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DISQUALIFYING INTERESTS FOR NOTARIES PUBLIC

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INTRODUCTION

The purpose of this Article is to examine situations where limitations are placed on a notary public's[1] powers. Since both Authors of this Article are notary public prosecutors for the Pennsylvania Department of State's Bureau of Commissions Elections and Legislation, this Article will focus primarily on Pennsylvania law, with references to the laws of other jurisdictions where applicable.[2]

I. BACKGROUND

The need for prohibiting notaries public from performing certain transactions becomes apparent after examining the duties and powers of a notary public. A notary public is given an office of trust and is frequently called upon to give oaths and affirmations, to receive acknowledgments and to certify documents as true copies of the original. The need to protect the integrity of the notary public office is so great that all commissioning jurisdictions[3] have statutes regulating notaries public.[4] In most jurisdictions,

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1. Throughout this Article the terms "notary public" and "notary" are used interchangeably.

2. The Authors of this Article emphasize that the analysis and opinions expressed in this Article are their own and are not to be considered those of the Pennsylvania Department of State.

3. For purposes of this Article, "commissioning jurisdictions" or "jurisdictions" is defined as the 50 states and the District of Columbia.

4. ALA. CODE § 36-20-1 to § 36-20-32 (1991); ALASKA STAT. § 44.50.010 to § 44.50.190 (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 & Supp. 1999); GA. CODE ANN. § 45-17-1 to § 45-17-34 (1990 & Supp. 1998); HAW. REV. STAT.

notaries are considered commissioned public officials and perform duties that are necessary and required in certain (often financially related) transactions.[5] One of a notary public's most important duties is to establish the identities of the parties to a document that he or she is notarizing. A notary is relied upon in business and law to minimize fraud in signed documents. The notary public is a neutral third party to attest to the validity of transactions. The ability of a notary to provide independent assurances of validity is crucial in today's society where parties to a transaction may never meet.

Because of the notary public's role in financial transactions, every jurisdiction in the United States has placed limitations on a notary public's powers. Generally, the reason for these limitations

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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. § 9E.1 to § 9E.17 (West 1995 & Supp. 1999); 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. ANN. STAT. § 486.200 to § 486.405 (West 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. § 240.001 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-1-101 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).

5. For example, in Pennsylvania, a notary public was formerly required to certify the signatures of all vehicle title transfers. 57 PA. CONS. STAT. ANN. § 1111 (West, WESTLAW through 1998 Reg. Sess.). However, this law changed after February 19, 1999. 75 PA. CONS. STAT. ANN. § 1103 (West, WESTLAW through 1998 Reg. Sess.). A notary public is no longer required to attest to the party's signatures in vehicle title transfers which take place at a licensed vehicle dealership. *Id.*

is to prevent a notary public, who has an interest in the transaction, from acting as a notary in the same transaction.

Undoubtedly, every notary has some interest in a transaction in which he or she performs his or her services. Frequently, the notary is entitled to a fee for his or her services in the transaction, albeit a nominal one. This would seem to give the notary a financial interest in the transaction. However, disqualification will not result from this type of minute interest in the transaction. The dilemma that the various notary public laws and court decisions struggle with is determining when a notary public's interest rises to the level of a disqualifying interest. There are certain transactions in which, by statute or case law, a notary public is prohibited from acting as such. Other disqualifying interests are described as "direct" or "financial" interests.[6] These disqualifying interests, as well as some other prohibited acts, will be discussed in this Article.

II. SPECIFIC PROHIBITIONS

A. Bank Officers

In Pennsylvania, Section 19 of the Notary Public Law of 1953[7] sets forth limitations on the instances in which a notary public may act. Pennsylvania law unconditionally prohibits the directors and officers of any bank, banking institution or trust company,[8] who are commissioned as notaries, from acting as notaries in transactions for the banks of which they are officers.[9] However, an employee of a bank, other than the director or officer, may be permitted to act as a notary in the transaction. Such employees are not considered to have an interest in the transaction, and therefore, there are no conflicts if they act as notaries. In contrast, other states prohibit this type of action only in certain instances. Some commissioning jurisdictions limit the notary public's power in this regard only where he or she is named as a party to the instrument either individually or as a representative of the bank.[10]

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6. Not all jurisdictions use the words "direct" and "financial," but instead use words or phrases of substantial similarity.

7. Section 19 of Pennsylvania's Notary Public Law of 1953 is now referred to as 57 *Pa. Cons. Stat. Ann.* § 165 (West 1996 & Supp. 1999), and will therefore be cited accordingly throughout this Article.

8. These institutions will be referred to collectively as "banks" throughout this Article.

9. Pennsylvania law is limited to bank officers and does not specifically prohibit directors, officers, or stockholders of a corporation from acting as a notary public. 57 PA. CONS. STAT. ANN. § 165 (West, WESTLAW through 1998 Reg. Sess.).

10. ARIZ. REV. STAT. ANN. § 41-320 (West 1999); GA. CODE ANN. § 45-17-12 (1990 & Supp. 1998); MISS. CODE ANN. § 25-33-21 (1999); MONT. CODE ANN. § 1-5-417 (1997); N.H. REV. STAT. ANN. § 455:2-a (1992); N.M. STAT. ANN. § 14-

These more lenient jurisdictions, by statute, permit a bank officer to act as a notary public for the bank.[11]

Regardless of whether a notary is completely prohibited from acting when he or she is a bank officer or director or only where the notary is a party named on the instrument, some limitation such as this is necessary to prevent fraud. The function of a notary public is to verify the signatures of the parties to the transaction and lend an assurance that the parties fully understand the nature of the transaction in which they are entering. When the person notarizing the signatures on the document stands to gain something from the transaction, the appearance of impropriety is substantial and the chance that fraud may be involved is great. In this instance, the purpose of the notary public is nullified.

B. Stockholders and Corporate Officers

Other states expand the prohibition for a notary public to act as such to include stockholders, directors, officers, or employees of a bank or corporation, but only where the notary is a party to the instrument either individually or as a representative of the bank or corporation.[12] Extending the prohibition to directors and officers of corporations is logical because they have an interest in the transaction similar to that of a bank director or officer. However, because the statute's prohibition applies only when the notary is a party to the transaction individually, or is a representative of the bank or corporation, the door is left open for someone within the corporation who is not a party or representative to act as a notary.

It is important to note the difference between the Pennsylvania statute and the statutes of other jurisdictions which include a prohibition against stockholders and employees acting as notaries for their businesses. Pennsylvania law prohibits bank officers and directors from acting as a notary in all transactions involving the bank, whether or not the officer/director-notary is a party to the transaction.[13] A statute of this type lends greater validity to transactions involving banks by assuring that an interested party cannot act as a notary for the bank. On the other hand, the more lenient statutes only prohibit a notary from acting where he or she is named either individually or as a representative of the bank or corporation on the document.[14] Thus,

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12-20 (Michie 1995).

11. NEB. REV. STAT. ANN. § 62-214 (Michie 1996); N.J. STAT. ANN. § 41:2-3 (West 1986); WYO. STAT. ANN. § 32-1-113 (Michie 1999).

12. *See supra* note 10 (limiting the prohibition only where the notary is named either personally or as a representative of the bank or corporation).

13. 57 PA. CONS. STAT. § 165 (West 1996 & Supp. 1999).

14. KAN. STAT. ANN. § 53-109(b)(1) (West, WESTLAW through 1998 Reg.

with these statutes, reliability may be lessened because another director or officer of a bank, while not being specifically named on the document notarized, may still have an interest in the transaction.

There are arguments for and against expanding the prohibition to include officers and directors named individually or as a representative of their bank or corporation. One argument for limiting the prohibition to a notary named either individually or as a representative of the bank or corporation is that other non-named employees may still notarize documents relating to the bank or corporation. Doing so promotes proper notarization of documents, since having a notary on the premises encourages the personal appearance of the signers to the document. At the same time, in most situations, the notary is usually a secretary with no significant interest in the transaction.

To the contrary, it may also be argued that any employee of a bank or corporation has an interest in the financial transactions of its employer because any prosperity the bank or corporation realizes may be beneficial to the employee himself. However, this is one instance where a good argument may be made that the level of the interest does not rise to one requiring disqualification. The secretary or other employee, who is not a profit shareholder or whose compensation is not related to the success of the business, generally does not have a significant interest to see that the transaction succeeds. The line of the disqualifying interest becomes blurred when the notary is someone who assisted in the transaction, prepared the documents or was an active director or officer at the time of the transaction. Thus, in the more lenient jurisdictions where the prohibition is limited to a notary named as a party either individually or as a representative of the bank or corporation, one suggestion is that, to avoid even an appearance of impropriety, it is better to be cautious and have a lower-level employee act as the notary in the transaction. This tends to protect all parties involved as it assures that a neutral third party is attesting to the validity of the transaction, and it also helps prevent the transaction from being scrutinized due to the use of a notary who had a personal or financial interest in the transactions.

Pennsylvania law expands the prohibition of the notary to all directors and officers that could potentially have an interest in the transaction or benefit from the transaction, regardless of whether they are a named party or representative to the transaction being notarized.[15] However, as restrictive as Pennsylvania law may appear to be, the prohibition still allows for a clerk or secretary of

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Sess.); UTAH CODE ANN. § 46-1-7(2) (1998).

15. 57 PA. CONS. STAT. ANN. § 165 (West 1996 & Supp. 1999).

the bank or institution to act as a notary. As stated above, such employees are generally considered non-interested parties.

C. Bank Clerks

In Pennsylvania, clerks in any bank, banking institution or trust company are prohibited from protesting "checks, notes, drafts, bills of exchange, or any commercial paper for any bank, banking institution or trust company" which employs them.[16] Other jurisdictions have similar prohibitions, but on a more limited level.[17] Some states make it unlawful for a notary public to protest a negotiable instrument owned or held for collection by the bank or corporation, where the notary is a named party to the instrument.[18] Again, a prohibition such as this protects against fraud or an apparent fraud.

D. District Justices

Almost all jurisdictions, Pennsylvania among them, prohibit justices of the peace, magistrates, or aldermen,[19] who are commissioned notaries, from having jurisdiction in cases that arose from papers or documents notarized by them.[20] The basis for the prohibition is that in these instances, the District Justice could become an essential witness in the matter before him or her, because he or she attested to the validity of the signature or instrument that gave rise to the dispute. If called upon to be a witness, the District Justice would need to be disqualified because he or she is also the person making all the final determinations involving those documents or papers. These determinations could involve a matter pivoting on the validity of the signature that he or she attested.

III. GENERAL PROHIBITIONS

The most important limitation on the powers of a notary

16. *Id.* § 165(b).

17. Pennsylvania's law is more comprehensive in that it prevents, without exception, any clerk from taking service of process for the bank in which he is employed regardless of whether he is named as a party to the instrument. *Id.* However, note that the statutes of other jurisdictions are not limited to clerks.

18. *See supra* note 10 (prohibiting a stockholder, director, officer or employee from processing any negotiable instrument owned or held for collection by the corporation, where the notary is individually a party to the instrument).

19. These judicial offices have been combined and renamed "District Justices," and for purposes of this Article will collectively be referred to as such. 42 PA. CONS. STAT. ANN. § 20003(d) (West, WESTLAW through 1998 Reg. Sess.).

20. 57 PA. CONS. STAT. ANN. § 150 (West 1996) (stating that a person holding any judicial office except the office of justice of the peace, magistrate or alderman is disqualified from becoming commissioned as a notary public).

public is the general prohibition that no notary may act in a transaction where he or she has a direct[21] or financial[22] interest. The likelihood for fraud is increased where there is no third party such as the notary verifying the party's identities, and ensuring that an arms length transaction exists. One of the notary public's greatest duties is to attest that the parties signing the instrument are actually who they purport to be.

A. *Direct Interests*

The determination of exactly what constitutes an impermissible interest is a debatable issue. States differ on the applicable definition of an "interest." Some states expressly define the prohibited interests within their statutes, but others do not.[23] There are, however, numerous legal definitions of "interest." *Black's Law Dictionary* defines an interest as a "right, claim, title, or legal share in something . . . ."[24] Pennsylvania's law prohibits the notary from acting as such where he or she has a "direct or pecuniary interest."[25] However, Pennsylvania's statute fails to provide a definition of a "direct interest."

Some jurisdictions expressly prohibit a notary from acting as such in a transaction where he or she has a direct interest by providing that a notary public may not notarize his or her own signature or a document which bears his or her name as a principal to the transaction.[26] Some of these jurisdictions limit the

21. Throughout this part of the Article, direct and personal interest will be used interchangeably, as some jurisdictions prohibit direct interests and others prohibit personal interests.

22. Similarly, the terms financial, pecuniary and beneficial interest will be used interchangeably, as they are used to describe generally the same interests in the notary public statutes of the various jurisdictions.

23. Missouri and West Virginia are two states that define the interest prohibited. *Compare* MO. ANN. STAT. § 486.255 (West 1987), W. VA. CODE § 29C-3-102 (1998) *with* ARK. CODE ANN. § 21-14-106 (Michie 1996), ARIZ. REV. STAT. ANN. § 41-313 (West 1999).

24. BLACK'S LAW DICTIONARY 560 (6th ed. 1990).

25. 57 PA. CONS. STAT. ANN. § 165(e) (West 1998).

26. *See* COLO. REV. STAT. ANN. § 12-55-110(2)(b) (West, WESTLAW through 1998 2d Ex. Sess.); CONN. GEN. STAT. ANN. §3-94g (West, WESTLAW through Gen. St., Rev. to 1-1-99); FLA. STAT. ANN. § 117.107(12) (West, WESTLAW through 1998 2d Reg. Sess.); GA. CODE ANN. § 45-17-8(c)(1) (WESTLAW through 1998 Reg. Sess.); IDAHO CODE § 51-108(3) (WESTLAW through 1998 Reg. Sess.); IND. CODE ANN. § 33-16-2-2(2) (West, WESTLAW through 1998 2d Reg. Sess.); KAN. STAT. ANN. § 53-109(b)(1) (WESTLAW through 1998 Reg. Sess.); MO. ANN. STAT. § 486.255(1) (West, WESTLAW through 1998 2d Reg. Sess.); MONT. CODE. ANN. § 1-5-416(2) (WESTLAW through 1997 Reg. Sess.); NEV. REV. STAT. ANN. § 240.065(1)(a) & (b) (Michie, WESTLAW through 1997 Reg. Sess.); N.C. GEN. STAT. § 10A-9(c)(1) (WESTLAW through 1998 Cumulative Supp.); N.D. CENT. CODE § 44-06-13.1(2) (WESTLAW through 1997 Reg. Sess.); OKLA. STAT. ANN. tit. 49, § 6 (West, WESTLAW through 1998 1st Ex. Sess.); OR. REV. STAT. § 194.158(1)

direct interest prohibition to real property transactions.[27] For example, California states that a person named as a "grantor, grantee, mortgagor, mortgagee, trustor, trustee, beneficiary, vendor, vendee, lessor, lessee," may not act as a notary public for the real property transaction.[28]

A direct interest clearly exists where a notary public is a party to the transaction or instrument. Thus, a notary is strictly prohibited from notarizing his or her own signature or a document bearing his or her name.[29] Likewise, in many states a notary public will have a direct interest in a transaction which involves a close family member. However, some states do not specifically prohibit a notary public from acting in such transactions.[30] For example, Pennsylvania does not automatically disqualify a notary public from acting in a transaction involving his or her spouse.[31] Some other commissioning jurisdictions take a stricter approach in this regard, and absolutely prohibit a notary public from acting in such an instance.[32] The most restrictive commissioning jurisdictions prohibit a notary public from acting in any transaction where the notary is related to one of the parties by

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(WESTLAW through 1997 Reg. Sess. and 1998 Cumulative Supp.); S.D. CODIFIED LAWS § 18-1-12.2 (Michie, WESTLAW through 1998 Reg. Sess.); UTAH CODE ANN. §46-1-7(1) (WESTLAW through 1998 Gen. Sess.); VA. CODE ANN. § 47.1-30 (Michie, WESTLAW through 1998 Reg. Sess.); W. VA. CODE § 29C-3-102(b)(1) & (2) (WESTLAW through 1998 1st Ex. Sess.) (prohibiting a notary from acting as such where he or she is a party to the transaction and/or is notarizing his or her own signature).

27. KAN. STAT. ANN. § 53-109(2) (1983); UTAH CODE ANN. § 46-1-7(3) (1998).

28. *See, e.g.*, CAL. GOV'T CODE § 8224(b) (West 1992).

29. Some laws do not expressly prohibit a notary from notarizing his own signature. For example, Pennsylvania, Arkansas, Arizona, New Jersey and Iowa do not have a statutory prohibition. ARK. CODE ANN. § 21-14-101 to 205 (Michie 1996); ARIZ. REV. STAT. ANN. § 41-311 to § 326 (West 1999); IOWA CODE ANN. § 9E.1 to. 9E.17 (West 1995 & Supp. 1999); N.J. STAT. ANN. § 52:7-10 to § 52:7-21 (West 1986 & Supp. 1999).

30. The jurisdictions vary on this point, but there is precedent for this type of prohibition in the area of estate law. For example, a beneficiary is sometimes barred from taking from an estate in which he was a witness to the will. *See, e.g.*, KAN. STAT. ANN. § 59-604 (1983 & Supp. 1998) (stating that a bequest made to a subscribing witness is void unless there are two other competent subscribing witnesses who are not beneficiaries); N.Y. EST. POWERS & TRUSTS LAW § 3-3.2 (McKinney 1993) (stating an appointment made to an attesting witness is void unless there are two other attesting witnesses who are not beneficiaries).

31. *See* Pennsy v. Department of State, 594 A.2d 845 (1991) (remanding case brought by Pennsylvania's Department of State to reconsider issuing sanctions against a notary public to determine if he had a pecuniary interest in the motor vehicle transfer to his wife).

32. *See* N.D. CENT. CODE § 44-06-13.1(2) & (3) (WESTLAW through 1997 Reg. Sess.); VA. CODE ANN. § 47.1-30 (Michie, WESTLAW through 1998 Reg. Sess.) (prohibiting a notary public to act in a transaction involving his spouse).

consanguinity.[33]

A notary public's generally assumed neutrality is always compromised when he or she performs a notarization for a close family member. There is always the suspicion that, due to the familial ties between the notary and the parties to the instrument, coercion or undue influence may be overlooked or a required party to the instrument was not present at the time of the purported notarization. In this instance, the function of a notary public will not be served, and thus demonstrates the basis for the restrictions.

B. Election Documents

In notary law, election cases are one of the most litigious areas of interest. A significant number of jurisdictions require the notarization of election related documents such as absentee ballots, nomination petitions, recall petitions and referendum petitions.[34] Consequently, the validity of acknowledgments and affidavits is questioned where the notary public has a direct or pecuniary interest in the results of the election and notarizes such documents.

1. The Political Candidate Notary

Generally, a notary public is prohibited from acting in situations where he or she has a direct or pecuniary interest in the subject matter of the transaction.[35] Typically, a candidate for

33. *See* FLA. STAT. ANN. § 117.017(11) (West, WESTLAW through 1998 2d Reg. Sess.) (prohibiting a notary public to act in transactions involving family members, including spouses, sons, daughters, mothers, or fathers of the notary public); NEV. REV. STAT. ANN. § 240.065(c) (Michie, WESTLAW through 1997 Reg. Sess.) (prohibiting a notary public to act in a transaction involving persons related to the notary public by marriage or consanguinity).

34. *See* MO. ANN. STAT. § 115.325 (West 1987) (requiring signature of notary on nomination petitions); COLO. REV. STAT. ANN. § 1-4-906 (West 1996) (requiring a notarized acceptance to be attached to nominating petitions); N.D. CENT. CODE § 16.1-01.09 (1993) (requiring notarization of the signature on recall petitions); ME. REV. STAT. ANN. tit. 21-A, § 336 (West 1989) (requiring verification by a notary public for nomination petitions); LA. REV. STAT. ANN. § 1254 (West 1985) (requiring a notarized affidavit of each candidate on nominating petitions); N.Y. ELEC. LAW. § 6-166 (McKinney 1993) (requiring authentication of nominating petitions by a notary public); IOWA CODE ANN. § 45.3 (West 1995) (requiring a notarized affidavit of candidacy to be attached to nominating petitions).

35. *See* Davis v. Beazley, 75 Va. 491 (Va. 1881) (holding that a grantee or a beneficiary to a deed is prohibited to take an acknowledgment of the deed); Merced Bank v. Rosenthal, 99 Cal. 39, 48 (Cal. 1893) (holding that an acknowledgment taken by agent of grantee was void); Beaman v. Whitney, 20 Me. 413 (Me. 1841) (holding void an acknowledgment of a deed taken by a grantee); Smith v. Clark, 69 N.W. 1011, 1013 (Iowa 1897) (holding void an acknowledgment of mortgage taken by a notary public who was a shareholder in a bank which was a beneficiary); Jones v. Porter, 59 Miss. 628 (Miss. 1882) (holding that an acknowledgment taken by the husband of a grantee was

political office cannot notarize his or her own nomination petitions because of the candidate's direct interest in succeeding to the elected office.[36] However, despite the seemingly clear interest of the candidate in the election documents, a number of courts have held that a notary is not disqualified from acting when he or she takes an oath or makes an acknowledgment on his or her own nomination petition.[37]

The New Jersey Absentee Voting Law, enacted in 1953,[38] requires a voter who wishes to vote by absentee ballot to sign the absentee ballot in the presence of a person authorized by law to administer oaths.[39] *In re Livingston* dealt with a losing candidate who challenged the results of an election because the winning candidate had acted as the notary public on at least fifty-one of the absentee votes cast.[40] The trial court held that the ballots should not be included in the count because the voters were subject to coercion that could undermine the public confidence in the election process.[41] The New Jersey Superior Court, in reversing the trial court, noted that the legislature had not expressly prohibited candidates from acting as a certifying officer for a ballot on which the certifying officer was a candidate.[42] The court relied on *Owens v. Chaplin*, where the North Carolina Superior Court held that absent a statute which specifically outlawed candidates from acting as an oath taker it was improper to invalidate the ballots.[43]

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void); Miles v. Kelly, 40 S.W. 599, 601 (Tex. Civ. App. 1897) (holding that a stockholder of a building association was disqualified to take an acknowledgment of a mortgage to the association).

36. *See In re* Livingston, 199 A.2d 37 (N.J. Super. Ct. 1964) (holding the neutrality of a notary public is questioned when the notary acts in an election matter directly related to his or her office); State *ex rel.* Allen v. Board of Elections of Lake County, 161 N.E.2d 896 (Ohio 1959) (holding that a nominating petition was invalid where a candidate for mayor took acknowledgment of circulators of petition papers); State *ex rel.* Reed v. Malrick, 165 Ohio St. 483 (Ohio 1956) (holding invalid nomination petitions where the candidates had notarized the circulator's affidavits).

37. Owens v. Chaplin, 228 N.C. 705 (N.C. 1948) (holding that absent statutory authority, candidates may take oaths).

38. N.J. STAT. ANN. § 19:57-17 (West 1999).

39. *Id.* The voter is then placed under oath in the presence of the oath-taker only, and in such manner that the officer cannot see the elector's vote. *Id.* Then, the voter is supposed to mark the ballot, and enclose and seal the ballot in the envelope without the oath-taker seeing or knowing the vote. *Id.* After the ballot is returned, the oath taker executes a certificate located on the envelope flap of each ballot. *Id.* This certificate guarantees that both the notary and the oath taker have complied with absentee voter procedural requirements and non-solicitation of voters. *Id.*

40. *Livingston*, 199 A.2d at 38.

41. *Id.*

42. *Id.* at 40.

43. 228 N.C. 705, 711 (N.C. 1948). In *Owens*, the oath-taker was the clerk of the superior court. *Id.* at 710.

The North Carolina Superior Court found that invalidating the ballots would negate the true choice of the voters.[44]

In contrast, the Supreme Court of Ohio in *State ex rel. Reed v. Malrick* ruled that although Ohio had no specific statutory provision which prevented a notary public from administering oaths in transactions in which the notary had a direct interest, there existed sufficient public policy reasons to prohibit the practice.[45]

2. *The Political Activist Notary*

A decade after *Livingston,*[46] *Citizens Committee To Recall Rizzo v. Board of Elections of Philadelphia* challenged the Supreme Court of Pennsylvania to determine whether there were a sufficient number of non-defective petition signatures for a recall referendum on an upcoming ballot.[47] In this case, numerous petition pages were called into question, because the required affidavit pages were notarized not by a candidate, but instead by persons actively working on the recall committee.[48] Some of the individuals working on the recall committee played dual roles, both as notaries for the committee, as well as recall petition circulators. While none of the notaries notarized their own circulator's affidavit, they did notarize the affidavits of other recall committee petition circulators.[49]

The Pennsylvania Supreme Court ruled that the notaries had a direct interest in the outcome of the recall campaign.[50] This constituted an impermissible interest for purposes of acting as a notary public on the petition affidavits.[51] In determining that the notaries had acted improperly, the court noted that the notaries had set themselves apart from the general public when they became actively involved in the recall initiative.[52] The court made a distinction between active involvement in a ballot issue and the general voter's interest in the outcome of the issue, stating that

> [w]hen one steps beyond the point of signing his name to a petition and actually solicits other signatures, he has more than a general interest as a citizen in the outcome. By notarizing these affidavits [the notaries] were performing an act essential to the achievement

44. *Id.* at 711.

45. 165 Ohio St. 483, 489-90 (Ohio 1956). The court further held that two candidates failed to obtain the requisite number of signatures to have their name placed on the ballot, because the candidates had notarized circulators' affidavits for their respective nomination petitions. *Id.* at 489.

46. 199 A.2d 37 (N.J. Super. 1964).

47. 367 A.2d 232, 241 (Pa. 1976).

48. *Id.* at 242.

49. *Id.* at 283.

50. *Id.* at 243.

51. *Id.*

52. *Rizzo*, 367 A.2d at 243.

> of their interests (in seeing Rizzo recalled) since affidavits are required for filing of the petition.[53]

Therefore, the court went on to rule that none of the signatures on the challenged petitions would be counted, because they were performing an act to ensure "the success of their efforts and the achievement of their political goals."[54]

The Pennsylvania Supreme Court considered a twist on the ruling in *Rizzo* in their decision of *In re Kersten*.[55] In this case, the Court again reviewed the issue of whether to invalidate nomination petitions; however, this time the circulator of the challenged petition pages notarized her own signature on the attached affidavits.[56] At a lower court's hearing to determine if the petition pages should be rejected, the circulator affirmed that she had personally witnessed the electors sign the petition and that when she notarized the petition she believed that her actions were proper because she did not have a financial interest in the matter.[57] The circulator also offered amended affidavits into evidence in which the circulator acted solely as the affiant and another person performed the notarization functions.[58] The Pennsylvania Supreme Court found that it was not an abuse of discretion on the part of the lower court to permit the amended affidavits to be attached to the petition pages.[59] In doing so, the Court placed great emphasis on the fact that there was no prejudice to the adverse party.[60]

3. *The Political Party Worker Notary*

In re Petrone is a recent Pennsylvania Commonwealth Court decision on the issue of whether a notary had an impermissible interest in the election document he or she notarized.[61] Specifically, the court in *Petrone* needed to determine whether a notary public who worked in the candidate's political office was prohibited from acting as the notary public for nomination petitions circulated by other persons.[62] The election challenger alleged that because the notaries were employed in Petrone's office, they had a direct and pecuniary interest in the outcome of the election.[63] The court found however, that a notary's

53. *Id.*
54. *Id.*
55. 575 A.2d 542 (Pa. 1990).
56. *Id.* at 543.
57. *Id.*
58. *Id.*
59. *Id.*
60. *Kersten*, 575 A.2d at 543.
61. 713 A.2d 1175 (Pa. Commw. Ct. 1998).
62. *Id.* at 1176.
63. *Id.*

employment status did not depend on the outcome of the election.[64] Therefore, the nomination petitions were not invalidated, because the notary did not have a direct or pecuniary interest in the election.[65]

4. The Political Voter Notary

Another case that further expanded the ruling in *Rizzo* is *Wolfe v. Switaj*.[66] In this case, two nomination petition pages were challenged because the notary public had also signed the petition pages as an elector.[67] The court noted that it was the circulator's affidavit that was notarized and not the signatures of the electors.[68] The court ruled that merely signing the petition as an elector did not rise to the level of a direct interest in the transaction.[69] In reaching this decision, the court referred to the test created in *Rizzo*: that a notary has a direct interest in a transaction when he or she exhibits more than a general interest as a citizen in the outcome of the election.[70]

C. Financial Interest

As previously discussed, most commissioning jurisdictions specifically forbid notaries from acting as a notary public in cases not only where the notary public has a direct interest in a transaction, but also where the notary has a pecuniary interest.[71] A pecuniary interest can arise anytime a notary stands to gain financially from a transaction.[72] In this instance, the document does not have to bear the notary public's name as a party in order for the notary to be in a position to gain from the transaction.[73] Similar to the cases which examined whether a notary public has a direct interest in a matter, the cases dealing with a notary

64. *Id.*
65. *Id.*
66. 525 A.2d 825 (Pa. Commw. Ct. 1985).
67. *Id.* at 826.
68. *Id.*
69. *Id.* at 826-27.
70. *Id.* at 827.
71. For further analysis, see discussion *supra* Part II.B.1.
72. *See, e.g.*, COLO. REV. STAT. § 12-55-110(2)(a) (West, WESTLAW through 1998 2d Ex. Sess.) (prohibiting a notary public from performing any notarial act if he "[m]ay receive directly, and as a proximate result of the notarization, any advantage, right, title, interest, cash, or property exceeding in value the sum of any fee properly received . . ."). For further analysis, see also discussion *supra* Part II.A.
73. One instance where this type of interest arises is in car sales or title transfers and assignments. A typical practice is for the agent of the dealership to sign the title transfer as the seller, then also notarize the document or for the owner of the dealership (evident when the name of the notary and the dealership are the same) to act as the notary. Clearly, the owner of a car dealership stands to gain financially from the sale of a car.

public's financial interest often rely on fact-specific determinations as to the degree of the notary's possible interest.[74] Common areas in which a notary public's interest in a transaction may become suspect are the areas of business owner notaries, commissioned sales, the business-employee notary and an amorphous group consisting of attorneys-at-law, attorneys-in-fact (powers of attorney) and agents for an individual.

1. Business Owner Notaries

The owner of a business, whether a sole owner or partner, is generally prevented from acting as a notary public for all transactions which relate to the business venture due to the owner's pecuniary interest in all transactions of the business. This proposition is so fundamental that there are no reported cases which discuss a varied interpretation.

2. Business Stockholder Notaries

There is some disagreement among the courts as to whether a notary public is prohibited from performing the duties of the office for a corporation in which the notary is a stockholder. Some courts have held that it is impossible for a notary to notarize an acknowledgment involving the corporation when he or she owns stock.[75] Other courts have held that as long as it does not appear on the face of the instrument that the notary public had an interest in the document, it will be acceptable for recording.[76] Likewise, some courts have held that an officer is not disqualified to take an acknowledgment, even if the officer has an interest in the transaction.[77]

The divergence of opinion on this topic can be attributed to the differing legal views as to whether the acts of a notary public are ministerial or judicial acts.[78] The jurisdictions that consider

74. For further analysis, see discussion *infra* Part II.C.

75. *See* Ogden Bldg. & Loan Ass'n v. Mensch, 63 N.E. 1049, 1051 (Ill. 1902) (holding a notary public's acknowledgment was void due to the notary's ownership of stock in the corporation); *see also* Sharber v. Atlanta Nat'l Bank, 109 S.W.2d 1042, 1043 (Tex. Comm'n App. 1937) (stating that it is universally known that a notary public's acknowledgment to an instrument will be void where the corporation has an interest and the notary is a stockholder).

76. *See* Carroll v. Nat'l Live Stock Credit Corp., 286 F.2d 362, 364 (10th Cir. 1961) (holding that "where it does not appear from the face of the instrument that the officer taking the acknowledgment . . . [is] legally disqualified by reason of their interest in the estate or property mortgages, the instrument may properly be received for the record . . .").

77. *See* Cooper v. Hamilton Perpetual Bldg. & Loan Ass'n, 37 S.W. 12, 13 (Tenn. 1896) (holding that without evidence of improper conduct, bad faith or undue advantage, an acknowledgment notarized by an interest notary cannot be voided).

78. *Compare* Anthony v. Collier County School Bd., 420 So.2d 895 (Fla. App. Ct. 1982), Martin v. Mooney, 695 S.W.2d 211 (Tex. App. Ct. 1985),

the taking of an acknowledgment by a notary public to be a ministerial act commonly indicate that a notary public is not disqualified from taking acknowledgments.[79]

Conversely, in the jurisdictions that recognize the taking of an acknowledgment is a judicial act, a notary public is disqualified from taking acknowledgments in cases where the notary has a financial interest, due to the ownership of stocks or shares in the corporation.[80]

One obscure case involving the pecuniary interest of a stockholder notary is the Pennsylvania Supreme Court decision of *Commonwealth v. Pyle*.[81] This case involved the notary commission of a bank stockholder wherein the court noted the following.

> A notary has a sort of judicial power. His protests, attestations, and other official acts, certified under his hand and seal of office, are evidence of the facts therein certified. It is necessary, therefore, that he should not be interested in favor of the parties who are oftenest invoking his services.[82]

The court held that the notary should be completely prohibited from holding the office of notary public because of his pecuniary interest in the bank's transactions.[83]

3. *Commissioned Sales*

The notarization of documents related to a commissioned sale is replete with unintentional violations of the applicable notary public law because of the existence of a pecuniary interest in the transaction. An example of how a notary can unwittingly perform an unlawful notarization is explained below.

> Nate is a real estate agent and a notary public. Henry and Wilma are Homeowners who recently moved across the country because of Wilma's work. They now wish to sell their old home. Nate and the Homeowners agree that for a six percent commission payable upon the sale of the

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Kimmel v. State of New York, 660 N.Y.S.2d 265 (N.Y. 1997), Owens v. Chaplin, 228 N.C. 205 (N.C. 1948) (taking of acknowledgment is a ministerial act) *with* Thames v. Jackson Prod. Credit Assoc., 600 So.2d 208 (Miss. 1992), Murdock v. Nelms, 186 S.E.2d 46 (Va. 1972), Krueger v. Dorr, 161 N.E.2d 433 (Ill. App. Ct. 1959) (taking of acknowledgment is a judicial act).

79. See *supra* note 78 and accompanying text for further discussion.

80. *See* Loyal's Auto Exchange, Inc. v. Munch, 45 N.W.2d 913 (Neb. 1951) (holding that a stockholder in a corporation has such a direct beneficial interest as to disqualify him from taking an acknowledgment); American Dist. Co. v. Reid, 114 S.E.2d 299 (Ga. App. Ct. 1960) (holding that a stockholder of a corporation bears such a financial relation to the corporation that he is disqualified from attesting as a notary to a deed or bill of sale).

81. 18 Pa. 519 (Pa. 1852).

82. *Id.* at 520.

83. *Id.* at 522.

> Homeowners' property, Nate will agree to list the Homeowners' property for sale. After a month on the market, the Homeowners accept an Agreement of Sale on their old home. The Homeowners, a thrifty couple, do not want to pay to stay in a hotel the night after the real estate settlement. Therefore, they make arrangements to fly in for only a few hours to complete the settlement and return the same day to their new home. Nate makes the required arrangements for settlement: he reserves a conference room at the local courthouse, has a new deed prepared, and ensures approval of the title insurance and mortgage. Unfortunately, Nate forgot to arrange for a notary public to come to the closing so that the Homeowners' signatures would be properly acknowledged on the deed.
>
> When the time arrives for the settlement it becomes apparent that no notary public is present. Nate realizes that in order for the deed to be recorded, an acknowledgment is necessary. Due to the seller's travel arrangements, there is insufficient time to locate another notary to acknowledge the sellers' signatures. Nate, in a desperate situation decides to notarize the acknowledgment himself, thus completing the sale of the Homeowner's old home.

In this situation, Nate should have refrained from acting as the notary public. While Nate has no direct interest in the Homeowner's house, he will be receiving a commission from the sale of the house conditioned upon completion of the sale. If the sale of the property does not occur, Nate may only receive a portion of his expected commission or possibly nothing at all. Nate has a pecuniary interest in the sale of the property because he stands to gain financially if the sale is completed.[84]

The same situation is prevalent in motor vehicle transactions as well. Several states, including Pennsylvania, require the seller of a vehicle to have his or her signature acknowledged on the vehicle title before the Department of Transportation will transfer title to the new owner.[85] If the transaction occurs at a vehicle dealership, there are likely to be multiple notaries present. The notary who can lawfully take the acknowledgment of the seller's signature depends on the notary's relationship to the sales transaction.

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84. *See generally* W.C. Belcher Land Mortgage Co. v. Taylor, 212 S.W. 647, 650 (Tex. Comm'n App. 1919) (stating that courts generally hold that notaries who have a direct pecuniary interest are disqualified from notarizing an acknowledgment).

85. 75 PA. CONS. STAT. ANN. § 1111(a) (West, WESTLAW through 1998 Reg. Sess.). *But see* 75 PA. CONS. STAT. ANN. § 1103.1(g.1) (West, WESTLAW through 1998 Reg. Sess.) (amending the Pennsylvania Vehicle Code to permit employees of licensed vehicle dealerships to witness signatures of sellers instead of acknowledgment before a notary public).

Similar to a real estate salesperson, a vehicle salesperson is prohibited from taking an acknowledgment for a vehicle sale in which he or she receives a commission or other remuneration, based upon the actual sale or purchase of a vehicle.[86] There are, however, some vehicle dealerships that have chosen to pay their salespeople a flat salary. In this instance, the salesperson is able to act as the notary public because his or her interest is only that of an employee.

4. The Employee Notary

Some jurisdictions provide that a notary does not have a direct interest where he or she acts in the capacity as an "agent, employee, insurer, attorney, escrow, or lender of a person having a direct financial or beneficial interest in the transaction."[87] Likewise, in those jurisdictions without an applicable statute, the case law indicates that an employee of a company is permitted to notarize documents for his or her employers.[88]

In *B.A.L. v. Edna Gladney Home*, the Texas Appellate Court needed to determine, in part, the validity of an affidavit of parental rights if the affidavit was notarized by an employee of a nursing home.[89] B.A.L. attempted to invalidate the document by alleging that the notary public had a financial interest in seeing the resident mother's child put up for adoption.[90] The court rejected this argument, noting that the notary was a salaried employee whose remuneration by the Gladney Home was not related to the number of notarizations performed.[91] Furthermore, the court stated that the notary was neither an officer nor director of the Home.[92] Accordingly, the court held that the notary's actions

86. *See, e.g.*, Fitzgibbon Discount Corp. v. Roberts, 283 S.W.2d 906 (Mo. App. Ct. 1955) (holding that an automobile dealer was disqualified from acting as a notary in taking the owner's acknowledgment by reason of his beneficial interest).

87. *See, e.g.*, CAL. GOV'T CODE § 8224(b) (West, WESTLAW through 1997-98 Reg. Sess. and 1st Ex. Sess.) (stating that in a situation where a notary acts as an agent, employee, insurer, attorney, escrow or lender, there is no direct beneficial or pecuniary interest).

88. *See* United Sav. Bank of Detroit v. Frazier, 116 S.W.2d 933 (Tex. App. Ct. 1938) (holding that a notary who was employed by a partner of bank to render services in regard to agency was not beneficially interested so as to disqualify taking an acknowledgment of a mechanics lien contract); Cory v. Groves Barnes Lumber Co., 32 S.W.2d 492 (Tex. App. Ct. 1930) (holding that a notary employed as a bookkeeper and credit man was qualified to take acknowledgments to mechanic's lien contracts and deeds of trust); Anderson v. Pioneer Bldg. & Loan Ass'n, 163 S.W.2d 421 (Tex. App. Ct. 1942) (refusing to invalidate trust deeds acknowledged by salaried employees of the lender).

89. 677 S.W.2d 826, 829 (Tex. App. Ct. 1984).

90. *Id.* at 831.

91. *Id.*

92. *Id.*

did not constitute an unlawful interest in the notarization.[93]

In *Director, County Child Welfare v. Thompson*, the appellant argued that an employee whose bond premium is paid by the employer gains an impermissible level of interest in notarizations performed for the employer.[94] The court found that the notary accepted no fees for her services and had no knowledge of the case or a personal interest in its outcome.[95] As a result, the court rejected the argument and held that a notary public is not disqualified from merely acting in his or her official capacity.[96]

5. Attorneys-At-Law

The question of whether an attorney-at-law may perform notarial work for his or her client has, for the most part, been settled in favor of permitting such action.[97] Some states have enacted the Uniform Acknowledgment Act, which permits an attorney who is not a notary public but who is a subscribing witness to a document, to appear before a notary public and to acknowledge the signature of the party to the document.[98]

Kutch v. Holly addressed the issue of whether an attorney may notarize a mortgage for his or her client.[99] The Supreme Court of Texas held that the attorney was not disqualified from acting as a notary public because his name did not appear elsewhere on the document, and there was no evidence he had any interest in the matter.[100]

While *Kutch* held that the attorney could act as notary public in that instance, it is important to note that the Pennsylvania Commonwealth Court in *Rizzo* held that notarizations by two attorneys working for a recall campaign were void because the attorneys had a sufficient interest in the outcome of the matter.[101] Thus, it appears that ordinary representation of a client may not create sufficient interest to invalidate a notarial act. This seems consistent with the general goal of attorneys to remain detached from their clients' legal causes so that they may provide accurate and neutral legal counsel. It is when the attorney steps into the

93. *Id.*

94. 667 S.W.2d 282, 283 (Tex. Ct. App. 1984).

95. *Id.* at 282-83.

96. *Id.* at 282.

97. *See* OHIO REV. CODE ANN. § 147.01(b)(2)(b) (Banks-Baldwin, WESTLAW through 1999 Portion of 123d G.A.) (allowing an attorney to qualify as a notary public); MONT. CODE ANN. § 1-5-604(1)(b) (WESTLAW through 1997 Reg. Sess.) (permitting attorneys-at-law to act as notaries public or obtain notary public commission by virtue of attorneys' law licenses).

98. UNIFORM ACKNOWLEDGMENT ACT § 2, 12 U.L.A. 8-9 (1990).

99. 14 S.W. 32 (Tex. 1890).

100. *Id.* at 34-35.

101. Citizens Comm. to Recall Rizzo v. Board of Elections of Philadelphia, 367 A.2d 232, 243 (Pa. 1976).

shoes of the client that the attorney may no longer be able to act as a notary public for that client.

CONCLUSION

The driving force behind the creation of the office of notary public was to prevent fraud. A document that contains a notary public's seal and signature is instinctively given more credibility than an unnotarized document. Many jurisdictions provide that a document with a notarial seal is to be accepted as evidence without further foundation. The basis for credibility of a notarized document is the assumption that the officer who took the oath or acknowledgment was impartial and ensured that no fraud occurred during the creation of the document. When a notary public exercises the duties and prerogatives of his or her office in cases where he or she has an interest in the matter, the perception of impartiality is destroyed and the desired credibility of the document is lost. Therefore, it is critical for notaries public to police themselves and question whether their relationship to the transaction would create suspicion. Perhaps the best credo for a notary public besides "habeas corpus"[102] is "if it looks bad, don't do it!"

102. *See* BLACK'S LAW DICTIONARY 709 (6th ed. 1990) (defining habeas corpus as "[y]ou have the body").