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A PROPOSED CODE OF ETHICS FOR EMPLOYERS AND CUSTOMERS OF NOTARIES: A COMPANION TO THE NOTARY PUBLIC CODE OF PROFESSIONAL RESPONSIBILITY

JOHN C. ANDERSON* & MICHAEL L. CLOSEN**

*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.*¹

INTRODUCTION

Misconduct in connection with notarizations is a pervasive problem with a long history, which traces back to the very first notary appointed in the American colonies.² While every state has a statute creating and regulating the office of notary public,³ few

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1. Earl Warren, *quoted in* FRED R. SHAPIRO, *THE OXFORD DICTIONARY OF AMERICAN LEGAL QUOTATIONS* 132 (1993).

2. The first notary in the American colonies was Thomas Fugill. Appointed in 1639 in New Haven Colony, he was soon removed from office for falsifying documents. *See Notaries Public In American History*, NOTARY BULL., Apr. 1997, at 3. *See also*, John C. Anderson & Michael L. Clozen, *Document Authentication in Electronic Commerce: The Misleading Notary Public Analog for the Digital Signature Certification Authority*, 17 J. MARSHALL J. COMPUTER & INFO. L. 833, 855-68 (1999) (detailing the problems and faults with notaries public in the United States).

3. Michael L. Clozen & G. Grant Dixon III, *Notaries Public From the Time of the Roman Empire to the United States Today, and Tomorrow*, 68 N.D. L. REV. 873, 876 n.25 (1992). The state statutes dealing with notaries include: ALA. CODE § 36-20-1 to § 36-20-32 (1991 & Supp. 1997); ALASKA STAT. § 44.50.010 to § 45.50.190 (Michie 1998); ARIZ. REV. STAT. ANN. § 41-311 to § 41-326 (West 1999); ARK. CODE ANN. § 21-14-101 to § 21-14-205 (Michie 1996); CAL. GOV'T CODE § 8200 to § 8230 (West 1992 & Supp. 1999); COLO. REV. STAT. ANN. § 12-55-101 to § 12-55-123, § 12-55-201 to § 12-55-211 (West 1996 & Supp. 1998); CONN. GEN. STAT. ANN. § 3-91 to § 3-95 (West 1988 & Supp. 1999); DEL. CODE ANN. tit. 29, § 4301 to § 4328 (1997); D.C. CODE ANN. § 1-801 to § 1-817 (1999); FLA. STAT. ANN. § 117.01 to § 117.108 (West 1996 &

states have taken substantial steps to resolve this problem, and those public and private efforts that have been tried have been almost uniformly unsuccessful.⁴ The problem is compounded by the fact that most notaries are lay citizens, untrained and unskilled in their duties as public officers.⁵ Only a handful of

Supp. 1999); GA. CODE ANN. § 45-17-1 to § 45-17-34 (1990 & Supp. 1998); HAW. REV. STAT. ANN. § 456-1 to § 45-19 (Michie 1988 & Supp. 1998); IDAHO CODE § 51-101 to § 51-123 (1994 & Supp. 1999); 5 ILL. COMP. STAT. 312/1-101 to 8-104 (West 1994); IND. CODE ANN. § 33-16-1-1 to § 33-16-8-5 (Michie 1998); IOWA CODE ANN. § 59E.1 to § 9E.17 (West 1995 & Supp. 1998); KAN. STAT. ANN. § 53-101 to § 53-401 (1983 & Supp. 1998); KY. REV. STAT. ANN. § 423.010 to § 423.990 (Michie 1992 & Supp. 1998); LA. REV. STAT. ANN. § 35:1 to § 35:671 (West 1985 & Supp. 1999); ME. REV. STAT. ANN. tit. 5, § 81 to § 90-A (West 1989 & Supp. 1998); MD. CODE ANN., STATE GOV'T § 18-101 to § 18-112 (1995 & Supp. 1998); MASS. GEN. LAWS ANN. ch. 222, § 1 to § 11 (West 1993 & Supp. 1999); MICH. COMP. LAWS ANN. § 5.1041 to § 5.1072 (West 1993 & Supp. 1999); MINN. STAT. ANN. § 359.01 to § 359.12 (West 1991 & Supp. 1999); MISS. CODE ANN. § 25-33-1 to § 25-33-23 (1999); MO. REV. STAT. § 486.200 to § 486.405 (1987 & Supp. 1999); MONT. CODE ANN. § 1-5-401 to § 1-5-611 (1997); NEB. REV. STAT. § 64-101 to § 64-215 (1996); NEV. REV. STAT. ANN. § 240.010 to § 240-169 (Michie 1996 & Supp. 1997); N.H. REV. STAT. ANN. § 455:1 to § 455:11 (1992 & Supp. 1995); N.J. STAT. ANN. § 52:7-10 to § 52:7-21 (West 1986 & Supp. 1999); N.M. STAT. ANN. § 14-12-1 to § 14-12-20 (Michie 1995); N.Y. EXEC. LAW § 130 to § 138 (McKinney 1993 & Supp. 1996); N.C. GEN. STAT. § 10A-1 to § 10A-16 (1991 & Supp. 1998); N.D. CENT. CODE § 44-06-01 to § 44-06-14 (1993 & Supp. 1997); OHIO REV. CODE ANN. § 147.01 to § 147.14 (Banks-Baldwin 1994 & Supp. 1999); OKLA. STAT. ANN. tit. 49, § 1 to § 121 (West 1988 & Supp. 1999); OR. REV. STAT. § 194.005 to § 194.990 (1991 & Supp. 1998); 57 PA. CONS. STAT. ANN. § 147 to § 169 (West 1996 & Supp. 1999); R.I. GEN. LAWS § 42-30-3 to § 42-30-15 (1993 & Supp. 1998); S.C. CODE ANN. § 26-1-10 to § 26-1-120 (Law Co-op. 1991 & Supp. 1998); S.D. CODIFIED LAWS § 18-1-1 to § 18-1-17 (Michie 1995 & Supp. 1998); TENN. CODE ANN. § 8-16-101 to § 8-16-309 (1993 & Supp. 1998); TEX. GOV'T CODE ANN. § 406.001 to § 406.025 (West 1998); UTAH CODE ANN. § 46-1-1 to § 46-1-22 (1998); VT. STAT. ANN. tit. 24, § 441 to § 446 (1992); VA. CODE ANN. § 47.1-1 to § 47.1-30 (Michie 1998); WASH. REV. CODE ANN. § 42.44.010 to § 42.44.903 (West 1991 & Supp. 1999); W. VA. CODE § 29C-9-101 to § 29C-9-101 (1998); WIS. STAT. ANN. § 137.01 to § 137.06 (West 1989 & Supp. 1998); WYO. STAT. ANN. § 32-1-101 to § 32-1-113 (Michie 1999).

4. Part of the problem is that

state laws and official guidelines are seldom specific or comprehensive enough to fully describe every facet of performing a notarial act. To fill those 'gray gaps,' Notaries in practice must rely on a firm understanding of their basic role in society and on personal qualities of honesty, fairness and common sense.

'Am I Being Ethical?', NAT'L NOTARY, Nov. 1996, at 7. Many notaries do not possess these qualities, however. As a result, many notaries are neither diligent nor competent. Michael L. Closen & R. Jason Richards, *Notaries Public - Lost in Cyberspace, or Key Business Professionals of The Future?*, 15 J. MARSHALL J. OF COMPUTER & INFO. L. 703, 707 (1997) (stating that "[t]he notary's business worth (or lack thereof) is largely due to two fundamental and interrelated factors: inadequate knowledge of their responsibilities and, consequently, poor job performance.")

5. See Michael L. Closen, *The Public Official Role of the Notary*, 31 J. MARSHALL L. REV. 651, 661-62 (1998) (stating "[n]otaries are said to be mere

states currently require notary education or testing.⁶ Also, since because notaries earn at most a paltry fee for their services, they generally have little or no financial incentive to learn and perform their duties.⁷ While civil,⁸ administrative⁹ or criminal¹⁰ liability should be ample incentive for notaries to identify and honor such duties, notaries are generally unaware that such liabilities even exist, or are indifferent about those risks.¹¹

About twenty years ago, the American Society of Notaries (ASN) developed a short, one-page, ten-point Code of Ethics for notaries.¹² That Code of Ethics addresses only the conduct of notaries, making no reference to any responsibilities of those who employ notaries nor of those who use their services.

ministerial officials. With more than four million of them, they are by far the most numerous of all public officers. Unlike most other public officials, notaries do not serve full-time in their official capacity. It is a sideline to their principal positions.” (citations omitted). See also PETER J. VAN ALSTYNE, NOTARY LAW, PROCEDURES & ETHICS: A COMPLETE REFERENCE ON NOTARIAL LAWS AND PROCEDURES IN AMERICA 19 (1998) (recognizing that a notary does not generally have the ability to judge whether a person’s signature is willful).

6. See Vincent Gnoffo, Comment, *Notary Law and Practice for the 21st Century: Suggested Modifications for the Model Notary Act*, 30 J. MARSHALL L. REV. 1063, 1089 n.218 (1997). The states requiring education or testing for notaries are California, Connecticut, Louisiana, New York, North Carolina and Pennsylvania. *Id.*

7. See Anderson & Closen, *supra* note 2, at 861. See also ALFRED E. PIOMBINO, NOTARY PUBLIC HANDBOOK: PRINCIPLES, PRACTICES AND CASES xxii (Nat’l ed. 1996) (noting “the advanced stage of decay and neglect that the office of notary public has suffered”).

8. See *First Bank of Childersburg v. Florey*, 676 So. 2d 324 (Ala. Civ. App. 1996) (holding that a notary may be liable for loss resulting from fraudulent conduct); *Independence Leasing Corp. v. Aquino*, 506 N.Y.S.2d 1003 (N.Y. 1986) (holding that a notary is liable for both intentional and negligent misconduct).

9. See, e.g., 5 ILL. COMP. STAT. 312/7-108 (West 1994) (giving Secretary of State power to revoke a notary’s commission for misconduct). See also *People v. Rathbone*, 145 N.Y. 434 (N.Y. 1895) (revoking notary’s office for violating state law).

10. See *Johnson v. State*, 238 N.E.2d 651 (Ind. 1968) (affirming notary’s conviction for falsely attesting an affidavit); *Jefferson Bank v. Progressive Cas. Ins. Co.*, 965 F.2d 1274 (3d Cir. 1992) (discussing the criminality of mortgage acknowledged by an imposter posing as a notary). See also Susan Ruiz Patton, *Notary Public Charged With Improper Practices*, ALLENTOWN MORNING CALL, June 16, 1995, at B2 (reporting that a local notary public was “charged with eight counts of improper license and paperwork practices”).

11. See Michael L. Closen & R. Jason Richards, *Cyberbusiness Needs Supernotaries*, NAT’L L.J., Aug. 25, 1997, at A19.

12. The *Code of Ethics of the American Society of Notaries* mandates that notaries “discharge [their] duties with both competence and integrity, resolve to adhere to . . . standards of conduct.” CODE OF ETHICS OF THE AMERICAN SOCIETY OF NOTARIES (May 4, 1980). The full content of the *Code of Ethics of the American Society of Notaries*, which includes a description of what these standards of conduct are, is reprinted with permission from the American Society of Notaries (ASN) in this issue of The John Marshall Law Review.

Unfortunately, the Code of Ethics of the American Society of Notaries (ASN Code of Ethics) has not been amended nor expanded over the last two decades.¹³ Clearly, a token one-page code is simply too general and insufficient to adequately inform and guide notaries public, especially as we approach the twenty-first century.

In an attempt to more earnestly confront and overcome the ethical challenges facing notaries today, the National Notary Association (NNA) recently completed its substantial Notary Public Code of Professional Responsibility (Notary Public Code).¹⁴ The Notary Public Code is based upon ten "Guiding Principles," with eighty-five accompanying "Standards of Professional Responsibility."¹⁵ For some forty years, the NNA has served the

13. Two versions of the *ASN Code of Ethics* have appeared, both of which have been substantially similar and both of which have borne the same date. Closen, *supra* note 5, at 667 n.88.

14. THE NOTARY PUBLIC CODE OF PROFESSIONAL RESPONSIBILITY (1998) [hereinafter NOTARY PUBLIC CODE]. *The Notary Public Code* is reprinted with permission from the National Notary Association (NNA) in this issue of *The John Marshall Law Review*.

15. *Id.* The Guiding Principles are:

I.

The Notary shall, as a government officer and public servant, serve all of the public in an honest, fair and unbiased manner.

II.

The Notary shall act as an impartial witness and not profit or gain from any document or transaction requiring a notarial act, apart from the fee allowed by statute.

III.

The Notary shall require the presence of each signer and oath-taker in order to carefully screen each for identity and willingness, and to observe that each appears aware of the significance of the transaction requiring a notarial act.

IV.

The Notary shall not execute a false or incomplete certificate, nor be involved with any document or transaction that is false, deceptive or fraudulent.

V.

The Notary shall give precedence to the rules of law over the dictates or expectations of any person or entity.

VI.

The Notary shall act as a ministerial officer and not provide unauthorized advice or services.

VII.

The Notary shall affix a seal on every notarized document and not allow this universally recognized symbol of office to be used by another or in an endorsement or promotion.

VIII.

The Notary shall record every notarial act in a bound journal or other secure recording device and safeguard it as an important public record.

IX.

The Notary shall respect the privacy of each signer and not divulge or use personal or proprietary information disclosed during execution of a

nation's notaries as the country's largest and most active educational and advocacy organization.¹⁶ The set of ideals embodied in the Notary Public Code is the indirect product of "decades of interaction between the NNA and thousands of notaries," other governmental officials and business persons, and it is the direct work-product of a blue ribbon commission appointed to draft it.¹⁷ The Notary Public Code proposes answers to various "issues and questions encountered by [n]otaries, particularly matters of conflicting interest."¹⁸ The Notary Public Code's stated purpose is to "guide [n]otaries . . . when statutes, regulations and official directives fall short."¹⁹ The complete Notary Public Code is a sizable document about thirty pages in length; it contains illustrations and explanations of ethical choices as well as extensive legal commentaries and citations to statutory authority.²⁰ Although not everyone may agree with every feature of the Notary Public Code,²¹ it represents a truly monumental advancement of the office of notary public. Unfortunately, while the Notary Public Code is a much-needed source of instruction for notaries, it too falls somewhat short of its full potential, for it fails to address directly the ethical responsibilities of those who employ notaries and those who utilize the services of notaries.

It seems that just about every profession has by now adopted a code of ethical conduct. Indeed, it may be that a group or occupation cannot truly achieve "professional" status without developing and adhering to an ethical code.²² Hence, there are

notarial act for other than an official purpose.

X.

The Notary shall seek instruction on notarization, and keep current on the laws, practices and requirements of the notarial office.

Id. at 1.

16. See generally Milton G. Valera, *The National Notary Association: A Historical Profile*, 31 J. MARSHALL L. REV. 971 (1998).

17. NOTARY PUBLIC CODE, Introduction at v (1998).

18. *Id.* at v-vi.

19. *Id.* at v.

20. See generally *id.*

21. For instance, the Authors believe that the NOTARY PUBLIC CODE goes too far in describing the unauthorized practice of law when it includes having the notary select the form of notarial certificate to be employed. See NOTARY PUBLIC CODE, Guiding Principle VI, Art. A, § VI-A-1 (1998). Further, notaries should not be attempting to determine the "willingness" of document signers. See *id.* at Guiding Principle III, Art. B, § III-B-2 (1998). See also 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 (1998).

22. See CODES OF PROFESSIONAL RESPONSIBILITY v (Rena A. Gorlin ed., 2d ed. 1990).

The professions have long carried distinct moral obligations with respect to public and private decisionmaking and behavior. What we do as professionals and how we do it, whether in commercial or nonprofit contexts, our sense of integrity, and our regard for self and others, affect

codes of ethics for lawyers, judges, arbitrators, architects, bankers, engineers, accountants, journalists, realtors, doctors, dentists, nurses and many others.²³ Even a code of ethics for certification authorities who authenticate electronic documents and digital signatures has recently been proposed and drafted.²⁴ Traditionally, the codes of ethics for each profession have targeted the conduct only of the professional in question.²⁵ These codes have not tended to impose (either directly or expressly) ethical standards on other parties who interact with the individual professions that are the subjects of the codes; yet, quite regularly implicit in a statement of professional ethical conduct is a conspicuous standard of behavior for others who deal with that professional.²⁶ If arbitrators, as an obvious example, may not accept gratuities from lawyers and litigants, then most certainly lawyers and litigants should not tender such gratuities to arbitrators in efforts to tempt arbitrators away from the noble path of impartial performance of their duties.²⁷

But why should such important responsibilities be left unstated and/or unpublished? Even non-professionals must be bound to abide by appropriate ethical standards. No one should lie or cheat, although those ethical principles are so well-accepted and so well-known that they do not need to be set out in a code of ethics for the general public. Yet, other ethical responsibilities that are quite generally accepted attend specialized settings and dealings and involve choices based upon more subtle and

the lives of everyone. There is no individual or group who is not touched—directly or indirectly, for better or worse—by how we deal with increasingly difficult and varied ethical matters. To address these matters is our task, our charge, and the highest order of professional responsibility to those around us . . . We find small comfort in realizing that these complexities are frequently a microcosm of situations that all of society must deal with.

Id. See also Consuelo Israelson, *The Evolution of Professional Ethics Through the Centuries*, NAT'L NOTARY, Nov. 1998, at 22 (noting that "[a]n ethical code is a profession's promise to the world that its practitioners are trained and trustworthy.")

23. See generally CODES OF PROFESSIONAL RESPONSIBILITY, *supra* note 22 (setting out 43 codes of ethics for various business, health care and legal professionals).

24. See Dina Athanasopoulos-Arvanitakis & Marilyn J. Dye, *A Proposed Code of Professional Responsibility for Certification Authorities*, 17 J. MARSHALL J. COMPUTER & INFO. L. 1003 (1999).

25. See, e.g., CODES OF PROFESSIONAL RESPONSIBILITY, *supra* note 22.

26. *Id.*

27. *Id.* at 304 (quoting the American Arbitration Ass'n, CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES Canon I(D) (1977): "[a]fter accepting appointment and while serving as an arbitrator, a person should avoid entering into any financial, business, professional, family or social relationship, or acquiring any financial or personal interest, which is likely to affect impartiality or which might reasonably create the appearance of partiality or bias . . .")

particularized facts. Those ethical responsibilities need the exposure and emphasis of being formulated in writing, of being widely distributed and of being discussed and consistently honored in practice.

Interestingly, at least one attempt has been made to prescribe a code of conduct for all of the constituents to one professional context, namely in the law review publishing process. Thus, the National Conference of Law Reviews Model Code of Ethics (Law Review Code) recognizes the interplay of the law review staffs (including student members, faculty advisers and clerical personnel) and of law review authors (the lawyers, judges, professors and others who author lead articles and who are not otherwise associated with the law reviews with which they publish).²⁸ The Law Review Code purports to set ethical standards for all of those participants in the publishing process, specifically with separate guidelines for the conduct of law review staffs and of law review authors.²⁹ That approach should serve as the analog for other codes of ethics.

A code of professional responsibility simply does not exist in a vacuum, as Chief Justice Warren's remarks that introduced this Article clearly emphasize.³⁰ The professional governed by such a code will sometimes independently initiate unethical behavior, but probably just as often, the professional will be challenged by ethical questions because some other constituent to the commercial activity tempts the professional away from the path of honorable conduct. Moreover, it would often be almost impossible to succeed in a plan of misconduct unless the other constituent or constituents to the practice cooperate in covering up the unethical activity. Even if the professional independently desired to engage in unethical conduct, it would be difficult to keep the misconduct hidden without the help of others (who should otherwise become the whistleblowers disclosing the wrongdoing).³¹

This Article will propose a companion code to accompany the Notary Public Code. This proposed Code of Ethics for Employers

28. See generally Michael L. Closen & Robert M. Jarvis, *The National Conference of Law Reviews Model Code of Ethics: Final Text and Comments*, 75 MARQ. L. REV. 509 (1992); Michael L. Closen, *A Proposed Code of Professional Responsibility for Law Reviews*, 63 NOTRE DAME L. REV. 55 (1988).

29. See Closen & Jarvis, *supra* note 28, at 509.

30. See Warren, *supra* note 1, at 132.

31. Notaries are expected to be honorable and trustworthy. Where these two qualities are absent, the notarial system collapses. Similarly, the legal profession demands exceedingly high standards with regard to honor and trust. To preserve that integrity, lawyers have a duty to report the unethical conduct of other lawyers. See, e.g., MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-103 (1999); *In re Himmel*, 533 N.E.2d 790, 793-94 (Ill. 1988) (explaining that an attorney has a duty to report another attorney's misconduct).

and Customers of Notaries could, of course, also supplement the ASN Code of Ethics. This Article begins with a brief explanation of the need for this companion code, identifying how employers of notaries and customers of notaries so often contribute to unethical conduct in the notarial process. This Article then sets out a ten-point code of ethical principles for notary employers and notary customers, along with a description of the application and meaning of each point.

I. THE REAL REASONS FOR NOTARIAL MISCONDUCT

*Growing a 'notarial backbone' is the toughest part of evolving into a professional and effective Notary.*³²

Many conflictive situations arise because professionals might obtain significant gains from engaging in misconduct. Illustrations of these possibilities come to mind easily for professionals such as lawyers, bankers, realtors, accountants, doctors and others of substantial position,³³ all of which are lucrative professions. These professionals frequently are considerably involved in commercial transactions and many even have ultimate control (as a practical matter) over such transactions.³⁴ These professionals of substantial stature easily understand how they might improperly benefit, and therefore such professionals often initiate misconduct themselves. They do not ordinarily have to be pressured or coerced into a course of dishonest activity, although there are certainly times when parties lead otherwise honest professionals astray. Greed gets the better of such professionals.

The circumstances for the notary are usually quite different. Most notaries do not work full-time as notaries; their notarial roles

32. *Know When to Say 'No'*, NAT'L NOTARY, Sept. 1996, at 14, 15. Under appropriate circumstances, a strong-willed and diligent notary must decline to render notarial service. "Acceptable conditions under which the notary may decline include: presentation [of] unacceptable or inadequate identification; failure of the acknowledger or affiant to appear before the notary public; request to back-date or post-date the acknowledgment certificate or jurat, etc." PIOMBINO, *supra* note 7, at 64-65.

33. Such professionals often deal with clients or patients of great wealth and often deal with transactions or estates of considerable complexity and significant value. The more complex and valuable the subject matter, the more the inducement and the opportunity for embezzlement and other forms of fraud.

34. Even though the client or patient, as principal, should legally and actually be in ultimate control of important decision-making, in reality some agents, (the lawyers, doctors, bankers, accountants or brokers) because of their superior knowledge and stature, can take advantage of the trust relationships with clients or patients and exert undue influence or perpetuate fraud. See MICHAEL L. CLOSEN, AGENCY, EMPLOYMENT, AND PARTNERSHIP LAW: CONTEMPORARY CASES AND MATERIALS 121-48 (1984) (discussing breach of fiduciary duties by agents).

are supplemental to their main occupations.³⁵ Most notaries do not have substantial involvement or authority over transactions, and their notarial positions are not lucrative.³⁶ In fact, notaries most often occupy the lowliest position at document signing ceremonies.

Notarial misconduct is usually initiated not by the notary, but by a third party.³⁷ Who would gain from deceptive practices? Most commonly, it is the notary's employer or customer.³⁸ Many notaries do not take their commissions and public official status as seriously as they should, and buy into the proposition that an improper notarization is unimportant and/or undetectable.³⁹

Some notaries public are quick to place their employer's interests over their official notarial duties.⁴⁰ This arises as a result of the employer's directives or threats (whether express or implied), by the notary-employee's natural desire to serve the employer or by the notary-employee's desire to avoid being troublesome to the employer.⁴¹ Other notaries are willing to forego

35. See Closen, *supra* note 5, at 662.

36. See *id.* at 661 (stating that notaries are described as "mere ministerial officials"); *Guide To Notary Fees*, NAT'L NOTARY, May 1999, at 22 (detailing nominal fees statutorily imposed on notaries).

37. The *Notary Public Code* recognizes that notarial responsibility "frequently will contradict not the provisions of law but the policies or expectations of the [n]otary's employer." NOTARY PUBLIC CODE, Introduction at vi (1998). "Today it is a sad and ironic reality that notaries are much more likely to be fraudulently exploited by trusted acquaintances, family members and business associates than by perfect strangers." Charles N. Faerber, *Being There: The Importance of Physical Presence to the Notary*, 31 J. MARSHALL L. REV. 749, 749 (1998).

38. The employers and customers of notaries are the ones with direct financial interests in the documents being signed and notarized by notaries.

39. Closen & Richards, *supra* note 4, at 703 (stating "the office of notary public continues to suffer from the stigma of insignificance.") "Between the notary and the state government, the most damaging and costly fiduciary breach is arguably the attempted rationalization to justify false notarial certificates. Rationalizers assuage themselves by thinking the notarizations don't mean anything and that it is merely a small detail." *Understanding Our Fiduciary Duties as Notaries*, THE NOTARY, May/June 1999, at 1, 5.

40. Often, employees will have other duties occupying the bulk of their time, whether these be administrative, clerical, etc. Employee-notaries often obtain their commissions to further the general business of their employers, making their notarial commissions something of a secondary concern in comparison to their other duties. When a situation arises where employees must prioritize between primary and secondary tasks, the employees' concern for their jobs prompts them to disregard their notarial duties.

41. See, e.g., *Lisi v. Resmini*, 603 A.2d 321 (R.I. 1992) (suspending a lawyer from the practice of law where the lawyer directed his employee to notarize forged signatures of absent clients); *In re Barrett*, 443 A.2d 678 (N.J. 1982) (suspending an attorney from the practice of law where he forged his client's signature and got his secretary to notarize it); *In re Smith*, 636 P.2d 923 (Or. 1981) (suspending a lawyer from the practice of law where the lawyer got his secretary to notarize the signature of an absent client). See also *infra* note 47 for further discussion.

the formal requirements of a proper notarization as a favor to the customer. Often, the customer is a friend or relative of the notary, and the notary is more inclined to notarize a document in violation of sound notarial practice.⁴² Of course, there are many instances in which the employers and customers of notaries are unfamiliar with proper notarial law and practice, and those parties suggest notarial misconduct at least in part due to their ignorance of legal and ethical requirements. Thus, the observation of the NNA (quoted at the beginning of this section) is so accurate: a notary must develop a "notarial backbone" in order to appropriately contend with undue pressures and requests from employers and customers.⁴³

The Notary Public Code focuses its principles exclusively upon the notary, but it acknowledges on numerous occasions the involvement of notary employers and customers in corrupting notaries. Obviously, since a notary is prohibited from notarizing his/her own signature, every notarization will involve at least one other party.⁴⁴

There are several introductory passages of the Notary Public Code noting the obvious interaction between two or three constituents to many notarizations between the notary and customer, between the notary and the employer, and sometimes between all three.⁴⁵ Furthermore, several of the official illustrations to the Notary Public Code realistically and convincingly make the case for the need to issue directives for notary employers and customers as well.⁴⁶

A. Notarial Misconduct Encouraged or Directed By Employers

Sometimes, notarial misconduct actually occurs under the direction or urging of the notary's employer.⁴⁷ In such cases, the

42. See Faerber, *supra* note 37, at 749 (observing that acquaintances and family are more likely to take advantage of notaries than are strangers).

43. See *Know When to Say 'No'*, *supra* note 32, at 15.

44. NOTARY PUBLIC CODE, Guiding Principle II, Art. B, § II-B-1 (1998).

45. See *id.* at Art. A, § II-A-1 to § II-A-2 (1998) (requiring a notary to act as an impartial witness and not improperly profit or gain from a notarization, apart from receiving an appropriate fee).

46. See *id.* at Art. E, § II-E-1 (1998) (prohibiting improper compensation to a notary employee); *id.* at Guiding Principle III, Art. C, § III-C-3 (1998) (illustrating the problem of clients improperly influencing notarial acts).

47. See, e.g., *Dickey v. Royal Banks of Mo.*, 111 F.3d 580, 582 (8th Cir. 1997) (pointing out that a bank officer directed a bank employee-notary to notarize a customer's signature even though the customer was not personally in the notary's presence); *Transamerica Ins. Co. v. Valley Nat'l Bank*, 462 P.2d 814, 815 (Ariz. Ct. App. 1969) (discussing allegations that bank officials had asked the employee-notary to notarize customer signatures without the customers being in the notary's presence). This is especially a problem where the employee becomes a notary at the request or direction of the employer, and notarizes documents as part of his or her normal daily routine. See also *supra*

notary is found in the precarious position of having to choose between the seemingly competing interests of the employer and those of the public office he holds as a notary. On the one hand, notaries are public officials having responsibilities unique to their office.⁴⁸ On the other hand, notary-employees are frequently confronted with on-the-job pressures from employers to perform improper notarizations.⁴⁹ And, notaries are no different than other employees who desire to win their employers' favor, or at the very least, to avoid any appearance of being troublemakers. When these two interests conflict, it is the employer who must yield.⁵⁰

note 41 and accompanying text.

48. Closen, *supra* note 5, at 661 (stating that "notaries occupy a most peculiar place in government and business in this country.") *See also* Britton v. Nicolls, 104 U.S. 757, 765 (1881) (declaring that a notary is a public officer); *State ex rel. Gray v. Hodges*, 154 S.W. 506, 507 (Ark. 1913) (stating that a notary is a public officer); *May v. Jones*, 14 S.E. 552, 553 (Ga. 1891) (declaring that "the notary . . . is a public officer, sworn to discharge his duties properly"); *Pitsch v. Continental & Com. Nat'l Bank of Chicago*, 137 N.E. 198, 200 (Ill. 1922) (identifying a notary as a public officer); *Stork v. American Sur. Co.*, 33 So. 742, 743 (La. 1903) (stating that a notary is a public officer); *State ex rel. Summerfield v. Clark*, 31 P. 545, 546 (Nev. 1892) (stating that "[i]t has been frequently held that a notary is a public officer"); *Commercial Union Ins. Co. of New York v. Burt Thomas-Aitken Constr. Co.*, 230 A.2d 498, 499 (N.J. 1967) (stating that "a notary public is a public officer"); *Harris v. Watson*, 161 S.E. 215, 217 (N.C. 1931) (holding that position of notary public is a public office); *Clapp v. Miller*, 156 P. 210, 211 (Okla. 1916) (stating that notary public is public officer); *Commonwealth v. Haines*, 97 Pa. 228 (1881) (declaring same); *Werner v. Werner*, 526 P.2d 370, 376 (Wash. 1974) (identifying "[t]he notary, as a public officer"). *See also* BLACK'S LAW DICTIONARY 1060 (6th ed. 1990) (defining a notary public as "[a] public officer . . ."); RICHARD B. HUMPHREY, THE AMERICAN NOTARY MANUAL 7 (4th ed. 1948) (stating that "[t]he office of notary public is a public office . . ."); RAYMOND C. ROTHMAN, NOTARY PUBLIC PRACTICES AND GLOSSARY 1 (Nat'l Notary Ass'n, 1978) (recognizing that the ancient Roman *notarius* was a public official); Closen & Dixon, *supra* note 3, at 873 (stating that "[a] notary public is a public official with unusual powers for a non-judicial officer"). *But see Transamerica Ins. Co.*, 462 P.2d at 817 ("designat[ing] a notary public as . . . , at best, . . . quasi-public [in] nature"). *Ely Walker Dry Goods Co. v. Smith*, 160 P. 898, 900 (Okla. 1916) (referring to the role of notaries as quasi-public).

49. *See* MICHAEL L. CLOSEN ET AL., NOTARY LAW & PRACTICE: CASES & MATERIALS 331 (1997). "Unfortunately, notary-employees often face on-the-job pressures from employers who coerce them into completing false certificates." *Id.* *See Employer & Notary Relations*, THE NOTARY, Mar./Apr. 1999, at 6 (stating "[a]n informal survey of notaries in various states indicates that only half of their employers expect and mandate correct notarial services.") "The employer's . . . values and objectives easily [appear to] conflict with the laws and standards for correct notarial services." *Id.*

50. *See Employer & Notary Relations*, *supra* note 49, at 6 (stating "[i]t is a well-established legal principle that employers do not have any jurisdiction or authority over [an employee's] notarial commission.") *See also* Milton Valera, *It May Be Time To Educate Your Boss*, at 1 (n.d., Nat'l Notary Ass'n) (stating "[i]f [notaries] perceive [their] job to be 'on the line' every time an improper notarial request is made by [their] boss, seldom will [they] assert [themselves] and confront [their] employer.")

Unfortunately, because of the employer-employee relationship, the notary's first loyalty may instinctively seem to be to the employer, and more and more notaries are acting inappropriately, unethically and even illegally on their employers' behalves.⁵¹

After all, notaries work full-time for their employers, but only part-time as notaries.⁵² Notaries depend upon their employers for their livelihoods, not upon the nominal fees they may collect for performance of notarial services.⁵³ 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.⁵⁴

In fact, according to the Notary Law Institute (NLI), notaries "usually become notaries at the request of [their] employers to have the luxury of having a notary available at the workplace."⁵⁵ In describing the tension of the employee-notary in the employment setting, the NLI has perceptively observed that "[t]he conflict comes from the understandable assumption employers make that they have dominion over . . . notarial services."⁵⁶ Since employers tend to possess superior knowledge and experience in the workplace, these factors may seem to carry over to the notary features of the jobs of notary-employees as well. Another possibility is that notaries and their employers are unaware of the official duties of the notaries and of the lines of demarcation between private jobs and public responsibilities.⁵⁷ But everyone should be aware of the obvious conclusion: an employer who directs an employee-notary to engage in illegal conduct also can be found guilty of illegal conduct himself.⁵⁸

51. Closen & Richards, *supra* note 4, at 713. "Employers of notaries encourage or direct them to take shortcuts." *Id.* "[G]ood people do bad things" in part because "[t]hey believe that the activity is in the organization's best interest." Michael G. Daigneault, *Why Ethics?*, ASS'N MGMT., Sept. 1997, at 31.

52. Closen, *supra* note 5, at 662 (observing that the notarial position "is a sideline to [notaries'] principal positions"). "Their notary functions ordinarily account for a small part of the activities engaged in while at their jobs." *Id.* at 676.

53. *See Guide To Notary Fees*, *supra* note 36, at 22 (outlining the fees that notaries are allowed to charge).

54. Closen, *supra* note 5, at 678-79. *See Employer & Notary Relations*, *supra* note 49, at 6 (pointing out that it should be "irrelevant whether the fees and supplies to become a notary were paid for by . . . [the notary's] employer").

55. *Employer & Notary Relations*, *supra* note 49, at 6.

56. *Id.*

57. *Id.* "In almost every circumstance, this improper attitude [of employers about notarial services] results from the employer's complete lack of awareness of the law and procedures for notarizations." *Id.*

58. *See id.* (stating "[e]mployers often do not realize that when they pressure a notary into violating state notary law, they are violating the state

Notarial misconduct is not always motivated by fear of losing one's job. It is also influenced by ignorance of a notarization's formal requirements. This is especially the case where the notary sought his or her commission at the direction of a supervisor. Such employees may not understand that their commissions make them "autonomous public official[s]," requiring them to deter and detect fraud.⁵⁹ Often, these employees operate under the assumption that their commissions exist solely to facilitate the employers' activities. Moreover, many notary employees feel compelled "to surrender their notarial seals, [embossers,] journals and commission certificates to [their] employer[s]" should they leave for employment elsewhere.⁶⁰ Employers do little to rectify the misunderstanding, either through their own dishonesty or simply because they are equally unaware of the notary employees' legal and ethical responsibilities.

There is some disagreement among courts as to when and how a notary employer becomes liable for an employee's notarial misconduct. Early on, courts were somewhat hesitant to hold employers liable for the misconduct of notary employees because of the notary's status as a public official.⁶¹ Other courts seemed to have had no trouble finding a notary employer liable for an employee's notarial misconduct.⁶² Today, several state notary statutes establish the vicarious liability of employers for employee-notary misconduct,⁶³ and common law vicarious liability of employers of notaries is predictable.⁶⁴ However, the various formulations of such liability differ markedly,⁶⁵ and courts are still in disagreement as to when or how an employer should be vicariously liable for an employee's notarial misconduct.⁶⁶

In 1891, the Georgia Supreme Court refused to find an employer liable because, the court reasoned, notaries complete

notary law themselves!")

59. See Deborah M. Thaw, *The Feminization of the Office of Notary Public: From Femme Covert to Notaire Covert*, 31 J. MARSHALL L. REV. 703, 732 (1998); Valera, *supra* note 50, at 1.

60. See Thaw, *supra* note 59, at 732.

61. See *May v. Jones*, 14 S.E. 552, 553 (Ga. 1891) (refusing to find employer liable for employee's notarial misconduct).

62. See *Simon v. Peoples Bank & Tr. Co.*, 180 A. 682, 684 (N.J. 1935) (finding that it is a well-settled rule that notary employers are vicariously liable for an employee's notarial misconduct).

63. See, e.g., IDAHO CODE § 51-118 (1994). Some jurisdictions impose employer liability if the notary acts within the scope of employment in addition to employer consent of the misconduct. See, e.g., MO. REV. STAT. § 486.360 (West 1987 & Supp. 1999); W. VA. CODE § 29C-6-102 (1998).

64. See PIOMBINO, *supra* note 7, at 26 (noting the joint liability of notary-employers for the official misconduct of notary-employees).

65. See Clozen, *supra* note 5, at 677-81 (discussing the various descriptions of vicarious liability of notary-employers for notary-employee misconduct).

66. See CLOZEN ET AL., *supra* note 49, at 331-55 (discussing various common law vicarious liability outcomes relating to notarial misconduct).

tasks that cannot be completed by the employer.⁶⁷ However, in 1935, the New Jersey Supreme Court suggested that an employer who encourages or directs a employee-notary to commit fraud is equally subject to liability.⁶⁸ The most common theory for employer vicarious liability for notarial misconduct probably exists under basic agency principles.⁶⁹ Other theories for employer liability include negligent hiring and negligent supervision of the notary.⁷⁰

Suppose Z is terminally ill and is spending the last few days of his life in a hospital. Z contacts an attorney and instructs the attorney to draft Z's will. Z's son, X, at the request of Z, travels to the attorney's office to pick up the document and take it to the hospital for Z's signature. However, the terms of the will, leaving virtually all of Z's property to X, are not agreeable to Z, and therefore Z does not sign the will. Unbeknownst to the attorney, X reads the draft will, forges Z's name and presents the document to the attorney. Even though Z is not present, under the circumstances, the attorney instructs a law firm secretary to notarize Z's apparent signature. Although the secretary knows this is improper, the secretary needs her job and does not want to create a problem; so the secretary performs the notarization. This, unfortunately, is a common scenario.⁷¹

67. *May v. Jones*, 14 S.E. 552, 552 (Ga. 1891).

68. *See, e.g., Commercial Union Ins. Co. of New York v. Burt Thomas-Aitken Constr. Co.*, 230 A.2d 498, 501 (N.J. 1967) (stating "the private employer of a notary public might be liable for the notary's breach of duty if the employer participated in that breach, as for example, if the employer should ask or encourage the notary to act without appropriate inquiry.")

69. *See Gerald Haberkorn & Julie Z. Wulf, The Legal Standard of Care for Notaries and Their Employers*, 31 J. MARSHALL L. REV. 735, 742-47 (1998) (discussing the application of basic agency principles to notarial services and employer liability).

70. *CLOSEN ET AL.*, *supra* note 49, at 351. *See also First Nat'l Bank of Manning v. German Bank*, 78 N.W. 195, 196 (Iowa 1899) (stating that "[i]n making [collection of the draft] it is usual to employ a notary, and, in forwarding the draft, there was an implied direction to do so, if necessary. If the defendant exercised prudence in making its selection, its responsibility ended.") (citations omitted); *May*, 14 S.E. at 553 (stating that "[i]n some cases, it seems, the bank would be liable for negligence in the selection of a notary")

71. Unfortunately, estate planning documents are often at issue in situations where attorneys direct notarial misconduct. *See, e.g., Killingsworth v. Schlater*, 292 So. 2d 536 (La. 1973) (dealing with accusations that will not be typed by attorney-notary); *In re Boyd*, 430 N.W.2d 663 (Minn. 1988) (suspending attorney who prepared false deed and caused it to be notarized); *In re Morin*, 878 P.2d 393 (Or. 1994) (disbarring attorney who frequently notarized wills outside the presence of clients). Lawyers frequently obtain notarizations of absent clients' signatures from their s employee-notaries. *See, e.g., In re Barrett*, 443 A.2d 678 (N.J. 1982) (suspending an attorney from the practice of law where he forged his client's signature and got his secretary to notarize it); *In re Smith*, 636 P.2d 923 (Or. 1981) (suspending a lawyer from

In 1993, the New Jersey Supreme Court reprimanded a lawyer for instructing an employee to notarize false signatures.⁷² One of the most common situations for notarial misconduct in the workplace occurs when the employer instructs the notary-employee to notarize a signature for a person not physically present.⁷³ 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.⁷⁴ Unfortunately, while disciplinary systems are in place for attorneys who direct such notarial misconduct and who are caught doing it,⁷⁵ most notary employers are not licensed attorneys and are not subject to the same degree of scrutiny.⁷⁶

Notarial misconduct appears to be a growing problem in law firms.⁷⁷ Law firms and lawyers are faced with heavy caseloads and impending deadlines that can tempt them to act too quickly, too sloppily and to simply cut corners.⁷⁸ In particular, issues arise where the attorney commits misconduct in his or her capacity as a notary, or where an attorney directs a notary-employee to perform an improper notarization. Because legal documents so often require notarization, most law firms require staff members to obtain notary commissions and hence, many attorneys are themselves notaries.⁷⁹ When a notary-employer directs an

the practice of law where the lawyer got his secretary to notarize the signature of an absent client); *Lisi v. Resmini*, 603 A.2d 321, 321 (R.I. 1992) (suspending a lawyer from the practice of law where attorney directed his employee to notarize forged signatures of absent clients). See also *supra* note 47 and accompanying text.

72. *In re Marra*, 635 A.2d 504 (N.J. 1993).

73. *Thaw*, *supra* note 59, at 731.

74. *Id.* Often the absent signer is a relative, friend or client of the employer. *Id.*

75. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102(A)(2) (1999) (prohibiting a lawyer from "[c]ircumventing [d]isciplinary [r]ule[s] through actions of another").

76. See Michael L. Closen, *Why Notaries Get Little Respect*, NAT'L L.J., Oct. 9, 1995, at A23. With more than 4.2 million notaries public in this country, most of them are not employed by attorneys or law firms. *Id.*

77. See generally Christopher B. Young, *Signed, Sealed, Delivered . . . Disbarred? Notarial Misconduct by Attorneys*, 31 J. MARSHALL L. REV. 1085 (1998). See also Michael L. Closen & Christopher T. Shannon, *The 10 Commandments of Notarial Practice for Lawyers*, AM. NOTARY, 3d Quarter 1999, at 1 (stating that "lawyers are perhaps the worst offenders of sound notarial practice and of notary public laws"); Michael L. Closen & Thomas W. Mulcahy, *Conflicts of Interest in Document Authentication by Attorney-Notaries in Illinois*, 87 ILL. B.J., June 1999, at 320 (arguing that when attorney-notaries "notarize the documents they have prepared for their [own] clients . . . [it leads to the] appearance of impropriety . . . [and to actual] conflict[s] of interest").

78. Closen & Mulcahy, *supra* note 77, at 321.

79. Young, *supra* note 77, at 1101.

employee to make an improper notarization, and when that employer is an attorney or a law firm, particularly troublesome issues arise. Attorneys are bound by strict ethical standards and are required to ensure that non-lawyer employees engage in conduct consistent with the attorney's professional obligations.⁸⁰ Unfortunately, a significant number of cases illustrate that attorneys have been disciplined for directing their employees to commit notarial misconduct; almost all of attorney-related notarial violations go unreported or undetected and undisciplined.⁸¹

In *The Florida Bar v. Farinas*, attorney Farinas represented clients who completed and signed interrogatories but failed to have their signatures notarized.⁸² Because his clients lived in another state, Farinas simply contacted a notary and had the signatures notarized in his clients' absence.⁸³ He was charged with violating the Rules of Professional Conduct, engaging in conduct prejudicial to the administration of justice, engaging in conduct unlawful or contrary to honesty and justice, and engaging in conduct involving dishonesty, fraud, deceit or misrepresentation.⁸⁴ Farinas defended his actions by claiming he was unaware that

80. MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.3 (1997). With respect to a nonlawyer employed or retained by or associated with a lawyer:

- (a) a partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;
- (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and
- (c) a lawyer shall be responsible for conduct of such a person that would be a violation of the rules of professional conduct if engaged in by a lawyer if:
 - (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
 - (2) the lawyer is a partner in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take remedial action.

Id.

81. See generally Young, *supra* note 77, at 1093-103 (providing a survey of cases involving attorney and notarial misconduct).

82. 608 So. 2d 22, 23 (Fla. 1992).

83. *Id.* The notarization violated Florida law, which requires:

[e]very notary public in the state shall require reasonable proof of the identity of the person whose signature is being notarized and such person must be in the presence of the notary public at the time the signature is notarized. Any notary public violating the above provision shall be guilty of a misdemeanor of the second degree. . . . It shall be no defense under this section that the notary public acted without intent to defraud.

Id. at 24 (citing FLA. STAT. ANN. § 117.09(1) repealed by Laws 1991, C 91-291, § 8, eff. Jan. 1, 1992).

84. *Id.* at 24.

proper notary procedure required the document signer be present before the notary.⁸⁵ The court-appointed referee in the case found Farinas not guilty and stated that lawyers commonly found a notary "to notarize a client's signature without the client's being present" as if to suggest that notarization is not a matter of any consequence.⁸⁶ *Farinas* paints a disturbing picture of both the lack of knowledge regarding notarial law, even among lawyers, and the frequency with which such laws are ignored.

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.⁸⁷ Employers should foster thorough notary practice, not undermine it. If employers promote thorough notarial practice, such efforts should reduce notarial errors and misconduct. If employee-notaries are more careful and thorough, employers will suffer less vicarious liability for defective and fraudulent notarizations. After all, the purpose to effect behavior modification among employers (masters) and employees (servants) was at the heart of the early legal decisions finding employers vicariously liable (although not guilty of any fault) for the injuries caused by their employees.⁸⁸

85. *Id.* at 23.

86. *Id.*

87. *Understanding Our Fiduciary Duties as Notaries*, *supra* note 39, at 3. "The signer . . . come[s] to [the notary] with every justifiable expectation that [the notary] will perform the notarization competently so that the needed notarization will be viewed as valid and enforceable." *Id.*

88. CLOSEN, *supra* note 34, at 4-5. Under the deterrence theory, the thought was that holding principals/employers vicariously liable for the actions of their agents/employees would reduce misconduct. Employers would be moved to use greater caution in selecting employees, employers would be inclined to more carefully instruct employees, and employers would be encouraged to more closely supervise employees—all of this having the effect of deterring misconduct by employees. *Id.* at 4-6.

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. Why, for example, where a servant commits a negligent tort on a third party is it insufficient to hold only the servant liable? In *Stockwell v. Morris*, 46 Wyo. 1, 22 P.2d 189, 194 (1933), the court commented, "[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." A number of justifications have been announced for holding the master accountable . . .

A third reason for the general rule is the deterrence theory. The theory is that if a principal/master knows he will be accountable for the actions and transgressions of his agent/servant, he will be more careful in selecting his agent/servant in the first place and will be more diligent in his instruction and supervision of his agent/servant during the term of the agency.

Id. at 4-5.

B. Notarial Misconduct Encouraged By Customers

Employers are not alone in inducing notarial misconduct. Often, misconduct is initiated or encouraged by the notary's customer.⁸⁹ A wide range of settings is possible in which customers seemingly find it to their advantage to encourage notaries to violate sound notarial practices.

At one end of the spectrum might be the customer who urges the notary to expedite the notarial process by omitting one or more steps in a thorough notarization simply to save time.⁹⁰ Though such requests may appear rather innocent, at a minimum they can result in notaries failing to exercise reasonable care in the performance of their duties. Such requests perpetuate the stereotype that notarial procedures are not important and can be abbreviated merely to save a little time. At the most sinister level, the seemingly innocent request to speed up the process and skip one or more steps in it may be a ruse employed by a scoundrel to accomplish a forgery. When customers suggest the omission of steps in sound notarial practice, it especially indicates that those customers know the process and intend to circumvent it.

Other customers may play upon the goodness of notaries to overlook notarial requirements for the convenience of the customers. Some of those customers may be the notary's friends, family or associates and may think they have standing to ask for and obtain such personal favors.⁹¹ These circumstances are not at all innocent because, again, the fact that the customers know the notarial requirements and seek to circumvent them indicates knowing and intentional misconduct. Some of these requests will be made with purely fraudulent motives to accomplish forgeries. Occasionally, notaries will be offered bribes to violate notarial law and practice or will be induced to join in collusion to defraud by the prospect of financial gain.⁹² Amazingly, it is not uncommon for customers who are friends, family or associates of notaries to utilize such connections to obtain improper notarizations, thereby involving those notaries in the fraudulent schemes.⁹³

89. Faerber, *supra* note 37, at 750 (providing examples of common scenarios of notarial fraud).

90. See, e.g., Paul D. Bresnan, *Investigator Relates a Shocking 'Typical' Case of Notary Fraud*, NOTARY BULL., June 1997, at 5.

91. See *id.* (citing the case where a husband forged his wife's name to a real estate document and convinced a fellow worker, with whom he had a "solid working relationship," to notarize the forged signature in the absence of the wife).

92. See, e.g., *Logue v. Von Almen*, 40 N.E.2d 73 (Ill. 1941) (observing that notary naughtily notarized deed in which he held a financial interest).

93. See Bresnan, *supra* note 90, at 5 (noting where a husband persuaded a co-worker notary to notarize his wife's forged signature, both the husband and the notary were the subjects of civil and administrative actions).

For example, a husband prepares a fraudulent document operating to remove his wife's name from a deed to property they own together.⁹⁴ The husband forges his wife's signature and then goes to have the signature notarized. Arriving at the notary's place of business, the husband presents the document and asks that it be notarized. The husband explains to the notary (who is a real estate broker and with whom the husband is acquainted) that his wife is out-of-town, or that she is ill and unable to personally appear. The notary, reluctant to notarize the document in the wife's absence, gives in to the husband's pleas that time constraints require immediacy. Relying on the acquaintance-husband's word, the document is notarized. It turns out that the husband and wife are in the midst of a hotly contested divorce. The wife, upon discovering what has happened, sues both the husband and the notary for fraud. The notary's notary commission is ultimately revoked and his real estate license could be revoked as well.⁹⁵ Again, this is a common scenario.⁹⁶

Thus, there is considerable room for notarial mistakes and misconduct. There is also considerable opportunity for employers and customers of notaries to initiate notarial violations or to conspire with notaries to commit fraudulent schemes.

II. A CODE OF ETHICS FOR EMPLOYERS AND CUSTOMERS OF NOTARIES

*The Code of Professional Responsibility points the way to the aspiring and provides standards by which to judge the transgressor.*⁹⁷

Although the Notary Public Code establishes a basic framework for notaries and their professional obligations, it is still lacking. More often than not, notarial misconduct is encouraged or initiated by an employer or customer rather than simply undertaken unilaterally by the notary. With this in mind, the Notary Public Code, as well as the ASN Code of Ethics, would both be more thorough if they also addressed the responsibilities of

94. *Id.*

95. *Id.*

96. This is an actual case from an article by Paul D. Bresnan, a former Senior California State Notary Investigator who, for over 12 years, investigated more than 1500 cases of notarial fraud. *Id.* Over two-thirds of lawsuits involving notarial misconduct involve real estate deeds. NAT'L NOTARY ASS'N, 101 USEFUL NOTARY TIPS 17 (1995). See also *In re McAlear*, 170 P.2d 763, 766-67 (Or. 1946) (disbarring attorney because he forged his estranged wife's signature on various deeds and checks and then persuaded an attorney-notary to notarize the signatures).

97. MODEL CODE OF PROFESSIONAL RESPONSIBILITY, Preamble (1999). The NNA recognizes this problem in the *Notary Public Code*, yet fails to adequately address the issue. See NOTARY PUBLIC CODE, Introduction at v (1998).

employers and customers. Everyone is obliged to follow the law, which includes notary public statutes. Moreover, employers and customers benefit directly from notarial services, and especially owe a duty to follow (rather than to discourage) adherence to formal notarial requirements. This is particularly true where the notary employer is an attorney or law firm. Misconduct undermines the integrity of the office of notary public.⁹⁸ The well-documented risk of conflictive practices employers and customers cause notaries warrants specific treatment in a code of ethics. The following ten principles, along with the accompanying explanatory materials, constitute a suggested Code of Ethics for Employers and Customers of Notaries. Just as the goals of the ABA's Code of Professional Responsibility (quoted above) were to provide guidance for those aspiring to the highest ethical conduct and to set clear standards to permit discipline for violators,⁹⁹ these same purposes can be achieved with this Code of Ethics for Employers and Customers of Notaries.

1. Guiding Principle I: Employers And Customers Shall Respect The Role Of Notaries As Independent And Impartial Public Officials.

A notary public is an authentic public officer who is to act as an impartial witness.¹⁰⁰ As the New York Court of Appeals stated long ago, notaries "are created for the benefit of the public."¹⁰¹ And, just like every other public officer (such as a legislator, mayor, police officer, building inspector or court clerk) when performing the functions of the public office, he or she is required to do so properly, without undue or corrupt influences guiding or directing his or her official acts.¹⁰²

Employers and customers' misbehavior regularly challenges notaries who refuse to notarize—that is, notaries are chastised for doing the right thing.¹⁰³ For example, employers and customers

98. NOTARY PUBLIC CODE, Introduction at v-vi (1998). As a member of the Commission charged with drafting the *Notary Public Code*, Professor Closen suggested that the Code be expanded to treat employers and customers of notaries, but that was not undertaken. Paradoxically, the *Notary Public Code* recognizes that notarial responsibility "frequently will contradict not the provisions of law but the policies or expectations of the [n]otary's employer." NOTARY PUBLIC CODE, Introduction at vi (1998). Yet, the *Notary Public Code* gives scant further mention of this issue in its guiding principles. NOTARY PUBLIC CODE *passim* (1998).

99. MODEL CODE OF PROFESSIONAL RESPONSIBILITY, Preamble (1999).

100. Closen, *supra* note 5, at 651-52. See also *supra* note 48 and accompanying text for further discussion.

101. *Sylvia Lake Co. v. Northern Ore Co.*, 151 N.E. 158, 159 (N.Y. 1926).

102. See *Understanding Our Fiduciary Duties as Notaries*, *supra* note 39, at 1 (asserting that notaries owe a fiduciary duty to perform competently and honestly).

103. See generally *The Crisis of Responsibility*, NAT'L NOTARY, May 1995, at

regularly tender defective documents to notaries, such as documents containing blank spaces within their bodies.¹⁰⁴ Although there is some authority to the contrary,¹⁰⁵ notaries cannot notarize such documents, unless and until the blanks are filled in or marked N/A (“not applicable”).¹⁰⁶ Employers and customers will sometimes tender documents containing no notarial language whatsoever, but notaries cannot notarize them until the notarial certificate language has been added.¹⁰⁷

Employers and customers may falsely date notarial certificates and expect notaries to ratify these falsifications.¹⁰⁸ Notaries either must correct such erroneous dates or must refuse to notarize.¹⁰⁹ Unfortunately, there are situations where employers or customers view notarizations as no big deal, and thus notarial formalities are seen as unnecessary inconveniences not worth following (as later sections of this Article will point out in greater detail).

In another situation, an employer or customer may ask a notary to notarize for a signer with whom the notary cannot communicate due to a language barrier, and for whom the notary cannot verify identity because the signer’s documents of identification are in a language foreign to the notary.¹¹⁰ The

11 (discussing notary duties and responsibilities).

104. NOTARY PUBLIC CODE, Guiding Principle IV, Art. D, § IV-D-1 (1998) (illustrating the problem when “[t]he Notary is asked by a stranger to notarize that person’s signature on a document containing blank spaces”).

105. Since a notary’s sole function is to identify document signers and to notarize the signers’ signatures (and sometimes to administer an oath to the signers), the argument can be made that the notary should not be judging the competence, willingness or understanding of document signers and should not be evaluating the completeness of documents. Of course, notaries have the responsibility to see that the certificate of notarization is complete, but that is all. “A notarization is *nothing more* than a written verification that a person’s signature is genuine.” (emphasis added). *Understanding Our Fiduciary Duties as Notaries*, *supra* note 39, at 3. See generally Bruno, *supra* note 21, at 1013 (arguing that notaries should not attempt to judge the competence or willingness of document signers).

106. NAT’L NOTARY ASS’N, SORRY, NO CAN DO! 2, at 7 (1993) [hereinafter SORRY, NO CAN DO!]. “The Notary shall refuse to notarize any document whose text is blank or incomplete.” NOTARY PUBLIC CODE, Guiding Principle IV, Art. D, § IV-D-1 (1998).

107. NOTARY PUBLIC CODE, Guiding Principle IV, Art. A, § IV-A-1 (1998). “The Notary shall not notarize any document unless it bears jurat, acknowledgment or other notarial ‘certificate’ wording that specifies what the Notary is attesting.” *Id.* This statement is followed by an illustration of a customer who asks a notary to notarize a drawing containing no notarial certificate. *Id.*

108. SORRY, NO CAN DO!, *supra* note 106, at 7. “If you are asking the Notary to write a date other than today’s date—the *actual* date of notarization—on an official notarial form, then you may be accused of soliciting an illegal act, which is itself a crime.” *Id.*

109. *Id.*

110. *Id.* at 8. “The Notary is approached by a client and a stranger who does

notary cannot notarize under such conditions. The Notary Public Code supports that conclusion by directing: “[t]he Notary shall not notarize for any person with whom the Notary cannot directly communicate in the same language, regardless of the presence of a third-party interpreter or translator.”¹¹¹

Another circumstance in which other parties ask notaries to breach notarial ethics involves requests to disclose the contents of notary journals. (The maintenance of a thorough and contemporaneous notary journal is a duty that will be discussed in detail in later sections of this Article.¹¹²) Notary journal entries contain information that the parties to a notarization may consider to be important and/or confidential. Notaries have the responsibility to preserve the confidences of those for whom notarizations are performed. Therefore, notaries should not release confidential information from their journals upon requests from employers and customers.¹¹³ The Notary Public Code covers this point as the principle applies to notaries themselves: “[t]he Notary shall respect the privacy of each signer and not divulge or use personal or proprietary information disclosed during execution of a notarial act for other than an official purpose.”¹¹⁴ The ASN Code of Ethics urges the notary not to “betray the confidence of any individual appearing before” him and not to “divulge the contents of any document nor the facts of execution of that document without proper authority.”¹¹⁵

While an employer can and should have in-house policies in place to foster the availability, accuracy and thoroughness of notarizations performed by each employee-notary, such policies must be consistent with existing notarial law and ethics—for after all, it is the notary who is commissioned to perform the official functions, not the employer.¹¹⁶ Similarly, no matter how important

not speak English, but offers a foreign passport as proof of identity.” NOTARY PUBLIC CODE, Guiding Principle III, Art. C, § III-C-3 (1998).

111. NOTARY PUBLIC CODE, Guiding Principle III, Art. C, § III-C-3 (1998).

112. See *infra* text accompanying notes 185-207.

113. The journal entry may contain such information as addresses and phone numbers of document signers, drivers’ license/passport numbers, and document types and dates. See *infra* text accompanying note 190.

Document signers should be entitled to expect that public officials performing notarizations will not reveal anything about the signers or the documents, unless permitted to do so by the entrustors or lawfully compelled to do so. Notaries should not even divulge the fact of a particular notarization. Included within this confidentiality responsibility is the duty to protect the security of the notary journal, which contains information about each notarization.

Closen, *supra* note 5, at 668-69.

114. NOTARY PUBLIC CODE, Guiding Principle IX (1998).

115. CODE OF ETHICS OF THE AMERICAN SOCIETY OF NOTARIES (May 4, 1980).

116. See generally, Closen & Shannon, *supra* note 77, at 1 (suggesting among other things that law firms (as employers) should have various practices and

a particular customer may be to the notary or the notary's employer, customers cannot dictate how a notarization will be performed. Impartiality and independence are the hallmark qualities of a notary public. If one does not have the gumption to insist on adhering to established notarial law and sound notarial practice, then one should not be a notary public. However, employees do not generally wish to appear disloyal to their employers and customers, and employers and customers should not place notary employees in a position of having to choose between their notarial commissions and their jobs or business.

2. Guiding Principle II: Employers and Customers Shall Cooperate With and Honor Notaries' Insistence Upon the Physical Presence of Document Signers at the Time of Notarization.

The most important function of the notary is to properly identify document signers, so as to prevent and deter document fraud.¹¹⁷ The notary statutes of every state expressly or impliedly demand that document signers appear in the physical presence of notaries to sign or acknowledge their signatures;¹¹⁸ the Model Notary Act demands likewise.¹¹⁹ Without adhering to this requirement of traditional notarizations (in contrast to the contemporary verification of digital signatures and electronic documents),¹²⁰ it would be nearly impossible to assure the signers' identities.

According to the Notary Public Code, "[t]he Notary shall require the presence of each signer and oath-taker in order to

policies in place for notarial services).

117. See *The ID Puzzle*, NAT'L NOTARY, Sept. 1996, at 9 (stating "[t]he Notary of the 1990s is heavily relied upon to verify that the signers of certain important documents are who they claim to be.") "At this time when business transactions between strangers are commonplace, society depends on the Notary to invest integrity and reliability into the document-execution process." *Id.* at 10. "A notarization is nothing more than a written verification that a person's signature is genuine." *Understanding Our Fiduciary Duties as Notaries*, *supra* note 39, at 3. "Perhaps the notary's most important duty when notarizing a signature is to exercise reasonable care to ascertain the identity of the signer." VAN ALSTYNE, *supra* note 5, at 23.

118. See, e.g., MICH. COMP. LAWS ANN. § 565.264 (West 1993); N.J. STAT. ANN. § 46:14-2.1(b) (West 1986 & Supp. 1999). "Under centuries of practice and under fundamental common law rules the performance of this duty [to verify document signer identity] absolutely requires the signer to personally appear in the physical presence of the notary prior to the execution of the notarization." VAN ALSTYNE, *supra* note 5, at 23.

119. MODEL NOTARY ACT § 1-105 (1) to § 1-105 (4) (1984).

120. See generally Anderson & Closen, *supra* note 2, at 833 (discussing document authentication through digital signatures); Closen & Richards, *supra* note 4, at 703 (discussing the role of cybernotaries and the inadequacy of cybernotary legislation).

carefully screen each for identity. . . .¹²¹ Yet, employers regularly ask, encourage or direct their staff-notaries to perform notarizations of signatures for absent signers, often family, friends, associates or clients of the employers.¹²² Employers regard this practice as appropriate support or favoritism for others, even though it violates the most fundamental precept of lawful and sound notarial practice. Customers, as well, regularly ask for this accommodation of not having the signer personally present to sign or acknowledge the signature.¹²³ For example, a customer well-known to a notary might execute and mail a document to the notary and then call the notary on the telephone to request that the notary notarize the document when it arrives without the signer being personally present.¹²⁴ Even though the notary would recognize the customer's voice and signature, the notary may not legally nor ethically notarize under those circumstances.¹²⁵

Furthermore, many document signings must include oral oaths taken by the signers to the truth of the contents of the documents,¹²⁶ and notaries should administer such oaths directly in person to the signers.¹²⁷ An oath cannot be administered if the one required to take it is not even present. Yet, employers and customers will sometimes ask notaries to administer oaths over

121. NOTARY PUBLIC CODE, Guiding Principle III (1998).

122. "[E]ven if an employer argues that it is an unnecessary inconvenience for a major client to appear before a Notary-employee for the signing of a notarized contract, the Notary must still insist on that client's personal appearance . . ." *Am I Being Ethical?*, *supra* note 4, at 7-8.

123. *See, e.g.*, *Butler v. Comic*, 918 S.W.2d 697, 698 (Ark. 1996) (stating that two of ten brothers and sisters presented a quitclaim deed purportedly signed by all ten to a notary for notarization even though eight were not present, and that some of the signatures were forgeries); *McWilliams v. Clem*, 743 P.2d 577, 579 (Mont. 1987) (stating that the husband, who signed a deed, persuaded the notary to also notarize the purported signature of the wife to the same deed although the wife was not present, and that the wife's signature was a forgery); *Ameriseal of N.E. Florida, Inc. v. Leiffer*, 673 So. 2d 68, 69 (Fla. Dist. Ct. App. 1996) (stating that a notary notarized the actual signatures of two document signers although they were not present and that the document contained false information).

124. *See* NOTARY PUBLIC CODE, Guiding Principle III, Art. A, § III-A-1 (1998).

125. *Id.* "The Notary declines to perform a 'telephone notarization' without the physical presence of the signer, since it would be a clear violation of the law . . ." *Id.*

126. *Closen, supra* note 5, at 660-61. "Notaries may or may not be asked to administer oaths to document signers, depending upon the kind of notarizations sought." *Id.* A jurat requires the administration of an oath. *See Tip Sheet*, NAT'L NOTARY, July 1999, at 20 (discussing the proper procedure for the administration of oaths).

127. *See* NOTARY PUBLIC CODE, Guiding Principle III (1998). It would often be impossible to know for sure the identity of a party at the other end of a telephone line or cellular call, so the notary's key function of identifying the document signer and oath-taker could not be performed. *Id.* at Guiding Principle III, Art. A, § III-A-1 (1998).

the telephone to absent signers,¹²⁸ or perhaps to omit the administration of the oral oath entirely. Unquestionably, the integrity of a document and the diligence of a notary will be placed in question if an oath that should have been given in person is administered by telephone¹²⁹ or not administered at all.¹³⁰

Employers and customers must not attempt to persuade notaries to violate the fundamental physical presence requirement for document signers. Statutory and case law require such physical presence.¹³¹ The Notary Public Code recites the obvious proposition that “[t]he Notary shall give precedence to the rules of law over the dictates or expectations of any person or entity.”¹³² Requiring signers to be physically present is in the best interests of employers and customers because it prevents document fraud and assures the integrity of notarizations.¹³³ On the other hand, if a notarization were performed without the physical presence of the signer, and if that fact were later to come to light, the notarization, the document on which it appears and the underlying transaction could be subject to challenge and possible invalidation.¹³⁴ Employers and customers should not want to contribute to a cloud of doubt placing the validity of notarizations in jeopardy, for that is antithetical to their own ultimate interests.¹³⁵

3. Guiding Principle III: Employers and Customers Shall Encourage Notaries to Take All Necessary Steps to Reasonably Identify Document Signers.

As already noted, identifying a document signer is the notary's most important task.¹³⁶ Moreover, one of the most

128. The so-called “telephone notarization” without the document signer/oath taker being present is impermissible. *Id.*

129. *See, e.g.,* United Servs. Auto Ass'n v. Ratterree, 512 S.W.2d 30, 32 (Tex. Civ. App. 1974) (detailing a case where a notarial oath was purportedly administered by telephone).

130. *See, e.g.,* Gargan v. State, 809 P.2d 998, 999 (Alaska Ct. App. 1991) (describing a case where a signature on a letter was notarized but no oral oath was administered, although the notarial certificate recited that the signer had “sworn” to it).

131. *See, e.g.,* MICH. COMP. LAWS ANN. § 565.264 (West 1993); N.J. STAT. ANN. § 46:14-2.1(b) (West 1986 & Supp. 1999). *See also* Christensen v. Arant, 358 N.W. 2d 200, 201 (Neb. 1984) (invalidating a sales contract because it was not notarized in the seller's presence).

132. NOTARY PUBLIC CODE, Guiding Principle V (1998).

133. *See generally* Faerber, *supra* note 37 for further discussion of the physical presence requirement.

134. *Christensen*, 358 N.W.2d at 202.

135. Peter J. Van Alstyne, *The Notary's Duty to Meticulously Maintain a Notary Journal*, 31 J. MARSHALL L. REV. 777, 779 (1998). “The document signer has every right to expect that the notarization is being performed correctly and that it will withstand challenges to its validity.” *Id.*

136. *The ID Puzzle*, *supra* note 117, at 9. “A Notary's most important duty is to positively identify each and every document signer to prevent forgery.”

common instances of document fraud occurs when notaries do not properly identify the signers.¹³⁷ Given the importance of this aspect of the notary's duty, coupled with potential liability imposed upon employers for notarial misconduct, it is somewhat paradoxical that employers do not implement more safeguards and procedures for properly identifying signers. Incredibly, some employers even intentionally direct notary employees to perform notarizations without such identification.¹³⁸ An employer or customer of a notary will sometimes introduce a signer to the notary for the very first time and expect the notary to accept the word of the employer or customer for the purpose of identifying the signer.¹³⁹ But, such an identification is woefully insufficient and cannot be accepted by the notary.¹⁴⁰

In the very early days of this country, notaries had virtually no difficulty in identifying document signers because the population was small, people did not tend to travel great distances and notaries knew just about everyone who sought their services.¹⁴¹ Moreover, there were no documents of personal identification generally available. At the present time of ease of mobility, many individuals, seeking to have signatures notarized, confront notaries, but regularly, these notaries do not know these individuals.¹⁴² "Ironically, identification documents or ID cards, the least secure of the ways to identify a signer, because of the prevalence of fake IDs, have necessarily become the predominant

SORRY, NO CAN DO!, *supra* note 106, at 3.

137. See Faerber, *supra* note 37, at 754-60 (setting out several examples of cases where notaries had not properly identified document signers).

138. See, e.g., *Dickey v. Royal Banks of Mo.*, 111 F.3d 580, 582 (8th Cir. 1997) (alleging that a bank officer had directed the bank's employee-notary to notarize for an absent customer); *In re Boyd*, 430 N.W.2d 663, 666 (Minn. 1988) (reciting that an attorney had directed a law firm's employee-notary to notarize the signature of an absent deceased client).

139. Faerber, *supra* note 37, at 750 n.2.

140. *Id.* at 750. See also *The ID Puzzle*, *supra* note 117, at 9 (noting that "[t]he safest and most reliable identification method is personal knowledge, strong familiarity with an individual resulting from numerous interactions in association with other people over a period of time sufficiently long to eliminate every reasonable doubt that the person has the identity claimed.")

141. *The ID Puzzle*, *supra* note 117, at 9. "For most of the nearly 2,000 years the office of Notary Public has existed, identification required little effort: most people were anchored in smaller communities, and Notaries personally knew nearly everyone who appeared before them." *Id.* See also Anderson & Closen, *supra* note 2, at 846 for further discussion.

142. *The ID Puzzle*, *supra* note 117, at 9. "Only in the 20th century has identification of document signers become the Notary's overriding preoccupation and problem. . . . [T]oday, almost everybody's on the move, and Notaries have the sobering responsibility of vouching . . . for the identities of total strangers." *Id.* See also Anderson & Closen, *supra* note 2, at 846 (stating "[n]otaries are now regularly confronted face-to-face by total strangers bearing a variety of documents of identification, all of which are subject to alteration and forgery.")

identification method used by Notaries in our mobile society.”¹⁴³

A thorough identification process merely takes a few minutes to complete. The document signer should be asked to produce two or more documents of identification. These ID documents should include at least one government-issued document containing a photograph of the signer, and together the ID documents, should also include a description of the signer and his/her signature.¹⁴⁴ Some state notary statutes, as well as the Model Notary Act, now mandate what is regarded as constituting “satisfactory evidence of identity,”¹⁴⁵ and those laws tend to be consistent with the practice just suggested.¹⁴⁶ The reason for this detailed identification procedure is that it provides the notary with at least three bases for comparative analysis to determine signer identification.

First, there is the photograph and written physical description that can be compared to one another. Second, there is the photograph and physical description to compare to the actual appearance of the signer who presents himself/herself to the notary.¹⁴⁷ Third, there are multiple signatures that can be compared to the signature on the document that is to be notarized and the signature on the document of identification.¹⁴⁸ Moreover, a signature will also be placed in the notary journal (to be discussed below), providing a third signature for comparison.¹⁴⁹ Incidentally,

143. *The ID Puzzle*, *supra* note 117, at 9. See also *Spot Those Imposters*, NAT'L NOTARY, Jan. 1999, at 27 (stating that “[a]ll identification documents should be carefully inspected for evidence of imposture, alteration and counterfeiting. There is no absolute and foolproof method to detect every false ID.”)

144. *The ID Puzzle*, *supra* note 117, at 10.

All authorities agree that the best IDs contain at least three elements: a photograph, a physical description . . . and a signature In addition, the best IDs are issued by an official authority known to exercise a high standard of care in screening applicants for the particular identification document. State and federal agencies have proven to be the most careful screeners.

Id.

145. MODEL NOTARY ACT, § 1-105 (11) (1984).

146. “Some statutes enumerate the different types of acceptable identification [see, e.g., CAL. CIV. CODE § 1185 (West 1992 & Supp. 1999); FLA. STAT. ANN. § 117.05(5) (West 1996 & Supp. 1998)], others merely call for satisfactory evidence [see, e.g., OHIO REV. CODE ANN. § 147.53 (Banks-Baldwin 1994 & Supp. 1997); IOWA CODE § 9E.9.6 (West 1992 & Supp. 1997)].” NOTARY PUBLIC CODE, Guiding Principle III, Art. B, § III-B-1 (1998).

147. Notaries often depend on photographs to identify people. Moreover, the physical description on an ID document should match the photograph on the same document, and both should match the signer’s appearance.

148. Van Alstyne, *supra* note 135, at 783 (discussing the three signatures to be compared—the signature on an ID document, the signature on the document to be notarized and the signature in the notary journal).

149. *Id.* Indeed, obtaining three signatures is particularly valuable because one is an established signature on an ID document that can be compared to a presently executed signature. The other two are contemporaneously executed

as will be addressed in more detail later, the titles and serial numbers of the ID documents should also be recorded in the notary journal entry.¹⁵⁰

If every notary statute in the country, and if every notary public in the country, were to routinely require all document signers to produce satisfactory evidence of identification, signers could not possibly believe they will be able to have a document notarized without possessing and displaying proper ID documents to notaries. No exceptions would be allowed, no matter how well the notary might know the signer. If every state notary law in the country mandated the notation in a mandatory journal entry of the serial numbers of two or more ID documents presented to a notary for each notarization, false identification of document signers would be drastically reduced, if not virtually eliminated.

It is likely that some employers directing improper notarizations based upon incomplete identification procedures do not know any better. Their reasons may be based on assumptions that notarial laws are unimportant, that an imposter could never victimize them or that there is a genuine need to expedite a transaction. But the fact is that the work of impostors is not just someone else's problem. Such fraud occurs all too often.¹⁵¹ Many employers do not understand that improper identification places their notary employees and their companies at risk for legal liability. Adhering to this proposed code can significantly reduce such risks.

Customers cause all sorts of difficulties for notaries during the identification process. Some customers do not carry any ID documents with them, or carry documents that are expired or deficient in providing the notary with the important features of a recent photograph, physical description and signature. Incidentally, while some expired ID documents would be quite satisfactory in supplying the listed features, others might be too old to have continuing reliability.¹⁵² Other customers may present ID documents that do not reflect recent changes in physical appearance (resulting from weight loss or gain, illness, hair styling, etc.), that do not reflect recent name changes (resulting from marriage or divorce, adoption, etc.) or that do not reflect recent changes in handwriting and signing (resulting from physical injury, illness, etc.).

Requiring or allowing notaries to record the signer's thumbprint is another useful method of verifying a signer's

signatures that should also appear similar. *Id.*

150. *See generally id.*

151. *See id.* at 802 (commenting that "American society is experiencing a continued upswing in document fraud and forgery")

152. *Id.* at 783.

identity.¹⁵³ Used in conjunction with an identification card such as a driver's license, thumbprinting is one of the latest and most effective ways to combat notarial fraud.¹⁵⁴ It deters many would-be imposters from attempting to commit a forgery.¹⁵⁵ This is evidenced by the success of a thumbprinting requirement instituted in California.¹⁵⁶ After rising instances of real estate fraud cost Los Angeles County residents millions of dollars, the state legislated that notaries public must obtain a thumbprint, to be imprinted in their notarial journals, from all persons signing certain deeds affecting real property.¹⁵⁷ This requirement imposes almost no expense on the notary, the notary's employer or customer, or the state. The program was a "remarkable success" and "dramatically reduced fraud."¹⁵⁸ The success of the California program has prompted some calls for all notaries nationwide to adopt similar measures.¹⁵⁹ As notarial thumbprinting becomes more common, especially where thumbprinting by notaries is permissive rather than obligatory, employers and customers should not stand in the way of this progressive and improved method for enhancing document security, even though it will be slightly more intrusive and time-consuming.

Employers and customers of notaries should not only refrain from interfering with the efforts of notaries to thoroughly identify document signers but also should encourage notaries to fully and accurately identify every signer. It is in everyone's best interests to do so. Both employers and customers should come to expect that all signers will be required to produce two or more documents of identification at notarization ceremonies. Such a practice should become routine.

153. See generally Vincent J. Gnoffo, *Requiring a Thumbprint for Notarized Transactions: The Battle Against Document Fraud*, 31 J. MARSHALL L. REV. 803 (1998) (advocating use of thumbprinting for notarial transactions).

154. See *Lasting Impressions*, NAT'L NOTARY, Mar. 1995, at 16 (touting the value of fingerprinting in deterring document fraud and assisting investigation and identification of criminals); *A Journal Thumbprint: The Ultimate ID*, NAT'L NOTARY, May 1996, at 9 (noting same). Other forms of biometric identification methods, including "fingerprints, hand geometry, retina scans, and signature or voice verification" are on the verge of widespread availability. David A. Petti, *An Argument for the Implementation of a Biometric Authentication System ("BAS")*, 80 J. PAT. & TRADEMARK OFF. SOC'Y 703, 703 (1998). "[W]idespread regulation of biometrics remains uncharted territory in the legal framework of the United States." *Id.*

155. Gnoffo, *supra* note 153, at 805.

156. *Id.* at 813-14.

157. Timothy J. Moroney, *Business Associations and Professions; Notaries Public—Journals*, 27 PAC. L.J. 451 (1996).

158. See *Thumbprinting: 'The Notary's Best Anti-Fraud Weapon' Now*, NOTARY BULL., June 1995, at 1 [hereinafter *Best Anti-Fraud Weapon*]; Corie M. Anders, *Thumbprints Squash Real Estate Fraud in L.A. County*, S.F. EXAMINER, May 7, 1995, at E1.

159. See generally Gnoffo, *supra* note 153.

4. *Guiding Principle IV: Employers and Customers Shall Encourage Notaries' Use of Notarial Seals and Shall Respect Notaries' Control Over Such Seals.*

Historically, the notary seal has served as the almost universally recognized symbol for the notary public.¹⁶⁰ The origin of the seal can be traced to ancient times.¹⁶¹ Indeed, the seal was so well recognized as a critical feature of any notarization that in 1883, the United States Supreme Court announced judicial notice would be accorded to the seal of a foreign country's notary.¹⁶² As the Supreme Court wrote, "the [C]ourt will take judicial notice of the seals of notaries public, for they are officers recognized by the commercial law of the world."¹⁶³ The notary seal has occupied a significant place in notary law and practice, and in commercial and governmental transactions in this country as well.

In thirty-six states, notaries are required by statute to possess and affix their seals on certificates of notarization.¹⁶⁴ Even in the states that do not require the use of notary seals, notaries are permitted to maintain and use seals as part of the notarization ceremony.¹⁶⁵ In these latter jurisdictions, notaries do tend to obtain and regularly use seals because the affixation of a seal on a notarial certificate contributes to the integrity of a notarization, particularly for documents that will be sent across state lines or to foreign countries.¹⁶⁶ Indeed, the Notary Public Code declares: "[t]he Notary shall affix a seal on every notarized document . . ."¹⁶⁷ The Model Notary Act also mandates that a notary affix a seal to

160. Douglas M. Fischer, *The Seal: Symbol of Security*, NAT'L NOTARY, Nov. 1995, at 10. "For more than 2,000 years, the Notary seal has symbolized genuineness." *Id.* In the United States, there has been relatively little change in the form of notary seal over the generations, having progressed only from the waxen seal to the embosser to the ink stamp to the computer generated/electronic seal. Closen & Richards, *supra* note 4, at 727.

161. Closen & Dixon, *supra* note 3, at 874-75.

162. *Pierce v. Indseth*, 106 U.S. 546, 549 (1883).

163. *Id.* at 549.

164. See *Comparison of Notary Provisions*, NAT'L NOTARY, May 1999, at 23 (listing 14 states not requiring the use of notary seals: Connecticut, Delaware, Iowa, Kentucky, Louisiana, Maine, Massachusetts, Michigan, New Jersey, New York, Rhode Island, South Carolina, Vermont and Virginia); *Which States Do Not Require Notary Seals?*, THE NOTARY, May/June 1999, at 4 (listing same).

165. Fischer, *supra* note 160, at 12.

166. See Closen, *supra* note 5, at 694-701 (discussing interstate and international recognition of notarial acts). "Especially troublesome to the foreign recognition of United States notarizations is the fact that several states do not require the use of a seal, particularly an embossing seal which is customary in most other countries." *Id.* at 700. See also Fischer, *supra* note 160, at 11 (stating that "[t]oday the seal is virtually synonymous with the Notary.")

167. NOTARY PUBLIC CODE, Guiding Principle VII (1998).

every notarial certificate.¹⁶⁸

The presence of a notary seal enhances a notarization in a number of important respects. The placement of the seal on a document lends an air of seriousness to the notarial ceremony, especially when, in connection with the issuance of a jurat, there is also the administration of an oath to the signer.¹⁶⁹ "The affixation of the Notary seal climaxes the notarial act . . ." ¹⁷⁰ Because notary seals throughout the country tend to be fairly comparable in content and design, they are immediately recognizable for their intended purpose when they appear on documents.¹⁷¹ Most importantly, the requirement of the attachment of a notary seal to a notarial certificate deters efforts to perpetrate document fraud. A scoundrel intent on committing such fraud would need either to steal or counterfeit a seal and forge the notarization, to enlist the assistance of a corrupt notary or to deceive an honest and diligent notary into affixing the seal to a document.¹⁷² Furthermore, the placement of a seal on a document makes document forgery and reproduction more difficult.¹⁷³

The seal belongs absolutely to the notary whose name appears on it, regardless of who may have paid for the notary commissioning fee or for the seal itself.¹⁷⁴ Once the notary commission expires or is terminated early for whatever reason, the seal becomes invalid and must be disposed of properly (often as mandated by statute).¹⁷⁵ Some statutes call for the destruction of expired or invalid notary seals, some call for such seals to be

168. MODEL NOTARY ACT, § 4-203 (a) (1984).

169. *Tip Sheet*, *supra* note 126, at 20.

A jurat is a notarial act that motivates a signer to make a truthful statement. While the jurat also requires personal appearance, the document's signer must affix a signature on the document in the Notary's presence and take an oath or affirmation, administered by the Notary, swearing that the contents of the document are true.

Id.

170. *Wield the Seal with Care*, NAT'L NOTARY, July 1996, at 15.

171. See Fischer, *supra* note 160, at 12 (noting the similarity of size and shape of notary seals). "In terms of symbolism, the stamp and embosser are to the Notary what the stethoscope is to the doctor." *Id.*

172. See, e.g., *True Life Story From A Notary*, THE NOTARY, May/June 1999, at 6 (describing a case in which someone stole a notary seal and used it to falsely notarize a document).

173. See Fischer, *supra* note 160, at 12 (stating that "[w]hen affixed correctly, the traditional seal becomes an effective fraud deterrent that can frustrate even high-tech forgery techniques . . . [T]he adeptly used embosser can deter fraud, especially when applied to multi-page documents.")

174. MODEL NOTARY ACT, § 4-202 (1984).

175. One problem can even be the misuse of an expired notary seal, because people so regularly fail to notice the expiration date on the seal. See, e.g., *In re Tanner*, 960 P.2d 399 (Utah 1988) (describing an attorney who had fraudulently settled a case with the help of his wife who was a notary and who falsely notarized a document with an expired notary seal).

turned over to the appropriate governmental office.¹⁷⁶ According to the Model Notary Act, “[a] notary shall keep an official notarial seal that is the exclusive property of the notary and that may not be . . . surrendered to an employer upon termination of employment.”¹⁷⁷

Unfortunately, employers and customers of notaries sometimes obtain control of notary seals and misused them.¹⁷⁸ Even non-notary lawyers have occasionally stolen or “borrowed” notary seals and have falsely notarized signatures on documents.¹⁷⁹ It is much easier for one to impersonate a notary and to forge a notarization if one possesses a real notary seal.¹⁸⁰ Thus, numerous states have enacted special statutes that criminalize the unlawful possession of a notary seal and/or the impersonation of a notary.¹⁸¹ The Model Notary Act provides that the seal “may not be used by any other person” than the notary,¹⁸² and defines the criminal offenses of “impersonation” of a notary¹⁸³ and “wrongful possession” of a notary seal or a notary journal or record.¹⁸⁴ As the ASN Code of Ethics warns, the notary public must “exercise extreme care to insure that the notarial seal, stamp and records are kept in a safe place and are not used by any other person.”¹⁸⁵ Similarly, the Notary Public Code announces that the notary shall “not allow this universally recognized symbol of office to be used by another”¹⁸⁶

Therefore, employers and customers of notaries in those states that do not require notaries to possess and use seals should not discourage notaries from affixing seals to documents. It is in

176. See, e.g., GA. CODE ANN. §§ 45-17-16 to 45-17-18 (1998); OHIO REV. CODE ANN. § 147.04 (Banks-Baldwin 1994 & Supp. 1998); W. VA. CODE §§ 29C-4-401 to 29C-4-404 (1998 & Supp. 1999) (requiring seal to be turned over to appropriate authorities).

177. MODEL NOTARY ACT § 4-202 (1984).

178. See, e.g., *True Life Story From A Notary*, *supra* note 172, at 6 (describing a case of fraudulent notarization by use of a stolen notary seal).

179. See, e.g., *In re Ballinger*, 625 N.Y.S.2d 225 (App. Div. 1995). See also *Board of Prof'l Resp. v. Neilson*, 816 P.2d 120 (Wyo. 1991) (detailing the case of an attorney who ordered a notary seal for a notary whose commission had expired and used that seal to fraudulently notarize deeds).

180. See, e.g., *True Life Story From A Notary*, *supra* note 172, at 6 (describing a case in which a stolen notary seal was used to falsely notarize a document).

181. See, e.g., FLA. STAT. ANN. § 117.05(9) (West 1996 & Supp. 1999); MO. ANN. STAT. § 486.380 (West 1987 & Supp. 1999); WASH. REV. CODE § 42.44.050 (West 1991 & Supp. 1999); W. VA. CODE ANN. § 29C-6-204 (1998 & Supp. 1999).

182. MODEL NOTARY ACT, § 4-202 (1984).

183. *Id.* § 6-301 (1984).

184. *Id.* § 6-302 (1984).

185. CODE OF ETHICS OF THE AMERICAN SOCIETY OF NOTARIES (May 4, 1980).

186. NOTARY PUBLIC CODE, Guiding Principle VII (1998).

the best interests of employers and customers for diligent notaries to take the extra step of affixing their seals. Everywhere, employers and customers of notaries must abide by the legal requirement that the notary seal is exclusively the property of the notary. So, employers and customers must not ask to borrow or use the notary seal, and must not surreptitiously take and/or use notary seals. Employers of notaries are not entitled to take possession of notary seals when their notary-employees leave the employment or when the commissions of notary-employees expire. This rule applies even if the employer has purchased the seal for the notary.¹⁸⁷

5. Guiding Principle V: Employers and Customers Shall Encourage Notaries' Use of Notarial Journals and Shall Respect Notaries' Control Over Such Journals.

One of the most common and effective ways employers of notaries can shield themselves from liability is by requiring notary-employees to utilize notarial journals.¹⁸⁸ An increasing number of jurisdictions require notaries to maintain journals.¹⁸⁹ The Model Notary Act includes a substantial article directing notaries to maintain thorough journal or record entries of their notarizations.¹⁹⁰ Unfortunately though, most states still do not require such meticulous record keeping for notarial acts.¹⁹¹ Journals protect notaries against unsubstantiated accusations of wrongdoing, and encourage notaries to be thorough and use caution in performing official duties.¹⁹² An effective notarial journal entry should include the name and address of the signer,

187. *Id.* at Art. C, § VII-C-1 (1998). "The inking stamp and embosser are the sole property of the Notary." Fischer, *supra* note 160, at 13.

188. See generally Gnoffo, *supra* note 153, at 804-06.

189. Van Alstyne, *supra* note 135, at 778 n.5. Notaries are required to maintain journals in Alabama, Arizona, California, Colorado, Hawaii, Maryland, Mississippi, Missouri, Nevada, Oklahoma, Oregon, Pennsylvania, Tennessee, Texas and the District of Columbia. *Id.* Kentucky, Louisiana, North Dakota and Ohio require notaries to journal only notarial protests. *Id.* Journal record keeping is recommended by state officials in Alaska, Connecticut, Florida, Idaho, Maine, Massachusetts, Michigan, Nebraska, New Hampshire, New Mexico, South Dakota, Utah, Vermont and Wisconsin. *Id.*

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

191. See Van Alstyne, *supra* note 135, at 778 n.5 (listing states that mandate use of a journal). Only 14 states currently require journals for general notarial acts. *Id.*

192. VAN ALSTYNE, *supra* note 5, at 38. See also *True Life Story From A Notary*, *supra* note 172, at 6 (describing a case where a notary's seal was stolen and used to falsely notarize a document, where the notary had kept a thorough journal with no chronological entry for the falsely notarized document, and where the police questioned the notary about his involvement in the fraud). According to the notary, "I feel that the only thing that saved me from prosecution in this case was maintaining a detailed notary journal." *Id.*

the date, the type of document, the type of service provided (such as whether a jurat or acknowledgment was produced and whether an oath was administered), the place or venue of the notarization, the signer's signature, the forms of identification supplied along with their serial or code numbers, the amount of any fee charged and possibly the signer's thumbprint.¹⁹³ Simply put, a proper journal entry in a bound book of chronological entries evidences very convincingly that a notary has taken his or her duties seriously and has exercised reasonable care.¹⁹⁴

Because of the tremendous value of thorough journals to notaries, employers and customers of notaries, the country's leading authorities strongly advocate the unwavering recording of a journal entry for each notarization. The Notary Public Code provides: "[t]he Notary shall record every notarial act in a bound journal or other secure recording device and safeguard it as an important public record."¹⁹⁵ This view is also supported, as already noted, by the provisions of the Model Notary Act.¹⁹⁶ Numerous notary experts advocate for the regular use of notary journals.¹⁹⁷ Indeed, we do not know of any notary authority that disagrees with this procedure.

Although the maintenance of such a notary 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. Even if a notary makes an innocent mistake in a notarization procedure, it would usually be caught or would be prevented if a journal were kept, because the content of the journal and the notary certification would usually disagree, and anyone simply reviewing the transaction would notice the discrepancy. An omission from a notarial certificate may be cured by the contents of a notary journal or by the testimony of a notary whose recollection is refreshed by the contents of a journal.¹⁹⁸

193. See Van Alstyne, *supra* note 135, at 783. See generally Gnoffo, *supra* note 153.

194. Van Alstyne, *supra* note 135, at 802.

An important reason the notary journal has no peer in comparability of protection to the notary and the public is because it is the least intrusive solution, for the greatest good, for the greatest number of people. . . .

The properly maintained notary journal is indeed the notary's most valued tool of the trade.

Id.

195. NOTARY PUBLIC CODE, Guiding Principle VIII (1998).

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

197. See generally Van Alstyne, *supra* note 135, at 777-802.

198. The general rule has been that notarizations will be held valid if they are in substantial compliance with legal requirements. Thus, a court would be inclined to uphold a notarization if the court were confident of the true content of a notarial certificate and that no fraud had occurred. See Clozen, *supra* note 5, at 684-85 (stating "[t]he courts generally accept the substantial

Historically, notaries have bitterly opposed relinquishing control over their journals.¹⁹⁹ Some state notary statutes have recognized the importance of the notary's control and safe-keeping of the journal.²⁰⁰ For example, in Maine, notaries "[s]hall safeguard and retain exclusive custody of these records. The notary may not surrender the records to another notary or to an employer."²⁰¹ And, California requires that notary seals and journals be kept under lock and key to prevent their unauthorized access and misuse.²⁰²

A number of states have adopted a different position, requiring that the notary submit the journal to a government agency when the person no longer serves as a notary.²⁰³ The Model Notary Act adopts this position.²⁰⁴ However, this practice has been criticized as antiquated and improper.²⁰⁵ A journal is the notary's most valuable protection against accusations of fraud or misconduct.²⁰⁶ Moreover, proper journal entries establish business

compliance doctrine in notarization cases. [Therefore,] substantial compliance with the notarization procedure [is] valid. . . . Thus, courts will allow testimony of witnesses to the notarization or other kinds of evidence to correct or supplement patent errors and omissions on certificates of notarization"); *Gargan v. State*, 809 P.2d 998, 999 (applying the substantial compliance doctrine); *Farm Bureau Fin. Co. v. Carney*, 605 P.2d 509, 514-15 (Idaho 1980) (applying the substantial compliance doctrine and recognizing evidence outside the notarial certificate to uphold it).

199. One of the earliest notaries, William Aspinwall of the Massachusetts Bay Colony, fought strongly against having to pass his notary records to his successor. He told the General Court in 1652, "[t]he bookes are mine own, bought at my owne chardge & Register therein my owne voluntary & handy worke, and as prople mine as any thing I possess is mine." *Notary Journals in Early American History*, THE NOTARY, Nov./Dec. 1998, at 4.

200. "The journal must be kept in the exclusive custody of the notary . . ." MODEL NOTARY ACT § 4-104(d) (1984). "The best strategy for protecting the notary and the public's need for access to the notary's journal is to statutorily require the notary to permanently retain the journal." Van Alstyne, *supra* note 135, at 792. Some 21 states require the notary journal to be surrendered to a governmental agency upon the termination of a notary's commission. *Id.* at 793.

201. ME. REV. STAT. ANN. tit. 4, § 955-B (West 1998).

202. CAL. GOV'T. CODE § 8206(a)(1) (West 1992 & Supp. 1998). See also *Landmark Law Mandates Protection of Journal, Seal*, NOTARY BULL., Oct. 1997, at 13.

203. *Handing Your Notary Journal to the Government for Safe-Keeping: It May Not Be as Safe as You Think*, THE NOTARY, Sept./Oct. 1997, at 4 [hereinafter *Safe as You Think*]. States requiring such submission are Alabama, Alaska, Arkansas, Arizona, California, Colorado, Hawaii, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Hampshire, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Texas, West Virginia and Wisconsin. *Id.*

204. MODEL NOTARY ACT § 4-104(e) (1984).

205. *Safe as You Think*, *supra* note 203, at 4. See also, Van Alstyne, *supra* note 135, at 788-94.

206. *Safe as You Think*, *supra* note 203, at 4.

records upon which the notaries can rely.²⁰⁷ Thus, notaries may wish to retain their journals even though their commissions have expired or have been terminated.²⁰⁸ Disputes and litigation about notarizations may not arise until years later, and notaries would be well served by having their journals available at that time.²⁰⁹ Journal entries help protect notary customers, employers, and the general public by ensuring that proper notarial procedures are followed. Therefore, employers and customers of notaries should cooperate with notaries and encourage the maintenance of a thorough notary journal, and employers should not attempt to interfere with notary-employees' control over their journals.²¹⁰

6. Guiding Principle VI: Employers and Customers Shall Not Seek Legal Advice from Non-Lawyer Notaries.

Unless notaries public are also licensed attorneys, they are not qualified to provide legal advice to customers beyond providing basic information about notarizations (including notarial certificates).²¹¹ If a non-lawyer notary goes further than the provision of fundamental information about a notarization, and for example, expresses views about the legal meaning or consequences of the content of documents or to advise customers about legal matters, then the notary engages in the unauthorized practice of law.²¹²

The Notary Public Code, the Model Notary Act and many state notary statutes expressly prohibit notaries from undertaking the unauthorized practice of law.²¹³ Although we believe the Model

207. *Id.*

208. See Van Alstyne, *supra* note 135, at 792.

As there is no defined statute of limitations on liability for the performance of a notarial act, there are no instructions as to how long a notary ought to personally retain the notary journal The effective life of a living will or durable power of attorney will vary with each individual.

Id.

209. *Id.* "The notary should be required to retain the journal for life." *Id.*

210. "The journal must be kept in the exclusive custody of the notary, and may not be . . . surrendered to an employer upon termination of employment." MODEL NOTARY ACT § 4-104(d) (1984). "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 135, at 778.

211. See NOTARY PUBLIC CODE, Guiding Principle VI (1998) (stating that "[t]he Notary shall act as a ministerial officer and not provide unauthorized advice or services.")

212. See *id.* at Art. B, § VI-B-2 (1998) (stating that "[t]he Notary who is not an attorney, or a professional duly trained or certified in a pertinent field, shall not prepare a document for another person or provide advice on how to fill out, draft or complete a document.")

213. See *id.* at Art. C, § VI-C-1 (1998); MODEL NOTARY ACT § 3-106 (1984). A number of notary statutes prohibit notaries from engaging in the unauthorized practice of law and provide that such activity constitutes

Notary Act would overly restrict the notary by prohibiting even the selection of notarial certificate language, the Act also states that “[a] non-attorney notary . . . may not assist another person in drafting, completing, selecting, or understanding a document or transaction requiring a notarial act.”²¹⁴ Some notary statutes focus special attention on the deceptive practice of a notary adopting the title *notario publico*, which customarily describes a lawyer-notary in many Hispanic countries.²¹⁵ And everywhere in the United States, there are court rules and general statutes, including criminal statutes, which forbid anyone not licensed in the appropriate jurisdiction from engaging in the unauthorized practice of law.²¹⁶

It is probably rare that a non-lawyer notary would volunteer unsolicited legal advice about a document or transaction. Instead, employers and especially customers of notaries may tend to ask notaries about issues beyond the notarization itself. However, employers and customers of notaries should not tempt non-lawyer notaries to undertake the unauthorized practice of law by asking

grounds for revocation of a notary commission or removal from office, and for injunctive relief to stop such activity. See, e.g., MO. ANN. STAT. §§ 486.385(1)(6), 486.390 (West 1987 & Supp. 1999); W. VA. CODE § 29C-7-101(g) (1998 & Supp. 1999). The Illinois statute governing notarial conduct states as follows: “[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; however, this prohibition shall not prohibit an attorney, who is also a notary public, from performing notarial acts for any document prepared by that attorney.” 5 ILL. COMP. STAT. 312/6-104(h) (West 1998). The Illinois statute further provides:

[u]pon his own information or upon complaint of any person, the Attorney General or any State’s Attorney, or their designee, may maintain an action for injunctive relief in the circuit court against any notary public who renders, offers to render, or holds himself or herself out as rendering any service constituting the unauthorized practice of law. Any organized bar association in this State may intervene in the action, at any stage of the proceeding, for good cause shown. The action may also be maintained by an organized bar association in this State. These remedies are in addition to, and not in substitution for, other available remedies.

5 ILL. COMP. STAT. 312/7-109 (West 1998).

214. MODEL NOTARY ACT, § 3-106(a) (1984). The NOTARY PUBLIC CODE also prohibits a notary from “determin[ing] or prescrib[ing] the particular type of notarial act or notarial certificate required in a given transaction.” NOTARY PUBLIC CODE, Guiding Principle VI, Art. B, § VI-B-3 (1998).

215. See, e.g., FLA. STAT. ANN. § 117.01 (West 1999). “Please, understand that the office of Notary in the United States is completely different from the office of *Notario Publico* in Spanish-speaking nations.” SORRY, NO CAN DO!, *supra* note 106, at 6.

216. See, Debra Baker, *Is This Woman a Threat to Lawyers?*, A.B.A. J., June 1999, at 54 (bearing the subtitle/abstract: “[a] resurgence of unauthorized practice complaints is raising questions about whether the court of public opinion will judge lawyers as guardians of the common good or protectors of their own turf.”)

notaries questions about the content of documents or about legal issues relating to documents. Indeed, employers and customers simply should not be seeking legal advice from someone like a non-lawyer notary who is not qualified to provide it. However, notaries should certainly be qualified to answer questions and advise parties about all features of a notarization, including the kind of notarial certificate appropriate for a particular document.²¹⁷ When a notary is unaware of the correct answer to a proper question, the notary should answer honestly that he or she is unsure.

Admittedly, there are areas of real uncertainty in situations in which notaries hold some other professional licensures, such as licensed real estate brokers, certified public accountants, licensed health care professionals and so on. When such professionals are called upon to notarize signatures on documents dealing with substantive matters within the subjects of their professional qualifications, such professionals are entitled to express views within their fields of professional competence, short of engaging in the unauthorized practice of law.²¹⁸ Hence, the prohibition against the unauthorized practice of law in the Model Notary Act "does not preclude a notary who is duly qualified in a particular profession from giving advice relating to matters in that professional field."²¹⁹

Realistically, it is probably the case that among non-lawyer notaries who engage in the unauthorized practice of law, those who are professionals in other fields most often engage in such unauthorized practice because they know more about legal matters relating to their fields of expertise than ordinary notaries. At the present time, for a host of reasons beyond the scope of this Article, there seems to be heightened focus within the legal profession on the unauthorized practice of law.²²⁰ Thus, notaries should especially beware of this area of concern.

7. Guiding Principle VII: Employers and Customers Shall Not Seek or Encourage Notaries to Provide Endorsements or Testimonials for Persons, Services or Products.

During the 1998 election campaign, Illinois Congressional

217. This view is contrary to the view expressed in the *Notary Public Code*. See NOTARY PUBLIC CODE, Guiding Principle VI, Art. A, § VI-A-1 (1998).

218. See Baker, *supra* note 216, at 55-56 (noting recent complaints of unauthorized practice of law committed by real estate closers, bankers, funeral directors, accountants, do-it-yourself law publishers and independent paralegals).

219. MODEL NOTARY ACT § 3-106(b) (1984).

220. See Baker, *supra* note 216, at 56 (pointing out that a "number of analysts trace the recent spate of unauthorized practice cases to frustration and fear [within the legal profession] over increased competition from businesses whose services traditionally were distinct from law practice . . .") According to Baker, there are "an increasing number of actions claiming nonlawyers are engaging in the unauthorized practice of law." *Id.* at 55.

candidate Gary Mueller managed to garner a great deal of media attention by becoming the first and only candidate to sign an affidavit of integrity attesting to his purity from just about all vices, including adultery, drug use, spousal abuse and so forth.²²¹ Standing at the candidate's side throughout his publicity stunt was a poster-size enlargement of the affidavit and an Illinois notary public.²²² With cameras rolling, the notary administered an oath to the candidate about the truthfulness of the affidavit. Unfortunately, no one seems to have noticed that the involvement of the notary public in this promotion was unseemly and improper, and might serve as a dangerous precedent for future abuse of the notarial office and deception of consumers and voters. When the notary—a public official commissioned by the state—knowingly participated in this media event, the notary provided the equivalent of a testimonial supporting the candidate's oath and affidavit. There have been other incidents of publication of notarial signatures and seals to lend the appearance of integrity to commercial schemes.²²³ Participation in such conduct is unethical for a notary, who is a public official sworn to serve as an impartial witness. Thus, employers and customers of notaries should not request that notaries participate in such commercialization.

The Model Notary Act prohibits notary testimonials, saying: “[a] notary may not endorse or promote any product, service, contest, or other offering if the notary's title or seal is used in the endorsement or promotional statement.”²²⁴ The Notary Public Code forbids the notary from “allow[ing] others to use or reproduce the Notary's seal in a commercial advertisement, solicitation or testimonial.”²²⁵ The ASN Code of Ethics directs each notary “to maintain a professional manner suitable to the office . . .” and “to uphold the trust placed in me by the public I serve.”²²⁶

The problem is that the general public does not appreciate the very limited function notaries perform in identifying document signers and administering oaths to the signers of some kinds of documents. Notaries do not verify the truth of the contents of affidavits and other notarized documents, but a lot of people do not

221. Cheryl Wetzstein, *Pledge of Integrity to Win Votes Could Prove a Risky Ploy: Voters Do Not Seem to Mind Lapses*, WASH. TIMES (D.C.), Oct. 28, 1998, at A2, available in 1998 WL 3462198.

222. The incident was even shown on prime-time national television news broadcasts.

223. See, e.g., *Unknowingly Swept Up In Sweepstakes, Notary Relates Her Recent Nightmare*, NOTARY BULL., Aug. 1996, at 3 (describing the case of a notary who “learned that her Notary seal and signature were being reproduced by the thousands to lend credibility to an internationally distributed sweepstakes”).

224. MODEL NOTARY ACT § 3-105 (1984).

225. NOTARY PUBLIC CODE, Guiding Principle VII, Art. B, § VII-B-3 (1998).

226. CODE OF ETHICS OF THE AMERICAN SOCIETY OF NOTARIES (May 4, 1980).

understand this narrow notarial role. The notary public is sworn to be an impartial witness. As a public official, a notary cannot become a partner in private commercialization, whether for political candidates or consumer products and services. The title is notary *public*, not notary *private*.²²⁷ A notary is a public officer or representative of the government whose official duty is to help prevent document fraud, not to contribute to consumer and voter acceptance and occasional deception.

It would be a grave mistake of judgment for notaries to lend their signatures and seals to efforts to promote candidates, goods and services. Also, employers and customers of notaries should not encourage notaries to engage in crass commercialization of used cars, insurance products, home loan and financial services, and so on.

8. Guiding Principle VIII: Employers and Customers Shall Become Reasonably Informed of Applicable Notarial Laws and Ethical Obligations.

In some states, notaries must certify that they are familiar with and will follow applicable notarial laws.²²⁸ A few other states require candidates to pass an examination before receiving their commissions (and the Model Notary Act also provides for notary applicants to pass a written examination)²²⁹ or to successfully complete a notarial training class.²³⁰ Both the ASN and the NNA are not-for-profit educational organizations and both promote notary education.²³¹ The ASN Code of Ethics urges notaries to "keep informed of the law regarding the duties and powers of the office of Notary Public . . . and not compromise that law,"²³² and the NNA Notary Public Code requires that "[t]he Notary shall seek instruction on notarization, and keep current on the laws,

227. See *Legislators Make the Rules, But You Can Make the Difference*, NAT'L NOTARY MAG., May 1996, at 3 (describing the possible effect of a proposed New Jersey law, the article says "Get Lost, I'm A Notary Private").

It would . . . be a dangerous public disservice [for a notary to provide testimonial endorsements of contests, services, and products] because many people mistake a Notary's involvement for governmental endorsement and may be deceived into believing that an otherwise unremarkable, or even shoddy, product is better than others.

'*Am I Being Ethical?*', *supra* note 4, at 7.

228. See, e.g., 5 ILL. COMP. STAT. ANN. 312/2-104 (West 1999); FLA. STAT. ANN. § 117.01(3) (West 1996 & Supp. 1998); W. VA. CODE § 29C-2-204 (1992 & Supp. 1998).

229. MODEL NOTARY ACT § 2-203 (1984).

230. See, e.g., N.C. GEN. STAT. § 10A-4(b)(3) (1998).

231. See generally Valera, *supra* note 16, at 971; Lisa K. Fisher, *American Society of Notaries: History of a Legacy*, 31 J. MARSHALL L. REV. 1001 (1998).

232. CODE OF ETHICS OF THE AMERICAN SOCIETY OF NOTARIES (May 4, 1980).

practices and requirements of the notarial office.”²³³ However, education requirements and testing procedures are not even followed in a majority of states. Nor are they generally supplemented by private businesses requiring their notary-employees to actually learn about the law, practice and ethics of their positions.

Moreover, many employers themselves are not familiar with existing notarial law, making it impossible for them to effectively supervise their notary-employees, institute proper procedures or ensure that such procedures are followed. Employers educated as to applicable notarial law can establish various safeguards so that notary-employees are less likely to commit either negligent or intentional notarial misconduct.²³⁴ Uninformed employers leave themselves more vulnerable to lawsuits for the misconduct of their notary-employees.²³⁵

Even customers of notaries should not blindly place their trust in another party, such as a notary. Customers ought to become reasonably well-informed about notarial requirements as a way of accepting some meaningful responsibility for their own transactions. By analogy, no one should sign a document without reading and understanding it. If upon reading it, one cannot fully understand its application and meaning, one should make appropriate inquiries to overcome any lingering doubts. Common sense dictates that one should also become reasonably knowledgeable about notarial requirements to satisfy the demands of minimal diligence and prudence.

“Ignorance of the law excuses no man from practicing it.”²³⁶ If both employers and customers of notaries become more familiar with notarial practices, employers and customers will gain a heightened appreciation for the importance of a notarization and a heightened respect for the office of notary public. Additionally, the prospect that employers and customers will tempt notaries away from the path of thorough and correct notarial procedures will diminish.²³⁷ Informed employers and customers will interject

233. NOTARY PUBLIC CODE, Guiding Principle X (1998).

234. See Nancy Perkins Spyke, *Taking Note of Notary Employees: Employer Liability for Notary Employee Misconduct*, 50 ME. L. REV. 23, 57 (1998) (offering suggestions to notary employers as to how they might avoid liability for notary employee's acts).

235. *Id.*

236. Addison Mizner, *quoted in* MICHAEL D. SHOOK & JEFFREY D. MEYER, LEGAL BRIEFS 156 (1995).

237. “After teaching thousands of notary public orientation and refresher seminars, it was quite surprising to discover how little is known about notarial powers and duties, particularly among commissioned notaries public.” PIOMBINO, *supra* note 7, at xxi. It follows that, if notaries are presently ill-informed about their roles and ethical responsibilities, then employers and customers of notaries (being even further removed) will be less knowledgeable and attuned to such matters.

fewer errors into the notarial process, thereby providing less of a challenge to notaries who must detect and correct such errors.

9. *Guiding Principle IX: Employers Shall Not Attempt to Direct or Restrict Notaries' Performance of Official Duties.*

A common misconception among employers is that they have virtually complete authority over all of their employees during work hours, including employee-notaries. However, employers who harbor this view are quite mistaken. Although announced in connection with another employment issue, the California Supreme Court made a point that applies here: "the employer is not so absolute a sovereign of the job that there are not limits to his prerogative."²³⁸ Employers are especially inclined to think they have virtually unbridled authority over employee-notaries if employers have made the holding of a notary commission a job qualification and/or have paid for all of the fees and costs associated with their employees becoming notaries or renewing notary commissions.²³⁹ The natural extension of this view is that the sole purpose of employee-notaries is to advance company interests, not to provide services to those other than clients of the employers.²⁴⁰ Again, this attitude is especially prevalent among employers who recognize that notaries charge trivial fees for notarial services or charge no fees at all, and that employers do not share in those fees.

Only a handful of states permit employers to limit employee-notaries during the period of their employment to servicing solely clients of the employers' businesses.²⁴¹ The fundamental reason so few statutes allow for this restriction is that the notary is a public servant with the obligation to provide an important service to the general public. As the New York Court of Appeals once observed, "[t]he very designation of 'notary public' indicates a relation which

238. *Tameny v. Atlantic Richfield Co.*, 610 P.2d 1330, 1336 (Cal. 1980).

239. Closen, *supra* note 5, at 677-78 (stating that employers may "encourage the performance of notary services by their notary-employees," and citing the example of a bank which may "pay the expenses associated with [a bank employee] becoming and remaining a notary")

240. *But see 'Am I Being Ethical?'*, *supra* note 4, at 9. "[A]n ethical Notary who is truly an impartial public officer [would not] withhold notarial services based strictly on a signer's status as a client or non-client." *Id.*

241. *See, e.g.*, CAL. GOV'T CODE § 8202.8 (West 1999).

[A] private employer of a notary public who has entered into an agreement with his or her employee . . . may limit, during the employee's ordinary course of employment, the providing of notarial services by the employee solely to transactions directly associated with the business purposes of the employer.

Id. *See also New Bill May Limit Notaries' Public Service*, NOTARY BULL., Apr. 1995, at 10 (reporting about legislation proposed in New Jersey allowing notary-employees to refuse requests for notarizations of non-business documents or from non-employees).

the incumbent of the office sustains to the body politic."²⁴² The Model Notary Act declares that "[a] notary shall perform notarial acts in lawful transactions for any requesting person who tenders the appropriate fee"²⁴³ The Notary Public Code persuasively establishes the appropriate standard: "[t]he Notary shall, as a government officer and public servant, serve all of the public in an honest, fair and unbiased manner."²⁴⁴ The Code goes on to squarely confront the issue of refusal of notarial service to non-customers, mandating that "[t]he Notary shall not refuse to perform a lawful and proper notarial act solely because the signer is not a client or customer of the Notary or the Notary's employer."²⁴⁵ The ASN Code of Ethics also provides that a notary must "treat each individual fairly and equally."²⁴⁶

Even in those few states that allow employers to restrict employee-notaries to servicing only the employers' business clients, we hope that employers will not do so. As noted earlier, the title is notary public, not notary private.²⁴⁷ Hence, employers should not be permitted to limit notaries to servicing exclusively private business interests, nor should employers do so even if statutes allow this.²⁴⁸ And, notaries who do not ordinarily charge for their services must not charge fees to people who are not the employer's customers.²⁴⁹ The Notary Public Code announces that "[t]he Notary shall not base the charging or waiving of a fee for performing a notarial act, or the amount of the fee, on whether the signer is a client or non-client, or a customer or non-customer, of the Notary or the Notary's employer."²⁵⁰

As another concern, if employers were allowed to restrict or limit notarial services, employers might do so for discriminatory and unlawful reasons. Employers might direct notaries not to service disabled signers because of the extra time that would be needed to perform such notarizations.²⁵¹ Employers might impose

242. *People v. Rathbone*, 40 N.E. 395, 396 (N.Y. 1895).

243. MODEL NOTARY ACT § 3-103(b) (1984).

244. NOTARY PUBLIC CODE, Guiding Principle I (1998).

245. *Id.* at Art. A, § I-A-4 (1998).

246. CODE OF ETHICS OF THE AMERICAN SOCIETY OF NOTARIES (May 4, 1980).

247. See *supra* note 227 and accompanying text for further discussion.

248. NOTARY PUBLIC CODE, Guiding Principle I, Art. A, § I-A-4 (1998).

249. *Id.* at Art. B, § I-B-2 (1998).

250. *Id.*

251. See Closen, *supra* note 5, at 686-87.

Clearly, some notarizations may be made more difficult and time-consuming because of circumstances beyond the control of the parties. To illustrate, some elderly citizens may possess little evidence of their own identities. Some people suffering from physical disabilities may find difficulty in signing their names. Some individuals with illnesses or disabilities, some people of advanced age, and some individuals having little resources may effectively be confined at home, in hospitals, or in long-term care facilities and may not be able to travel to the standard

their prejudices upon employee-notaries and prohibit notarial services due to the customer's race, religion, age, ethnicity, gender, political views or sexual orientation. That cannot be tolerated or even risked. The Notary Public Code rightly declares "[t]he Notary shall not refuse to perform a lawful and proper notarial act because of the signer's race, nationality, ethnicity, citizenship, religion, politics, lifestyle, age, disability, gender or sexual orientation, or because of disagreement with the statements or purpose of a lawful document."²⁵²

10. Guiding Principle X: Employers and Customers Shall Report Notary Misconduct to Appropriate Agencies.

Every professional should bear the responsibility to report the misconduct of fellow professionals, for fairly obvious reasons.²⁵³ First, fellow professionals should be well qualified to detect misconduct. Second, if misconduct goes unreported, the danger exists that the misconduct will continue unabated. Still worse, those who get away with misconduct may actually be induced to engage in it even more. Worst of all, other professionals who witness misconduct and observe that it is not reported, investigated and sanctioned may be tempted to cross the ethical line and to also engage in misconduct. Such a downward spiral of misconduct must be avoided. In the legal profession, as just one illustration, both ethical codes and case decisions impose a reporting obligation.²⁵⁴ Third, the lack of esteem that the office of notary public is given is a serious problem. If notaries do not report the misconduct of fellow notaries, their office loses even more respect.

Every citizen, notary or not, who observes professionals engaging in misconduct should report the misconduct to the appropriate agency. This reporting obligation is appropriate, in part, because our law in numerous circumstances goes so far as to

sites where notaries are available—so that notaries may be asked to travel to accommodate such persons. Even those involuntarily confined in jails and prisons should have reasonable access to the services of notaries.

Id.

252. NOTARY PUBLIC CODE, Guiding Principle I, Art. A, § I-A-3 (1998).

253. Attorneys, for example, have a professional obligation to report certain misconduct of fellow lawyers. MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.3 (1997). "As a responsible public officer, the Notary should report all attempts to perpetrate frauds to proper law-enforcement authorities." *'Am I Being Ethical?'*, *supra* note 4, at 9. In some professional settings, such as those relating to lawyers, it may be difficult to determine who are the proper authorities to whom misconduct is to be reported. *See, e.g.*, Elizabeth Cohen, *Who Needs To Know?*, A.B.A. J., Apr. 1999, at 77 (bearing the subtitle "When Reporting Lawyer Misconduct, Just Telling the Judge Isn't Enough").

254. *See, e.g.*, MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-103 (1999); *In re Himmel*, 533 N.E.2d 790, 790 (Ill. 1988).

hold parties responsible for the misconduct of other people. Businesses may be legally responsible for the misconduct of their employees and even their customers.²⁵⁵ Dram shops and social hosts may be liable for the drunken actions of their patrons and guests.²⁵⁶ Parents may be legally responsible for the misconduct of their minor children,²⁵⁷ and psychiatrists may be liable for the conduct of their patients.²⁵⁸ As noted above, licensed attorneys bear a professional responsibility to report the misconduct of their fellow lawyers, in part because attorneys are licensed by the state and become officers of the court.²⁵⁹ Everyone should feel the ethical responsibility to report crime and professional misconduct. This reporting burden must be regarded as an obligation particularly in the notarial context because a notary is more than just a professional. A notary is a public official, who breaches the public trust when engaging in misconduct.²⁶⁰

Admittedly, although we propose this reporting obligation for notary employers and notary customers, we realize that the ASN Code of Ethics fails to announce an obligation of fellow notaries to report one another when they observe or discover notarial misconduct.²⁶¹ This omission from the ASN Code of Ethics constitutes an important oversight. The state agencies that oversee notarial functioning are too understaffed and underfunded to effectively root out unethical notarial practices without the assistance of others, mainly the constituents in the notarial

255. See, e.g., *Lockard v. Pizza Hut, Inc.*, 162 F.3d 1062 (10th Cir. 1998) (holding that an employer may be liable for sexual harassment perpetrated by his or her customers). See also David G. Savage, *Look the Other Way and Pay*, A.B.A. J., July 1999, at 34 (discussing a recent U. S. Supreme Court decision "holding schools and colleges liable if their officials ignore severe student-on-student harassment").

256. See, e.g., *Kelly v. Gwinnell*, 476 A.2d 1219 (N.J. 1984) (finding social host liability to third parties); *Clark v. Mincks*, 364 N.W.2d 226 (Iowa 1985) (holding same). See also Matthew C. Houchens, Comment, *Killer Party: Proposing Civil Liability for Social Hosts Who Serve Alcohol To Minors*, 30 J. MARSHALL L. REV. 245 (1996) (discussing both dram shop statutory liability and common law liability).

257. RESTATEMENT (SECOND) OF TORTS § 316 (1999).

258. See, e.g., *Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334 (Cal. 1976) (holding psychiatrist to legal duty to give warning to the specifically identified target of threats of violence of his or her patient). See also Michael L. Closen & Scott H. Isaacman, *The Duty to Notify Private Third Parties of the Risks of HIV Infection*, 21 J. HEALTH & HOSP. L. 295 (1988) (discussing the duty of doctors to warn sexual partners of patients with HIV).

259. See, e.g., MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-103 (1999); *In re Himmel*, 533 N.E.2d at 790.

260. See *supra* note 48 and accompanying text.

261. See CODE OF ETHICS OF THE AMERICAN SOCIETY OF NOTARIES (May 4, 1980). The *Notary Public Code* covers this point: "[t]he Notary shall report to the commissioning authority violations of the statutes, regulations and directives governing the conduct of Notaries." See NOTARY PUBLIC CODE, Guiding Principle X, Art. C, § X-C-1 (1998).

process.²⁶² If proper notarial functioning is really to be taken seriously, and if notaries public in this country are to really be regarded as professionals, steps such as this reporting obligation must be implemented and faithfully observed.

CONCLUSION

*The world has achieved brilliance without conscience. Ours is a world of nuclear giants and ethical infants.*²⁶³

Although General Bradley's observation of the late 1940's described foreign countries and their governmental leaders, regrettably his remark could also describe the broader contemporary decline of ethical standards and behavior in this country. Notaries public, their employers and their customers have not been immune from the dishonesty virus that has afflicted so many. We can no longer leave ethics to chance. The Notary Public Code of Professional Responsibility and the proposed Code of Professional Responsibility for Certification Authorities²⁶⁴ point us in the right direction. However, more action is warranted.

If a set of guidelines for the ethical conduct of notary-employers and notary-customers were adopted by the membership organizations of notaries public, and if those guidelines were published, widely distributed and prominently posted in the places of business of notaries public, those guidelines would create a substantial positive effect. Employers and customers of notaries could not claim ignorance of notarial practices as often. Perhaps some employers and customers who frequently deal with notary issues would even be inspired to find out more about notarial ethics, law and practice. Neither notaries, nor their employers nor customers can be allowed to languish as "ethical infants." Each should possess and exhibit a "conscience" consistent with the highest standard of notarial service. Adherence to this proposed Code will be advantageous to employers and customers of notaries because such adherence will improve the quality of notarial service and will reduce their potential liability—the proverbial win-win situation.

The ten principles suggested represent rules of reason and are so clearly pertinent that they are not controversial in their substance. Most are drawn more or less directly from notary

262. John T. Henderson & Peter D. Kovach, *Administrative Agency Oversight of Notarial Practice*, 31 J. MARSHALL L. REV. 857, 866 (1998). "Unfortunately, because of limited resources, the commissioning authorities are invariably unable to directly monitor a notary public's activities absent a complaint being filed against the notary public." *Id.*

263. General Omar Bradley, JOHN BARTLETT, *FAMILIAR QUOTATIONS* 825 (15th ed. 1980) (quoting General Bradley from an Armistice Day address in 1948).

264. Athanasopoulos-Arvanitakis & Dye, *supra* note 24, at 1003.

statutes, such as Principles I, II, III, IV, V, VI, VII and IX of the Model Notary Act.²⁶⁵ Additionally, the ten principles proposed here have close parallels in the Notary Public Code of Professional Responsibility, with only Principle X (the misconduct reporting obligation) not having a comparable provision in the ASN Code of Ethics.²⁶⁶ Only Principle VIII (the duty to become reasonably well informed) is purely aspirational in its nature—it has no direct statutory basis but it does have a parallel provision in the Notary Public Code.²⁶⁷ Nevertheless, a main part of this proposal is to provoke thoughtful and constructive consideration and discussion about the participation of notary-employers and notary-customers in the notarial process. If anything has been omitted, the hope is that such matter will be pointed out. If one or more of the statements of the ten principles has been constructed inartfully in any way, the hope is that others will suggest more effective language.

Furthermore, these guidelines cannot remain static but must be seen as genuinely fluid principles having the flexibility to moderate and apply as technology, commercial needs, practices and the law change. Of course, if any of the proposed principles become completely outdated, they must be disregarded and written out of future statements of these principles. But one way or another, there will be a continuing need to review and modify the guidelines for notary-employers and notary-customers.

The final point is an important note. Nothing said in these proposed principles and explanations is intended to relieve or even to diminish the notary's ultimate responsibility to perform a proper notarization, for the notary is the commissioned public officer who bears that legal duty. No matter what the source of pressure to do otherwise, and no matter what the magnitude of the coercion, the notary cannot succumb or even bend in the slightest from the legal and ethical course of conduct.

265. *See generally* MODEL NOTARY ACT (1984).

266. *See* CODE OF ETHICS OF THE AMERICAN SOCIETY OF NOTARIES (May 4, 1980).

267. NOTARY PUBLIC CODE, Guiding Principle X (1998) (stating that “[t]he Notary shall seek instruction on notarization, and keep current on the laws, practices and requirements of the notarial office.”)

