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NEW TECHNOLOGY AND A GLOBAL ECONOMY DEMAND THAT AMERICAN NOTARIES BETTER PREPARE FOR THE FUTURE: UPGRADING THE CURRENT COMMON LAW SYSTEM MAY MEAN ESTABLISHING A NEW CLASS OF CYBER PROFESSIONAL

MILTON G. VALERA*

INTRODUCTION

One of the Louvre Museum's most treasured ancient artifacts is the famous statue of a seated Egyptian scribe from the Fifth Dynasty, over 4,000 years old.¹ In stunning life-like color, the shirtless male figure sits on the floor with spread knees supporting a papyrus sheet over which is poised a stylus held in the right hand. The scribe's eyes² engage the onlooker across the millennia—or are the eyes focusing on Pharaoh and the hand poised to write down the god-king's next word?

The "Seated Scribe" of the Louvre may be history's first artistic representation of a notary. It is also a visual reminder that notary-like officers existed long before the Roman Empire, when the functionary known as a *notarius*, a kind of public stenographer or note taker, continued the custom; indeed, the very word *notarius* derives from *notae*³—notes.

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1. See LAROUSSE ENCYCLOPEDIA OF PREHISTORIC AND ANCIENT ART 127 (Rene' Huyghe ed., 1968) (providing a history of ancient art including one of the first representations of a scribe).

2. *Id.* "With pupils of crystal, each inset in a thin capsule of copper, the statue's eyes retain their vital spark after 4,000 years." *Id.*

3. See N.P. READY, BROOKE'S NOTARY 2 (10th ed. 1988) (chronicling the origin and history of notaries public).

In the last century of the Republic, probably in the time of Cicero, a new system of shorthand was invented, and instead of abbreviations, called *sigla*, certain arbitrary marks or signs, called *notae*, were substituted for

*The concept of a specialist dedicated to writing documents is as old as writing itself, for we find scribes or note takers in most ancient cultures.*⁴

Many of the pre-Roman scribes had duties beyond the strictly secretarial functions that correspond to post-Roman notarial authenticating roles.⁵ Besides the ancient Egyptians, the Babylonians, Hebrews and Greeks of antiquity relied on scribes of different authority to give public character to otherwise private documents through affixation of an official seal; often these scribes were also priests and their authenticating acts were thereby invested with supernatural authority.⁶ It took the organizational genius of the Romans to place such authenticating officials within the context of a lasting code of civil law. That code today imprints the laws and *notariats* of most of the non-English-speaking world.

The fact that most notaries public in the English-speaking world today—namely, the nearly 4.3 million notaries of the United States⁷—operate under a system of law different from that governing the *notarios* and *notaires* of the Latin world has proven at times to be a significant obstacle to the free exchange of documents and the smooth conduct of business across international borders. The impediment springs largely from the reluctance of the highly qualified and trained, attorney-like notarial officers of Latin nations to accord respect to the official acts of the minimally screened and trained ministerial notaries of the United States. There is an unfortunate tendency abroad to overlook the many shared principles and practices of the civil and common law notaries and to forget that ministerial status is no

words in common use. A writer who adopted the new method was called *notarius*. Originally, therefore, a notary was one who took down statements in shorthand and wrote them out in the form of memoranda or minutes.

Id. (footnotes omitted). Ready explains that *notae tironianae*, a Roman shorthand, derived its name from Cicero's secretary, a freedman and orator named Marcus Tullius Tiro, who was said to have invented the system to transcribe his master's speeches. *Id.* See also John Robert Gregg, *Julius Caesar's Stenographer*, J. CT. REPORTING, Jan. 1992, at 32-34 (describing the use of shorthand in the time of the caesars). Gregg's *Julius Caesar's Stenographer* article is a shortened version of an article that originally appeared in the May 1921 issue of *The Century Magazine*. *Id.* at 32. It should also be noted that John Robert Gregg invented Gregg Shorthand. *Id.*

4. Pedro A. Malavet, *Counsel for the Situation: The Latin Notary, A Historical and Comparative Model*, 19 HASTINGS INT'L & COMP. L. REV. 389, 403 (1996).

5. See EDUARDO BAUTISTA PONDE, *ORIGEN E HISTORIA DEL NOTARIADO 1-30* (1967) (providing an overview of the history and origin of notaries).

6. *Id.*

7. See Marc A. Birenbaum, *The 1997 NNA Notary Census*, NAT'L NOTARY MAG., May 1997, at 30 (providing statistics for the NNA notary census in the United States for the last 25 years).

more a guarantee of incompetence than advanced education is of high integrity.

The advent of electronic data interchange (EDI) may prove a watershed opportunity for American notaries. In this nascent era of “electronic documents” and “digital signatures,” a trusted impartial functionary will be needed to authenticate certain sensitive EDI transmissions—now a relative rivulet in volume but likely to become a deep and wide river, and to take over many transactions conducted today through exchange of paper documents. This functionary could be the notary public. But “electronic notaries” must be much more highly trained and professional than current paper-oriented notaries, and specialized computer expertise will be their strength and stock-in-trade.

The new, and to many, daunting language of the computer can provide the means for the notaries of the United States to win a new prestige in this nation and abroad. And because in a similar way the priest-scribes of antiquity were revered for their mastery of a daunting written hieroglyphics, an apt talisman and icon for the 21st century American notary might be the Louvre’s “Seated Scribe,” his thighs bearing not an unfurling papyrus but an unfolding laptop.

I. THE PAST: TWO STRANDS WITH A COMMON SOURCE

It is convenient, but a bit misleading to divide the notaries of the modern world into two camps based on their allegiance to either the civil or common law. Many common law notarial officers—the notaries of British Columbia or the Scrivener’s Company notaries of London, for example⁸—have arguably much more in common with Latin *notarios* than with the notaries of the United States. It may actually make a lot more sense to bifurcate the ranks of the world’s notaries in another way: (1) the notaries of the United States and (2) all the rest.

A. *Notaries of the Rest of the World*

The Latin notarial practice is a private, liberal profession requiring extensive legal education and/or apprenticeship, passage of a challenging competitive examination, and membership in a professional association or college.⁹ Performing “a nonadvocacy counseling function,”¹⁰ members of the Latin *notariat* have exclusive legal authority and often exclusive geographic

8. See Milton G. Valera, *The National Notary Association: A Historical Profile*, 31 J. MARSHALL L. REV. 945, 972-73 (1998) (describing the significant duties afforded notaries of London, England and British Columbia, Canada).

9. See Malavet, *supra* note 4, at 429-30 (discussing the requirements for notarial status, notarial jurisdiction, as well as, notarial geographic limitations and duties).

10. *Id.* at 391.

jurisdiction¹¹ to put private transactions into proper legal form and then to authenticate them as publicly enforceable. They must keep a permanent register, or *protocollo*, of all public documents executed before them, and are closely supervised by governmental and professional bodies.¹² Notably, Latin notaries serve as "counsels for the situation" and owe a duty to the transaction rather than to any individual; they serve "interested parties" rather than "clients."¹³

Unlike advocates, who are free to refuse to serve a client, the [Latin] notary must serve all comers. This added to his functions as a record office and his monopoly position, tends to make him a public as well as private functionary. Access to the profession of notary is difficult because the number of notarial officers is quite limited. Candidates for notarial positions must ordinarily be graduates of university law schools, and must serve an apprenticeship in a notary's office. Typically, aspirants for such positions will take a national examination, and if successful, will be appointed to a vacancy when it occurs.¹⁴

1. *The Ancient Roman Notaries*

Both civil and common law notaries claim the same ancestor in the *notarius* of ancient Rome. Ironically, the office of the highly prestigious and professional modern Latin notary may bear less resemblance to that of the Roman *notarius* than does the office of the ministerial notary of the United States.¹⁵ The *notarius*, after all, was not a discretionary official of any prestige, but a stenographer, an underling—often a slave or freedman¹⁶—serving persons with authority.

Eventually, low-level Roman note takers ceased to be called *notarii* and this title was later applied to loftier positions, including registrars in the courts of provincial governors, the secretaries of emperors and to the highest class of officials in the imperial privy council and chancery.¹⁷ Over the centuries-long

11. *Id.* at 430.

12. *Id.*

13. *Id.* at 392.

14. JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION* 115 (1969).

15. Perhaps the modern American functionary most closely resembling the *notarius* is the shorthand or court reporter. In most states, reporters must have notary commissions in order to swear in deponents; however, several states do not. See, e.g., MO. REV. STAT. § 492.010 (1996) (giving certified reporters automatic *ex-officio* power to administer oaths).

16. See READY, *supra* note 3, at 1.

17. *Id.* at 2-3. Ready's footnote 10 states:

[o]n the re-organization of the empire by Constantine, *notarii* were constituted into an imperial chancery, the members of which, in addition to their regular duties, were frequently employed by the Emperor on important public missions. The first of them in rank was

duration of the Roman Empire, two other public officials—*scribae* and *tabularii*—also performed certain record-keeping and authenticating functions akin to those of the modern Latin notary,¹⁸ as “the notary function [was] dispersed and attributed to a multitude of various public and private officials, without originally accumulating all the attributes in a single person.”¹⁹

It was the private Roman officer known as a *tabellio* that the modern Latin notary most closely resembles.²⁰ Regulated by law, the *tabelliones* “took their stations, *stationes*, in the forum or market place, where the public applied to them for professional advice and assistance.”²¹ They prepared such documents as deeds, wills and transfers of property.²²

The acts of a *tabellio* were styled *instrumenta publice confecta*, and commanded a degree of credit and authenticity not accorded to *instrumenta privata*, or documents executed by private individuals without the intervention of a *tabellio*. They were not, however, in Roman law accorded the full credit and authenticity that attached to an official record . . . Full probative force [*fides publica*] could only be conferred on the instrument following a special judicial procedure. . . . [I]f the instrument was accepted, copies of the judicial proceedings had full evidentiary weight. The act of the *tabellio* thus passed from being an *instrumentum publice confectum* to become an *instrumentum publicum*, a status otherwise enjoyed only by documents issued by public authorities or from public archives.²³

In the latter days of Rome’s empire, *tabelliones* increased in number and importance, and they were eventually able to deposit and register their acts directly into the public archives without a court proceeding.²⁴

Even after the fall of the Western Roman Empire to barbarians in 476 A.D., the Roman Empire in the East, with its capital at Constantinople, would continue the traditions of Roman law until the Turkish onslaught of 1453.²⁵ Indeed, under the sixth-century Eastern Roman Emperor Justinian, “the *tabelliones* were in their heyday.”²⁶ In ensuing centuries in the Eastern Empire, the titles *tabelliones* and *tabularii* became virtually synonymous

called *primicerius notariorum*. Codex Theodosianus, (A.D. 438) 6, 10.

Id. at 3 n.10.

18. See Malavet, *supra* note 4, at 408-11 (providing a background on *scribae* and *tabularii*).

19. See ENRIQUE GIMENEZ-ARNAU, DERECHO NOTARIAL ESPANOL 69 (1964).

20. See READY, *supra* note 3, at 3 (stating the duties of the *tabellio*).

21. *Id.* at 2-3.

22. *Id.* at 3.

23. *Id.* (citations omitted).

24. *Id.*

25. See WILL DURANT, CAESAR AND CHRIST 670 (1944) (providing a history of Roman civilization).

26. See Malavet, *supra* note 4, at 412.

and applied to private legal professionals, who often employed a scribe known by the generic term of *notarius*.²⁷

As the Middle Ages commenced, the conquered provinces of what was once the Western Roman Empire integrated the legal customs of Rome into their civil institutions.²⁸ In the lands that would become modern-day France, Spain, Germany and the other nations of continental Western Europe, the custom of the notary was widely adopted. In the land of the Franks, for instance, notaries were often registrars at the district justice courts, recording official proceedings and affixing the court's seal on deeds and other documents in order to render them as public and authentic acts; these officials were generally known as "palatine" notaries because they were appointed by the local palace-dwelling count.²⁹ In addition, there were imperial notaries appointed by emperors, and papal notaries appointed by the Pope in Rome, who enjoyed no territorial restrictions.³⁰

The Renaissance inspired a renewed study of ancient Roman law³¹ and the Scuola di Notariato, started in Bologna, Italy, in 1228,³² developed and refined notarial law and practice.

The School of Bologna placed great emphasis on the legal and technical qualifications of the notary and drew up formularies to facilitate the preparation of notarial acts in a correct form of law. It is as a result of the studies made at Bologna during that era that the concept of the notary as a qualified jurist arose and to the school is due the expansion of the notarial system throughout medieval Europe.³³

In the Renaissance, notaries were weaned from the imprimatur of the courts and their sealed independent acts were in time given *publica fides* (public trust) in their own right.³⁴ Gradually the laws relating to the execution of legal instruments became so technical that European courts gladly ceded the authenticating of this arcane activity to highly trained notaries.³⁵

2. *The Development of the English Notariat*

In the British Isles, the common law evolved on its own, largely independent of civil law developments across the Channel.

27. See *id.* (describing the European notary profession during and after the middle ages).

28. See READY, *supra* note 3, at 4.

29. *Id.*

30. *Id.*

31. *Id.*

32. See PONDE, *supra* note 5, at 152.

33. See READY, *supra* note 3, at 7.

34. *Id.* at 6.

35. *Id.* at 8.

Four phases in the establishment of an English *notariat*³⁶ are described in condensed form below:

(1) *Before 1279.* Notaries were virtually unheard of in England prior to this date, though there were occasional visits by imperial or papal notaries, usually Italians. In place of notarization, private deeds and contracts could be given authenticity by the affixation of the seal of an important official, such as a bishop or mayor, or they could be filed in court and "cast in the form of a judicial decision."³⁷

(2) *1279-1533.* In 1279 the Archbishop of Canterbury was granted power to appoint notaries by the Pope; while in time other English churchmen and secular authorities were also given this power, by 1533 the Archbishop was the only authority to retain notary-appointing authority. Though notaries were involved in both ecclesiastic and secular affairs, they were as a rule members of the clergy or under their guidance or control; at length, however, laymen unaffiliated with the church took on notarial functions, serving as conveyancers and attesting to the execution of wills, deeds, contracts and other documents. While common law courts did not give weight to notarial acts, they were useful with documents that would take effect on the Continent.³⁸

(3) *1533-1801.* As a result of King Henry VIII's dispute with the Pope over a royal divorce, the King took over the power to appoint notaries through the Ecclesiastical Licenses Act of 1533, and an appointing Court of Faculties attached to the Archbishop of Canterbury was created. To this day, the Court of Faculties retains the power to appoint notaries.³⁹

(4) *1801-Present.* "With the passing by Parliament of the Public Notaries Act 1801, the notarial profession began to evolve into something akin to its present form and to concentrate its activities almost exclusively on the preparation and authentication of instruments to be used abroad."⁴⁰

Pursuant to the Courts and Legal Services Act of 1990, British notaries today are classified "as Ecclesiastical Notaries, Scrivener Notaries, Solicitor Notaries or other Notaries."⁴¹ The

36. See READY, *supra* note 3, at 8-17 (providing an overview of the development of English notariats). The author credits H.C. GUTTERIDGE, *THE ORIGIN AND HISTORICAL DEVELOPMENT OF THE PROFESSION OF NOTARIES PUBLIC IN ENGLAND* (P.H. Winfield & A.D. McNair eds., 1926).

37. READY, *supra* note 3, at 10. See *id.* at 9-11 (providing background for the period prior to 1279).

38. See *id.* (providing background for the period from 1279 to 1533).

39. See *id.* (providing background for the period from 1533 to 1801).

40. See *id.* (providing background for the period after 1801).

41. G.E. DELAFIELD, *THE PROVINCIAL NOTARY* 3 (3d ed. 1991).

monopolistic Scrivener Notaries, who have a colorful history⁴² and operate under the jurisdiction of the Scrivener's Company, hold the exclusive right to notarial practice within the city of London and "within the circuit of three miles of the said city,"⁴³ and are extensively involved with international commerce. Notaries outside of London are termed "provincial" notaries.⁴⁴ As a "civil lawyer practicing in non-contentious matters,"⁴⁵ the British notary today bears a strong resemblance to civil law notarial officers around the world: "[h]e will advise and assist the client like any other lawyer but when he is carrying out his public duty he can be said to have a responsibility to the transaction itself rather than only to an individual personal or corporate client."⁴⁶

A well-equipped English notary needs a pen, a seal, a ribbon or tape, wafers and a register.⁴⁷ "He may if he so wish robe and equip himself with an inkhorn and pencase suspended from his girdle, but this accoutrement ceased in late mediaeval times."⁴⁸ The author also recommends use of a nibbed pen and permanent ink, in preference to a ballpoint, because "a Notarial act may have

42. See *READY*, *supra* note 3, at 14.

The connection of notaries public with the Scriveners' Company . . . dates from the fourteenth century. Scriveners were originally public scribes, exercising their calling as letter-writers and expert copyists. From these activities they became skilled in the drawing of deeds . . . [and] developed into 'a body of legal practitioners exercising the function of conveyancers.' In 1373, the Scriveners of the City of London formed themselves into a company for the purpose of preserving to themselves a monopoly of the activities of their profession. From then until 1760, when the right of London solicitors to practise conveyancing was established, members of the Company of Scriveners, enjoyed within the City of London and a circuit of three miles of the City, a monopoly of the 'art or mystery' of preparing all deeds, charters, and other writings which by the common law or custom of this realm required to be confirmed or attested by a seal. Since part of his practice would include the drawing of deeds and conveyancing, a notary wishing to exercise his calling within those geographical limits was obliged to become a member of the Company. Although the Company's monopoly in conveyancing was ultimately lost, it is still the invariable rule that no notary public is allowed to practise in the City of London . . . until he has become a member of the Company of Scriveners.

Id. (footnotes omitted).

43. *READY*, *supra* note 3, at 14.

44. Hence the title of G.E. Delafield's book *THE PROVINCIAL NOTARY*, which focuses largely on the duties of solicitor and other notaries.

45. *READY*, *supra* note 3, at 1.

46. *Id.*

47. *DELAFIELD*, *supra* note 41, at 6.

48. *Id.* See *READY*, *supra* note 3, at 12 n.30 (stating "[a]n inkhorn and pencase attached to a silken cord suspended from his girdle formed the distinguishing badge of the medieval notary. Hence the remark of Jack Cade: '[a]way with him, I say; Hang him with his pen and inkhorn about his neck.' Shakespeare, *Henry VI*, Pt. 2.")

to go into damp or tropical climates.”⁴⁹ Indeed, from the Elizabethan Age onward, Britain dispatched notarial documents—and countless notaries themselves—to every corner of the earth, damp and tropical, to help administer an empire on which the sun never set. One of these corners, of course, was the eastern seaboard of the North American continent where the English colonists brought their common law mores, including the custom of the notary public.

B. Notaries of the United States: A Distinctive and Ministerial Notary

At the start of the 21st century, the American notary is a largely ministerial officer whose public commission is generally viewed as a useful or necessary adjunct to a primary profession or career, be it legal secretary, court reporter, escrow officer, attorney, police officer, clerk, real estate agent or any of a host of other vocations at every level of American society. The ministerial role of the modern American notary may have begun to take shape in colonial times.

In the English colonies, notaries had a less central and more ministerial role [than in the Spanish colonies], having largely surrendered important land conveyancing and document drafting functions to solicitors under British law. Still, notaries functioned as trusted official witnesses, recorders, scribes and de facto paralegals in private and public transactions. . . . Not the least of the notary's contributions was execution of protests, particularly the maritime protest whereby damage to a ship's cargo would be verified and documented under seal to satisfy the vessel's owner an ocean away. In the age before transoceanic electronic communication, notaries engendered confidence in the integrity and reliability of seaborne commerce.⁵⁰

In 1639, the Massachusetts Bay Colony and the New Haven Colony witnessed appointment of the first two notaries in the English-speaking New World.⁵¹ As did their counterparts in the mother country, early colonial American notaries drew authority from the Archbishop of Canterbury's Court of Faculties. After the American Revolution, however, each of the new states appointed its own notaries and enacted statutes to govern them.

Today in the United States, most often it is the secretary of state (e.g., Colorado, Missouri, Oregon) or the governor (e.g., Maryland, Minnesota, Utah) who commissions notaries, though, in particular states, such officials as the attorney general (Hawaii),

49. DELAFIELD *supra* note 41, at 6.

50. Deborah Thaw, *The Feminization of the Office of Notary Public: From Feme Covert to Notaire Covert*, 31 J. MARSHALL L. REV. 703, 706-07 (1998) (footnotes omitted).

51. *Id.* at 707 & n.15.

lieutenant governor (Alaska), licensing director (Washington) or county judges (Alabama, Georgia, Vermont) perform this function.⁵² In most states where the governor is the commissioning authority, the actual involvement of the governor's office is nominal or ceremonial and it is the office of the secretary of state (e.g., Delaware, Nebraska, South Carolina) or department of commerce (Minnesota) or corporations (Utah) that administers the state's notary program on a day-to-day basis.⁵³

Though it does share certain important principles and practices with other notarial offices around the globe, the American notary public office is singularly distinctive in a number of ways. One source of distinction, of course, is America's unparalleled number of notaries: with 346,548 notaries in the state of Florida alone,⁵⁴ and 327,000 in Texas,⁵⁵ many medium-sized American cities have more notaries than entire European⁵⁶ and Asian⁵⁷ nations. Indeed, it is likely that either Florida or Texas by itself more than matches the world's current population of notaries outside the United States. Another evident and singular characteristic of the notary office in the United States is that its practitioners are not segregated in a particular socioeconomic stratum; anyone in any walk of life may find it useful to become a notary.

The duties of notaries commissioned in the fifty states⁵⁸ are relatively narrow and typically include the power to take acknowledgments and proofs of execution; to administer oaths and affirmations; to execute jurats, also known as verifications upon

52. See National Notary Association, *National Index of Notary Officials*, NAT'L NOTARY MAG., May 1998, at 33-34 (listing state notary commission grantors and administrators).

53. *Id.*

54. See Birenbaum, *supra* note 7, at 30 (stating that in a 1997 NNA census, as was the case in a 1992 census, Florida was the most notary-populous state).

55. See *id.* (stating that in a 1997 NNA census, Texas was the second most notary-populous state).

56. See Malavet, *supra* note 4, at 474 (comparing the number of notaries with the number of lawyers and total populations of Belgium, France, Italy, the Netherlands and Spain; the largest number of notaries (7500) in these countries exists in France).

57. There are 540 notaries in Japan, a nation of over 115 million people, according to Shin-Ichi Tsuchiya, Vice Chairman of the Foreign Affairs Committee of the Japan National Notaries Association. Shin-Ichi Tsuchiya, Remarks at the National Notary Association's 19th Annual Conference of Notaries Public in Newport Beach, California (June 19-21, 1997). However, Japanese notaries, who are required to be former judges or public prosecutors, do employ numerous assistants. *Id.*

58. See Charles N. Faerber, 1998-1999 NOTARY SEAL & CERTIFICATE VERIFICATION MANUAL (providing a specific recitation of notarial duties in the fifty states, the District of Columbia and the jurisdictions of American Samoa, Guam, Northern Marianas, Puerto Rico and the U.S. Virgin Islands) [hereinafter VERIFICATION MANUAL].

oath or affirmation;⁵⁹ and, in some states, to certify a copy as identical to an original.⁶⁰ Many state codes still empower notaries to make or note a protest of a negotiable instrument,⁶¹ a duty rarely performed today, and “to take depositions and affidavits,”⁶² a transcribing function that normally only trained, shorthand reporters are qualified to perform. Not included among the American notary’s duties is the drafting or preparation of legal documents or the advising of others about the completion or effect of legal documents. The American notary’s main focus and accountability is the accuracy of statements within the “notarial certificate” wording printed or attached at the end of each notarized document. These statements rarely attest to more than that an individual appeared before the notary on a certain date within a particular county and state, was identified by the notary and, in the notary’s presence, freely affixed or acknowledged a signature in a particular capacity (e.g., as an individual, attorney-in-fact, partner, etc.) and/or took an oath or affirmation.

While the “ministerial” label on the American notary’s duties belies some often tough discretionary choices (e.g., about what constitutes satisfactory evidence of a given signer’s identity, or about whether a particular signer is aware of the significance of a document) in the face of often minimalist statutory guidelines, generally any literate, conscientious, honest and moderately intelligent adult is capable of effectively handling the notarial

59. The UNIFORM LAW ON NOTARIAL ACTS (ULONA), approved by the American Bar Association in 1983, describes the notarial duty of executing a jurat as follows: “[i]n taking a verification upon oath or affirmation, the notarial officer must determine, either from personal knowledge or from satisfactory evidence, that the person appearing before the officer and making the verification is the person whose true signature is on the statement verified.” UNIFORM LAW ON NOTARIAL ACTS § 2 (1983). The ULONA also defines the acts of acknowledgment, of “witnessing or attesting a signature,” of “certifying or attesting a copy of a document or other item,” and of “making or noting a protest of a negotiable instrument,” omitting the act of taking a proof of execution by subscribing witness because of its increased potential for fraud. *Id.*

60. Not all states authorize notaries to certify copies. The state of New York, for example, provides no statutory authority for the act, while California only allows notary certification of copies of powers of attorney and notarial journal pages. See VERIFICATION MANUAL, *supra* note 58, at 34, 243.

61. See, e.g., CAL. GOV’T CODE § 8205(a) (West 1999).

It is the duty of a notary public, when requested [t]o demand acceptance and payment of foreign and inland bills of exchange, or promissory notes, to protest them for nonacceptance and nonpayment, and, with regard only to the nonacceptance or nonpayment of bills and notes, to exercise any other powers and duties that by the law of nations and according to commercial usages, or by the laws of any other state, government, or country, may be performed by notaries.

Id.

62. *Id.* at § 8205(a)(3).

responsibilities imposed by each state. Thus, the education and training required for an applicant of no readily detectable criminality to obtain a notary commission in the United States typically need only be sufficient to allow that applicant to read and legibly complete the application form.⁶³

The lack of requirements for a notarial commission has been reflected throughout American history in the growth of the notary population. From the birth of the United States, the population of notaries has grown almost exponentially.⁶⁴ In Connecticut, for example, there were fifteen notaries in 1800, thirty-two in 1812, sixty-four in 1827, 10,789 in 1932 and approximately 48,000 in 1990.⁶⁵ In one sense, this unparalleled proliferation of notaries is a positive—an opening up or “democratization” of a perhaps overly tradition-encrusted office.

Yet, in another sense, the explosion of the notary population can be regarded as something of an uncontrolled cancer, for far too many of the thousands of new notaries minted across the nation every day have not the slightest idea of the seriousness of their duties, nor how to perform them effectively.

Sadly, helping spur the metastatic growth in the ranks of American notaries in this era of governmental belt-tightening is an attitude in some states—as evidence suggests in the next section—that notary programs are at least as important as income-generating “profit centers” as they are as agencies for protecting the public from document fraud.

II. THE PRESENT: ANACHRONISM AND APATHY

Since the birth of the American republic, there has been a trend to pare or whittle away the functions of an English colonial notary office, functions that were modest to begin with. Any legal claim by the modern American notary to an archiving function, for

63. The sole exception is the state of North Carolina, which requires applicants for a notary commission to take and pass a community college course. See N.C. GEN. STAT. § 10A-4(b) (1991) (stating the qualifications for North Carolina notaries). Several other states do require applicants to pass some kind of written or oral examination, including Alaska, California (proctored), Connecticut, District of Columbia (oral), Hawaii, Louisiana, Maine, New York (proctored), Ohio, Oregon, Utah (proctored) and Wyoming. See National Notary Association, *Guide to Notary Commission Eligibility*, NAT'L NOTARY MAG., May 1998, at 30 (listing states that require applicants to pass a written or oral examination). The remaining states typically send each applicant or newly commissioned notary a pamphlet or booklet reprinting or paraphrasing pertinent notarial statutes and hope that the notary reads and absorbs it.

64. See Thaw, *supra* note 50, at 718 (discussing the growth of notaries in urban areas).

65. See CONNECTICUT SECRETARY OF THE STATE, NOTARY PUBLIC MANUAL § 1.2 (1995) (providing a brief history on notaries).

example, has long since been given over to county recording officers; any claim to conveyancing or document preparation powers was long ago ceded to attorneys; and any practical⁶⁶ claim to a stenographic function to shorthand reporters.

Beyond an oath-administration function shared with countless other officers, what remains for the American notary is the core duty of screening document signers for identity, volition and basic awareness⁶⁷—though many maintain that even the determination of basic awareness is beyond the notary's ken, because it is tantamount to judging competence, a notoriously difficult task.⁶⁸

Part and parcel of the notary's duty to ascertain a signer's identity has been the duty to verify any representative status claimed by that signer, whether as attorney-in-fact, partner, corporate officer or the like. Yet even this function has purposely been stripped away from the notary by some states in recent decades, in the belief that notaries have neither the aptitude nor the training to scrutinize such legal documents as powers of attorney to determine who is thereby empowered, with what authority and under what circumstances.⁶⁹ In 1982, for example, California reworded three statutory representative-capacity acknowledgment forms so notaries would no longer be obliged to verify a signer's capacity.⁷⁰ Below are portions of the "before" and

66. In a number of states, notaries still retain the legal power to "take" depositions and affidavits, though realistically only trained and certified shorthand reporters are in a position to do so. See, e.g., CAL. GOV'T CODE § 8205(a)(3) (West 1999) ("[i]t is the duty of a notary public, when requested . . . [t]o take depositions and affidavits, and administer oaths and affirmations, in all matters incident to the duties of the office, or to be used before any court, judge, officer, or board").

67. Florida is the first and, so far, only state whose statutes expressly require notaries to judge awareness: "[a] notary public may not notarize a signature on a document if it appears that the person is mentally incapable of understanding the nature and effect of the document at the time of notarization." FLA. STAT. ANN. § 117.107(5) (West 1998).

68. However, THE NOTARY PUBLIC CODE OF PROFESSIONAL RESPONSIBILITY, GUIDING PRINCIPLE III (1998) declares that "[t]he 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." The Code further states: "[t]he Notary shall not notarize for any person if the Notary has a reasonable belief that can be articulated that the person at the moment is not aware of the significance of the transaction requiring a notarial act." *Id.* at § III-C-1. It is the conviction of the NNA that any moderately intelligent layman can make a common-sense judgment about whether a signer appears aware of what is going on at that moment.

69. See Charles N. Faerber, *Being There: The Importance of Physical Presence to the Notary*, 31 J. MARSHALL L. REV. 647, 766 (1998) (providing a description of the transformation to a ministerial notary) [hereinafter *Being There*].

70. *Id.* at 766-67. The three California acknowledgment certificates

“after” partnership certificates:

BEFORE: “. . . personally appeared _____, known to me (or proved to me on the oath of _____) to be one of the partners of the partnership that executed the within instrument. . . .”⁷¹

AFTER: “. . . personally appeared _____, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person that executed this instrument, on behalf of the partnership. . . .”⁷²

Ten years later, California further reduced the notary’s role by introducing a so-called “all-purpose” acknowledgment certificate that does not oblige the notary even to note any signer’s representative capacity:

All-Purpose Form: “. . . personally appeared _____, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies). . . .”⁷³

“In the space of 10 years, . . . three statutory forms arguably demarcate the transformation of the California notary office from a quasi-judicial position (pre-1982) to a ministerial position (pre-1993) to a quasi-secretarial position (post-1993).”⁷⁴

Of course, some traditional and once important functions of the notary office have been pared away not by legislative action but by the advance of technology and the refinements of commercial usage. This is true of the notarial act of protest. Before the era of electronic banking and commerce, notaries were trusted in such matters as verifying the condition of shipped goods (marine protests)⁷⁵ or protesting the nonacceptance or nonpayment of foreign and inland bills of exchange.⁷⁶ Today notarial protests are so rare that they are recognized neither in the Uniform Law on

amended in 1982 so that the notary would no longer have to ascertain representative capacity were: the corporate acknowledgment form, CAL. CIV. CODE § 1190 (West 1997), the partnership acknowledgment form, CAL. CIV. CODE § 1190(a) (West 1997), and the form for an acknowledgment by a public corporation, agency or political subdivision of the state, CAL. CIV. CODE § 1191 (West 1997).

71. See CAL. CIV. CODE § 1190(a) (West 1997) for the California Partnership Acknowledgment Form before January 1, 1983.

72. See *id.* for the California Partnership Acknowledgment Form after January 1, 1983.

73. See CAL. CIV. CODE § 1189(a) (West 1999).

74. *Being There*, *supra* note 69, at 767.

75. See Thaw, *supra* note 50, at 707 (discussing the role of the notary in the English colonies).

76. See CAL. GOV’T CODE § 8205(a) (West 1999) for an example of a state statute that was in effect prior to the electronic banking and commerce era.

Notarial Acts⁷⁷ nor the Model Notary Act⁷⁸ and, as a result, are increasingly being eliminated from state notary codes.

The technical advent of the shorthand and court reporter's stenograph, whose operation requires a highly refined skill, signaled the true passing of the notary as scribe—a heritage that began with the Roman *notarius*. And the advent of the photocopy machine was perhaps the final nail in the coffin of the notary as archivist/copyist.

Yet, if the functions of the American notary have been whittled away by technical advance and legislative action, a few things related to the office have seen far too little change. For one, the maximum fees that notaries are allowed to charge by statute have remained so embarrassingly low in some states that many notaries do not even bother to ask for a fee. A South Carolina notary, for example, may charge no more than fifty cents for taking an acknowledgment and twenty-five cents for executing a jurat. California, Florida and South Dakota do permit a charge of \$10 per signature notarized, but most states allow a fee of only \$1 to \$2 per signature.⁷⁹ Until the National Notary Association through its Uniform Notary Act and its Model Notary Act⁸⁰ began a drive for notary fees that more fairly reflect the notary's expenditure of time and exposure to unlimited liability, many states had seen little or no change in their notary fees since gaining statehood. Of course, with every passing year that notary fees remain unfairly suppressed, the perceived value of the notarial act inches downward, both in the eyes of the citizenry and of notaries themselves. This immeasurably harms the societal status of the notary and the professionalism with which notarial acts are performed.

However, there is nothing in the states' current notary laws that is as anachronistic as the shamefully low level of notary surety bonds. Surety bonds protect the public in two ways. First, they professionalize notaries and motivate them to be attentive to their duties. Bonds distinguish career fields in which the financial stakes are high and the practitioners are in a position to do great damage to private citizens' rights and property. Surety firms will

77. See *supra* note 59 for a discussion of the UNIFORM LAW ON NOTARIAL ACTS.

78. The MODEL NOTARY ACT was published by the National Notary Association (NNA) as "a resource for lawmakers seeking to draft effective statutes that are in step with modern commerce." MODEL NOTARY ACT, PREFACE (1984). Drafted by a national committee of officials and attorneys, the MODEL NOTARY ACT is a revision of the NNA's UNIFORM NOTARY ACT (1973), drafted with the assistance of Yale Law School. *Id.*

79. See National Notary Association, *Guide to Notary Fees*, NAT'L NOTARY MAG., May 1998, at 31 (listing the 50 states' costs for notary fees).

80. See MODEL NOTARY ACT Art. III, Commentary (discussing the need for higher notary fees due to increased cost of living).

seek monetary recovery from the notary whose misconduct causes financial harm. A bond is the enforcing "hammer" that applies pressure to keep notaries on the straight and narrow. Second, bonds protect the public by helping victims recover their financial losses in the event of the notary's negligence or intentional misconduct. If a person harmed by a notary's impropriety is unable to find and recover against the notary, the surety company will reimburse the victim for financial losses up to the dollar value of the bond.

Unfortunately, in more than a few states the dollar value of the notary surety bond has changed little or not at all since the attainment of statehood. The bond remains at \$500, for example, in the states of New Mexico, Wisconsin and Wyoming, and at \$1,000 in Alaska, Hawaii and Oklahoma.⁸¹ Even in California, which now imposes the nation's highest notary bond at \$15,000,⁸² the bond remained fixed for 128 years, from 1850 to 1978.⁸³

A bond of \$500 to \$1,000 is all but useless as protection for the public, since what rare attorney could be interested in helping a client recover \$500 or \$1,000 from a surety company in the event a miscreant notary is fundless or cannot be found? This question, of course, is moot in those twenty states which require notaries to post no bond at all and leave victims of a notary's misconduct without surety funds to secure to pay legal fees in recovering such property as an automobile or home. If, in all states, construction bonds are regarded as necessary to protect the public—when the financial stakes are often higher with the documents handled by notaries, why then isn't a notary bond required, too, in all states?

Clearly, the greatest shame of state notary laws is not in their anachronism, but in their absence. All but a handful of states have established no meaningful statutory program for qualifying, educating,⁸⁴ testing, investigating and disciplining notaries. In some states, it is actually impossible to revoke the commission of a notary for misconduct⁸⁵—if notary misconduct is even defined!

81. See National Notary Association, *Comparison of Notary Provisions*, NAT'L NOTARY MAG., May 1998, at 32 (listing the 50 states' bond requirements).

82. *Id.*

83. *Id.* Shortly after attaining statehood in 1850, California established a notary bond of \$5,000. See National Notary Association, *Notary Home Study Course-California Supplement* (1989), at 56-57 (chronicling the history of the California notary). The bond remained at \$5,000 until 1978, when the Legislature, enacting certain provisions of the National Notary Association's Model Notary Act, raised it to \$10,000, where it remained until 1997. *Id.*; see also CAL. GOV'T CODE § 8212 (West 1999) (providing that the current bond requirement in California is \$15,000).

84. See *supra* note 63 and accompanying text for a discussion of the lack of statutory notary programs throughout the United States.

85. The state of Arkansas, for example, does not give its Secretary of State power to revoke a notary commission. However, a bill currently pending

It must also be noted that some states seem to show perhaps too much interest in commissioning as many notaries as possible in order to add revenue to state or departmental coffers, and too little in training a truly professional corps of notaries to defend the public from fraud. Of sixteen state notary-regulating agencies responding to a recent National Notary Association survey, twelve said they are compelled to pour all of their collected commissioning fees into the state's general fund, with ten of these receiving back less than they take in—and in one case “far less.”⁸⁶ It is particularly revealing that three of the four states that the survey indicates control or largely control their own collected commissioning fees (Hawaii, Louisiana, Oregon) impose some form of test⁸⁷ on notary commission applicants, while only one of the other twelve states does. This suggests that when notary program administrators are given sufficient financial resources, these funds will be used intelligently and to the benefit of both notaries and the public they have been commissioned to serve and protect.

before the Arkansas General Assembly would give the Secretary of State that power. An Act to Establish the Revocation of a Notary Public's Commission; and for Other Purposes, S. 469, 82nd Gen. Assem. (1999).

86. The National Notary Association's scripted telephone survey of March 1999 (on file with the author) asked state Notary administrators the following four questions:

- (1) Are commissioning fees and other funds collected by your notary program kept for the exclusive use of notary administration or are they shared with other programs?
- (2) Are moneys collected by the notary program put into the state's General Fund?
- (3) If the commissioning fees are not put into the General Fund, what agency or officer controls the fund that they are put into?
- (4) Are the funds made available to operate your notary program more or less than the funds taken in by your notary program?

Responses to Question (1): 12 states share the notary-commissioning fees they collect with other state programs, three had no response to this question, and one state (Hawaii) has a self-funding notary program. Responses to Question (2): 12 states contribute all of their collected notary-commissioning fees to the General Fund, and four states contribute it to other funds (one state, Oregon, mentioning that the notary program receives the lion's share of this fund; another, Vermont, that it contributes 75% to the General Fund and 25% to the notary's local county; and another, Hawaii, controlling its own self-funding program). Responses to Question 3: Of the 4 states not contributing their collected notary-commissioning fees to the General Fund, only two mentioned what officer or agency controlled this other fund: in Louisiana, it is the Secretary of State; in Hawaii, it is the Department of the Attorney General. Responses to Question (4): 10 states receive less funds back from the state than they take in (Nevada reported taking in “far less”), three states said they receive back about as much as they take in, one (South Carolina) reported receiving more back from the state than it takes in, and two states had no idea. All Responses are on file with the National Notary Association in Chatsworth, California.

87. See *supra* note 63 and accompanying text for a discussion of states that require some form of written or oral examination.

The office of notary is one of the most underutilized of our nation's manpower resources. For two centuries, the functions of the American notary office have been incrementally pared and the rigor of its qualifications undermined by official apathy. State legislators have generally acceded to the demands of law and commerce that notaries be powerless factotums—if not lapdogs—in legal and commercial offices. The “notaire covert,”⁸⁸ the lower-level office notary, often young and female, who feels tremendous pressure to defer to the will of superiors in all matters notarial, is a very real dilemma in America today. Such “in-house” notaries may not even regard themselves as independent public officers, nor understand their duty to accord precedence to state law over any conflicting notarial demands of an employer. Their ignorance is the fault of the state legislators and notary-regulating officials who have given a low priority to notary competence and professionalism.⁸⁹

Yet more remarkable than the apathy of officialdom is the public-spirited conscientiousness of the many notaries who transcend this official neglect. In the ranks of American notaries, there is a significant percentage of true professionals as dedicated and competent in their range of duties as any Latin notary—and many of them are counted among the National Notary Association's 150,000 members. There is also a very large percentage of well-meaning notaries who perform as best as their limited training allows. As in any calling, only a tiny percentage—consisting of the unscrupulous and the uncaring—account for the majority of incidents of misconduct.

At this juncture in American history, social needs and technological advances present an unusual opportunity for the nation at long last to fully utilize its largely dedicated but unchallenged corps of notaries.

III. THE FUTURE: TWO NEW ROLES

American and Latin notaries are divided by specifics but united by principle. Both are impartial witnessing officers. Both are expected to serve as pillars of fairness, lawfulness and propriety. And both have a responsibility to the situation rather

88. See generally Thaw, *supra* note 50.

89. The National Notary Association's MODEL NOTARY ACT (1984) provides a two-part solution to the problem of the notaire covert. Thaw, *supra* note 50, at 733. “First, each state must have statute language in place expressly putting employers on notice that they will be punished for requiring improper notarial acts of employees.” Thaw, *supra* note 50, at 733; see MODEL NOTARY ACT §§ 6-101(c), (d). “Second, each state must make it a statutory requirement that notaries take and pass a course of instruction on their duties before becoming commissioned.” Thaw, *supra* note 50, at 733; see MODEL NOTARY ACT § 2-101(b)(4).

than to the needs of any employer or client. Above all, the notary's "stock in trade" in any nation is integrity.

In matters of integrity, American notaries are no more suspect than the notarial officers of any other nation. Their deficiency is in their professional training, though many make up for the lack of state-provided instruction through their own initiative: studying notarial laws and instruction books, attending seminars and joining professional associations.

The undertrained, underestimated and underutilized American *notariat* is capable of a larger role. Fortuitously, a confluence of social and technological developments has provided new and increasingly urgent needs that notaries could be asked to fill, with the proper training. These possible new notarial roles fall into two categories.

A. *The Fact Verifier*

First, there is a societal need for a trusted, impartial officer to serve as a verifier of certain important and easily ascertainable facts, often in the context of international exchange. The State of Washington has already paved the way for such an expanded role by creating the statutory notarial power to certify that "an event has occurred or an act has been performed."⁹⁰ As suggested to the National Notary Association from numerous sources, here are only a few of the areas in which simple but helpful determinations and certifications could be entrusted to an appropriately trained American notary public:

(1) *Foreign adoptions.* Americans increasingly are adopting foreign-born children. A frequent snag in these adoptions is the lack of an official, impartial verifier of certain facts about the adoptive parents, such as their marital status. Much of this information could be verified quite simply by an American notary.⁹¹

(2) *Foreign pensions.* Many foreign pensioners residing in the United States must annually file a "certificate of life" proving they are alive in order to continue receiving their pension. While a notary is typically listed on the certificate as one of the American officials who may verify certain information about the pensioner, many notaries correctly refuse to help

90. See WASH. REV. CODE § 42.44.080(7) (1998) (stating "[i]n certifying that an event has occurred or an act has been performed, a notary public must determine the occurrence or performance either from personal knowledge or from satisfactory evidence based upon the oath or affirmation of a credible witness personally known to the notary public.").

91. During a March 1999 visit to the People's Republic of China, the author learned firsthand from Chinese notaries that this lack of a reliable, government-appointed American verifier of fact complicates the foreign adoption of many Chinese children.

because they have no authority to confirm and certify such information as the pensioner's address. This verification, however, could be easily done by a notary.

(3) *Representative capacity.* Not every state gives its notaries authority to confirm a signer's representative capacity as a partner, corporate officer, attorney-in-fact, trustee or the like.⁹² This has proven to be a significant impediment to interstate commerce,⁹³ since attorneys, insurers and lenders in State A often insist that notaries in State B confirm and certify a signer's capacity using the statutory certificates of State A—an act that may be unauthorized if not expressly disallowed in State B. The result is often a time-consuming and costly interstate "ping-pong match" in which a document is notarized, mailed, rejected and returned, and then notarized, mailed, rejected and returned again before a solution is worked out that typically involves finding a notary

92. The state of Florida is a notable example. See *supra* note 67 and accompanying text for further discussion.

93. See MICHAEL L. CLOSEN ET AL., NOTARY LAW & PRACTICE: CASES & MATERIALS 234 (1997).

There has been a recent and serious problem with certain California notarized documents because some parties and agencies in other states would not accept such notarizations. The reason was that California had adopted legislation requiring the use of an all-purpose form, which was deemed too general and thus unacceptable in some other places.

Id. See also National Notary Association, *Out-of-State 'All-Purpose' Solution Set*, CAL. NOTARY BULL., Dec. 1996, at 1 [hereinafter *Out of State*].

For four years, one of the most troublesome and common complaints to the California Notary Public Section and the National Notary Association has been: "They won't accept the 'all-purpose' acknowledgment form out of state—what should I do!?" As a result of enactment of Assembly Bill 3304 earlier this year, there is now a solution available in most cases. Effective January 1, 1997—exactly four years after the unique-but-problematic form became mandatory for all acknowledgments taken in California—California Notaries may use acknowledgment forms from another U.S. state or jurisdiction on documents that will be filed in that other state or jurisdiction.

Id. at 1-2. Specifically, CAL. CIV. CODE § 1189 (West 1999) has been amended by the new law, with a new subsection (c) created, stating:

[o]n documents to be filed in another state or jurisdiction of the United States, a California notary public may complete any acknowledgment form as may be required in that other state or jurisdiction on a document, provided the form does not require the notary to determine or certify that the signer holds a particular representative capacity or to make other determinations and certifications not allowed by California law.

CAL. CIV. CODE § 1189(c) (West 1999). This "solution," however, has only reduced some of the document rejections, because it does not apply to documents filed in non-U.S. jurisdictions or filed in California itself, nor does it change the fact that California notaries are not authorized to confirm and certify a signer's representative capacity. See *Out-of-State, infra* at 2 (listing several questions that have already been raised and responses related to § 1189(c)).

in State B who will ignore local notarial law. There is no reason that notaries in all states cannot be taught the relatively simple techniques for verifying any signer's representative status.

(4) *Certified copies.* Not every state gives its notaries authority to certify copies of original documents that cannot otherwise be certified by an appropriate public records custodian (e.g., a birth certificate by a custodian of vital records, or a property deed by a county recorder).⁹⁴ Yet, notaries in every state regularly are asked to certify copies of such documents as diplomas, licenses and passports for a host of legitimate purposes. Notaries in all states could be given the helpful power to certify copies.

(5) *Certified photographs.* Notaries are frequently asked to certify the genuineness of the photograph of an individual seeking to renew a foreign passport⁹⁵ or to apply for or transfer a medical license,⁹⁶ but no state yet expressly defines photo-certification as a notarial power. Yet, in a sense, notaries perform a photo-certification every time they compare a picture on an ID card against the physical appearance of a document signer. Photo-certification of facial appearance would impose no taxing new responsibilities on the notary and might be authorized by law as a valuable public service.

(6) *Age verification.* Companies have already begun to use notaries to verify adult age for direct mail purchasers of

94. See *supra* note 60 and accompanying text for further discussion.

95. Renewal of an Indian passport in the United States normally requires such verification of the renewer's photograph.

96. See Charles N. Faerber, *Identifying the Doctor*, NAT'L NOTARY MAG., July 1995, at 14-15 (discussing the identification form presented at testing centers by doctors taking the United States Medical Licensing Examination (USMLE), which bears a "notarized" photograph of the test-taker overprinted with a notary seal). A former version of the USMLE identification form, which bore the notarial language, "I certify that the photograph and signature on this form accurately apply to the individual named above," was often rejected by notaries in the correct belief that they had no statutory authority to certify photographs. *Id.* at 14. In 1994-95, compromise notarial language was worked out between the National Notary Association and the National Board of Medical Examiners so that notaries could notarize the identification form without appearing to certify a photograph:

I certify that on the date set forth below the individual named above did appear personally before me and that I did identify this applicant by: (a) comparing his/her physical appearance with the photograph on the identifying document presented by the applicant and with the photograph affixed hereto, and (b) comparing the applicant's signature made in my presence on this form with the signature on his/her identifying document.

Id. at 15. Of course, such verbal contortion would be unnecessary if notaries simply had authority to certify photographs.

tobacco.⁹⁷ Age verification is a simple procedure that normally entails looking at a photo-bearing ID that contains a date of birth.

A number of states already give notaries minor roles as verifiers of information. In Florida, for example, notaries may confirm vehicle identification numbers. In California, notaries may confirm the age of certain affiants.⁹⁸

The above new roles would necessarily require educational and certification programs to teach notaries the techniques of confirming representative capacity, marital status and the like. But these are not exceedingly complex tasks, and the procedures might be imparted through classroom sessions, a home study program or a study course on the Internet.

Depending upon a state's preference, this certification as a verifier of fact need not be a qualification that every notary would have to achieve, or it could be made a mandatory facet of every notary's repertoire of powers. However, because the confirmation of certain facts might take considerably longer than the execution of such currently authorized notarial acts as jurats and acknowledgments, fact verification would best be made a power of full-time, self-employed notaries whose time is not restricted by any one employer.

B. The Self-Employed Modern American Notary: Emergence of the CyberNotary

Would the verification of facts, along with the performance of such traditional notarial acts as jurats and acknowledgments,

97. See National Notary Association, *Notarized Form Developed To Order Tobacco Via Mail*, CAL. NOTARY BULL., Dec. 1997, at 8 (describing the new role of the notary in mail-order tobacco purchases). One company using notaries to ascertain that mail-order tobacco purchasers are at least 18 years old is New Mexico's Santa Fe Natural Tobacco. *Id.* Accommodating the fact that notaries have no express statutory authority per se to confirm and certify age, Santa Fe Natural Tobacco's notarial form requires the notary to identify the purchaser, take the individual's acknowledgment of a signature and then to insert a date of birth on the form taken from the purchaser's. *Id.* Again, such verbal contortion would be unnecessary if notaries had authority to confirm and certify such simple facts as date of birth and age.

98. See CAL. GOV'T CODE § 8230 (West 1999).

If a notary public executes a jurat and the statement sworn or subscribed to is contained in a document purporting to identify the affiant, and includes the birthdate or age of the person and a purported photograph or finger or thumbprint of the person so swearing or subscribing, the notary public shall require, as a condition to executing the jurat, that the person verify the birthdate or age contained in the statement by showing either: (a) A certified copy of the person's birth certificate, or (b) An identification card or driver's license issued by the Department of Motor Vehicles.

Id.

provide sufficient income for a notary to be self-employed full-time? It would if duties are added from a second category of prospective new roles for the modern American notary. These roles have emerged over the past decade with the burgeoning growth of the Internet and the increasing importance of electronic data interchange (EDI) in commerce, law and government. It has become apparent that many of the notary's traditional witnessing and authenticating functions with pen-and-ink signatures and paper documents are transferable to the arena of digital signatures and electronic documents.

These EDI authenticating functions might be gathered under the title "CyberNotary,"⁹⁹ though this term was coined with a relatively narrow, specific and, currently, unrealized application in the field of international commerce. "So far . . . there exist no CyberNotaries, as envisioned by the ABA's Information Security Committee. To a great extent, the CyberNotary is a hypothetical office in search of a real-world purpose."¹⁰⁰

In 1997,¹⁰¹ Florida became the first American state to try to give the CyberNotary a real-world purpose, but it did so by breaking up the office into two separate notarial offices—the "Florida international notary"¹⁰² (renamed in 1998 as "civil-law

99. See Charles N. Faerber, *Book Versus Byte: The Prospects and Desirability of a Paperless Society*, 17 J. MARSHALL J. OF COMPUTER & INFO. L. 797, 798 (1999) (pointing out that the CyberNotary was conceived by the American Bar Association's Information Security Committee as a new legal specialization for facilitating international electronic commerce, one in which technical and legal expertise would be combined in a single officer) [hereinafter *Book Versus Byte*]. "The CyberNotary was envisioned as an American notary with both a law degree and an expertise on digital signatures who would be regarded as a professional equal by the attorney-like notarial officers within the International Union of Latin Notariats (IULN)." *Id.* See Theodore S. Barassi, *The CyberNotary: A New U.S. Legal Specialization for Facilitating International Electronic Commerce*, *Bulletin of Law, Science & Technology*, 1995 A.B.A. SEC. SCI. & TECH. 5-7. See also the report issued by the CyberNotarial Group of the Meeting of the Information Security Committee of the American Bar Association, Wash. D.C., Nov. 9-11, 1994 (on file with the author).

100. *Book Versus Byte*, *supra* note 99, at 798.

101. Florida Statute provisions creating two new notarial offices were enacted in 1997 through Committee Substitute for House Bill 1413 (Chapter 241) and Committee Substitute for Senate Bill 1754 (Chapter 278). See FLA. STAT. chs. 117.20, 118.10 (1998) for comparison and history of the acts.

102. Florida legislation enacted in 1998 (Committee Substitute for House Bill 1125 (Chapter 246)) changed the title of the new "Florida international notary" to "civil-law notary." The governing rules for the civil-law notary are in FLA. STAT. ch. 118.10 (1998). To qualify for appointment by the Florida Secretary of State as a civil-law notary, an applicant must have been a member in good standing of the Florida Bar for at least five years. FLA. STAT. ch. 118.10(1)(b). The civil-law notary is authorized to issue "authentic acts," in the manner of foreign Latin notaries, but also has authority to perform the same acts as ordinary Florida notaries, including the power to solemnize the

notary") and the "electronic notary,"¹⁰³ who will operate within a public key infrastructure (PKI).¹⁰⁴ Florida legislators, apparently, did not want to restrict electronic notarizations just to attorneys.

There are at least three potentially considerable roles for the electronically sophisticated notarial officer that we will call the CyberNotary. These distinct roles include the internet knowledge navigator, the digital signature authenticator, and a certification authority.

1. Internet Knowledge Navigator

The effectiveness of the notary as a confirmer of fact, as outlined above, can only be enhanced by the infinite reach of the Internet. It is just a matter of time before every public record is online and, thus, accessible to the electronically adept notary. In Brunswick County, North Carolina, for example, a web site is now being developed to provide Internet users with access to property records and vital records such as birth, death and marriage certificates.¹⁰⁵ The notary might serve as an "Internet Navigator"

rites of matrimony. FLA. STAT. ch. 118.10(3). The civil-law notary must maintain a protocol containing original documents. FLA. STAT. ch. 118.10(1)(c). The new officer has global jurisdiction to take acknowledgments and proofs concerning real property. FLA. STAT. ch. 695.03. Not surprisingly, the roving authority of the Florida civil-law notary has already drawn criticism from notaries in IULN nations, who resent the invasion of their own jurisdictions.

103. Provisions regarding "electronic notarization" are contained in FLA. STAT. ch. 117.20(2) (1998):

[a]n electronic notarization shall include the words 'Notary Public—State of Florida,' the name of the notary public, exactly as commissioned, the date of expiration of the commission of the notary public, the commission number, and the notary's digital signature. Neither a rubber stamp seal nor an impression-type seal is required for an electronic notarization.

Id. To become an electronic notary, an applicant must already have been commissioned as a regular Florida notary and have had a private/public key pair certified by a certification authority; the Florida Secretary of State then would issue an amended commission to any qualifying applicant. FLA. STAT. ch. 117.20(3). Electronic notaries must abide by all laws governing regular notaries, including that requiring each document signer to appear in person before the notary at the time of notarization. FLA. STAT. chs. 117.20(3), 117.05. Unlike other Florida notaries, however, the electronic notary must "keep a sequential journal of all acts performed;" if the journal is "stolen, lost, misplaced, destroyed, or rendered unusable," the state must be notified immediately. FLA. STAT. chs. 117.20(5), 117.20(5)(c).

104. See Jane Kaufman Winn, *Open Systems, Free Markets, and Regulation of Internet Commerce*, 72 TULANE L. REV. 1177, 1201-04 (1998) (describing the use of a public key infrastructure to provide a reliable public key distribution).

105. See National Notary Association, *County in NC Offers Internet Record Access*, FOR THE RECORD, Mar.-Apr. 1999, at 3 (describing the ongoing effort in one North Carolina county to standardize recordable documents). FOR THE RECORD is an NNA publication issued on behalf of the Property Records

of sorts for certain information-hungry citizens who lack the resources or technical confidence to plug in to this encyclopedic information pathway.

2. *Digital Signature Authenticator*

Electronic data interchange has not eliminated fraud. Rather, it has given the resourceful criminal new venues and techniques for exploitation. “[D]igital signatures will make many types of fraud much easier, by eliminating the annoying need for personal presence [and the possibility of detection and arrest].”¹⁰⁶ The closed system of public key cryptography that is supposed to “make information safe from eavesdropping, tampering, or forgery, regardless of the security of a communication channel,”¹⁰⁷ is still subject to imposture. “The main problem with the public key/private key technology is that a private key may be stolen, borrowed or coercively taken and then used to create a fraudulent electronic message, without the knowledge of the message recipient, who may be on the other side of the earth.”¹⁰⁸

Thus, there is a role for an impartial digital authenticator—an “electronic notary”—who would be in the presence of the signer/transmitter of an electronic document to screen that person for identity, lack of coercion and basic awareness, and then to authenticate the transmission by adding the witness’s own digital signature. “A digital signature is just a new kind of pen, and consumers still need professional co-signer witnesses in their local communities to protect them from fraud, overreaching, and duress in life changing transactions, such as the sale of their home. . . .”¹⁰⁹

Florida and Utah¹¹⁰ have led the way in creating statutory

Industry Joint Task Force.

106. See Frank W. Sudia’s Written Comments, Submitted as a Member of the National Notary Association’s Model Notary Act Revision Committee, March 25, 1999 (on file with the National Notary Association) [hereinafter Sudia’s Written Comments].

107. See Winn, *supra* note 104, at 1241 (discussing cryptography’s role in keeping information safe).

108. Charles N. Faerber, *Electronic Notarization: Florida, Utah Lead the Way*, NAT’L NOTARY MAG., July 1998, at 20.

109. Sudia’s Written Comments, *supra* note 106.

110. Through enactment of Senate Bill 107 (Chapter 63) in 1998, qualifying Utah notaries may now take acknowledgment of digital signatures:

[a] notary acknowledgment on an electronic message or document is considered complete without the imprint of the notary’s seal if: (a) the electronic message or document has been digitally signed pursuant to Section 46-3-401 in the presence of a notary; (b) the notary has confirmed that the digital signature on the electronic message or document is verifiable by the public key listed in the certificate issued to the signer in accordance with Section 46-3-403; (c) the notary electronically signs the acknowledgment with a digital signature pursuant to Section 46-3-401; and (d) the following information appears

provisions to commission and regulate such "electronic notaries," while three other states¹¹¹—Georgia, Virginia and Wisconsin—currently have briefer statutory sections merely recognizing use of a digital signature by a notary. As of this writing, no state has yet commissioned any citizen as an electronic notary.

At present, a broad and well-defined role for the American notary as a "Digital Signature Authenticator" awaits the regularizing of electronic procedures for executing and filing such commonly notarized documents as real property deeds¹¹² and motor vehicle titles. It also awaits a consensus that public key cryptography has more to offer than other technologies, such as biometrics, in linking a given person with a given electronic message. Specifically, "[u]ntil a reliable, inexpensive key distribution system that facilitates identification of the private key holder is created, public key cryptography will probably not be very useful in electronic commerce applications."¹¹³ But the CyberNotary, in the function described below, could well be part of that inexpensive key distribution system.

3. Certification Authority

Some analysts view the American *notariat* as an obvious human resource to tap in creating that new officer, so vital to the public key infrastructure, who would be called a "Certification Authority" (CA).

A certification authority is a trusted third party who is in the business of associating a public key with a particular individual. The certification authority associates an individual with a public key by issuing a certificate that at a minimum contains a copy of the

electronically within the message digitally signed by the notary: (i) the notary's full name and commission number exactly as indicated on their commission; and (ii) the words 'notary public,' 'state of Utah,' and 'my commission expires on (date)'; and (iii) the address of the notary's business or residence exactly as indicated on their commission.

UTAH CODE ANN. § 46-1-16(7) (West 1998).

111. See Charles N. Faerber, *1998 Notary Public Laws in Perspective*, NAT'L NOTARY MAG., May 1999, at 20 (describing Florida and Utah's comprehensive notary reform and the recognition of digital signatures in several states). At the end of the states' 1998 legislative sessions, Georgia, Virginia and Wisconsin recognized a notary's use of a digital signature. *Id.* However, in early 1999, Arkansas enacted its "Electronic Records and Signatures Act," which also allows a notary to use a digital signature. *Electronic Records and Signatures Act*. 1999 Ark. Acts 718.

112. A committee now drafting a proposed Uniform Electronic Transactions Act for the National Conference of Commissioners on Uniform State Laws has recommended inclusion of real estate documents in the Act only upon the devising of a reliable electronic equivalent to a notary's signed and sealed paper acknowledgment certificate (30-page interim report circulated for discussion purposes only, on file with the author).

113. Winn, *supra* note 104, at 1201.

public key in question and the identity of the person associated with it. It may also contain information about how long the certificate will be valid or special characteristics identifying the context in which the public key will be used. The certification authority then signs the certificate with its own digital signature.¹¹⁴

As screened and trusted impartial witnesses, notaries would be well-positioned to qualify with the state as CAs, or they might serve as local agents of a CA, though some see a potential problem with the notary being the CA rather than the agent:

[i]n theory there is no bar to allowing them also to act as a Certification authority . . . that signs the subscriber's certificate directly in their own name, as contemplated by the Utah [Digital Signature] Act. My reservation is that the duties of CA also require, in my opinion, the maintenance of a 24x7x365 online revocation capability, in case the customer's key is stolen, whereas the notary needs to sleep, go on vacation, etc. This might, however, be contracted out, with the customer being given an 800 number to call during non-business hours.¹¹⁵

Conceivably, notaries could associate in firms, just as lawyers currently do, so that one or more would always be "on duty" to handle certificate revocation chores. Notably, VeriSign, Inc. of Mountain View, California, the first commercial CA in the nation to offer its services to the public,¹¹⁶ already uses notaries as an alternative to local registration agents in issuing its highest class of digital ID, used in such applications as e-banking, corporate database access, personal banking and membership-based on-line services.¹¹⁷

C. A New Dual Role for the American Notary?

If the American notary is to undertake a new dual role as a confirmer of critical information and as CyberNotary, the office will necessarily become more professional but notaries will become fewer in number. Intensive classes, study and testing on the

114. *Id.* at 1202 (citations omitted).

115. See Sudia's Written Comments, *supra* note 106.

116. See Winn, *supra* note 104, at 1211-12 (describing VeriSign's role as a certification authority).

117. A state's mere imposition of a test on notary commission applicants, or the toughening of a current test, normally will cause the number of commissionees to fall off in that state. For example, when California changed its open-book test to a closed-book proctored exam on January 1, 1992, the California notary population plummeted from 161,000 in 1992 to 130,000 in 1997. See Birenbaum, *supra* note 7, at 31 (showing the drop in the number of notaries in California). See also National Notary Association, *New Qualifying Exam Begins January 1*, CAL. NOTARY BULL., Dec. 1991, at 1 (stating that a new California notary qualifying exam was to begin on January 1, 1992); NATIONAL NOTARY ASSOCIATION, PREPARING FOR THE CALIFORNIA NOTARY PUBLIC EXAM (1995).

subjects of computer science, business and law will be a *sine qua non*. Many individuals who currently own notary commissions will not have the personal resources to qualify, and the total count of notaries in any state that chooses to restyle its notary program in this new direction will doubtlessly fall¹¹⁸—a turn of events that many observers would applaud.¹¹⁹ Of course, with the law of supply and demand ever in force, fewer notaries would mean more business and higher fees for the individuals who qualify.

It is likely that the advent of the notary in one or both of the above-described roles will be incremental rather than sudden. It is also possible that the American notary office may articulate into two or more different classes of notary, either on a transitional or a permanent basis. Below are described three possible future classes of notary.

In the least selective class would be the traditional, strictly ministerial, paper-oriented notary office that we have known for decades; functionaries in this office would continue to administer oaths and take acknowledgments, most often as lower-level “notaires covert” in an office setting. But states must do much more to address the dilemma of these so-called “lapdog” office notaries who, out of ignorance or fear, tend to defer to the wishes of employers and clients, even when they conflict with requirements of notarial law. One part of the solution may be to eliminate or find alternatives to the “production line” notarizations that many corporate notaries perform by the hundreds every day. Do we really need all these notarizations? Another part of the solution is enactment of stiff statutory penalties for employers who request or require improper notarial acts,¹²⁰ coupled with clear state instructions and warnings for notaries on what may and may not be done in an office environment. Further, private employers must be put on notice by the state that the price of the convenience of having a state officer, a notary public, at one’s beck and call in house is strict adherence to all notarial laws. Accordingly, the state should not be reluctant to take away the privilege to employ notaries on one’s premises if notarial laws are broken, compelling these employers to use the services of more scrutinous,

118. See Michael L. Closen & R. Jason Richards, *Notaries Public—Lost in Cyberspace, or Key Business Professionals of the Future?*, 15 J. MARSHALL J. COMPUTER & INFO. L. 679, 757 (1997).

There is simply no sound business or policy reason for so many individuals to hold notary commissions in this country. The explosion of notary commissions since the mid-1800s has seriously diluted the quality of services rendered by notaries and destroyed the special stature of the office. If there are some 4.5 million notaries in this country today, the authors believe there are at least 4 million too many.

Id.

119. See *supra* note 89 and accompanying text.

120. See generally Malavet, *supra* note 4, at 475-82.

independent notaries.

These more scrutinous, independent notaries might comprise the middle tier of the envisioned three transitional classes of notary. They would be self-employed, highly professional and well-trained—perhaps college graduates. In being self-employed and independent, this class of notary would not be subject to the often overwhelming pressure applied to salaried employee/notaries to follow their supervisor's improper notarial directives—e.g., by not requiring signers to appear or to show proper identification—rather than to follow the law. They would have all the powers of the traditional notary and serve as a confirmer of fact, a digital signature authenticator and perhaps as a local agent for a Certification Authority, but would not handle the discretionary functions of an attorney and steer clear of the unauthorized practice of law.

On the top tier of the three classes of notary might be the attorney/notary, who would have all the powers of both the traditional and mid-tier notaries, but would perhaps serve primarily in the international arena and be accepted as an equal by civil law notaries of other countries.

One can envision firms in which all three types of notary would be employed, with perhaps those on the lower rungs serving apprenticeships before moving up; just as the *tabelliones* of the Eastern Roman Empire employed *notarii* as clerk-scribes,¹²¹ so the mid-tier and attorney/notaries might employ lower-level traditional notaries and hire them out as “temps” in corporations. One can also visualize firms run on somewhat of the Japanese model—one notary with many less experienced assistants.

CONCLUSION

It is difficult to visualize a continuation well into the 21st century of the American notary office as it currently operates. What we have today in the United States is an underutilized and often denigrated, but nonetheless quietly effective notarial system whose weaknesses stem from two sources. First, there are constitutional weaknesses that minimize the office's powers, authority and potential societal usefulness, and relegate most notaries to an in-house role rather than a function as a self-supporting and independent practitioner. Second, there are weaknesses in the American notary office stemming from official apathy, particularly about the need for education and testing. It has, of course, been the mission of the National Notary Association (NNA) since its founding in 1957 to address that need and attempt to fill the educational void for the American notary. The NNA has striven to inculcate understanding and acceptance on the part of

121. See *supra* note 27 and accompanying text for further discussion.

notaries that what they do is critical to the integrity of legal and commercial activity in this nation, and that they will be held accountable for their failure to uphold certain standards. Our challenge has been to imbue in notaries a professionalism and care that will reflect that understanding and accountability. We have also worked hard to win from government administrators, lawmakers, the media, attorneys, academia and the general public an acknowledgment of the importance of the notary office and a respect for the duties notaries perform.

The two new roles presenting themselves for notaries—as confirmers of critical information and as Internet navigators—offer a rare opportunity and an impetus to further professionalize the office. It is also an opportunity to enhance public recognition and respect for the significant role of the notary as society's impartial witness. Too few people realize that, without the notary to screen document signers for identity, volition and basic awareness, the security of our reliance on important and sensitive documents like real property deeds and powers of attorney would be breached, with devastating results on our lives and fortunes.

Welcomed and needed changes are in the offing for the notary office in this country. In the future, there will likely be fewer American notaries, but they will be better paid and much more highly trained, competent, independent, professional, respected and useful. For the notaries public of the United States on the threshold of a new century and millennium, it is a bright future indeed.