE, *supra* note 7, at 235; see also Closen, *supra* note 359, at 7 (concluding that enforcement of the substantial compliance doctrine in cases of challenges of notarizations "tends to uphold notarizations and foster the public interest").

729. "Just as a doctor's first duty is to 'do no harm', a Notary's utmost responsibility must be to avoid placing a notarization in jeopardy." Michael L. Closen & Trevor J. Orsinger, *Is Blood Thicker than . . . Professional Responsibility?*, NAT'L NOTARY, July 2001, at 27; see also Michael L. Closen, "Do No Harm" First Rule for Oath, NOTARY BULL., Feb. 2005, at 7 (pointing out that a notary should not place both a notarization and its underlying transaction at risk of challenge by failing to administer a required oral oath or affirmation, and analogizing to the duty of a medical doctor to first do no harm).



their sole official responsibility is to perform lawful notarizations.<sup>730</sup> The primary method both to obtain a correct notarization in the first place and to protect the notarization from successful attack thereafter is for the notary to prepare and retain a journal entry for each notarization. It was no exaggeration to claim, as was done early in this Article, that almost all notarial errors would be prevented, immediately noticed and corrected, or subject to later detection and appropriate remedies, if notaries would simply complete and keep journal records.<sup>731</sup>

A second striking instance of the common law's effort to foster societal good respecting notarial practice is the application of the de facto notary doctrine.<sup>732</sup> Again, as with the previous example, at the heart of this doctrine is the sensible presumption that citizens who seek notarial services intend and expect to obtain valid notarizations. But, what happens when the supposed notary innocently and mistakenly performs a notarization without authority to do so? Perhaps, the notary's commission had expired, or the notary had moved to another county thereby triggering the

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730. Scores of court cases have announced the obvious proposition that notaries public serve as public officials. See, e.g., *Rathbone*, 40 N.E. at 437 (N.Y. 1895). "A Notary serves as a commissioned public official who is a disinterested witness to the true identity of document signers." *Risk Management*, *supra* note 17, at 27. "To have . . . a document ruled a nullity or ineffective for the purpose it was designed to serve because a notary failed to properly notarize out of ignorance of the law is patently unfair." CLOSEN, *supra* note 2, at 82. The consequences are far worse when a notary knowingly fails to abide by the law, thereby causing the invalidation of the notarization and perhaps the transactional document as well. "[T]he practice by notaries public of affixing their seals to documents not signed in their presence, is clearly unlawful and should not be condoned, particularly since the notary, as a public officer, has a duty to take reasonable precautions to assure that his seal will not be the vehicle by which a fraudulent transaction is consummated." Larner, *supra* note 62, at 550-51. "[S]uch practice tends to destroy the credit which the law gives to the certificates and to overturn the whole basis of security for the recordation system." *Id.* at 543. Such conduct, then, tends to undermine the notarial system itself.

731. See *supra* note 12 and accompanying text. "The notary journal is the notary's best friend. If used properly, it won't permit serious mistakes. It prevents notaries from committing notarial misconduct or from notarizing falsely. The journal will steer the notary in the right direction every time. It will enable the notary to solve notarial problems and to correctly decide how to proceed." VAN ALSTYNE, *supra* note 7, at 188.

732. "An officer 'de facto' is one who without actually being qualified to act, nevertheless performs and discharges the duties of a public office." HUMPHREY, *supra* note 205, at 15. "A notary may be a notary de facto, and his official acts may be upheld, when he is actually without legal notarial standing." *Id.* See generally Larner, *supra* note 62, at 528 (discussing the de facto notary doctrine); CLOSEN, *supra* note 2, at 94-99 (same); VAN ALSTYNE, *supra* note 7, at 72-73 (same). "Incidentally, the de facto notary doctrine is a form of the broader de facto official doctrine, that applies to other public officers whose authority has ceased without them realizing it." *Id.* at 73 (quoting Closen).

automatic cancellation of the commission.<sup>733</sup> On whom should the common law place the responsibility to assure that the notary holds a current, valid commission? The right thing to do to promote the public interest is to uphold notarizations executed under the above circumstances, by applying the common law fiction of the de facto notary doctrine. Although the notary lacks actual legal authority to act officially, justice (the public good) insists upon treating the notary as though real legal authority existed to save the otherwise faulty notarization.<sup>734</sup>

An additional example in which the common law has advanced the good of society was in its imposition upon notaries public of a heightened standard of reasonable care (as opposed to a duty to use the mere reasonable care of lay persons).<sup>735</sup> Consequently, notaries, like professionals in nearly all fields of government and commerce, are held to a standard of practice unique to their group. As notaries are commissioned public officials performing important governmental and commercial functions, the public they serve would most certainly desire such a standard to apply, because the product should be better performance by notaries (or at least better protection of the public through expanded liability of notaries).

Another early common law addition to the body of notarial

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733. With more than 4.8 million notaries, and with the average length of a notarial term to be about four years, that means some 1.2 million commissions expire each year, or more than 3200 commissions expire every day. Some notaries will forget that their commissions have expired or not notice the lapse. With so many notaries, many of them will move, sometimes causing their commissions to be invalid. But, some notaries will not appreciate this consequence.

734. "The errors or mistakes of notaries will not be visited upon the parties who act before him." JOHN, *supra* note 148, at 34. See, e.g., *Succession of Galway*, 483 So. 2d 662 (La. Ct. App. 1986). However, "the longer the official or notary continues to act after the term has expired, the less likely the law will uphold the acts. If there were some special reason to conclude the notary or the document signer knew or should have known of the commission's expiration, the law probably would reach a different outcome." VAN ALSTYNE, *supra* note 7, at 73 (quoting Closen).

735. To be precise, a notary has a responsibility to act reasonably as other similarly situated notaries would act, not merely to act as a lay person would behave. "Reasonable care is the level of care an ordinary prudent person would exercise under the same or similar circumstances as the notary is under." VAN ALSTYNE, *supra* note 7, at 340. "[E]very Notary must exercise 'reasonable care,' defined in law as that degree of concern and attentiveness that a person of normal intelligence and responsibility would exhibit when notarizing documents." Aguirre, *supra* note 19, at 36. See, e.g., *Ehlers v. U.S. Fid. & Guar. Co.*, 152 P. 518 (Wash. 1915) (holding that a notary must exercise reasonable care to determine the true identity of document signers); *First Bank of Childersburg*, 676 So. 2d 324 (discussing the common law doctrine of reasonable care as applied to the performance of a notary public in modern cases); *Aquino*, 506 N.Y.S.2d. 1003 (N.Y. Civ. Ct. 1986) (finding that notaries are bound by the law of negligence).

law was the imposition of vicarious liability upon the employers of notaries for the misconduct of notary employees.<sup>736</sup> Thus, banks, law firms, real estate companies, and other businesses were held accountable if staff notaries were guilty of errors, omissions, or frauds committed within the scope of employment.<sup>737</sup> The issue of whether to recognize respondeat superior accountability of employers for the performance of their notaries had proved to be unique in a key respect. That is, notaries are peculiar functionaries at their places of employment. They are, at one and the same time, both public officials and private employees. The early argument of employers was that notaries were commissioned public officials who were not subject to the control of the employers and, therefore, employers should not stand liable for the misdeeds of notaries. Judges were largely unpersuaded.<sup>738</sup> The courts noted the realistic pressures that employers could bring to bear upon lowly notaries and observed that employers generally benefited from the presence and service of notaries in the workplaces.<sup>739</sup> Indeed, many employers insist that certain employees obtain notary commissions—even to the extent that employers regularly pay the costs of notary commissions, notary bonds, and notary seals.<sup>740</sup> Most certainly, the recognition of vicarious liability of employers of notaries is in the public interest by imposing liability upon entities (the employers, which are most often commercial

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736. Vicarious liability of notary employers was first established by common law cases, and then began to be incorporated into notary statutes (often for the purpose of narrowing or limiting the scope of accountability of notary employers, in contrast with the sweeping responsibility imposed under the common law's scope of employment doctrine). See, e.g., *Simon*, 180 A. at 684 (noting that "[i]t is well-settled law that collection banks are liable for the negligence of their notaries."). "Statutes in some states specifically describe the extent of vicarious liability of employers of notaries, while in other states the common law of vicarious liability applies as in other employment settings to determine under what circumstances employers will be liable for mistakes and misconduct of notaries." CLOSEN, *supra* note 2, at 257-58. For modern examples of cases holding employers vicariously liable for employee-notary misconduct, see *First Bank of Childersburg*, 676 So. 2d at 324; *Iselin-Jefferson Fin. Co.*, 549 P.2d 142; *Leiffer*, 673 So. 2d 68.

737. See, e.g., *Id.* at 68 (holding a law firm vicariously liable for the negligent notarization of signatures performed by a staff notary public); *Simon*, 180 A. at 682 (holding a bank liable for the negligence of a staff notary in serving notice of a commercial protest). See also *infra* Part XI (discussing *Vancura* where the court held a major national copy company liable for a negligent signature notarization performed by one of its staff notaries).

738. *But see May*, 14 S.E. at 552 (holding a bank not liable for the negligence of its notary in the performance of a commercial protest).

739. See, e.g., *Iselin-Jefferson*, 549 P.2d at 142 (illustrating a case in which a bank officer directed a bank employee-notary to notarize for an absent signer).

740. "[T]he notary's fees and tools to become a notary are frequently paid for by the employer." VAN ALSTYNE, *supra* note 7, at 94. "We usually become notaries at the request of our employers to have the luxury of having a notary available at the workplace." *Id.* at 95.

firms) that are more likely to be financially sound and able to satisfy substantial monetary claims than mere notaries.<sup>741</sup>

A related and significant argument in favor of mandatory notary record-keeping is its minimal cost and time commitment for notaries, their employers, and document signers.<sup>742</sup> Judge Learned Hand, in 1947, explained the theory of negligence and the remedies to avoid it in a mathematical or algebraic type of formulation. "Negligence occurs where the probability of harm multiplied by the gravity of the resulting injury is greater than the burden of taking precautions to prevent the harm."<sup>743</sup> The burdens of the time and expense of notary record-keeping are so slight as to warrant its imposition and enforcement as a means to eliminate, or immediately detect and correct, nearly all notary errors and frauds.

In summary, it undeniably appears that judges have had no reluctance to employ the common law to expand and modify the existing statutory law of notarial practice when the need to do so presented itself. Moreover, it plainly appears that those modifications have overwhelmingly taken the form of supplementation or expansion of notarial law, rather than invalidation or restriction of rules. That is what has been argued herein—to announce a helpful, progressive mandatory procedure. It will strengthen commercial and governmental transactions. It will reduce the number of challenges to notarizations and the transactions they support. It will promote greater professionalism among notaries and, in turn, improve the notary system. Undoubtedly then, the most important reason to impose a common law duty of notaries to complete and maintain detailed journal records of their notarizations is that such practices would significantly advance the public interest. As the legal commentary

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741. In 1933, the Supreme Court of Wyoming candidly remarked, "[T]he rule that a master is liable for the negligence of his servant committed in the course of his employment. . . is founded not upon a rule of logic, but upon a rule of public policy." *Stockwell v. Morris*, 22 P.2d 189, 194 (Wyo. 1933). "Even though the deep-pocket theory is the most popular basis for the devotion to the general rule of accountability of principals/masters, it is the theory least often articulated by court opinions." CLOSEN, *supra* note 719, at 5.

742. "Tort law has tended, although not universally, to resolve many disputes in a way consistent with the first line of economic analysis, taking into account the benefits and costs of a particular activity in judging fault." DOBBS, *supra* note 40, at 20-21.

743. *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947). "[E]conomically sound [tort] decisions are indeed good for the community as a whole. . . . [P]erhaps all social policies are in a sense economic policies." DOBBS, *supra* note 40, at 20. See generally GUIDO CALABRESI, *THE COST OF ACCIDENTS* (Yale University Press 1970). That book introduced, in the words of Professor Orth, "into common use the concept that liability ought to fall on the 'cheapest cost avoider,' the party who could most efficiently avoid an accident" or negligent damage. Orth, *supra* note 57, at 803.

to the Notary Public Code of Professional Responsibility posits, the ethical mandate for notaries to keep journals of their notarizations “is grounded in the belief that a Notary’s maintenance of a journal serves the public interest.”<sup>744</sup>

The functions performed by notaries are vital to government and commerce. Indeed, consistent with that conclusion, as just one example, the first declared purpose of the Notary Public Act of North Carolina is “[t]o promote, serve, and protect the public interest.”<sup>745</sup> Clearly, the interests of the people of North Carolina would be far better served if North Carolina notaries were to keep detailed journal entries for their official acts. Similarly, the preamble to the 2003 Massachusetts Executive Order on Standards of Conduct For Notaries Public notes that “notaries public promote, serve, and protect the public interest by acting as independent witnesses in a variety of situations.”<sup>746</sup> During the 2003 signing ceremony for the Massachusetts Executive Order, William Galvin, the Secretary of the Commonwealth, explained: “Every year, businesses across Massachusetts lose millions of dollars to crimes of fraud and identity theft. Well-trained, responsible and ethical men and women serving as notaries public are our best front-line defense in that battle.”<sup>747</sup> Both the Model Notary Acts of 1984 and 2002 announced that one of their underlying purposes was “to promote, serve, and protect the public interest.”<sup>748</sup> According to the Commentary to the 2002 Act, that law “adopts the position that notaries are first and foremost public servants. Their powers are to be exercised only in the public’s interest.”<sup>749</sup> Significantly, the frequency of involvement is quite relevant here, for as notary observer Richard Humphrey witnessed in the mid-1900s, “The functions of the Notary’s office are called into action throughout the country far more often than those of any other public officer.”<sup>750</sup> Consider that when he reached this conclusion there were merely some 500,000 U.S. notaries,<sup>751</sup> while today there are more than 4.8 million of them. Notarial functioning should always foster sound public policy because the sheer volume of notarial acts demands it.

In these contemporary days of quite serious threats of identity theft and document fraud, the millions of U.S. notaries should be enlisted to serve a far more significant and meaningful

744. NOTARY PUBLIC CODE OF PROF’L RESPONSIBILITY Guiding Principle VIII general cmt.

745. N.C. GEN. STAT., § 10A-2(1).

746. Exec. Order No. 455 at Preamble.

747. Press Release, Romney Establishes New Standards for Notaries Public, *supra* note 46, at 1.

748. MODEL NOTARY ACT § 1-102 (1984); MODEL NOTARY ACT § 1-2 (2002).

749. MODEL NOTARY ACT § 1-2(1) cmt. (2002)

750. HUMPHREY, *supra* note 205, at 9.

751. *Id.* at 15.

role in the war against document criminals and terrorists.<sup>752</sup> The vast army of notaries public, particularly if all of them kept detailed records of their official acts, could effectively supplement the efforts of police and other authorities. If we as a nation do not take more advantage of the notary's anti-fraud functions, a significant resource will have been lost. The public may well have been misled and betrayed, for the general public operates in a passive and trusting mode in which, to the extent they notice or think about notaries at all, they mistakenly assume notaries are well informed about their duties and perform their official duties thoroughly and responsibly.<sup>753</sup> Instead, in reality, the general success of notarial functioning is truly more a matter of chance, than the result of diligent design and effective oversight.

Perhaps, of all the contexts in which the common law might rely upon the public interest to guide its course, decisions about the role of the notary public rank among the most appropriate. After all, we know that the post of notary public is a public office.<sup>754</sup> The first implication is obvious. As the words that began this segment of the Article remind us, such "offices are created for

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752. According to the Pennsylvania Department of State, "Notaries Public are playing an even more vital role in commerce and are on the front lines of deterring document fraud, particularly in light of heightened security concerns and the increased threat of identity theft." David S. Thun, *A Call to Action*, NAT'L NOTARY, Nov. 2004, at 20. "In the post 9/11 era, leaders in the public and private sectors are recognizing the critical role Notaries have as gatekeepers in the complex task of maintaining our nation's security." Aguirre, *supra* note 15, at 31. According to attorney Timothy Reiniger, NNA Executive Director, "With the rampant spread worldwide of identity theft crimes, Notaries are poised to carry out an increasingly important role in consumer protection and law enforcement efforts." *Id.* "U.S. Senator John McCain of Arizona has said that Notaries are on the front lines in defense against attacks on the nation." *Id.* "Since the national tragedies of September 11, 2001, there has been a growing realization among lawmakers that imposters, whether motivated by greed or ideology, sometimes approach Notaries to give their criminal affairs the patina of legitimacy." Charles N. Faerber, *Bills Enlist Notaries in Making Post 9/11 Nation More Secure*, NOTARY BULL., Feb. 2003, at 14; *see also* Terri Lynn Land, *Our Goal of Modernizing Notary Law is Achieved*, NOTARY BULL., June 2004, at 15 [Michigan Secretary of State] (opining that "[n]otaries are regarded as an integral part of the fight to combat fraud and ensure that transactions are performed in an ethical and honest manner."). "Notaries are an underutilized national resource—a proven, fraud-deterrent 'standing army,' 4.5 million strong, located in every community, every industry and every corner of the nation—who can be deployed to protect property and lives." Timothy S. Reiniger, *State of the Association*, NAT'L NOTARY, Mar. 2005, at 31.

753. *See Closen & Osty, supra* note 215, at 13 (noting the general public's false sense of confidence in notaries due to their status as public officials).

754. *See HUMPHREY, supra* note 205, at 7. *See, e.g.,* ARIZ. REV. STAT. ANN. § 41-312(c) (stating that "[a] notary public is a public officer commissioned by this state"). Many court decisions hold that notaries are public officials. *See, e.g., Moser, 201 A.2d 365.*

the purpose of effecting the end for which government has been instituted, which is the common good.”<sup>755</sup> Moreover, judges regularly confront the challenge of deciding cases in which memories of circumstances fail or conflict and in which it would have been more effective to fully preserve transactions in writing. The second implication is also obvious, for the principle is as old a lesson as writing itself, and it was the point with which we commenced this article.<sup>756</sup> Humphrey once remarked when people first “learned to write . . . it was found that cold letters remain after the fragile structures of memory have failed.”<sup>757</sup> Hence, the intersection of both notary practice and the common law suggests the wisdom and legitimacy of mandatory record-keeping.

In light of all of the long-established influences detailed in the preceding pages (the historic traditions of notary record-keeping, the interpretation of incomplete notary statutes, the availability of the methodology and technology to efficiently accommodate detailed journalizing, the changed circumstances of the contemporary notarial system, and the advantages to the public interest to be gained by thorough notary record-keeping), the recognition of a common law notarial responsibility of comprehensive record-keeping and record preservation does not require the creation of a new duty, but is a duty already existing yet not fully appreciated by the vast community of notaries and ordinary citizens. Fittingly, Justice Felix Frankfurter once wrote, “Wisdom too often never comes, and so one ought not to reject it merely because it comes late.”<sup>758</sup> Although this notarial duty may come to the majority of states and territories at least 75 to 200 years late, that tardiness is no justification for further delay. As the old saying goes, “Better late than never,”<sup>759</sup> and never might be the perilous outcome if this matter is left to the politicians, bureaucrats, and notaries and their employers.

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755. See *supra* note 712 and accompanying text. “[B]eing able to rely on documents is the purpose of having them notarized . . . If business cannot depend on notaries doing [the] simple task [of properly identifying document signers and properly administering oaths to them], then there is no place for notaries in the world of commerce.” *Leiffer*, 673 So. 2d at 69-70; see also *CLOSEN*, *supra* note 2, at 10 (opining that “[t]he most important function of the notary public is to help assure the integrity of written documents, so that such documents can be trusted in governmental and commercial dealings.”).

756. See *supra* note 1 and accompanying text.

757. HUMPHREY, *supra* note 205, at 11.

758. PLATT, *supra* note 127, at 374.

759. DALE, *supra* note 19, at 182.

## X. LAWYER OPPOSITION TO MANDATORY NOTARY JOURNALIZING

It is always within the power of the parties to secure a disinterested officer to take the acknowledgment, and it is certainly no hardship to require them to do so. . . . To hold that a party beneficially interested in an instrument is incapable of taking or certifying an acknowledgment of it cannot work any possible injury to any one, while it will keep closed a door of temptation, at least, to fraud and oppression.<sup>760</sup>

When notaries act in their official capacities, they serve as fiduciaries of the public, and thereby accept one of the law's highest obligations—to abide by fiduciary duties.<sup>761</sup> Judge Benjamin Cardozo may have offered the best description of those heightened responsibilities:

Many forms of conduct permissible in a workaday world for those acting at arm's length are forbidden to those bound by fiduciary ties. Not honesty alone but the punctilio of an honor most sensitive is the standard of behavior. There has developed a tradition about this standard that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity.<sup>762</sup>

It is difficult to imagine a higher standard of conduct, than the one imposed by the fiduciary role. Yet, all across this country, lawyers insist upon acting simultaneously in conflicted roles as notary-fiduciaries for the public and as attorney-agents representing the private interests of their personal clients on documents those same lawyers have prepared for those very clients.<sup>763</sup> In addition, lawyers, tempted by the power they have

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760. *Wilson v. Traer & Co.*, 20 Iowa 231 (1866).

761. There is no question that a notary public is a "public servant" or a "public officer." See, e.g., ARIZ. REV. STAT. ANN. § 41-312 (2008); TENN. CODE ANN. § 39-16-401(3)(D) (2008). The general rule is that public officials serve as agents and fiduciaries of the public, and this rule would include notaries. Indeed, it is sometimes said that "an elected public official [holds] a position of the highest public trust." *County of Cook v. Barrett*, 344 N.E.2d 540, 545 (Ill. App. Ct. 1976). "Officially a notary public is the agent of the public." HUMPHREY, *supra* note 205, at 14. "The notary's fiduciary duty requires the highest qualities of integrity, fairness, fidelity and care for others. . . . Every government official holds a position of public trust. . . . By definition, public officials have a fiduciary duty to their constituencies, to the people they represent and serve." VAN ALSTYNE, *supra* note 7, at 119. In writing of the responsibilities of notaries, former California Governor Edmund G. Brown wrote: "Fundamental to the workings of our society is the recognition by elected and appointed public officers of the great public trust invested in them in the performance of their duties." ROTHMAN, *supra* note 166, at iv.

762. *Meinhard v. Salmon*, 249 N.Y. 458, 464 (N.Y. 1928).

763. This dual practice by attorney-notaries is well known. "Attorneys are usually permitted to notarize their clients' documents." MODEL NOTARY ACT 5-2 cmt. (2002). See generally Michael L. Closen & Thomas W. Mulcahy, *Conflicts of Interest in Document Authentication by Attorney-Notaries in*



over so many notarizations (including especially those in which they serve both as lawyer and as notary on the same documents), regularly engage in fraudulent and unlawful notarial activities.<sup>764</sup> Lawyers are undoubtedly the worst offenders of sound notarial practices and notary law.<sup>765</sup> Not surprisingly, lawyers do not wish

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*Illinois*, 87 ILL. B.J. 320 (June 1999) (discussing the dual roles of lawyer-notaries who notarize on documents they prepare for their own clients); Closen, *supra* note 148, at A24. See also NOTARY PUBLIC CODE OF PROF'L RESPONSIBILITY Guiding Principle II-A-2 (announcing: "The Notary shall not notarize for a client or customer who will pay the Notary a commission or fee for the resulting transaction, apart from the fee for performing a notarial act allowed by statute," and providing a hypothetical illustration of an attorney who prepared documents for a client and who is advised by the Code to obtain the services "of a truly impartial Notary" to perform the need notarizations).

Unfortunately, conflicted notarial practices of this general kind date to at least the colonial American period. See, e.g., MERWICK, *supra* note 27, at 17 (discussing Albany notary Adriaen Janse—a non-attorney—in 1670 drafted the last will and testament of a businessman who appointed Janse and another individual to be administrators of the estate). At that time, "[w]ills [were] the bread and butter of notaries." *Id.* Thus, this conflicted practice allowed notaries to act essentially in the dual roles of draftsman (attorney) and notary for their clients.

Interestingly, someone else apparently shared our view about this conflict in proposing special legislation in Illinois in 2004 to create the post of civil law notary to be occupied exclusively by attorneys. Under proposed Illinois House Bill 4689, civil law notaries would have been "obligate[d] . . . to refrain from representing any party in any matter arising from or relating to their authentic acts." Armando Aguirre, *Legislative Watch*, NOTARY BULL., Oct. 2004, at 14. We certainly do not mean to suggest that there is no reasoned opposition to our position from honorable members of the bar. It "raises a particularly controversial issue" among many members of the bar, mostly because lawyers are so used to serving in the dual roles for their legal clients. MODEL NOTARY ACT § 5-2 cmt. (2002). See, e.g., Carole Clarke & Peter Kovach, *Disqualifying Interests for Notaries Public*, 32 J. MARSHALL L. REV. 965, 982 (1999). (concluding in regard to attorney-notaries "that ordinary representation of a client may not create sufficient interest to invalidate a notarial act").

764. See generally Christopher B. Young, Comment, *Signed, Sealed, Delivered . . . Disbarred: Notarial Misconduct by Attorneys*, 31 J. MARSHALL L. REV. 1085, 1095 (1998) (examining the large number of cases of lawyer discipline for knowingly false and fraudulent misconduct relating to notarizations). See, e.g., Comm. on Prof'l Ethics v. Seff, 457 N.W.2d 924 (Iowa 1990); *In re Stockman*, 502 N.W.2d 209, 212 (Minn. 1993); *In re Morin*, 878 P.2d 393 (Or. 1994).

765. "[L]awyers as a group are the worst violators of Notary laws and sound notarial practices." Michael L. Closen, *Lawyers Worst Violators of Law: Part I*, NOTARY BULL., Dec. 2007, at 7. See also Michael L. Closen, *Lawyers Worst Violators of Law: Part II*, NOTARY BULL., Feb. 2008, at 7 [hereinafter Part II]. "[T]oo few attorneys are fully aware of the unique demands of the office of Notary Public . . . . Ironically, the attorneys who should be the main upholders of due process in the execution of legal documents are today too often its circumventers." CLOSEN, *supra* note 2, at iii (quoting NNA President Milton Valera). Amazingly, one attorney in a twisted attempt to defend against notarial misconduct charges actually argued that lawyers regularly violate

to create and preserve detailed records of what they do as notaries.

Preliminarily, it should be emphasized that lawyers and their bar organizations have historically been very strong and successful on many subjects and in many forums.<sup>766</sup> In particular, lawyers have been quite strong and successful in advocating for their own interests, and the notary field stands as a prime illustration of this strength and success.<sup>767</sup> Moreover, lawyers have a direct source of a good deal of power in regard to state notary legislation, because so many attorneys have served in the legislatures and have served as lobbyists to those legislatures. Attorneys have, therefore, succeeded in achieving favored status in numerous ways under notary laws.<sup>768</sup>

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notary statutes. The court was unimpressed, and it commented that “members of the bar are held to a higher standard of morality than the public generally.” *In re Finley*, 261 N.W.2d 841, 845 (Minn. 1978). Of course, much of the unseemly image which anchors the legal profession to less than the place of honor it should have achieved is well deserved. See generally MUNROE H. FREDMAN, *UNDERSTANDING LAWYERS’ ETHICS* 14 (1990); JEROLD AUERBACH, *UNEQUAL JUSTICE* 14-39 (Oxford 1976); FRIEDMAN, *supra* note 55, at 690-91.

766. “The influence of lawyers as a class upon legislation is great, and it is said that all legislation, good or bad, springs from the bar.” WILBER A. OWEN, *OWEN’S LAW QUIZZER* 713 (5th ed. 1924). One basic reason for the power and influence of lawyers is that there came to be so many of them. From a very small group up to the time of the American Revolution, “after the Revolution the dam burst, and the number of lawyers grew fantastically. It has never stopped growing.” FRIEDMAN, *supra* note 55, at 304.

767. See FRIEDMAN, *supra* note 55, at 95 (referring to the “legal profession, with its special privileges”). It has been noted that the “ABA has mounted a well-financed effort to promote the adoption of the Model Rules [of Professional Conduct of 1983],” which have been characterized as not adequate and not done “disinterestedly” and not “so well.” FREDMAN, *supra* note 765, at 2, 5.

For example, a North Carolina statute had “prohibited attorneys holding the office of notary public from administering ‘any oaths to a person to a paper writing to be used in any legal proceedings [litigation documents] in which he appears as attorney,’” but it was repealed. See *Attorneys As Notaries*, N.C. Ethics Op. RPC 136 (1992). Regarding notary legislation favoring attorneys in Illinois, “many of those supporting such legislation were lawyer-legislators, and they and their fellow attorneys would benefit from such special treatment.” Closen & Mulcahy, *supra* note 763, at 321. As another example, “there has been a strong movement afoot by the ABA to restrict the post of certification authority [cybernotary] to law firms and lawyers.” *Id.* at 324.

768. “More often than any other class of men are lawyers called to the halls of the legislature and of congress.” OWEN, *supra* note 766, at 713; see also FRIEDMAN, *supra* note 55, at 306 (commenting that many lawyers of the 1800s found that “[p]olitics had an irresistible appeal.”). The inordinate involvement of lawyers in government, especially in the legislative assemblies, has been the pattern since the earliest days of the formation of this nation. “[L]awyers, or men who called themselves lawyers, were among the founders of the Republic. . . . [T]wenty-five of the fifty-six signers of the Declaration of Independence were lawyers, and thirty-one of the fifty-five delegates to the

Many attorneys and bar associations have vigorously opposed calls for mandatory notary journalizing. Indeed, opposition from the organized bar resulted in the eventual exemption of lawyers and their staff members from the obligation of detailed notarial journalizing embodied in the original Massachusetts Governor's Executive Order of December of 2003. That exemption for attorneys was first adopted in a revised version of the Governor's Executive Order in May of 2004 and then enacted into law by the Massachusetts legislature in the summer of 2004.<sup>769</sup> Lawyers have succeeded in a number of other states that have adopted mandatory notary journalizing statutes to obtain exclusions of lawyers from more rigorous record-keeping requirements applicable to notaries generally.<sup>770</sup> Lawyers in several states have

Constitutional Convention were lawyers." *Id.* at 101. Even under the common law system of England, "the ranks of practicing attorneys and successful politicians [were] often one and the same." Orth, *supra* note 57, at 129.

As to notarial legislation, North Carolina has exempted lawyers from both notary education and notary testing requirements in North Carolina. *Guide to Notary Commission Eligibility*, *supra* note 669, at 34. Further, "just as Illinois has done in its notary act, California, Florida, Kansas, New York, North Carolina, and South Dakota have enacted notary statutes that expressly authorize attorney-notaries to notarize documents they have prepared for their clients." Closen & Mulcahy, *supra* note 763, at 321

769. MASS. GEN. LAWS ANN. Ch. 222 § 12 (2008). "After the original [Massachusetts Governor's Exec. Order 455] was issued, the governor's office received several objections to the wording of the new Notary rules—particularly from attorneys." Aguirre, *supra* note 108, at 14. "Executive Order No. 455 (03-13), signed by Governor Mitt Romney on December 19, 2003, extensively expanded upon the state's rules for Notaries. This order was later amended and superseded by Romney's Revised Executive Order No. 455 (04-04), effective May 15, 2004." FAERBER, *supra* note 15, at 219. The Revised Executive Order provides:

A journal shall be recommended as the best practice, but not required, for a notary public who is an attorney licensed to practice law in the Commonwealth of Massachusetts or employed by such attorney. This Executive Order shall not be construed in any way to impair or infringe in any way on the attorney-client privilege or the attorney work product doctrine. (Gov. Exec. Order, Sec 11[b]).

*Id.* at 228. Then, the Massachusetts legislature enacted this exception for attorneys: "Notwithstanding any general law, rule, regulation or order to the contrary, attorneys-at-law and counselors-at-law as well as paralegals, legal secretaries and other legal staff, who by virtue of their employment perform notarial duties shall be exempt from maintaining a journal of their notary transactions." MASS. GEN. LAWS ANN. Ch. 222 § 12.

770. Colorado, exempts law firms from the statutory requirement to keep a journal record of acknowledgments "affecting the title to real estate" if the relevant instrument or a copy thereof "is retained by the notary's firm or employer in the regular course of business." COLO. REV. STAT. ANN. § 12-55-111(1)-(2). Missouri's law, as another example, provides in part: "Every notary shall keep a true and perfect record of his official acts, except those connected with judicial proceedings." MO. ANN. STAT. § 486.265 (West 2008). Importantly, in Arizona, the notary statute designates that "records of notarial acts that violate the attorney-client privilege . . . are not public record." ARIZ.

succeeded in obtaining statutory exceptions expressly allowing them to serve as both attorney and notary on the same documents.<sup>771</sup> Also, lawyers in several jurisdictions have succeeded in getting waivers for lawyers from the requirements other notaries must honor, such as training, bonding, and testing to become notaries.<sup>772</sup> Consistent with the arrogance behind such efforts by lawyers, they have often been the most formidable foes of notary record-keeping. Some lawyers and bar organizations have opposed mandatory notary journalizing because attorneys want to continue to serve in the dual but incompatible roles of lawyers and notaries on the same instruments, and because those attorney-notaries do not want to make full written records of what they do as notaries. Furthermore, with knowledge of the extent of other kinds of attorney misconduct relating to notarial practice, lawyers have not wished to be required to create and preserve more extensive records of their work as notaries, for those records would more readily expose those other corrupt practices. Of course, instead of honestly admitting the above reasons, lawyers and bar associations assert alternative justifications to oppose mandatory notary record-keeping, such as its interference with the attorney-client privilege<sup>773</sup> and the expenditure of unnecessary extra time to perform the journalizing of notarizations.<sup>774</sup> But

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REV. STAT. ANN. § 41-319(A) (2008). And, such a record falls outside one which “is a public record that may be viewed by or copied for any member of the public.” *Id.* § 41-319(E). Lawyers are attempting to get similar exemptions in other jurisdictions. For instance, in New Jersey in 2004, legislation was proposed that would have allowed attorney-notaries to utilize their office files as substitutes for the notary journals of official acts. Aguirre, *supra* note 763, at 15. Also in 2004, legislation was introduced in New York that would have required notaries to keep journals of their official acts, but that would have allowed attorney-notaries to substitute their office files for such journal records. *Id.* Office files or photocopies of notarized documents are not equivalent to permanently bound paper journals or secure electronic notary journals. See Valera, *supra* note 14, at 20 (observing that one reason journalizing is discouraged is the mistaken belief that “photocopies are as good as journals.”). properly kept notary journal entries without leaving evidence of the tampering.

771. Those states include California, Florida, Illinois, Kansas, Nevada, North Carolina, South Carolina and South Dakota. See *infra* notes 805-12 and accompanying text; see also *infra* notes 813-15 and accompanying text (noting that Utah and New Mexico, as well as the Marianas Islands, do allow for relaxed standards, though none have yet adopted a statute mandating the relaxed standard).

772. See *supra* note 768 and accompanying text. See, e.g., Consuelo Israelson, *Commuting Notaries*, NAT'L NOTARY, Mar. 2008, at 40-41 (pointing out that the only non-residents allowed to be notaries in Ohio and Rhode Island are members of the bar of those two states).

773. See the references to the attorney-client privilege in the exemption of lawyers from the notary journal mandates in the Massachusetts Governor's Executive Order and in the Arizona statute. *Supra* notes 769-70.

774. “Employers of notaries encourage or direct them to take shortcuts. . . .

those reasons are simply excuses and woefully insufficient.

Some readers may find it difficult to believe that so many lawyers, who occupy a truly noble and laudable profession, could possibly be so mischievous in regard to notarization. The answer lies in the control of the notarial circumstances.<sup>775</sup> Lawyers dominate the notarial setting in a number of ways, especially when they serve as both attorneys and notaries on the same documents. Remember, notarizations are performed in private ceremonies, not in open, public settings.<sup>776</sup> The lawyers draft the

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Of special concern is that attorneys who are notaries and attorneys who employ notaries are guilty of most of these same failures in notarial practice.” R. Jason Richards, *Stop! . . . Go Directly to Jail, do not pass go, and do not ask for a Notary*, 31 J. MARSHALL L. REV. 879, 887 (1998). “It is not uncommon for employers of notaries to discourage notary journal keeping because it might inconvenience them or their clients.” Van Alstyne, *supra* note 6, at 778. Yet, as Van Alstyne has estimated, the creation of a journal entry should ordinarily take only about 45 seconds. Van Alstyne, *supra* note 7, at 192. Even if the time required were twice that estimate, the making of a journal entry could still be accomplished in less than two minutes. The value of notary journalization is certainly worth so little time. “The importance of such record keeping is so great that it cannot be overstated.” VAN ALSTYNE, *supra* note 6, at 778.

775. Charles N. Faerber, *Law Text a Landmark*, NAT’L NOTARY, July 1997, at 8.

A dilemma well-known to many practicing Notaries is that of the attorney who insists on the performance of an improper notarial act—typically, notarization of the signature of an absent person. What can make this situation so difficult is that, as a rule, attorneys are articulate, forceful and they disarmingly argue that they know the law and the Notary does not. Yet almost invariably in such cases, they do not know the law.

*Id.* Moreover, in many cases, the lawyer is the employer of the notary, or at least the lawyer is senior to the notary in the employment setting (as in a law firm, bank, or corporation where the notary is often a receptionist, secretary, clerk, paralegal or junior attorney). The implicit risk of discharge, discipline or dislike hangs over a notary who would stand up to an attorney in the workplace. “[T]oo few attorneys are fully aware of the unique demands of the office of Notary Public. They do not appreciate that Notaries are not mere expediting factotums in the legal process but government officials who must speak out when they detect impropriety.” CLOSEN, *supra* note 2, at iii (introduction written by Milton G. Valera).

776. “[T]he place and manner of conducting notarizations are almost always quite private.” Closen, Orsinger & Ullrick, *supra* note 105, at 223. “Bystanders and strangers are not welcomed to observe.” *Id.* at 224. Most notarizations are performed in private commercial offices in banks and loan companies, mortgage companies, hospitals and health care facilities, corporations and other business entities, and law firms. Usually, only the notary, the lawyer, and possibly one other person (the document signer) is present during a notarization. If the lawyer serves as both attorney and notary, there may only be two people present. If the attorney-notary decides to engage in gross misconduct and to notarize for an absent signer, then only one person is present. Thus, the circle of individuals who would witness any notarial wrongdoing is extremely small, making it appear to lawyers that they

language of the instruments, as well as the language of the certificates of notarization. The lawyers are the most powerful parties involved—more so than their staffs or their clients (and unfortunately and unlawfully, the client-signers often are absent from the notarial ceremonies).<sup>777</sup> The lawyers control what information is included in the certificates of notarization. Without separate and independent notary journal records, lawyers can pre-date or post-date documents and notarizations, can notarize for absent document signers, can notarize for signers who are not identified on the basis of satisfactory evidence (and who turn out to be imposters), and can omit to administer required oral oaths and affirmations to signers.<sup>778</sup> Any and all of these faults can

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can control the risk of disclosure of the misconduct. “Lawyers who notarize signatures on documents prepared for their own clients have the power to take advantage of the situation.” Closen & Mulcahy, *supra* note 763, at 323.

777. A common criticism “is that it is the lawyer-client relationship which is morally objectionable because it is a relationship in which the lawyer dominates and in which the lawyer typically, and perhaps inevitably, treats the client in both an impersonal and a paternalistic fashion.” See Richard Wasserstrom, *Lawyers As Professionals: Some Moral Issues*, 5 HUMAN RIGHTS 1, 15-16 (1975). When the position of the attorney and the weight that it carries are coupled with the lack of knowledge about notarization possessed by most members of the public and notaries public, it is easy to understand how lawyers can control notarial settings, even if such lawyers are woefully underinformed themselves. England’s Prince Charles observed: “The less people know about what is really going on, the easier it is to wield power and authority.” MACMILLAN DICTIONARY OF QUOTATIONS, *supra* note 49, at 444.

778. These four matters are both the most frequent and most serious misdeeds with notarizations committed by lawyers and other parties. See *supra* notes 763-65 and *infra* notes 803-04, 842 and accompanying text.

Attorney-Notaries have notarized client signatures when their clients did not personally appear (sometimes after forging the clients’ signatures). Attorney-Notaries have failed to administer required oral oaths and affirmations for jurat notarizations. Attorney-Notaries have back-dated documents and the notarizations of signatures appearing thereon. And the list goes on.

Closen Part II, *supra* note 765, at 7. See, e.g., *In re Slocombe*, 867 N.E.2d 130, 131 (Ind. 2007) (illustrating a case of an attorney-notary who notarized a document for his own client knowing the client had not signed it); *In re Berberian*, 213 A.2d 411, 413 (R.I. 1965) (describing a case where the attorney falsely represented that the affiant appeared before the notary); *In re Reback*, 513 A.2d 226, 228 (D.C. 1986) (detailing a case of an attorney-notary who forged the client’s signature and falsely notarized it); *In re Crapo*, 542 N.E.2d 1334, 1334-35 (Ind. 1989) (same); *Cincinnati Bar Assn. v Reisenfeld*, 701 N.E.2d 973, 973 (Ohio 1998) (relating the facts of the eight cases in which two attorney-notaries notarized signatures of absent clients, originally signed on blank pages on which documents were then prepared); *Bd. of Prof’l Responsibility v. Neilson*, 816 P.2d 120, 121 (Wyo. 1991) (describing the extreme case of an attorney who used an expired notary stamp and back-dated deeds, which he notarized and then recorded); *In re Ballinger*, 625 N.Y.S.2d 225, 226 (N.Y. App. Div. 1995) (involving a case in which an attorney used the notary seal of another lawyer and fraudulently notarized loan documents); *In re Giusti*, 686 A.2d 1185, 1185 (N.J. 1997) (illustrating a case where an

occur, and yet the notarial certificate on its face will not reveal a single one of them. That is how lawyers get away with so much misconduct in the notarization of signatures on instruments.<sup>779</sup> It is one more substantial reason why notaries are required to be impartial witnesses.<sup>780</sup> However, a detailed notarial journal, securely bound in a book or maintained in an electronic record, and contemporaneously and chronologically kept, would make it virtually impossible for any of those misdeeds to be accomplished.

The conflict of interest of the attorney-notary who as attorney prepares a legal document for a client and then proceeds as notary to preside over the notarization of the client's signature on that document is particularly offensive—much more so than the garden-variety of conflicts of interest. First, the conflict is knowingly and intentionally undertaken by a professional trained in law and ethics. According to Joseph Margolis, “A conflict of interest is, fundamentally, a matter of intention.”<sup>781</sup> Second, many attorney-notaries commit this conflict offense time and time again, so that they and others around them (possibly including newly licensed and commissioned attorney-notaries) come to accept this betrayal of ethics as the norm. The ethical lapses are reinforced and perpetuated. Third, the appearance arises that the dual representation was undertaken for the purposes of overreaching and manipulation of the circumstances surrounding execution and authentication of the subject documents. Margolis has observed that “conduct considered as involving a conflict is normally taken

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attorney forged a client's signature and forged its notarization by using a notary's seal and then forging the notary's signature).

779. An old proverb applies here. “Power tends to corrupt.” DALE, *supra* note 24, at 270. When attorneys also serve as notaries, their power is heightened considerably. “Notaries undoubtedly believe they can get away with shortcuts or misdeeds in violations of notary laws and ethical standards because they control the performance of notarizations and there is so little risk of the corruption's disclosure.” Closen & Orsinger, *supra* note 64, at 617; see also *supra* note 777 and accompanying text.

780. An absolute obligation of the notary is to serve on behalf of the government as an impartial witness to signatures and as an impartial administrator of notarizations. “A notary public is defined as . . . an impartial agent of the state, who in the performance of his duties, exercises a delegation of the state's sovereign power.” LARNER, *supra* note 62, at 523. “Notaries stand as guardians against forgeries and fraud.” VAN ALSTYNE, *supra* note 7, at Introduction. “Notaries, as a matter of law, are to be impartial to the transactions upon which they notarize signatures, and to be impartial to the notarizations themselves.” *Id.* at 175.

781. Joseph Margolis, *Conflict of Interest and Conflicting Interests*, reprinted in TOM L. BEAUCHAMP & NORMAN E. BOWIE, *ETHICAL THEORY AND BUSINESS* 366 (1979). Moreover, lawyers should be quite familiar with both the concern about conflicts of interest and with their heightened responsibilities to avoid even the appearance of impropriety. After all, “[a] conflict of interest normally arises in legal contexts.” *Id.* at 365.

to involve as well the agent's intention to exploit that conflict."<sup>782</sup> Or, in the context of a conflict of interest, "the prospect of abuse is obvious."<sup>783</sup> Why else engage in the dual representation unless to take advantage of the situation, or at least to be able to do so if the perceived need for it arises? There have been frequent instances in which attorney-notaries have attempted to use their dual positions to cover-up mistakes and misconduct—which attempts would be virtually impossible to undertake if detailed notary journal records were prepared and safeguarded.<sup>784</sup> Fourth, the conflict is always avoidable. One should serve as the attorney, or as the notary, but not as both. We have more than 4.8 million notaries; are lawyers unable to find any of them? Margolis made the point plainly: "[W]here a conflict of interest obtains, [the agent] must not undertake the relevant ventures cojointly, [but] must divest himself of one at least."<sup>785</sup> To put it differently, "[W]hat is wrong in a conflict of interest is merely to have acted in a way that manifests the conflict,"<sup>786</sup> or in a way that even creates the appearance of a conflict.<sup>787</sup> Thus, the conspicuous severity and aggravating circumstances of the attorney-notary conflict just

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782. *Id.* at 367. A notary is fundamentally expected to serve as an "impartial witness" to a document signing. WYO. STAT. ANN. § 32-1-105(b). However, an attorney-notary who serves in the dual role as both attorney for the document signer and notary for the document signing cannot possibly be impartial as a notary because s/he is required to serve as agent and fiduciary of the legal client.

783. Margolis, *supra* note 781.

784. In the hundreds of cases we have reviewed in which lawyers have been disciplined for notarial misconduct, there has not been a single case where the lawyer involved had initiated the investigation and disciplinary proceeding because s/he came forward completely voluntarily. Thus, in every case about which we know, the attorney-notary or ordinary lawyer concealed the wrongdoing at least initially. The Attorney General of Nevada Frankie Sue Del Papa, well aware of the tendency of unethical lawyers to attempt to manipulate the notarial system, observed that such "attorneys may attempt to pressure Notaries to disregard the law or to violate the law in an attempt to . . . cover up their own mistakes or omissions." CLOSEN, *supra* note 2, at x (quoted in the *Foreword*). Even the legal profession as a whole should be faulted for attempting to hide from these notarial abuses by lawyers. "Although the legal community is aware of the problem of widespread and serious ethical and statutory violations by attorneys, it continues largely to ignore the epidemic of notarial wrongdoing by attorneys." Closen Part II, *supra* note 765, at 15.

785. Margolis, *supra* note 781, at 363. That these ethical conflicts are avoidable reminds us of the proverb: "Misfortune is not that which can be avoided, but that which cannot." DALE, *supra* note 24, at 223.

786. Margolis, *supra* note 781, at 371.

787. *Id.* at 364. "[O]ne should avoid acting under avoidable circumstances in which such abuses may obtain. In this sense, avoiding a conflict of interest is rather like conforming to the rules of etiquette; one should avoid situations that may give offense, even if particular acts do not otherwise actually offend." *Id.*



described (which could not succeed if all notaries, including attorney-notaries, created and preserved detailed notary journals) ought to deter lawyers from engaging in the dual representation. But instead, attorneys and bar associations work to find ways for lawyers to continue in the conflicted roles.

With disappointing regularity, some lawyers and bar groups oppose notary journalizing requirements on the much exaggerated basis of its potential for infringement upon the attorney-client privilege.<sup>788</sup> Yet, that reason is not only baseless, but also is associated with unethical conduct engaged in by far too many attorneys. Historically, it was convenient for lawyers to be notaries, because there were so few notaries in the earliest days of the colonies and the country, and lawyer-notaries could provide notarial services to the public and to their own clients. Many lawyers and their staff subordinates became commissioned notaries.<sup>789</sup> Notary observer Richard Humphrey in 1948 knew what may still be true today, namely, that “[p]robably more lawyers are notaries than any other class though . . . bank employees and office secretaries run them close for second place.”<sup>790</sup> However, those simpler days of few notaries have been gone for more than 60 to 100 years. Nevertheless, many lawyer-notaries continue to both draft documents for their clients and notarize the signatures of their clients on those very documents the lawyer-notaries have prepared.<sup>791</sup> Attorneys are paid substantial sums to prepare documents that are expected to be valid and to withstand challenges. Lawyer-notaries who are driven by their substantial legal fees may be tempted to violate notary laws in the hope of validating notarizations that would otherwise be deficient, especially when those lawyer-notaries act

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788. See generally CLEARY, *supra* note 94, at 175-211 (discussing the attorney-client privilege); JOHN E. CORKERY, *ILLINOIS CIVIL AND CRIMINAL EVIDENCE* 150-66 (2000) (same).

789. “So critical are notarial acts to the functions of a modern law office that many legal secretaries, paralegals and attorneys themselves hold Notary commissions.” See CLOSEN, *supra* note 2, at iii (quoting NNA President Milton Valera); *Balancing the Boss’s Needs with Legal Responsibilities*, NOTARY BULL., Ap. 2002, at 13 (reporting about paralegal Susan Turner who “became a Notary because it was necessary for me to perform the duties required by my employer [an Alabama law firm].”). “Millions of documents are notarized every day by the more than 4.2 million U.S. notaries, many of whom are lawyers.” Closen, *supra* note 148, at A24.

790. HUMPHREY, *supra* note 205, at 16. See CLOSEN, *supra* note 2, at iii (quoting NNA President Milton Valera) (concluding that “[s]o critical are notarial acts to the functions of a modern law office that many legal secretaries, paralegals and attorneys themselves hold Notary commissions.”).

791. See generally Michael L. Closen & Thomas W. Mulcahy, *Conflicts of Interest in Document Authentication by Attorney-Notaries in Illinois*, 87 ILL. B. J. 320, 320 (1999). “Daily, thousands of attorney-notaries notarize documents they have prepared for their own clients.” Closen, *supra* note 148, at A24.

as both private attorneys and public officials (notaries) for the same transactions. In a twisted way, attorneys who commit errors and omissions in notarizations may be inclined to commit still further misdeeds in misguided attempts to cover-up the faults and to thus avoid malpractice liability. The dual roles undertaken by attorney-notaries constitute both apparent and actual conflicts of interest.<sup>792</sup>

An attorney-client privilege objection to the keeping of notary journals, if there is a colorable claim to an objection at all, would arise only because lawyers or their staff personnel who are notaries choose also to serve as notaries for their clients. With more than 4.8 million U.S. notaries today, there are plenty of notaries to go around. Yet, even in 1866 (as the Iowa Supreme Court observed in the quotation at the start of this section of the Article), it was “always within the power of the parties to secure a disinterested officer” to perform a notarization (although that court was not speaking specifically of lawyer-notaries being “beneficially interested” in the instruments they draft and notarize).<sup>793</sup> It does not need to happen that lawyers, or even their staff employees, serve as notaries for their clients on documents prepared by those lawyers.<sup>794</sup> If the attorney were to choose to give up some control and to obtain the services of an impartial notary, the attorney-client privilege would not be implicated at all.

Moreover, the claim that the keeping of notary journal entries

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792. “A Notary should not notarize documents the Notary prepared for his or her clients while serving in the capacity of a business professional because this dual role constitutes a conflict of interest. One simply should not represent the public and a private party in the same transaction.” *Risk Management*, *supra* note 17, at 27. See Closen, *supra* note 148, at A24 (opining that lawyer-notaries who notarize documents prepared for their own clients “thereby engage in a conspicuous and serious compromise of ethics”). See *State ex rel. Counsel for Discipline v. Rokahr*, 675 N.W.2d 117 (Neb. 2004) (illustrating a case in which an attorney-notary had not kept a notary journal and testified she could not recall the details about the notarization in question, but where she was found to have back-dated the notarization).

793. *Wilson*, 20 Iowa at 233-34 (1866). What the Iowa court wrote seems to fit the conflicted practices of lawyer-notaries quite accurately. “Tension between the duty of loyalty a lawyer-notary owes the private client for whom a document has been prepared and a notarization is needed, and the duty of impartiality that the same lawyer-notary owes the public, poses a real conflict.” Closen, *supra* note 148, at A24.

794. See Closen & Orsinger, *supra* note 729, at 25 (concluding that “[w]ith more than 4.2 million U.S. Notaries, there certainly is no need for Notaries to be notarizing for family members.”). The same thinking applies to lawyer-notaries and their own clients. “There are now so many [notaries] that virtually any lawyer and his or her clients can readily obtain notarial services from other sources.” Closen, *supra* note 148, at A24. However, even inconvenience would not constitute sufficient justification for lawyer-notaries to undertake conflicted functions. “A lawyer simply should not serve in both a private and a public role in connection with a single transaction.” *Id.* at A24.

will lead to violations of the attorney-client privilege in any important way is illusory.<sup>795</sup> In order for there to be a claim of an attorney-client privilege, there must have been a confidential communication between the client and attorney. A notary journal entry for a notarization should contain nothing of relevance to the attorney-client relationship or of a confidential nature such as to invoke its evidentiary privilege. The most revealing information in a notary journal entry relevant to the attorney-client relationship would be the identification of the document signer (who would happen to be the client) and the instrument type being executed (such as an affidavit, contract, litigation document, mortgage, power of attorney, title, trust, will, etc.), along with the date and time of the signing of the instrument and its length (in number of pages).<sup>796</sup> Absolutely none of the substantive content of the notarized document would be recorded in the notary journal entry.

Would any of the information to be recorded in a notary journal fall within the attorney-client privilege? Generally, the fact of the employment of an attorney by a client is neither confidential nor protected by the attorney-client privilege.<sup>797</sup> After all, there must be an attorney-client consultation or relationship in order for the privilege to be asserted, so that such information is not the kind intended for coverage by the privilege.<sup>798</sup> Next, the document type (along with its date and length) recorded in the notary journal should also be regarded as outside the scope of the privilege. Unquestionably, the document itself on which a signature is notarized would not be covered by the privilege because it is not confidential, since it is always the type of

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795. "The essential element for an attorney client privilege is a communication between the client and attorney that is intended to be confidential." CORKERY, *supra* note 788, at 155. "It is the essence of the privilege that it is limited to those communications which the client either expressly made confidential or which he could reasonably assume under the circumstances would be understood by the attorney as so intended." CLEARY, *supra* note 94, at 187.

796. This information (the signer's name, document type, and date/time of signing) is among the standard items of information for inclusion in a notary journal entry. See VAN ALSTYNE, *supra* note 7, at 189-90; see also *supra* notes 266-80 and accompanying text.

797. "Generally, communications as to the client's identity will not be considered confidential and privileged." CORKERY, *supra* note 788, at 156. "The weight of authority denies the privilege for the fact of consultation or employment, including the facts of the identity of the client, such identifying facts about him as his address." CLEARY, *supra* note 94, at 185-86.

798. One reason advanced for this limitation on the attorney-client privilege is that "the mere fact of the engagement of counsel is out of the rule [of privilege] because the privilege and duty of being silent do not arise until the fact is ascertained." *Id.* at 186.

instrument intended for viewing by other parties.<sup>799</sup> After all, the whole purpose for notarization is to establish authenticity of a signature when it is viewed by some third party.<sup>800</sup> Thus, to simply identify the document type in the notary journal as part of the official notarization process could hardly be thought to be confidential. Finally, determination of the possible application of the attorney-client privilege often requires a balancing of interests and policies,<sup>801</sup> and the substantial reasons favoring the security of documents to be fostered by notary journalization should outweigh the opportunity of lawyers to artificially create a privilege situation by taking on the unnecessary, secondary and conflicted notarial role. Most importantly, if the benign information identifying a client and a generic document type would appear in the journal of a disinterested notary, no attorney-client privilege issue could possibly arise.

Attorney-notaries simply should not notarize for their own clients on documents prepared by those attorneys. Attorney-notaries who notarize for their own clients on documents those attorney-notaries prepared have a self-interest in seeing to it that the documents bear what appear to be lawful notarizations of their clients' signatures. Attorney and notary scholar Humphrey declared "[t]he general rule is that [a notary public] should not officially act on matters in which he has a personal interest," and Humphrey approved of no exceptions for lawyer-notaries.<sup>802</sup> Lawyer-notaries who execute notarizations for their own clients on instruments prepared by the lawyer-notaries are legally expected to properly date the certificates of notarization, to properly insist upon the clients' presence at the times of the notarizations, to

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799. "Wherever the matters communicated to the attorney are intended by the client to be made public or revealed to third persons, obviously the element of confidentiality is wanting." *Id.* at 188. Thus, consider that so many documents notarized by attorney-notaries and their staff notaries are intended to be filed in litigations and arbitrations or filed for public recording in connection with titles to property. Furthermore, the transactional documents which are notarized are not truly communications between clients and attorneys. "The privilege covers written confidential communications between an attorney and client, but it does not apply to documents that are not in themselves communications." CORKERY, *supra* note 788, at 163.

800. See Larner, *supra* note 62, at 543 (referring to "the credit the law gives to [notarial] certificates"). "A document under [notarial] seal is presumed to speak the truth." *Id.* at 550.

801. See CORKERY, *supra* note 788, at 159 (referring to cases where the trial court "must balance factors" in deciding whether there has been a waiver of the privilege); see also CLEARY, *supra* note 94, at 175-82 (discussing the uncertainties and debates about the attorney-client privilege, as well as the basic proposition that the rule itself is about a balancing between the conflicting interests of full disclosure and truth seeking pitted against the value to justice to be served by encouraging clients to speak freely with their lawyers).

802. HUMPHREY, *supra* note 205, at 18.

properly insure the true identities of the clients, to properly append the notarial certificates to the correct documents, to properly administer oral oaths or affirmations to client-signers (if required by the kinds of notarizations involved), to properly obtain the signatures of the clients themselves for notarizing, and to properly seek the consent of clients to the execution and notarization of documents on their behalf.

The attorney-notary's far greater interest in the legal fee involved will tend to trump the insignificant interest in the notarial fee. Because of the obvious conflict of interest that arises when lawyer-notaries act simultaneously in their private positions as attorneys and in their public official positions as notaries for the same clients, lawyer-notaries have regularly violated every one of the legally required steps listed just above.<sup>803</sup> Lawyer-notaries have falsely dated notarial certificates, have notarized signatures of absent clients, have notarized for clients who were not required to present proof of identity (and who turned out to be imposters), have switched the documents to which notarial certificates were supposed to be attached, have failed to administer required oral oaths or affirmations, have notarized forged client signatures, and have performed notarizations on documents without client consent.<sup>804</sup>

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803. See generally Young, *supra* note 764 (presenting numerous case examples of attorney-notary misconduct relating to notarizations); CLOSEN, *supra* note 2, at 357-415 (same). The attorney's interest in her/his substantial legal fees can be a powerful temptation to wrongdoing. Remember the proverb: "Money is the root of all evil." DALE, *supra* note 24, at 98. In deciding attorney disciplinary cases for notarial misconduct, courts have regularly rejected the excuses of unethical lawyers and have held those lawyers to higher standards than other members of the public (including ordinary notaries) and/or have noted the significance of the notarial functions and the corresponding duty of lawyers to abide by notarial law. See, e.g., *In re Finley*, 261 N.W.2d at 846 (emphasizing that "members of the bar are held to a higher standard of morality than the general public"); *In re Kraus*, 616 P.2d 1173, 1177 (Or. 1980) (commenting that "attorneys who undertake to exercise the functions of a notary public must constantly bear in mind the seriousness of the possible consequences of a failure to perform such a function in strict accordance with the requirements of the law.").

804. See, e.g., *Columbus Bar Assn. v. Dougherty*, 789 N.E.2d 621, 622 (Ohio 2003) (involving an attorney-notary who performed a notarization on a liquor license application without the signer being present); *Comm. on Prof'l Ethics & Conduct v. Bauerle*, 460 N.W.2d 452, 453 (Iowa 1990) (illustrating a case in which an attorney-notary notarized for an absent signer); *Neilson*, 816 P.2d 120 (illustrating a case in which an attorney-notary falsely dated a notarial certificate); *In re Gale*, 674 N.W.2d 183 (Minn. 2004) (involving a case in which an attorney-notary accepted his own son's representation that the son had been authorized to sign his wife's signature, and in which the attorney-notary notarized his daughter-in-law's signature signed by the son without the wife's presence); *In re Gianetto*, 781 N.E.2d 1138 (Ind. 2003) (reprimanding an attorney-notary who notarized a document with blank signature spaces for a client-signer who was not present); *In re Wiss*, 3 A.D.3d 182 (N.Y. App. Div.

The actual, or at least apparent, conflict of interest of attorney-notaries who notarize for clients on instruments prepared by those attorney-notaries is so conspicuous that lawyers have succeeded in several states in achieving special notary legislation to exempt the described practice from the application of conflict of interest rules. The states which have done so include California,<sup>805</sup> Florida,<sup>806</sup> Illinois,<sup>807</sup> Kansas,<sup>808</sup> Nevada,<sup>809</sup> North Carolina,<sup>810</sup> South Carolina,<sup>811</sup> and South Dakota.<sup>812</sup> In the Northern Marianas, the Attorney General's Regulations expressly permit attorney-notariess to notarize on documents they prepare for their own clients,<sup>813</sup> and the official notary Web sites for both New Mexico<sup>814</sup> and Utah<sup>815</sup> take the same position on behalf of lawyers. However, the true nature of this conflict of interest cannot be erased simply by adopting or approving an exception, for that exemption merely eliminates the risk of discipline for committing the otherwise unethical conduct. Indeed, the caption of the California provision favoring lawyers actually reads: "Conflict of interest; financial or beneficial interest in transaction; exceptions."<sup>816</sup> It seems obvious that conflicts of interest by any

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2004) (involving a situation in which an attorney-notary instructed a staff member to falsely notarize using the attorney's notary seal). *See also They Made Me Do It*, NAT'L NOTARY, Mar. 2003, at 37 (reporting the strange case of a New Jersey lawyer-notary who claimed that pressure from his law partners to engage in unethical acts, including improper notarization of the purported signature of a partner's dead relative, caused him to misappropriate funds from the law firm).

805. CAL. GOV'T. CODE § 8224 (West 2008) (entitled "Conflict of interest; financial or beneficial interest in transaction; exceptions"). That section states in part: "For purposes of this section, a notary public has no direct financial or beneficial interest in a transaction where the notary public acts in the capacity of an agent, employee, insurer, attorney, escrow or lender for a person having a direct financial or beneficial interest in the transaction." *Id.* "In reality, the California Legislature recognized the financial conflict because CAL. GOV'T CODE § 8224, which permits lawyer-notaries to notarize documents they have prepared, is captioned: 'conflict of interest; financial or beneficial interest in transaction; exceptions.' Conflicts of interest by any other name (such as 'exceptions') are still conflicts." Closen, *supra* note 133, at A24.

806. FLA. STAT. ANN. § 117.107(12) (2008).

807. 5 ILL. COMP. STAT. 312/6-104(h) (2008).

808. KAN. STAT. ANN. § 53-109(c) (2008).

809. NEV. REV. STAT. § 240.065[2] (2008).

810. N.C. GEN. STAT. § 10A-9(c)(2) (2008).

811. S.C. CODE ANN. § 26-1-110 (2008).

812. S.D. CODIFIED LAWS § 18-1-7 (2008).

813. N. MAR. I. ATTY. GEN. REGS. § 3-102[4].

814. New Mexico Secretary of State, *Business Services*, <http://www.sos.state.nm.us/sos-NotaryPrec.html>.

815. The official Utah notary Web site reads: "A notary public may notarize documents when acting in a professional capacity, such as a professional advisor, counselor, agent, or attorney." FAERBER, *supra* note 15, at 465.

816. CAL. GOV'T CODE. § 8224. "Conflicts of interest by any other name

other name, such as “exceptions,” nevertheless remain conflicts, and that creating these kinds of provisions should actually serve to draw additional attention to our conclusion. In one old case from Texas in 1890, an attorney-notary successfully argued that he was not disqualified from notarizing his legal client’s signature on a mortgage which the attorney had prepared.<sup>817</sup> Then, there is a 1930 Alabama decision allowing an attorney-notary both to prepare a client’s affidavit giving notice of a personal injury claim to a city and to notarize the client’s signature thereon, with the court reasoning that the affidavit and its notarization were merely for the purpose of placing the city on notice of the claim.<sup>818</sup> Yet, in both of those older cases, the lawyer-notaries had substantial financial interests in their legal fees for the representation of the clients whose documents were notarized. There are also at least two bar association ethics opinions in North Carolina and Virginia approving of lawyers serving as notaries on instruments they have prepared.<sup>819</sup> The several examples set out above, demonstrating arrogant and self-interested efforts of lawyers and bar associations to preserve their unethical conflicted practices as attorney-notaries, remind us of the backward and regrettable positions too frequently taken by lawyers and bar organizations in this country beginning in the 1700s and continuing with occasional dark episodes to the present time.<sup>820</sup> The legal profession will never

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(such as ‘exceptions’) are still conflicts.” Closen & Mulcahy, *supra* note 791, at 323. Why would lawyers feel the need to seek the protection of such provisions, unless without them attorney-notaries would be in jeopardy of being held accountable for knowingly engaging in conflicted practices?

817. *Kutch v. Holly*, 14 S.W. 32, 33 (Tex. 1890).

818. *Birmingham v. Simmons*, 130 So. 896, 897 (Ala. 1930). Our view is that the attorney-notary had a substantial and conflicted interest in the notice that was filed in this case.

819. *Attorneys As Notaries*, N.C. Ethics Op. RPC 136, 1992 WL 754072 (1992); *Attorney As Witness*, 1993 VA Legal Ethics Op. 1512 (1993).

820. Munroe Freedman provides a scathing line of facts revealing the prejudicial and self-centered motives of the legal profession in the early 1900s as it was drafting its first code of conduct, the A.B.A. CANONS OF PROFESSIONAL ETHICS of 1908, through to mid-century. See FREEDMAN, *supra* note 765, at 2-5. “[T]he established bar has not been constant in its dedication to zealous representation free of conflicting obligations to others. In fact . . . the principal concerns of the established bar often have been elsewhere.” *Id.* at 2. Freedman cites specific instances of prejudice and mistreatment toward women, African Americans, Catholics, Jews, and immigrants. *Id.* at 2-3. Indeed, he concludes that the “major” incentive for the first code of lawyer conduct and educational requirements was for the purpose “to maintain a predominantly native-born, white, Anglo-Saxon, Protestant monopoly of the legal profession.” *Id.* at 4. Lawrence Friedman has also been blunt about the unfortunate positions taken by the organized bar.

The performance of the organized bar, compared to its ballyhoo, has been retrograde and weak. In times when justice or civil liberty were in crisis, the organized bar was not on the side of the angels. It was racist in the early part of the century (no blacks were allowed in the ABA);

overcome the tainted portion of its image until it abandons completely these repeated types of efforts driven purely by self-interest and greed.

Unfortunately, not one state or territory statutorily prohibits attorney-notaries from notarizing for their clients on instruments prepared by those attorneys. However, the official Notary Public Manual for New Jersey warns: "Notaries should refrain from notarizing documents in which they have a personal interest, including documents they have prepared for a fee."<sup>821</sup> The West Virginia Notary Public Handbook has also noted: "If you are an attorney and have prepared the documents for your client, the West Virginia State Bar advises that you have a third party perform the notarization."<sup>822</sup> Prior to Florida's enactment of a statute authorizing attorney-notaries to notarize on documents they prepare for their clients, there were two important sources of Florida legal authority opposed to the dual practice. In 1907, the Florida Supreme Court observed the conflicted practice at work in a case before it and commented in opposition to such conduct as follows: "We call attention to the fact that every one of the affidavits. . . was sworn and subscribed to before . . . one of the solicitors of record for the appellees, as a notary public. [T]he practice. . . is not to be commended."<sup>823</sup> Then in 1967, the Committee on Professional Ethics of the Florida State Bar Association in one of its official opinions remarked that there was "no definitive ethical prohibition against a lawyer . . . serving" as a notary public for a client in the execution of litigation documents prepared by the attorney, but it warned that "a prudent practitioner would be well advised to limit his service as a notary to those instances wherein no alternative party was available" to perform the notarization.<sup>824</sup> Most importantly, the statutes and regulations of about forty-seven states and territories are completely silent on the subject of attorney-notaries notarizing for clients on documents prepared by those attorneys.<sup>825</sup> Hence,

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during the McCarthy period, the ABA was eager for loyalty oaths and purges. Its 'ethics' meant, for the most part, squelching advertising and protecting lawyers against competition.

FRIEDMAN, *supra* note 55, at 690-91. See generally CATHERINE CRIER, *THE CASE AGAINST LAWYERS* 180-92 (2002) (admonishing the ineffectiveness of ABA rules).

821. FAERBER, *supra* note 15, at 303.

822. *Id.* at 507.

823. *Savage v. Parker*, 43 So. 507, 510 (Fla. 1907).

824. 67 Fla. Ethics Op. 19 (1967).

825. We know that there are some 47 jurisdictions with no express statutory or regulatory prohibitions against attorney-notaries serving in both roles regarding documents they prepare for their clients, because only nine jurisdictions are listed above as have such express provisions. See *supra* notes 805-13 and accompanying text.



lawyers have consciously chosen simply to take advantage of the absence of express restrictions, and to engage in the unethical conduct of the dual representation.<sup>826</sup>

Incidentally, attorney-notaries are not the only professionals who face this conflict of interest. Other professionals such as real estate brokers, insurance agents, bankers, health care professionals, certified public accountants, architects, and engineers who also hold notary commissions should not notarize for their clients on transactions in which these other business people have been professionally involved.<sup>827</sup> Notaries are required to be impartial witnesses, and there should be absolutely no exceptions.

The field of ethics represents one more area in which both U.S. notary law and the practices of our notaries lag far behind the professional notaries of the rest of the world.<sup>828</sup> French notaries, for instance, have since the mid-1800s been “forbidden . . . to become mixed up with the administration of any society, enterprise, or company of finance, commerce or industry . . . [and] to have any interest in any business for which they act.”<sup>829</sup> However, since our notary statutes seldom address ethical issues of any kind, U.S. notaries are left to their own devices on questions of ethics generally, and questions of conflicts of interest in particular. “[T]he [U.S.] notary public operates in a laissez faire system that inspires an atmosphere of tolerance for questionable conduct on matters of conflicts of interest.”<sup>830</sup> This conclusion applies as well to attorney-notaries.

On the other hand, both the Model Notary Acts and the Notary Public Code of Professional Responsibility have squarely taken on conflict of interest situations and have forbidden them,

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826. “[T]he vast majority of state notary laws simply do not specifically address the subject [of attorney-notaries notarizing on documents prepared for their own clients], so attorney-notaries just take advantage of the absence of express prohibitions.” Closen, *supra* note 148, at A24.

827. See, e.g., *Estate of Shinkle*, 119 Cal. Rptr.2d 42 (Cal. Ct. App. 2002) (overruled on different grounds) (describing a case of a caregiver taking advantage of an elderly woman with the help of an estate planner-notary who notarized blank trust documents before meeting the woman, who falsely attested she had signed in the notary’s presence, and who stood to gain financially from the creation of the trust); *Vegas Man Accused of Signature Fraud*, NOTARY BULL., Apr. 2002, at 12 (reporting about federal charges against a stockbroker alleged to have forged client and notary signatures to perpetrate financial frauds).

828. See Closen *supra* note 148, at A24 (referring to “the already-tarnished image of U.S. notarizations”).

829. BROOKE’S NOTARY, *supra* note 100, at 9.

830. Closen, Orsinger & Ullrick, *supra* note 105, at 234; see also Closen & Orsinger, *supra* note 64, at 547 (positing that “the laissez-faire notarial system of this country in many ways promotes unethical performance by notaries, their employers, and consumers of notarial services.”).

without exception. Under the 1984 Model Notary Act, attorney-notaries who notarize for their own legal clients on documents those lawyers have prepared are considered to occupy a conflicted position and, thus, are disqualified from acting as notaries in such circumstances. Its Section 3-102(2) provides: "A notary is disqualified from performing a notarial act if the notary . . . will receive directly from a transaction connected with the notarial act any commission, fee, advantage, right, title, interest, cash, property, or other consideration exceeding in value the [notarial] fees."<sup>831</sup> Its official commentary declared that "an attorney's fee" constitutes "a disqualifying interest."<sup>832</sup> The 2002 ACT contains even stronger and more direct language prohibiting attorney-notaries from serving dual roles on instruments prepared for their own legal clients. Its Sections 5-2(a)(2) and (4) announce:

A notary is disqualified from performing a notarial act if the notary . . . will receive as a direct or indirect result any commission, fee, advantage, right, title, interest, cash, property, or other consideration exceeding in value the [notarial] fees . . . [or] is an attorney who has prepared, explained, or recommended to the principal the document that is to be notarized.<sup>833</sup>

The official comments remark that "[t]he drafters believed . . . that lawyers clearly have an interest in documents they draft or offer advice on for clients that should disqualify them from notarizing those documents."<sup>834</sup> If notarization is truly an important governmental document security procedure, as it is, then these positions of the Model Notary Acts are unquestionably correct.

The *Notary Public Code Of Professional Responsibility* of 1998 recites: "The Notary shall not notarize for a client or customer who will pay the Notary a commission or fee for the resulting transaction, apart from the fee for performing a notarial act allowed by statute."<sup>835</sup> This blanket prohibition is the right approach for all notary-professionals—lawyers, real estate brokers, insurance agents, bankers, health care professionals, estate planners, certified public accounts, stockbrokers, architects, engineers, and others. The Code's official commentary explains: "The gravamen of the problem is that there is a *great* likelihood the Notary will be more interested in seeing the transaction completed than in following proper notarial procedure. This is so because the notarial fee will be insignificant as compared to the remuneration to be had in the Notary's other capacity. The

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831. MODEL NOTARY ACT § 3-102(2) (1984).

832. *Id.* § 3-102 cmt.

833. MODEL NOTARY ACT § 5-2(a)(2),(4) (2002).

834. *Id.* § 5-2 cmt.

835. NOTARY PUBLIC CODE OF PROF'L RESPONSIBILITY, II-A-2.

conflict perhaps most visibly arises with attorney-Notaries.” (emphasis added).<sup>836</sup> Furthermore, and quite importantly, lawyer ethics codes also appear to prohibit attorney-notaries from occupying dual public and private roles in the same transactions, for the very reasons behind the above-noted prohibition of the Notary Public Code, although the lawyer ethics codes do not do so as plainly as they should and do not anywhere expressly mention the role of lawyers as notaries public.<sup>837</sup>

Consider that busy lawyer-notaries are often faced with deadlines and that date-sensitive commercial instruments and court documents may involve potential fees of thousands of dollars and sometimes hundreds of thousands or millions of dollars for the lawyer-notaries. Might the magnitude of the notarial fees involved dissuade busy attorney-notaries from back-dating documents, from fraudulently notarizing for absent signers and from engaging in other forms of shortcuts to notarizations? Hardly.<sup>838</sup> Here are a few astonishing numbers. Although some

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836. *Id.* at II-A cmt. (emphasis added). “[T]he attorney’s direct financial interest in the validity of documents he or she has drafted is obvious.” Closen, *supra* note 148, at A24; *see also Md. Cas. Co.*, 344 S.W.2d at 59 (illustrating a case in which a used car dealer-notary defrauded an automobile purchaser in part by falsely notarizing official title transfer documents; and the court concluded the fraudulent conduct of the dealer-notary as both a notary and as a used car dealer could not be separated but that they combined as essential features of one fraudulent scheme). Such a case demonstrates the danger to the public, which arises when business people with direct financial interests in transactions are permitted to also serve as the notaries for those transactions.

837. Rule 1.11 of the Rules of Professional Conduct generally prohibits an attorney from “represent[ing] a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer.” MODEL RULES OF PROFESSIONAL CONDUCT R. 1.11 (2007). An official comment to that Rule explains: “A lawyer should not be in a position where benefit to a private client might affect performance of the lawyer’s professional functions on behalf of public authority.” *Id.* R. 1.11 cmt. However, lawyer-notaries frequently succumb to various influences and violate notary laws when their own clients are involved. Rule 1.7 of the Rules of Conduct directs: “A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer’s responsibilities to another client or a third person.” *Id.* R. 1.7. A lawyer simply cannot serve both the public as an impartial notary and the private fee-paying client simultaneously. A provision from the Model Code also seems relevant. According to a disciplinary rule explaining Canon 5, an attorney should “not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial . . . interests.” MODEL CODE OF PROF’L RESPONSIBILITY DR 5 cmt. (1980). Again, the financial interest of attorneys in the fees of their private clients have all too often affected their judgments in carrying out their simultaneous roles as notaries on behalf of the public they are sworn to safeguard. Both ABA ethics codes have been criticized for not having been drafted “disinterestedly” nor adequately. *See FREEDMAN, supra* note 765, at 2.

838. “Heavy caseloads, impending deadlines and other demands of legal practice often tempt attorneys to take dangerous shortcuts relating to

eight jurisdictions have no maximum notary fee schedule, forty of the remaining forty-eight jurisdictions set their maximum notary fees at five dollars or less.<sup>839</sup> Incredibly, forty-eight of the fifty-six U.S. jurisdictions set their maximum notary fees at ten dollars or less.<sup>840</sup> In view of maximum statutory notary fees of ten dollars or less, the concern about the temptation of attorney-notaries to place their interest in their lawyer fees ahead of, and to the exclusion of, their commitment to demand full compliance with notary law is quite realistic. The epidemic of misconduct of attorney-notaries has proven that conclusion beyond any doubt.<sup>841</sup>

In addition to the conflicted practices of lawyer-notaries identified above, other unethical attorneys have often violated notary laws. Attorneys have regularly obtained notarizations of signatures of absent clients, and have obtained notarizations without the administration of required oral oaths and affirmations. Attorneys have forged client signatures to documents or instructed law firm staff personnel to forge client signatures and have then obtained the notarizations of those forgeries. Attorneys have drawn documents and forged or obtained forged signatures of clients to those documents where the clients had not even consented to the attorneys' preparing such documents in the first place, and the unethical attorneys have then had the forged signatures notarized. Attorneys have pilfered or unlawfully obtained notary seals and used those seals to falsely notarize the signatures of their clients. Some attorneys have committed hundreds of the same notarial violations. The range of attorney abuse of the notarial system has been almost unimaginable.<sup>842</sup>

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notarizations." Closen, *supra* note 148, at A24.

839. *Guide to Notary Fees*, *supra* note 273, at 36.

840. *Id.*

841. *See supra* notes 803-04 and *infra* notes 842-53 and accompanying text.

842. Closen Part II, *supra* note 765, at 7.

Attorneys who are not Notaries have pilfered Notary seals and falsified notarizations. Attorneys have forged their clients' signatures and sometimes the signatures of non-clients on documents and then had those forged signatures notarized by Notaries (of course, without the purported signers personally appearing before the Notaries). . . . And the list goes on.

*Id.*; *see also Neilson*, 816 P.2d at 122 (illustrating the extreme case of a non-notary attorney who ordered a notary seal for a notary whose commission had expired and who then used that false seal to forge notarizations on documents). Attorney-notaries have regularly been guilty of notarizing for absent document signers and even for notarizing knowingly forged signatures on documents and unsigned documents. *See, e.g., Jefferson Bank v. Progressive Cas. Ins. Co.*, 965 F.2d 1274 (3d Cir. 1992) (describing a case in which a lawyer knowingly perpetrated a fraudulent scheme, using an accomplice to impersonate a notary public to falsify notarizations on mortgage documents); *In re Session*, 555 N.W. 2d 120 (Wis. 1996) (suspending an attorney's license in part because the attorney had filed a warranty deed while

The notarial misconduct of both attorney-notaries and other attorneys is almost always compounded by one or more of three additional features about the misdeeds which they commit. First, in many instances, notarial misconduct is not merely unlawful; it constitutes a crime.<sup>843</sup> It is most often characterized as a misdemeanor, sometimes termed “official misconduct.”<sup>844</sup> It may subject the individuals involved to prosecutions and convictions. It may be punishable by confinement in jail, by a fine, by the criminal law’s other sanctions, and by the stigma which thereby attaches. Notaries and others who engage in such misconduct may also be subject to civil liability<sup>845</sup> and to administrative sanctions (such as the suspension or revocation of commissions for notaries, and to the suspension or revocation of licenses for attorneys).<sup>846</sup>

Second, very regularly unethical attorneys seek the assistance of other individuals to carry out their misconduct, such as their clients and their staff subordinates (secretaries, legal assistants, paralegals, law clerks, and junior lawyers).<sup>847</sup> In

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falsely claiming it had been notarized where he knew it had not); *In re Caller*, 899 P.2d 468 (Kan. 1995) (involving a case where an attorney forged the signature of a client and then had the signature notarized); *In re Smith*, 636 P.2d 923 (Or. 1981) (describing the case of an attorney who had the signature of an absent client notarized); *Carter v. Jones*, 525 A.2d 493 (R.I. 1987) (reporting the case of an attorney who forged both the signature of his mother and a notary on a power of attorney); *In re Morin*, 878 P.2d 393 (describing the case of an attorney who had some 300 signatures of absent signers notarized by staff notaries).

843. See, e.g., MODEL NOTARY ACT § 6-203 (1984) (providing for criminal prosecution for knowing and repeated notarial misconduct); MODEL NOTARY ACT § 12-6 (2002) (providing for criminal sanctions for the notarial misconduct of notarizing for an absent signer, failing to properly identify a document signer by the use of personal knowledge or satisfactory evidence, and for executing a false notarial certificate). See, e.g., *In re Finley*, 261 N.W.2d 841 (describing the case of an attorney-notary whose false notarization constituted a misdemeanor).

844. See, e.g., 5 ILL. COMP. STAT. ANN. 312/7-104 (West 2008) (defining official misconduct); *id.* 312/7-105 (declaring the commission of notary official misconduct to constitute a misdemeanor).

845. See, e.g., MODEL NOTARY ACT § 6-101 (1984) (describing the civil liability of the notary, the notary’s surety, and the notary’s employer); MODEL NOTARY ACT § 12-1 (2002); *id.* § 12-7 (providing that other remedies and sanctions are not precluded); MODEL NOTARY ACT § 6-204 (1984).

846. See, e.g., MODEL NOTARY ACT § 6-201 (1984) (providing for administrative revocation of a notary commission); MODEL NOTARY ACT § 12-3 (2002) (same). See generally Henderson & Kovach, *supra* note 301, at 866-73 (examining the administrative procedures and sanctions for dealing with notary misconduct).

847. “Sometimes, attorneys involve their own clients by asking their cooperation to carry out the notarial misdeeds—such as seeking client consent to sign and notarize clients’ names, or to back-date documents and notarizations thereon.” Closen Part II, *supra* note 765, at 7.

More often, attorneys order their subordinates (paralegals, law clerks,

dealing with their subordinates, unethical attorneys often issue direct orders or utilize implicit intimidation to enlist the help of otherwise innocent individuals.<sup>848</sup> It is bad enough that unethical lawyers engage in misconduct themselves, but it is even worse when they knowingly place others in the roles of wrongdoers and thereby place those others in positions of risk for civil, criminal, and administrative sanctions and for the stigma which attends these consequences. When the other parties who are solicited to engage in notarial misconduct are legal clients, lawyers have betrayed their highest fiduciary responsibility to protect the interests of those clients. Incidentally, virtually all attorney notarial misconduct is undertaken while in the scope of the representation of legal clients, and therefore the interests of their clients are almost always placed in jeopardy by the notarial wrongdoing.<sup>849</sup>

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legal assistants, and junior lawyers) to engage in Notary law violations—such as forging signatures to be notarized, notarizing for absent signers, back-dating documents, and so on. Sometimes, attorneys ask law firm staff or other lawyers to assist in notarial misconduct. Involving others in illegal notarial practices places those other persons at risk of civil and criminal penalties.

*Id.* at 7, 15. According to Nevada Attorney General Frankie Sue Del Papa: “[T]he duties of a Notary Public embrace the responsibility of preventing improper or illegal requests of a Notary’s powers—requests which, it has been shown, many times come from attorneys.” CLOSEN, *supra* note 2, at x. See, e.g., *People v. Woodford*, 97 P.3d 968, 971 (Colo. 2004) (illustrating a case in which a lawyer asked a staff notary to notarize an unsigned document, of course, without the personal appearance of the purported signer); *In re Boyd*, 430 N.W.2d 663, 666 (Minn. 1988) (illustrating a case in which the court concluded that the attorney’s misconduct was more egregious where he involved others—both his client and a staff notary); *In re Caller*, 899 P.2d at 468 (illustrating the case of an attorney who had his secretary notarize for an absent signer, where the attorney had forged the signature); *Fla. Bar v. Farinas*, 608 So. 2d 22 (Fla. 1992) (involving a case in which a lawyer had a staff notary complete a false notarization); *In re Morin*, 878 P.2d at 393 (describing a case where an attorney had staff notaries notarize signatures for about 300 absent signers).

848. See *Maintaining Ethics While Notarizing for Clients*, *supra* note 349, at 13 (reporting that “[s]ome of our readers have complained. . . attorneys who employ them have asked them to perform improper notarizations.”). According to attorney John Henderson, who served as counsel to the Pennsylvania department overseeing the state’s notaries and who is now a Pennsylvania hearing examiner: “In many cases, Notaries have been placed in a difficult position by an attorney requesting that the Notary perform a notarization that may not fully comply with the law.” *Chatting with John Henderson of the Pennsylvania Department of State*, *supra* note 222, at 3. The following are cases in which attorneys influenced or directed staff notaries or other notaries to violate notary: *Lisi v. Rasmini*, 603 A.2d 321 (R.I. 1992); *In re Beiter*, 462 N.W.2d 595 (Minn. 1990); *In re McAlear*, 170 P.2d 763 (Or. 1946); *In re Boyd*, 430 N.W.2d at 663; *Iowa State Bar Assn. v West*, 387 N.W.2d 338 (Iowa 1986); *Farinas*, 608 So. 2d 22.

849. “An attorney’s failure to accord proper respect to notarial procedures

Third, many and probably most of the documents prepared by unethical lawyers who commit notarial misconduct, which documents bear fraudulent notarizations of signatures, are litigation-related or property-related instruments that must be filed with courts or other governmental agencies, such as recorder's offices. After all, if instruments are important enough that lawyers have been involved in their preparation and that notarizations are necessary, the likelihood is high that such instruments are destined to be filed.<sup>850</sup> When lawyers file such documents knowing that they contain false notarizations, the unethical attorneys make intentional and material misrepresentations to the recipient courts and agencies.<sup>851</sup> Those faulty instruments are either invalid, or they at least do not deserve the trust which is ordinarily reposed in documents bearing notarizations. Such misconduct is serious. For example, *The ABA Model Rules Of Professional Conduct*, Rule 3.3 declares: "A lawyer shall not knowingly . . . make a false statement of material fact or law to a tribunal . . . [or] offer evidence that the lawyer knows to be false."<sup>852</sup>

The abuses of notary law by ordinary attorneys and attorney-notaries is frequent and widespread. There are hundreds of reported cases of discipline of lawyers for violating notary laws,<sup>853</sup>

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may bring disciplinary or even criminal charges against the attorney. In addition, the legality of a notarized document may be questioned." CLOSEN, *supra* note 2, at 109. Under such circumstances, attorneys have been disloyal to their clients. "Loyalty is an essential element in the lawyer's relationship to a client." MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. "When notaries neglect their full responsibility to abide by the statutory requirements for proper notarizations, they place the integrity of the documents they notarize in jeopardy along with the interests of their clients." CLOSEN, *supra* note 2, at 295. Moreover, lawyers are often able to bring to bear considerable persuasive power over their own clients, in order to enlist them in notarial misconduct. The concern has regularly been voiced about "the inequality inherent in the [attorney-client] relationship, in which the lawyer has considerable power over the client." FREEDMAN, *supra* note 765, at 7. "To faithfully serve the public, the Notary must be aware of . . . situations in which he is not qualified to act so that he does not do his constituents and himself a disservice." ROTHMAN, *supra* note 166, at iii (quoting Edmund G. Brown).

850. "Almost always, the documents involved in [notarial wrongdoing by attorneys] are later filed for public recording or filed as part of legal proceedings, lawsuits and arbitrations." Closen Part II, *supra* note 765, at 7. See, e.g., *In re Slocombe*, 867 N.E.2d 130, 130 (Ind. 2007) (describing a case where an attorney-notary falsely notarized an affidavit for his client and filed it).

851. "A review of state Bar Association disciplinary proceedings shows that attorneys not only regularly violate Notary laws; they also knowingly make false representations to recorders, judges, arbitrators and others." Closen Part II, *supra* note 765, at 7.

852. MODEL RULES OF PROF'L CONDUCT R. 3.3.

853. See Young, *supra* note 764 and accompanying text; CLOSEN, *supra* note 2, at 357-415 (discussing attorney responsibility and liability for notarial

and for each such case which gets into the published reports there are undoubtedly a hundred cases of lawyer discipline involving one or more notarial violations that do not get published. Worse yet, for every reported case of lawyer sanctions for notarial violations there are certainly thousands of violations that are never detected or brought to the attention of lawyer-discipline authorities.<sup>854</sup> Several reasons explain, although do not justify, why lawyers are among the worst offenders of sound notarial practice and of notary law itself.

Lawyers get no formal instruction about notary law, ethics, and practice in the law school curriculum. Only two mainland U.S. law schools have offered a course in notary law and practice, and then only on a few occasions to very small numbers of students.<sup>855</sup> Notary law, ethics, and practice are not included as topics for possible testing on any of the state bar examinations. Lawyers get no coverage of notary law, ethics, and practice in their continuing legal education programs, except for one yearly seminar attended by a small number of attorneys and held in conjunction with the annual conference of the National Notary Association.<sup>856</sup> Although the legal profession should be well aware

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misconduct); *see also Ex-Notary Loses His Right to Practice Law*, NOTARY BULL., Oct. 2004, at 5 (reporting that a former Louisiana attorney and notary, Archie L. Jefferson, has been permanently declared ineligible to practice law in part because he continued to act as a notary although his notary commission had expired along with his law license).

854. Attorney wrongdoing relating to notarial acts is so widespread that some lawyers have told us everyone in the legal community seems to be doing it. We know that most attorney-notaries knowingly insist on engaging in the conflicted practice of notarizing for their own clients on documents prepared by those attorney-notaries. We know that attorneys almost never voluntarily come forward to report themselves or their peers for other kinds of blatant notarial misconduct and that attorneys who engage in notarial misdeeds almost always conceal their misconduct. With so much experience committing notary fraud, it should be no surprise that most attorney wrongdoing regarding notarizations goes undetected.

855. According to NNA President Milton G. Valera, there has been a "failure of law schools to teach the critical principles and practices of notarization." *Case Law Book is Introduced at the NNA Conference*, NAT'L NOTARY, Sept. 1997, at 25; *see also* Charles N. Faerber, *Law Text a Landmark*, NAT'L NOTARY, July 1997, at 8 (opining that "invariably [in many cases attorneys] do not know the law [of notarizations] because Notary principles, practices, statutes and case law have never been taught in any organized fashion in American law schools"). Nearly 200 years ago, this quip from Jeremy Bentham could have applied here: "Lawyers are the only persons in whom ignorance of the law is not punished." MACMILLAN DICTIONARY OF QUOTATIONS, *supra* note 49, at 320. "The NNA published an extensive legal casebook appropriate for teaching Notary law to law students and lawyers, but only two law schools offered Notary law courses using this book for very brief periods." *Closen Part II*, *supra* note 765, at 15.

856. *See* CLOSEN, *supra* note 2, at x (quoting Frankie Sue Del Papa) (commenting that "[m]any times attorneys inadvertently ask a Notary to



of this serious problem of unethical practices relating to notarial misconduct, in cowardly fashion the profession has largely chosen simply to ignore it, and hence to perpetuate it.

Lawyers are often overloaded with clients and cases, and under self-inflicted time pressure those busy lawyers fall prey to shortcuts and slipshod practices that include abuses of notarial matters. Lawyers regularly claim these violations of notarial law were undertaken in the best interests of their clients, to protect client's rights, to meet pressing deadlines, and to do what clients would have wanted done.<sup>857</sup> However, these excuses serve mainly to compound the lawyers' violations, because unethical lawyers are really trying to protect their own interests by justifying their misconduct. Not surprisingly, unethical lawyers sometimes assert that mandatory notary journalizing will take too much additional time to carry out.<sup>858</sup> But in reality, journalizing of notarizations would make it almost impossible for unethical attorneys to conceal their notary law violations, and such attorneys do not want to give up this avenue to expediency.<sup>859</sup>

The frequently incomplete and antiquated state and territorial notary statutes have paid very little attention to issues of notary ethics and particularly to the subject of avoidance of conflicts of interest, such as may occur with the conduct of

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perform a notarial act which . . . is unlawful. This is mainly due to a lack of basic knowledge on the attorney's part."); *see also id.* at iii (quoting Milton G. Valera) (opining that "too few attorneys are fully aware of the unique demands of the office of Notary Public.").

857. *See The Crisis of Responsibility, supra* note 216, at 11 (concluding that "[t]he human universals of laziness and ignorance are also factors: Some Notaries are just too lazy to care, and others just don't understand their potential devastating liability. Perhaps the most common alibi of all for not being responsible is: 'I just don't have time.'). Lawyer-notaries have even argued for mitigation in their disciplinary cases on the basis that the type of notary misconduct involved is commonplace, but such argument seems only to compound the misconduct and offend the judges deciding the disciplinary matters. *See, e.g., Farinas*, 608 So. 2d at 22 (illustrating a case in which the hearing referee had actually agreed that the practice of notarizing for absent client signers was common among the members of the bar).

858. *See Fitzgerald, supra* note 19, at 2 (noting that "[k]eeping a record of all notarial acts takes only a few minutes"); *CLOSEN, supra* note 2, at x (emphasis in original) (quoting Frankie Sue Del Papa) (opining that "Notary procedures, such as maintaining a journal, *are not* trivial, inconvenient or a 'nuisance.'").

859. The misconduct of attorneys has been discovered or reported by some other parties, because the attorneys involved have concealed their misdeeds and/or have at least hoped their wrongdoing would not be discovered. *See CLOSEN, supra* note 2, at 357-415 (discussing the hundreds of case examples of lawyer discipline for notarial misconduct); *Young, supra* note 764; *see also CLOSEN, supra* note 2, at x (observing that "[s]ome attorneys may attempt to pressure Notaries to disregard the law or to violate the law in an attempt to . . . cover up their own mistakes or omissions."). A well-known proverb applies particularly fittingly here: "There are none so blind as those who will not see." *DALE, supra* note 24, at 42.

attorney-notaries. Legislation has been so inadequate in this regard that the notary statutes of as many as twenty-seven jurisdictions do not expressly forbid notaries from notarizing their own signatures or from notarizing documents in which they are named,<sup>860</sup> and only as few as nine notary statutes prohibit notaries from notarizing for their own family members (such as spouses, parents, and children).<sup>861</sup> Far more special statutory provisions have been enacted to allow for ethically questionable notarial conduct than to prohibit activities which may result in the appearance of improprieties.<sup>862</sup> It is no wonder that little sense of ethical standards has been instilled in so many U.S. notaries, including lawyer-notaries.

Astonishingly, in light of the common knowledge about all the problems just described, lawyers have succeeded in getting several U.S. jurisdictions to grant special notarial privileges to attorneys, favors that are not extended to any other professional group.<sup>863</sup> Some jurisdictions automatically confer notarial authority upon licensed attorneys without the need for them even to apply for notary commissions or to attest to having read the local notary statutes (as a number of states require).<sup>864</sup> One state even grants

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860. "Many jurisdictions have failed to enact legislation specifically prohibiting notaries from notarizing their own signatures or from notarizing instruments in which they are named." Closen & Orsinger, *supra* note 64, at 571; *see also id.* at 572-73 (listing the 27 jurisdictions that have yet to enact legislation prohibiting notaries from notarizing their own signatures).

861. An old proverb which states a matter accepted by virtually everyone recites, "[a]ffection blinds reason." DALE, *supra* note 24, at 19. With more than 4.8 million notaries, there is certainly no reason that notaries should be servicing their own family members. "Disappointingly, few jurisdictions have enacted any kind of statutory prohibitions against notaries performing notarial acts for their family members." Closen & Orsinger, *supra* note 64, at 587. Table 3 lists the nine jurisdictions with such prohibitions. *Id.* at 626.

862. Appearance is important. The appearance of impropriety suggests to a client and others that the conduct of a lawyer cannot be trusted, for the lawyer either did not recognize the conflict or impropriety (and was therefore lacking in perception and competence), or recognized it and elected to proceed regardless of such concerns (and was therefore lacking in integrity). "[A] conflict of interest can exist even though no actual impropriety . . . has occurred and even though no actual impropriety will in fact take place . . . because conflicts of interest are forbidden in order to guard against potential improprieties and against the appearance of impropriety." FREEDMAN, *supra* note 765, at 181.

863. "Attorney-notaries get lots of special treatment." Closen, *supra* note 148, at A24. Incredibly, in Florida in 2004 Senate Bill 1312 was introduced in the legislature to permit "a Notary to notarize the signature of an immediate relative if the relative or the Notary were an attorney licensed by the Florida Bar," but the bill was withdrawn from consideration. Armando Aguirre, *supra* note 704, at 14.

864. "[I]n Delaware and Maine, licensed attorneys are automatically empowered to perform acts that may be done by notaries public." Closen, *supra* note 148, at A24.

lifetime notary commissions to its lawyers.<sup>865</sup> Some jurisdictions waive the mandatory notary bonding provisions or residency requirements for lawyers, or grant enhanced authority to attorney-notaries.<sup>866</sup> Most incongruously, some states actually exempt attorneys from the required notary education and testing statutes, as though somehow lawyers possess innate knowledge about notary law, ethics, and practice.<sup>867</sup> Perhaps, the assumption is that lawyers will at least generally demonstrate sufficient respect for the law that they will study and honor the notary statutes — but any such assumption is hardly supported by the reality of the range and magnitude of attorney abuses of the notarial process.<sup>868</sup>

Lastly, lawyer-notaries who notarize for their own clients face the possible prospect of becoming witnesses in legal proceedings that challenge those notarizations. It may even develop that the attorney-notaries will sometimes be confronted with the problem of having to testify against their own clients. This happens when clients, who are just ordinary people, change their minds and decide the transactions they had engaged in should not in hindsight have been undertaken.<sup>869</sup> After all, it should be

865. "Wisconsin grants permanent commissions to attorney-notaries but not to ordinary notaries." *Id.*

866. "In Louisiana, ordinary notaries have authority only within their home parishes and must post a surety bond, while attorney-notaries possess statewide authority and are exempt from the bond requirement." *Id.* "Michigan and Rhode Island require residency for ordinary notaries, but nonresident attorneys may be commissioned." *Id.*

867. "In Louisiana and New York, ordinary notary applicants must pass a test, but attorney-applicants are not tested." *Id.*

868. Lawyers do not deserve favored treatment in regard to notarial appointment and practice. "[V]olumes of cases of lawyer discipline, including numerous cases of attorney sanctions for notarial misconduct, prove lawyers to be subject to the same frailties as others." *Id.*

869. See *Attorney as Witness*, supra note 819, at 1512 (adopting the position was adopted that attorney-notaries could notarize on documents prepared for their clients, provided "there is no probability that the lawyer will be a witness in regard to his client's signature." However, the caveat just expressed demonstrates a shallow understanding of the features of a notarization, which may involve issues about the date of the signing, the document to which the notarization pertains, the presence of the signer at the notarization, the identity of the signer, and the oath or affirmation administered to the signer. The concern has regularly been expressed, based upon plenty of real life instances, that a document signer who appears before a notary and obtains a notarization may later "claim he never appeared before" the notary. Barich, supra note 19, at 32. "No act is more human than changing one's mind . . . It is not unusual for a document signer to change his or her mind after having signed an important document . . . sometimes . . . years after the document was signed and notarized." JOURNAL THUMBPRINT, supra note 23, at 17. See, e.g., *Succession of Ventre*, 682 So. 2d 988, 989 (La. App. Ct. 1996) (illustrating a case in which both a party to a contract and the notary who notarized it changed their minds and testified that it had been backdated and was therefore invalid).

remembered that one of the principal reasons for adoption of the Statute of Frauds in the 1600s and thereafter is the fact it prevents individuals who have agreed to contractual obligations from denying such agreements exist as a way of avoiding their responsibilities.<sup>870</sup> The possible change of heart by persons who have had their signatures notarized is a frequent concern among notary educators and experienced notaries. Humphrey, for instance, once wrote, “[I]t would inevitably happen that A or B or C would sign a paper and thereafter say he did not sign it.”<sup>871</sup> One way to escape from an instrument or transaction which bears a notarization is to attack the notarization. At that point, attorney-notaries and their clients would occupy opposing positions, and such twisted circumstances have arisen.<sup>872</sup> Lawyers should avoid conduct that may cause them to become witnesses, and must avoid conduct that may cause direct conflict with their own clients. To put it simply, attorney-notaries who notarize for their own clients on documents those attorneys prepared are inviting unnecessary complications and problems. Lawyers should not oppose journalizing of notarizations, for detailed record-keeping, including chronological entries with signatures and thumbprints, will prove that signers were present and that valid notarizations took place.<sup>873</sup>

Lawyers and the organized bar should cease their selfish and

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870. The Statute of Frauds requires that, in order for certain contracts to be legally enforceable, the contracts or a memorandum evidencing them must be in writing. Thus, if a covered contract is somehow satisfactorily in writing, a party cannot merely deny its existence and avoid its obligations, as would be possible if there were only an oral agreement. See generally MICHAEL L. CLOSEN, ET AL., *supra* note 103, at 371-411 (discussing the Statute of Frauds).

871. HUMPHREY, *supra* note 205, at 12. “A Notary journal provides a record that a notarization took place, which can be crucial if a signer or other person affected by the notarized document claims otherwise.” Barich, *supra* note 19, at 37. A wise old adage warns that: “A man apt to promise is apt to forget.” DALE, *supra* note 24, at 123.

872. “Journals protect against unfair claims regarding the integrity of any notarization, document each signer’s identity and ultimately assure the consumer that documentary transactions have been executed securely and can withstand legal challenge.” Thaw, *supra* note 869, at 7. Lawyers need to learn more about the mechanics and purposes of thorough notarization, or they will remain proverbially blind. “There is no blindness like ignorance.” DALE, *supra* note 24, at 42.

873. Hopefully, more attorneys and bar organizations will come around to our point of view. “A wise man sometimes changes his mind, a fool never does.” DALE, *supra* note 24, at 389. Consider one more prospect.

[T]o the extent that notary laws will serve as the analog for digital signature statutes and for statutes creating the new legal specialty of international notarial practitioner . . . we run the risk of allowing this conflicted practice of lawyers to carry over into international and electronic commerce. The effect would diminish still further the . . . image of U.S. notarizations.

Closen, *supra* note 148, at A24.

misguided opposition to mandatory record-keeping by notaries. To the extent they do not cease, their opposition should be almost completely discounted for the array of reasons set out above. Attorneys should realize that thorough notarial record-keeping is advantageous to them and their clients. Such records will help to assure the validity of the documents lawyers prepare, and in turn will better protect the interests of their clients. For professionals like lawyers who are so generally committed to the wisdom of record-keeping for their clients and other parties to so vehemently object to its application to themselves is utterly unprofessional and disgraceful.

#### XI. PRONOUNCEMENT AND PUBLICATION OF THE RECORD-KEEPING STANDARD

All too often. . . [the] sense of [notarial] responsibility has been thwarted by a lack of good information on the proper performance of notarial acts.<sup>874</sup>

There can be no surprise that we have advocated as we have done in this Article. To journalize, or not to journalize? That is the question. And there are only two possible answers. Nor can there be any genuine surprise about our suggestion that the common law act as the source of the mandate to journalize notarizations. There is, after all, a long and substantial history of the judiciary serving as the forum of last resort on all sorts of matters, when the legislative and executive branches have failed to serve as the sounding boards or when prior legislative and executive decisions have become so dated as to be irrelevant or unjust. While the legislative and executive branches enjoy great discretion as to whether they will consider matters at all, the judicial branch can seldom avoid the responsibility to address matters if such matters are properly brought before it. In United States jurisprudence, actual controversies and legal cases arising therefrom have served as fundamental prerequisites to judicial decision-making, and cases of first impression have regularly served as the vehicles for substantial change and progress.<sup>875</sup>

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874. ROTHMAN, *supra* note 166, at iii (quoting Edmund G. Brown in Preface).

875. Under the Constitution, the judicial power extends to "cases" and "controversies." U.S. CONST, art. III, § 2. "Most lawmaking by courts occurs in decisions of first impression that produce evolutionary accretions to the body of existing precedents." PROSSER & KEETON, *supra* note 36, at 18. "The progress of the common law is marked by many cases of first impression, in which the court has struck out boldly to create a new cause of action, where none had been recognized before." *Id.* at 3. "Tort cases look backward: they decide that conduct that has already taken place was wrongful. . . . Once the tort case is decided, however, it has effect as precedent, and as precedent it looks forward in time." DOBBS, *supra* note 40, at 9. After a lawsuit is properly filed, if it is not resolved by dismissal by the plaintiff or by agreement of the

Such cases sometimes take the form of “test cases” originating either from happenstance or by design, and thereafter being carefully planned and shepherded by the plaintiffs’ attorneys.<sup>876</sup> In addition, supplemental resources are often solicited to assist in support of such test cases, such as financial contributions, volunteer legal services, and help from interested organization—especially amici curiae or friends of the court.<sup>877</sup> Those litigations present to the courts issues not previously addressed at all or not previously addressed in the particular ways formulated in the test suits. These test cases, especially when they are well selected and handled by skillful attorneys, have frequently resulted in decision-making on the most significant issues of the time. Sometimes, when more than one forum is available in which to pursue a case, the plaintiff along with the plaintiff’s lawyers will take into consideration as much relevant information as possible in order to select the most favorable forum in which to bring suit.<sup>878</sup> The advantages to be gained from mandatory notary record-keeping certainly warrant test case strategizing.

To begin, the occurrence facts of the appropriate case to pronounce the common law duty to create and maintain a detailed notarial journal will need to have taken place in one of the states or territories which do not expressly by statute or executive order require notary record-keeping, but the forum could be in the same

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parties, then the court must decide the case. And, the number of such suits has risen dramatically. “[J]udicial creativity—judicial activism, as it has come to be called—has increased markedly, both in public and in private law.” Berman, *supra* note 62, at 513.

876. See the discussion of test case litigation in another context in Michael L. Closen & Jon D. Cohen, *Judicial Receptivity to HIV-AIDS Advocacy: An Empirical Survey*, 17 S. ILL. U. L.J. 211, 222-26 (1993). “Both by the process of interstitial lawmaking in cases of first impression and by occasional overruling decisions, change and development have come, as social ideas have altered, and they are constantly continuing.” PROSSER & KEETON, *supra* note 36, at 19.

877. See generally Michael L. Closen, *The NNA As ‘Amicus Curiae’*, NOTARY BULL., Oct. 2006, at 7 (discussing the procedures and advantages when friends of the court participate in legal cases, especially notary cases, and in particular the role of the NNA as the most active and respected notary membership and education organization in the world); see also DOBBS, *supra* note 40, at 28 (pointing out that in deciding cases, “courts will frequently look to general principles of common law or to the opinions of commentators or respected professional groups”).

878. See Closen & Cohen, *supra* note 876, at 215-22 (considering the factors involved in the selection of a forum for litigation). Typically, a lawsuit must be filed where either the cause of action arose (where the occurrence facts took place), or where the defendant resides or conducts business. *Id.* at 215. Thus, in a notary case on the issue of a common law duty of notary journalizing, the only appropriate forum would be forum where the notarization was performed, and that forum would need to be one of the jurisdictions which does not statutorily require journalizing. Those 35 jurisdictions are listed, see *supra* notes 199-200.

jurisdiction or some state or territory that expressly mandates such record-keeping. The test case on the journalizing duty cannot be one the origination of which has been planned in advance or artificially created by the plaintiff—as will be obvious immediately. The case will simply be a notary fraud or malpractice case in which no journal was maintained or at least no journal was preserved. The appropriate lawsuit would be one for damages against a notary, and/or the notary's employer, alleging financial injury proximately caused by the negligent or fraudulent conduct of the named notary in performing a notarization of a plaintiff document signer's signature and in failing to prepare and preserve a notary record of official acts. In regard to the question of whether to mandate notary journal record-keeping, a test case will have to be incorporated into an ordinary case asserting negligent or fraudulent performance by a notary. That is, once the potential for an ordinary suit for negligence or fraud against a notary has arisen, or once such an actual case has been filed, the notary journal question can be timely added to the case as a test of that issue. The reason we so casually suggest to simply add the journal issue to a standard notary malpractice case is the almost certain prospect that the defendant notary will not have created and/or preserved a proper journal record. A notary careful enough to maintain a notarial journal is not likely to be careless enough to commit malpractice, and a notary who completes a journal entry at the beginning of a notarization has created a road map that will most probably guide him/her through the full notarial procedure without errors or omissions.<sup>879</sup>

Thus, the best case will, unfortunately, be one where the notary has actually been guilty of negligence or fraud and where the negligence or fraud would undoubtedly have been prevented if the notary had prepared and retained a detailed journal entry for the notarization in question. As we have seen, such cases where notaries have been guilty of negligent or fraudulent conduct have not been uncommon. Indeed, they occur all too often. Ultimately, a thoughtful trial judge and/or appellate court panel will then have to adopt the view of this Article and write a thorough and well-reasoned opinion declaring that notaries possess the common law responsibility to maintain and preserve detailed journal records of their official acts. That outcome almost happened in a recent case, although that litigation was not prepared as a test case (rather, by coincidence, one of the authors of this Article simply became involved in the litigation). The case proceeded without any outside assistance from interested individuals or groups, including without help from any *amici curiae*.

The idea to actively advocate in an actual litigation for a

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879. See *supra* note 209 and accompanying text.

common law duty of notaries to journalize and preserve the records of their official acts was born when one of the authors, Professor Closen, was retained as an expert witness on behalf of the plaintiff who was asserting notary malpractice in the trial court case of *Vancura v. Katris* in the Circuit Court in Chicago, Illinois, a few years ago.<sup>880</sup> The lawsuit was already well underway when Professor Closen was retained. Remarkably, the challenged notarization had occurred on December 20, 1995; the actual bench trial took place on seven days spread between September 2005 and January 2006; and the trial court's written opinion was filed on May 2, 2006.<sup>881</sup> In other words, a decade passed between the time of the relevant notarization and the trial. Illinois did not at any of those times, and does not now, statutorily require notaries to create and retain journals of their official acts.<sup>882</sup>

According to the opinion of Judge Bernetta Bush in the *Vancura* case: (1) the plaintiff Vancura's signature had been forged on a mortgage release document, and the plaintiff did not personally appear before the notary in question on the occasion of the notarization of that forged signature;<sup>883</sup> (2) the plaintiff's forged signature was notarized by the notary who did not obtain photo identification (or perhaps any identification) from the signer, or alternatively the notarization itself was also forged by a co-worker or someone else who had access to the notary's seal;<sup>884</sup> (3) the defendant-notary at the suggestion of his employer Kinko's (the copy store) to prepare a notarial record had maintained a small, homemade, spiral notebook-style ledger of his notarizations;<sup>885</sup> (4) the ledger entries prepared by the notary did not include key details (such as document types or their expiration dates) for documents of identification used to identify signers of

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880. *Vancura*, No. 98 CH 6225 (Chancery Division, Cook County Ct. 1998).

881. See Opinion of Judge Bernetta Bush, in *Vancura*, filed May 2, 2006, at 1,2,15; see also Barich, *supra* note 321, at 33 (commenting that "[l]awsuits typically arise years after a notarial act is performed").

882. The judge noted that "Kinko's argued that there is no requirement in Illinois that Kinko's train its employees. There is no requirement that [the notary] maintain a logbook." *Id.* at 14.

883. *Id.* at 2-3 (observing that "by all accounts the signature on the Assignment of Mortgage was not [the plaintiff] Vancura's"). "It is undisputed in the record that the signature on the Assignment of Mortgage is not [the plaintiff's], and further that [the plaintiff] was not present at Kinko's when the document was notarized." *Id.* at 7.

884. *Id.* at 6-8 (finding someone else at Kinko's affixed the notary's seal and signed the notary's name on the mortgage assignment, or the notary himself failed to obtain proper identification from the document signer whose forged name had already been signed on the document).

885. See *id.* at 12-13 (regarding the insufficient format of the notary's homemade journal, there were general references to the expert testimony of Professor Closen).



instruments, nor did the entries include the signatures or thumbprints of the instrument signers;<sup>886</sup> (5) the notary's homemade record had been kept at the business premises in the desk of a supervisor, but otherwise not secured, and it had been accessible to other employee-notaries and ordinary employees of the company;<sup>887</sup> (6) the notary's journal had been left behind at the business premises when the notary terminated his employment with the company and had been destroyed by the employer;<sup>888</sup> (7) the notary's official seal had also been left at the business premises in the same manner, accessible to other employees;<sup>889</sup> (8) all of the occurrence events and the litigation took place in Illinois, where the notary statute did not direct its notaries to create and preserve notary journal records, and obviously did not describe what information to record in a notary journal;<sup>890</sup> (9) just prior to the time of the notarization in question, the notary's employer Kinko's had embarked upon a program to provide notarial services to the public at its various locations, and Kinko's had urged some employees (including the defendant-notary) to become notaries and had paid the fees for its employees to do so;<sup>891</sup> (10) although the state notary statute did not require it to do so, Kinko's undertook to provide notary training to its employees, but the training was done by a Kinko's agent who had never been a notary and whose training of the Kinko's notaries was described as unsatisfactory;<sup>892</sup> (11) the Kinko's notaries were

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886. *See id.* (regarding the insufficiency of the substance of the notary's journal entries, again there were general references, as in the preceding note, to the expert testimony of Professor Closen).

887. *Id.* at 10 (stating the "evidence adduced at trial establishes that [the notary] did not secure his . . . logbook, pursuant to the manager's instructions the logbook was kept in the manager's office, which was not always locked").

888. *Id.* (noting that "[w]hen [the notary] left employment at Kinko's, he left his notary . . . log book at Kinko's. The logbook he left at Kinko's was destroyed.").

889. *Id.* (stating the "evidence adduced at trial establishes that [the notary] did not secure his seal... When [the notary] left employment at Kinko's, he left his notary seal . . . at Kinko's."). The judge concluded that the "testimony leads the Court to conclude that either someone at the Kinko's store other than [the notary] affixed [the notary's] notary seal and signed [the notary's] name to the Assignment of Mortgage or [the notary] failed to get proper identification since [the plaintiff] Vancura was not present in the Kinko's on December 20, 1995."). *Id.* at 8.

890. *Id.* at 2-3 (pointing out that the real estate in question was located in Wheaton, Illinois, and the Kinko's location where the notarization took place was in Oak Lawn, Illinois). The judge also pointed out, as the defendant Kinko's argued, that Illinois law did not mandate the keeping of a notary journal. *Id.* at 14.

891. *Id.* at 9 (pointing out that the notary "testified that he became a notary at the request of his employer Kinko's"). "Professor Closen testified that . . . Kinko's asked [the notary] to become a notary for Kinko's." *Id.* at 13.

892. *Id.* "Professor Closen testified that . . . Kinko's provided notary training

urged to keep notarial records, but they were not instructed about the proper form and contents of such records, about the need to secure their notary records (and notary seals), nor about the need to retain and preserve their records;<sup>893</sup> (12) Kinko's received all of the notarial fees collected for the notarizations performed on its premises by its employee-notaries;<sup>894</sup> (13) by the time of his deposition and his testimony at trial, the defendant-notary could recall virtually nothing about the notarization in question;<sup>895</sup> and, (14) the plaintiff Vancura was damaged in the amount of some

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for [the notary] and other company notaries. Kinko's used an instructor who had no experience as a notary and was not familiar with Illinois notary requirements, to train its notaries. Kinko's training was inadequate and incorrect in a number of respects." *Id.*

893. *Id.* "Both Notary seals and Notary journals must be secured against theft and misuse." Closen, *Risk Management*, *supra* note 17, at 27. Of course, it is well known that unsecured seals can be pilfered and misused. *See Seal Used in Fraud Case*, NOTARY BULL., Oct. 2004, at 3 (reporting about the case of a Florida notary who alleges that one of his employees forged his signature and used his notary seal on several documents in order to commit various document frauds); *Imposter Impersonates Notaries and Former Pro Baseball Player*, NOTARY BULL., Oct. 2004, at 8 (reporting the story of an imposter who impersonated a notary and who was in possession of several notary seals in various names); *Suspect Misused Seal*, NOTARY BULL., June 2004, at 5 (reporting that an Alaskan woman had misused a notary seal as part of her extensive fraud schemes). *See also* Thaw, *supra* note 18, at 7 (commenting that "[a]s Notaries, if our identities are assumed by other persons, these individuals may also assume our notarial functions."); *Woman Sentenced to Prison for Forgeries*, NOTARY BULL., June 2004, at 7 (reporting about the case of a woman who forged the signatures of some of her relatives and of a notary to perpetrate financial frauds).

894. *Id.* The notary "testified that he became a notary at the request of his employer Kinko's and that all fees collected for his notarial services were retained by Kinko's." *Id.* at 9. "Kinko's charged and retained the fees assessed for notary services." *Id.* This point is especially important, because it is the notary who is the publicly commissioned official, not the employer that holds the commission. Thus, if the employer insists upon receiving the nominal notarial fees, then it seems the employer is more than is usually the case in the position also to be charged with responsibility for negligent performance of the notary. How incongruous for an employer to be so focused upon the trivial notarial fees, but to have so little disregard of notarial procedure that it hired a notary instructor to teach its future notaries who had never been a notary and who instructed its employees inadequately and incorrectly.

895. *Id.* at 7. The notary "did not offer an explanation as to how his seal became affixed to the Assignment of Mortgage; he only stated that he did not believe the signature on the document was his . . . [The notary] testified that he had no recollection of [the plaintiff] appearing in the Oak Lawn Kinko's." *Id.* Since the notary had abandoned his skimpy notarial logbook, leaving it behind at the employer's premises, and since it had then been destroyed, there was no notarial journal to assist the notary in his recollection of the circumstances which had occurred years earlier. "When [the notary] left employment at Kinko's, he left his notary seal and log book at Kinko's. The logbook he left at Kinko's was destroyed." *Id.* at 10.

\$110,000 (plus the loss of 10 years of interest on that sum) which had been secured by a mortgage that was fraudulently released in major part because of the notarization of his forged signature.<sup>896</sup>

The plaintiff Vancura had sued the notary, the notary's employer Kinko's, and others for the injuries suffered due to the successful forgery of the release of the commercial instrument.<sup>897</sup> Among numerous other matters, Professor Closen testified at his expert deposition and the judge allowed him to testify at the bench trial that the notary had the responsibility to prepare and preserve a journal far more complete than the one the notary said he had created and that had been destroyed.<sup>898</sup> By agreement, the case against the notary was settled, including payment of \$30,000 to the plaintiff from the notary's statutory \$5,000 bond and from the insurance coverage of \$25,000 which the employer had carried on each of its notaries.<sup>899</sup> The case against the employer Kinko's went to trial and judgment on theories of common law direct negligence of the employer in supervising and training its employee-notary and statutory vicarious liability resulting from the negligence of the notary (pursuant to the Illinois notary statute).<sup>900</sup> Kinko's was held responsible by Judge Bush for the \$110,000 liquidated sum, plus statutory prejudgment interest for the period of more than ten years.<sup>901</sup>

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896. *Id.* at 12. "Judgment is entered in favor of [plaintiff] Vancura and against Kinko's, Inc. in the amount of \$110,000 plus statutory pre-judgment interest." *Id.*

897. *Id.* at 3-5. There were five defendants—the notary, the notary's employer Kinko's, and three named individuals who were alleged to have participated in the forgery of the plaintiff's signature and its fraudulent notarization.

898. *Id.* at 12-14. Until the day of Professor Closen's trial testimony, it was uncertain whether the judge would allow his testimony on notary record-keeping at all, because the Illinois notary statute does not mandate it and because the defendants strenuously objected to such testimony. "Kinko's argues that there is no requirement in Illinois that Kinko's train its employees. There is no requirement that [the notary] maintain a logbook." *Id.* at 14.

899. *Id.* at 4. "At the time of trial, the Court had already entered a \$30,000 judgment against [the notary] based upon an agreement of the parties." *Id.* Of course, this agreement to settle with the notary was terribly important and highly disadvantageous to the employer Kinko's, for the vicarious liability of an employer for the misdeeds of an employee is purely derivative—and based upon the fault of the employee (which had been conceded).

900. *Id.* at 5. There were five defendants sued by the plaintiff, and the plaintiff "Vancura filed a five count complaint in this action." *Id.* at 3. The plaintiff "Vancura states claims against Kinko's for Violation of the [Illinois] Notary Act and Negligent Supervision and Training. These claims will be addressed separately." *Id.* at 5.

901. *Id.* at 12, 14. Kinko's was found liable under both the statutory cause of action, and the common law cause of action.

Subsequent to the Article going to press, in a 2-1 decision in *Vancura v. Katris*, the Appellate Court of Illinois, First District, Sixth Division, continued

Although the trial judge found Kinko's liable under both the common law and statutory theories, the common law responsibility will be the focus of the remainder of our discussion. First of all, it was apparent during the course of the proceedings about notary law and practice that the judge was quite attentive and interested in understanding the positions of the parties, and her fifteen page written opinion confirms that the judge took the case quite seriously.<sup>902</sup> The judge was most willing to be educated about notarial practices and standards. She seemed especially concerned regarding the plaintiff's complaints about the failures of the defendants relating to journal record-keeping. To start, the mere fact that the judge allowed expert testimony on the subject of record-keeping was telling, for the state notary statute did not require notaries to journalize.<sup>903</sup> Professor Closen explained to the judge the various purposes served by a detailed journal entry—its value as a guide to a notary in performing a notarization, its assistance in providing a present exemplar signature for comparison with the signature on the principal document and simultaneously in providing evidence that the signer did in fact personally appear before the notary at the time of the notarization, its advantage for recording the manner in which a document signer is identified (such as by documents of identification), and its benefit in helping a notary to recollect the circumstances of a notarization which had been performed long ago. Most importantly, according to Closen's expert testimony, for a case like the instant one in which the notary claimed that the notarization itself was forged, a securely bound, thoroughly maintained, and contemporaneously and chronologically kept journal would have

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the trend of expanding the common law duties owed by both notaries and employers of notaries. *Richard P. Vancura v. Peter Katris, Gustavo Albear, Glenn S. Brown, Randall Boatwright, Old Kent Bank, as Trustee Under Trust Agreement 6927, and Kinko's, Inc., No. 1-06-2750, 2008 WL 5423357 (Ill. App. Ct. Dec. 26, 2008)*. The appellate court affirmed the trial court's finding of employer direct liability for negligent training and supervision based on common law theories, but reversed the finding of employer liability based on the Illinois notary act. *Id.* at \*17, 20. Significantly, the court determined that an inadequately trained or supervised notary employee poses the type of danger or risk of harm from which employers have a duty to protect third parties. *Id.* at \*17 Also of note, in defining the applicable standard of conduct for notaries and notary employers, the court looked beyond statutory language to available notarial professional codes and other common law sources. *Id.*

902. See *Vancura*, No. 98 CH 6225 at 15.

903. The defendants, understandably, objected to expert testimony that the employer did not adequately and correctly instruct the notary regarding the maintenance of a notary journal, that the notary failed to keep a detailed notary journal and that the notary failed to preserve and safeguard the notary journal, when the state statute did not expressly require any of those steps. The judge's opinion notes the objections: "Kinko's argues that there is no requirement in Illinois that Kinko's train its employees. There is no requirement that [the notary] maintain a logbook." *Id.* at 14.

served as highly persuasive evidence of such a forgery, provided there was no journal entry appearing at all for the date and time of the alleged notarization. But alas, all of these advantages of notarial journalization were lost in the instant case because the journal had been so poorly prepared by the notary in the first place and because the journal had not been retained and preserved by the notary in the second place.<sup>904</sup>

Secondly, the judge's written opinion summarized extensively and approvingly the expert testimony of Professor Closen, and it noted the defendants had not impeached that testimony with an expert of their own.<sup>905</sup> Importantly, as to the responsibility of Kinko's, the judge observed: "In Closen's opinion, the notary instructor did not properly train [the defendant notary] and others about the procedures for identifying document signers, did not teach them that information regarding notarizations was to be kept in a journal, did not teach them about steps to take to secure the notary seals and journal, and did not instruct Kinko's notaries on the need to preserve the notary seal and logbook."<sup>906</sup> As the judge further wrote:

It was Professor Closen's opinion that [the defendant notary] was not acquainted with sound notarial practice . . . . [The notary] did not properly secure his notary seal and he did not properly keep his notary journal. Also, Closen testified that when [the notary] left the

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904. Although it is only Professor Closen's impression, it appeared to him that the proverbial light clicked on when the judge heard his explanation how a thoroughly and contemporaneously kept record in a securely bound journal will help to prove a forgery of a notarization. The reason is that no entry at all should appear in the notary journal for the date and time of the alleged (but forged) notarization. In the *Vancura* case, the notary asserted that the notarization was not his, but was a forgery. A properly kept journal would have resolved that issue one way or the other. However, the notary was really in a "catch 22" position, because if the notarization was not performed by him, then someone apparently obtained his notary seal to commit the forgery. Thus, the notary probably was negligent in securing the seal, and that is essentially what he admitted.

905. "Kinko's offers no expert witnesses to support its arguments and the opinion of Professor Closen was not impeached." *Id.* at 14. It is difficult to imagine that the defendants could have found a genuine expert in notary practice who would have opined that notaries should not journalize their notarizations, that notaries should not include detailed information in journal entries (such as the present signature of the document signer), or that notaries should not safeguard their seals and journals. See generally Michael L. Closen, *Experts Can Help Win Lawsuits*, NOTARY BULL., Aug. 2006, at 7 (discussing the advantages to litigants in obtaining the services of experts on notary issues, and in doing so early in order to possibly effect resolutions or settlements of the disputes in question). On many notary issues, there would be only one expert point of view about how notaries should have handled the matters in question. Hence, the side unable to find an expert willing to support its position might wish to consider withdrawing or settling the case.

906. *Vancura*, No. 98 CH 6225, at 13.

employ of Kinko's, he left his seal and journal behind with no assurance that the seal would not be misused or that his logbook would not be lost or destroyed.<sup>907</sup>

Clearly, the subject of proper preparation and safeguarding of the journal was a central concern of the judge.

Lastly and most significantly, the judge distinguished between the liability of Kinko's based upon the statutory theory and its liability under common law tort doctrine.<sup>908</sup> As to that common law cause, the judge accepted Professor Closen's conclusion that the standard of reasonable care applied to the official actions of the notary public.<sup>909</sup> Consistent with what has occurred throughout legal history, as courts have repeatedly looked to protection of the public welfare and to promotion of even broader public policy goals, this judge fixed her sights on those very issues in determining the standard of conduct to which Kinko's was obligated. Regarding the common law tort standard of care, as the judge concluded her opinion, she announced:

The Court finds that while there is no statutory mandate requiring supervision and training of its notaries, the common law requires that Kinko's, as a provider of notary services to the public, must adhere to a standard of reasonableness regarding its notary employees. This standard would require that the notaries employed by Kinko's understand notary requirements and that they are supervised in a manner to ensure that they are performing their duties in accordance with the law, so as to prevent harm to the public. The Court finds that the evidence supports a finding that Kinko's failed to meet the necessary standard of care, and is therefore liable for the negligent training and supervision of its

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907. *Id.* at 12-13; *see also* Adviser [column], NAT'L NOTARY, July 2004, at 44 (noting that a notary had written to the NNA to report "[r]ecently, someone asked me to leave my journal and seal with him so that he could execute a notarization. He told me that he had been a Notary for several years and this was common practice."). Unfortunately, this may be a common practice, but it is absolutely improper and unlawful, endangering the security of the contents of the notary journal and possibly allowing both the seal and journal to be misused to perpetrate a very convincing forged notarization. "A Notary's powers and duties rest with the Notary alone and cannot be transferred to another person." Barich, *supra* note 423, at 36.

908. "[Plaintiff] Vancura states claims against Kinko's for Violation of the [Illinois] Notary Act and [Common Law] Negligent Supervision and Training. These claims will be addressed separately." *Vancura*, No. 98 CH 6225, at 5. The judge's opinion then considers the statutory theory first. *Id.* at 5-12. Next, the judge's opinion considers the common law claim for negligent supervision and training of the notary. *Id.* at 12-15.

909. "Plaintiff and various defendants also allege that Kinko's is guilty of negligent supervision and training of its employees. This liability arises under a common law tort theory . . . Professor Closen stated that in his expert opinion, the standard of care in this area is reasonableness." *Id.* at 12.

notary employees.<sup>910</sup>

When the judge's words from this paragraph and the preceding one are read together, it is clear that she concluded the creation and safekeeping of a detailed notary journal record was part of the common law standard of care owed by the notary to the public under the facts of this case.

Just how significant is the *Vancura* decision, and does its common law notarial standard of care regarding the preparation and preservation of journal records have widespread application? Because the written opinion is that of an Illinois trial court, it will not be widely circulated. It is not published as part of the national reporter system, nor will it be available on-line through the court system. As a non-circulated Illinois trial court decision, it is not likely to have great influence as a precedent, especially outside of Illinois. And, it is pending on appeal, so that its precise holding might be modified by the appellate court (though we hope and doubt that the trial court's thoughtful decision will be reversed or diminished by the appeals court). Most relevant to the lower court decision's importance are the curious factual features of the case relating to the employer Kinko's having provided a training program for its would-be notaries and to its employee-notary having prepared an inadequate home-made journal and having abandoned it (only to have it destroyed). Does the holding in this case, therefore, apply only to cases on similar facts, where for instance employers have urged their employee-notaries to maintain notary records? Would the journal obligations noted by the judge apply across the board to all Illinois notaries, or only to cases where notaries serve as employees of some business entity or where employers have undertaken notarial training of their employee-notaries? We believe the judge essentially announced that the duty of reasonable care owed by every notary to the public includes the obligation to create a detailed journal entry for each official act and to retain and preserve that journal record as a valuable tool of the notarial office.

Without a doubt, the *Vancura* case illustrates the real prospect that appropriate legal cases will arise in which to test the hypothesis of this article. Notaries regularly neglect to journalize and protect and preserve their journal records; these omissions sometimes contribute to damages suffered by members of the public whose signatures have been notarized or who rely upon

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910. *Id.* at 14. The judge's focus on the concern about the performance of notaries "so as to prevent harm to the public" is exactly how judges deciding both notary cases and other tort cases have reasoned and should have reasoned. "[T]he law of torts is concerned not solely with individually questionable conduct but as well with acts which are unreasonable, or socially harmful, from the point of view of the community as a whole." PROSSER & KEETON, *supra* note 36, at 7.

notarized signatures; and, litigations sometimes result from those circumstances. Judges, who have the public interest at heart, can readily be educated about the virtues of notary record-keeping, and can be persuaded to recognize notarial record-keeping duties as part of the common law standard of reasonable care. The additional feature that is needed is a well-developed and well-supported appellate court decision which squarely and plainly pronounces a duty of all notaries to maintain and retain detailed journal records.

Beyond the rendering of a court opinion as described above, we are tempted to declare the rest of the remedy for the maladies identified in this Article to be reasonably simple to incorporate into notarial practice. It would involve a modest three-step process: (1) of informing notaries of this common law record-keeping responsibility, (2) of educating notaries about sound methods for journalizing their official acts and safeguarding the resulting records, and (3) of providing for some degree of governmental agency oversight and enforcement of the journal responsibilities. Governor Brown's comment which introduced this segment of the article centered attention on perhaps the worst fault of the notarial system in this country, namely the widespread failure to inform notaries of the importance of their roles and to thoroughly inform them of sound procedures to carry out their duties.<sup>911</sup> In actuality, the task of informing notaries of the legal obligation to maintain detailed records of their official acts would not be as difficult, protracted, or expensive as might be thought.

The states and territories possess the names and addresses of all of their notaries so that conventional paper notices and/or e-mail messages could be sent to all current notaries advising them of this development. Virtually all the states and territories also publish notary handbooks and/or maintain notary websites through which this information could be disseminated to current notaries and to future applicants for notarial commissions.<sup>912</sup> Actual notary application packages could be revised to include such information. For those few jurisdictions which have adopted mandatory notary education and/or testing but which have not adopted mandatory notary journalizing by statute or executive order, their programs and examinations could readily be revised to

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911. See *supra* note 874 and accompanying text. Of course, widespread knowledge of the common law duty within the general public, the employers of notaries and especially the ranks of notaries is essential. According to Oliver Wendell Holmes, "any legal standard must, in theory, be capable of being known. When a man has to pay damages, he is supposed to have broken the law, and he is further supposed to have known what the law was." HOLMES, *supra* note 36, at 81.

912. See *supra* note 311 and accompanying text.



include coverage of the notary journalizing subject.<sup>913</sup> Lastly, private notary educational vehicles, such as the seminars of notary education providers and the publications of notary membership organizations, could address these record-keeping responsibilities.<sup>914</sup>

As to the governmental oversight and enforcement feature of the solution, this aspect could also readily be achieved. Notary oversight agencies, by regulations in the states, could take a number of steps to impress upon notaries the need to create and retain proper journal records. Agencies could announce to their notaries that journal records would be subject to random, periodic inspection by representatives of the agencies; that the journal records of all notaries accused of misconduct by members of the public would be reviewed by the agencies; that sample pages from journal records would have to be submitted (by means of secure procedures) as part of the applications for renewals of notary commissions; that all requests by members of the public to review and/or copy entries from notary journals would have to be processed and performed by the agencies (which would obviously include the necessity of the agencies obtaining the requested entries from the journals of the notaries); and, that journal records of all former notaries would have to be submitted to the state agencies upon the termination of the notary commissions. In order to comply with such regulations, notaries would necessarily be required to prepare and maintain detailed journal records.

The reform of notary practice suggested in this Article implicates the additional burdens of diligence and time to prepare thorough records and to securely retain them, but that must be expected. "For every hope that you entertain," said journalist Walter Lippmann, "you have a task that you must perform."<sup>915</sup> The additional cost of this task constitutes a pittance in comparison to the added value to be enjoyed by notarial acts. Admittedly, journalizing of notarizations will at least double the amount of time necessary to perform them.<sup>916</sup> But, that expanded

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913. Those jurisdictions which have adopted mandatory notary education and/or testing include California, Florida, North Carolina, and Pennsylvania. *Guide to Notary Commission Eligibility*, *supra* note 669, at 34.

914. The materials of virtually every private notary membership and education organization already extensively cover the subjects of the format, substance, maintenance and safeguarding of notary journals, because virtually everyone who really understands the role and function of notaries appreciates the wisdom of thorough notarial record-keeping and record preservation. The numerous footnote references in this paper to the programs and publications of the NNA relating to notary journal keeping demonstrate the NNA's absolute commitment to the worth of journalization.

915. PLATT, *supra* note 127, at 301.

916. To some it will appear that journalizing will mean notarizations are to be performed twice—once in the journal, and again in the notarial certificate.

timeframe should still be only a few minutes in duration, because the execution of a thorough notarial act should not ordinarily be a complex or complicated process. On the other hand, one of the purposes of seeking to impose a journal requirement is to avoid notarizations becoming rote and common, because when procedures become too routine the opportunities for lackadaisical practices and for errors increases. So, the record-keeping should be quite thorough if notary journalizing is to provide the full advantages described earlier in this text. The declining American notarial system cannot afford not to make this investment of time and effort to preserve and enhance its future.

The states and territories should then proceed to do as they have done on numerous earlier occasions when courts pronounced common law notarial duties. The states and territories should incorporate the common law journalizing responsibilities into comprehensive statutes. After all, neither a single common law decision, nor a few of them, could be expected to fully address all of the relevant issues raised in this Article, while thoughtful and thorough legislation (perhaps based upon the well studied and well tested Model Notary Act of 2002) could readily treat each of the major points of concern. Importantly, this legislative supplement to the workings of the common law would allow state and territorial legislators to exercise their collective wisdom and discretion in ironing out the fine details about notarial journalizing, and would allow for the preservation and exercise of a substantial degree of local control over these significant matters.

## XII. CONCLUSION

The official duties, powers, and functions of a Notary Public are confined to . . . [m]aking a written record of his act of notarization in an official record book kept by him for that purpose, regardless of whether such record is described or required by state law.<sup>917</sup>

Record-keeping by notaries public is global in scope, with the exception of the some thirty-five isolationist states and territories of the United States identified earlier.<sup>918</sup> The notarial system in each of these reluctant jurisdictions has failed twice, once in not adopting mandatory journal-keeping, and secondly in not correcting that error. About thirty years ago, notary expert Raymond Rothman, who is quoted above, recognized the record-keeping obligation inherent in the office of notary public.<sup>919</sup> As a non-lawyer, Rothman simply did not articulate his position in

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We are not offended by that view. An old proverb concurs. "That which is well done is twice done." DALE, *supra* note 24, at 381.

917. ROTHMAN, *supra* note 166, at 7-8.

918. *See supra* note 199 and accompanying text.

919. *See supra* note 918 and accompanying text.

terms of the legal structure necessary to achieve the beneficial results of his expertly based intuition. More recently, the current NNA President Milton Valera concluded: "Maintenance of accurate and reliable records is the hallmark of a professional in any field."<sup>920</sup> Record-keeping is merely so basic and customary a part of the business and governmental traditions that there can be no doubt public officials whose principal role is documentary must thoroughly record and preserve a detailed record of their official acts.

Notarizing without journalizing is much like professional wrestling; it has become a familiar ritual of utterances and gyrations without enough substance; and incredibly, it is taken too seriously by its audiences.<sup>921</sup> There is an old adage, proven to be a truism by its longevity and frequency of repetition, to the effect that "[i]f a job's worth doing, it's worth doing well."<sup>922</sup> In the matter of the case for a common law notarial obligation of detailed record-keeping, the job of the notary public is not just "worth doing," but is unquestionably essential in American commerce and government. A 1993 article in the *Wall Street Journal* reported: "[Notaries] witness the signatures on all that paper that keeps the nation ticking."<sup>923</sup> Former Nevada Secretary of State Cheryl A. Lau has referred to "the staggering volume of sealed and notarized documents that are exchanged across state borders every day in our shrinking world."<sup>924</sup> *The Notary Public Code of Professional*

920. Charles N. Faerber, *States Take Steps to Raise Notary Public Fees*, NOTARY BULL., Ap. 2002, at 15. This is in keeping with the viewpoint that: "There is a strong cultural sense in our society that responsibility comes with authority." STEPHEN M. BAINBRIDGE, *AGENCY, PARTNERSHIPS & LLCs* 29 (Foundation Press 2004). In England where record-keeping is a central feature of the work of notaries, those notaries have had a sterling record of integrity and diligence. "Great, indeed, is the confidence attached to [English] Notaries, and very onerous are their duties; and hence the necessity of their being distinguished for extensive knowledge, probity, discretion, and zeal." BROOKE'S NOTARY, *supra* note 100, at 8. "To the credit . . . of [English] Notaries, it may be here observed, that instances of misconduct . . . or of complaints preferred against them . . . very rarely occur." *Id.* at 9.

921. "A survey shows that wrestling on TV is taken seriously by 93 percent of the viewers." JOE GRIFFITH, *BUSINESS SPEAKER'S LIBRARY OF STORIES, ANECDOTES, AND HUMOR* 257 (1990). It is the turn of notaries to be taken more seriously. "Notaries Public have always provided fascinating footnotes to American history." *Notaries Public in American History*, NOTARY BULL., Apr. 1997, at 3. But the time has come for an expanded role for notaries beyond the mere footnote level, closer to the forefront of efforts to protect against document fraud and identity theft — and this responsibility simply must entail detailed record-keeping.

922. MACMILLAN DICTIONARY OF QUOTATIONS, *supra* note 49, at 457.

923. Lee Burton, *It's a Proud Calling, but the Notary's Lot Is Full of Indignities*, WALL ST. J., June 15, 1993, at A1.

924. FAERBER, *supra* note 15, at iv (referring to Cheryl A. Lau and Foreword).

*Responsibility* concluded that notaries play a “key role in lending integrity to important transactions of commerce and law.”<sup>925</sup> In commenting upon the 2003 Massachusetts Governor’s Executive Order on Standards of Conduct For Notaries Public, NNA President Valera remarked: “It will have an impact in reducing real property frauds and in helping weed out the imposters who circulate among us, whether their intent is financial fraud or terrorist mayhem.”<sup>926</sup> Further, Richard Humphrey long ago cleverly, but accurately, commented, “Clearly enough if we did not have the office of notary public, we’d have to create it or something like it to take its place.”<sup>927</sup> The notary’s role is certainly “worth doing.” To do the notary job “well” requires the creation and preservation of the detailed paper or electronic journal described in this article.

As urged above, the definition of the term “notarization” or the phrase “notarial act” must include the act of recording a thorough journal entry as one of its essential features. Among the byproducts of expanded record-keeping by notaries should be improved understanding of their responsibilities, increased diligence in their official work, heightened self-respect in their positions, and, thus, more professionalism for U.S. notaries. One of the indispensable conditions of professionalism is prudence in practice. Record-keeping is prudent. It is a “hallmark” of professionalism according to the above opinion of NNA President Valera. Absence of documentation renders transactions more vulnerable. Deliberate omission or ignorant neglect of record-keeping amounts to unethical performance.

Sadly and remarkably, it has actually become standard expectation in places which do not statutorily require journalizing that notaries will not be able to recall the circumstances surrounding their notarizations.<sup>928</sup> Business people, lawyers, and even judges in those jurisdictions fully understand that months and years after the occasion of a seemingly ordinary notarization,

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925. NOTARY PUBLIC CODE OF PROF’L RESPONSIBILITY Purpose of the Code at v (1998).

926. Romney Signs Executive Order, *supra* note 47, at 1 (quoting Milton G. Valera).

927. HUMPHREY, *supra* note 205, at 9. “Notaries public have been doing their work in America for three-and-a-half centuries. The early settlers could not get along without them, and neither can we.” Ross, *supra* note 146, at 12 (quoting Julia H. Tashjian, Connecticut Secretary of State).

928. It must be remembered that notarizations tend to be ordinary and regular, and thus they tend not to be memorable. Moreover, many notaries perform large volumes of notarizations, so that each one tends to fade into obscurity. And, many of us have recollections that are quire imperfect, especially with the passage of time. It was humorously, but correctly, said that “[m]emory is the thing you forget with.” MACMILLAN DICTIONARY OF QUOTATIONS, *supra* note 49, at 363 (quoting Alexander Chase).

the notary who performed it cannot be expected to remember the details necessary to assist the parties in some kind of inquiry into, or challenge of, a transaction which bears the notarization of a signature.<sup>929</sup> The authors know of not a single reported court decision in all of U.S. history involving a notarization in which the notary, who had not prepared and retained a journal record, could recall the specific circumstances about the notarization in question. In fact, wrongdoers who have encountered notary journal record-keeping requirements have even unsuccessfully attempted to manipulate notarial record-keeping or to destroy journal records.<sup>930</sup> The heart of our argument for mandatory notary record-keeping lies in age-old wisdom. In the mid-1600s, Sir Edward Coke, as one more distinguished example of many leaders we could cite, wrote: "It is therefore necessary that memorable things should be committed to writing... and not wholly betaken... to slippery memory which seldom yields a certain reckoning."<sup>931</sup> Notary expert Humphrey correctly concluded that "if no notary record is available, injustice and wrong may be done and suffered."<sup>932</sup> The greatest tragedy here is that these difficulties can so easily and inexpensively be prevented—by the couple of minutes it takes to record a detailed journal entry.

No living expert on notarial practice could be produced who

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929. The expectation that a notary will not be able to recall the details of a particular notarization results from the large volume of cases in which notaries are unable to do so and, of course, in which they have kept no journal records to help refresh their recollections. See, e.g., *Webb v. Pioneer Bank & Trust*, 530 So. 2d 115 (La. App. 1988) (where the notary testified he could not recall whether the signer executed the documents in question in his presence); *Florey*, 676 So. 2d at 331 (where the notary testified she could not remember whether the signer had already signed the document in question outside of her presence or whether she observed the signing). Attorney-notaries have been similarly afflicted. See, e.g., *Rokahr*, 675 N.W.2d 117 (Neb. 2004) (demonstrating a case of an attorney-notary who testified she could not recall the details about the notarization in question, a notarization she was found to have back-dated).

930. See, e.g., *Crittell v. Bingo*, 83 P.3d 532 (Alaska 2004) (describing the strange circumstances in which a married couple carried out a scheme to obtain the proceeds of an estate resulting from a fraudulently executed and notarized will witnessed by two imposter-witnesses using false identities, and in which the couple arranged the burglary of the notary's premises to obtain and destroy the notary's record of the notarization); see also *Barich*, *supra* note 222, at 31 (setting out the case of a Florida notary and her sister who falsified notarizations, and then recorded them in the notary's journal—so that investigators were able to use the journal against the notary and sister).

931. *PLATT*, *supra* note 127, at 223. Thomas Jefferson remarked, "Of all the faculties of the human mind, that of memory is the first that suffers decay from age." *THE FORBES BOOK OF BUSINESS QUOTATIONS*, *supra* note 25, at 568.

932. *HUMPHREY*, *supra* note 205, at 233.

would testify that notaries should not maintain journals of their official acts. Nor is any deceased notary expert known to have advocated against the wisdom of journalizing notarizations. No state or territory prohibits its notaries from maintaining journals of official acts. If every objective notary expert supports journalizing, and if no objective and knowledgeable expert would forbid notaries to journalize, then it seems to be at most a small step forward to recognize an affirmative common law duty upon notaries to maintain comprehensive journals of their official acts. When, in the words of President John F. Kennedy, “the high court of history sits in judgment”<sup>933</sup> of the service, in this instance, of the notarial system to commerce and government, its point of view will be greatly enhanced if the reform of procedure advocated herein becomes universally practiced throughout the states and territories. We must banish from notarial functioning the neglect of thorough record-keeping so that omission will no longer mar the notarial system. To do so would culminate in the achievement of the two interdependent and central themes identified in the introduction of this Article—namely, that knowledge should lead to change, and that such change should result in true progress.<sup>934</sup> Indeed, this development would be consistent with the following prediction. “It has been forecast by a number of knowledgeable observers of the Notary scene that, by mid-21st century, there likely will be fewer Notaries per capita than there are now, but these Notaries will be more highly trained and better paid.”<sup>935</sup> To prepare and retain records does not cut against the grain of sound commercial and governmental experience and practice. In these modern times, human nature has become well-disposed toward thorough record-keeping—for we do so much of it in so many facets of our lives. Indeed, notary authority Peter Van Alstyne has correctly observed, “The keeping of certain records is an inherent responsibility of nearly every responsible adult.”<sup>936</sup>

Notarial preparation and maintenance of a record of

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933. PLATT, *supra* note 127, at 300-01.

934. See *supra* notes 42-43 and accompanying text.

935. Faerber, *supra* note 752, at 14. That prediction was followed with this observation. “Indeed, we are starting to see modest legislative steps in that direction.” *Id.* “There was a time when some argued that emerging identity technology would make Notaries obsolete. The exact opposite is true. The trust and security Notaries bring to any transaction—especially through personal appearance and establishing willingness and awareness—is more necessary than ever before.” Timothy S. Reiniger, *Leading the Way to a Digital Future*, NAT’L NOTARY, Mar. 2008, at 23. The notary public should be readily able to rise to the level of professional. See Samuel Haber, *Professionalization*, in OXFORD COMPANION TO UNITED STATE HISTORY 622 (Paul S. Boyer ed., Oxford University Press) (2001) (defining “professionalization” as “the rise of particular occupations to positions of authority and honor”).

936. VAN ALSTYNE, *supra* note 6, at 779.

notarizations moves notary functioning out of the darkness of missing written records, as though a giant vacuum had virtually erased the expected evidence of official acts. It moves notary functioning into the daylight of visible public or quasi-public records available for appropriate scrutiny, allowing for meaningful oversight and, in turn, enhanced notarial performance in service to the public. In the notarial context, journalizing according to Van Alstyne "is the least intrusive solution, for the greatest good, for the greatest number of people."<sup>937</sup> And, public service is the ultimate duty of notaries. The title of the office is, after all, not *notary private*, but *notary public*.<sup>938</sup> The symbolic "slip of paper," referenced in the first line of this article,<sup>939</sup> as superior to unrecorded memory translates in the notarial context to detailed journal record-keeping in either traditional paper or contemporary electronic formats, and represents the prudent and expected standard of conduct the common law must recognize for public officials as important to commerce, government and the public welfare as notaries public. Without proper journal records, the prospect is that wrongdoers will continue to succeed in their schemes to obtain unlawful notarizations (that appear valid on their faces) and to perpetrate document frauds and identity thefts.<sup>940</sup>

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937. *Id.* at 802.

938. "The important thing to remember when receiving a commission is that the full title of the office is not 'Notary' but 'Notary Public.' The office of Notary is not just a private sideline business. It is a civic responsibility, a position of trust that requires those appointed to the office to protect document signers from fraud and dishonesty." Thun, *supra* note 225, at 19. See, e.g., MODEL NOTARY ACT § 7-4 cmt (2002) (stating that "[t]he Act . . . does not recognize a 'notary private' and considers every notary to owe obligations to the general public"). "As has often been observed, Notaries Public cannot become 'Notaries Private.'" *Risk Management*, *supra* note 17, at 25. "It is often repeated in notary circles that one who becomes a notary serves as 'a notary public, not a notary private.'" Closen, *supra* note 59, at 685.

939. See *supra* note 1 and accompanying text. Without written records, there remains only the memory to serve as evidence. Ogden Nash once cleverly and correctly noted: "How confusing the beams from memory's lamp are." BARTLETT, *supra* note 474, at 856. According to Alexander Smith, "A man's real possession is his memory. In nothing else is he rich, in nothing else is he poor." THE FORBES BOOK OF BUSINESS QUOTATIONS, *supra* note 25, at 569. A well-known proverb observes: "The pen is mightier than the sword." DALE, *supra* note 24, at 338. And clearly, what is penned is also mightier than unrecorded recollections. According to Edward Young in The Statesman's Creed, "[R]ecords . . . defy the tooth of time." BARTLETT, *supra* note 474, at 330.

940. Florida statutes do not require its notaries to create and retain journal records. "Real estate fraud was snowballing in South Florida . . . last year . . . [W]ell-organized groups of con artists . . . are presenting phony property deeds that are virtually undetectable as counterfeits to Notaries . . . . The deeds are presented with fraudulent identification and notarized by the unsuspecting Notary, after which the properties are 'sold' or the deed is used

Consider one last consequence of the notarial obligation to prepare and preserve a detailed journal record of official acts. The ceremony of diligent and thorough journalization of every official notarial act will have the additional advantage of impressing upon document signers the legal significance of their signatures on transactional instruments and the importance of the notarial feature of such signings. An analogy to the ceremonial feature of the effective administration of oral oaths and affirmations comes to mind. That is, if notaries and other oath and affirmation givers take their responsibilities seriously, they will conduct oaths and affirmations in ways that include corporal features and solemnity appropriate to this feature which results in legal application of the law of perjury.<sup>941</sup> Thus, oath and affirmation givers should stand and raise their right hands, and they should direct oath and affirmation takers to stand and raise their right hands as well and to repeat the words of the oaths or affirmations spoken by the notaries or other officials.<sup>942</sup> In the case of a notarization, these steps should be part of the journalization process, and completion of these steps should be followed immediately by the notation in the notary journal that the oath or affirmation was indeed administered. Imagine the positive and sweeping effect if some 4.8 million notary-spokespersons would rigorously follow the notary journal record-keeping procedures set out in this Article for the many millions of notarizations performed for the many millions of Americans every year. The process of notarization would become better understood and held in higher regard by both notaries and other members of the public. Some eighty years ago, the esteemed Professor John Wigmore wrote (what unfortunately remains) a fitting conclusion for this Article: “[T]he time has come for a revival of soul and practice. The notary must be restored to the position of respect which his office merits.”<sup>943</sup>

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as collateral to borrow against.” Madge, *supra* note 18, at 9.

941. See *Administering Oaths, Affirmations and Jurats*, NAT’L NOTARY, Mar. 1999, at 22-23 (discussing the legal importance of oaths and affirmations, and urging that they always be taken seriously). “[A] Notary should always act with a degree of solemnity when administering [oaths, affirmations and jurats].” *Id.* at 23.

942. “Notaries are encouraged to include formal ceremony in the administering of oaths and affirmations.” *Administering Oaths, supra* note 941, at 22-23. Such ceremonial steps could include the oath-giver and oath-taker facing one another, “holding up their right hands, palms out,” and having the oath-taker or affirmation-taker placing the left hand on a religious text for an oath or over the heart for an affirmation. *Id.* at 23; see *supra* note 271 and accompanying text.

943. John H. Wigmore, *Notaries Who Undermine Our Property System*, 22 U. ILL. L. REV. 748, 749 (1928). Although Wigmore’s comment was made more than 80 years ago, we must remember the famous proverb: “No time like the present.” DALE, *supra* note 24, at 274; see also *supra* note 936.



