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## Disabilities in Notary Law and Practice, 32 J. Marshall L. Rev. 1033 (1999)

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# DISABILITIES IN NOTARY LAW AND PRACTICE

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*We have talked long enough in this country about equal rights. We have talked for a hundred years or more. It is time now to write the next chapter—and to write in the books of law.*—President Lyndon Baines Johnson<sup>1</sup>

## I. INTRODUCTION

This Article addresses an often occurring, yet seldom discussed, issue in disability law. Over the years, numerous books<sup>2</sup> and dozens of law review symposiums<sup>3</sup> have focused entirely on the subject of disability. At the same time, no attempt has been made to address seriously the issue of disabilities in the notary profession. For that reason, this Article is long overdue.

Disabilities directly impact some 50,000,000 Americans—or about one in every five people.<sup>4</sup> Thus, it is fair to say that virtually everyone has at one time or another come in contact with a person with a disability. This observation is no less true for the office of notary public, where in recent years the number of encounters between notaries and persons with disabilities has increased significantly; the number of persons with disabilities seeking to become notaries has increased as well.<sup>5</sup> Indeed, it is no longer uncommon for a notary to be asked to notarize a document for someone who is blind, deaf or needs assistance writing his or her signature.<sup>6</sup> Still, however, many notaries remain “uncomfortable handling some of the challenging requests from persons with

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1. JOHN BARTLETT, FAMILIAR QUOTATIONS 723 (16th ed. 1992).

2. See, e.g., LAURA F. ROTHSTEIN, DISABILITIES AND THE LAW (1992).

3. See, e.g., *The Americans with Disabilities Act Symposium: A View from the Inside*, 64 TEMP. L. REV. 371 (1991).

4. Gilbert F. Casellas, *The Equal Employment Opportunity Commission: Challenges for the Twenty-First Century*, 1 U. PA. J. LAB. & EMPLOYMENT L. 1, 2 (1998).

5. *Embracing the Disabled Signer*, NATIONAL NOTARY, Jan. 1996, at 7 [hereinafter *Disabled Signer*].

6. *Id.*

disabilities.”<sup>7</sup> In response, a handful of states have passed laws establishing guidelines for providing notary services for disabled persons.<sup>8</sup> One state (Florida) has provided that notaries who are themselves disabled may, under certain circumstances, use a signature ink stamp in lieu of a handwritten signature to fulfill the requirements of a valid notarization.<sup>9</sup>

This Article examines this “new era” for notaries so in three ways. First, this Article reviews disability law generally. Next, it discusses the legal rights of disabled persons to obtain or retain a notary commission. Finally, this Article evaluates the extent to which notaries must—or should—accommodate persons with disabilities. In exploring this topic, this Article is aimed at raising awareness of, and dispelling, misconceptions associated with, disabilities in the notary profession. It is intended to shed more light on the unsettled aspects of the law that require remedial legislative action. Additionally, it proposes practical solutions in the hope of harmonizing the rights of the disabled in notary law, and also harmonizing these laws with the laws relating to disabilities generally.

## II. DISABILITIES AND THE LAW: A BRIEF HISTORICAL PERSPECTIVE

Persons with disabilities have been subjected to pervasive and severe discrimination throughout history.<sup>10</sup> Disabled persons have routinely been identified as the disenfranchised among us,<sup>11</sup> deprived of the privilege of association and the richness of daily life in American society.<sup>12</sup> They are much poorer, much less likely

7. *Dealing with Disabilities*, AM. NOTARY, 1st Qtr. 1999, at 10 [hereinafter *Disabilities*].

8. *Id.* These states are Florida, Hawaii, Michigan, Texas and Washington. *Id.* at 11.

9. *Id.*

10. 42 U.S.C. § 12101(a), (b) (1998). See Robert L. Burgdorf Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413, 426 (1991) for further discussion.

11. See R. Jason Richards, *Stop! . . . Go Directly to Jail, Do Not Pass Go, and Do Not Ask for a Notary*, 31 J. MARSHALL L. REV. 879, 883 (1998) [hereinafter *Go to Jail*] (proclaiming “[t]he terms associated with person convicted of crime—whether they be convicts, outlaws, felons or ex-cons—are not terms of forgiveness, but rather words chosen to identify the perpetually unforgiven and disenfranchised among us.”)

12. See Mark C. Weber, *Disability Discrimination by State and Local Government: The Relationship Between Section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act*, 36 WM. & MARY L. REV. 1089, 1090 (1995) (maintaining “[m]any persons with disabilities remain too poor to take advantage of private recreation and commercial activity . . . .”) See also Eugene Hunt, *Developments in the Law: An Outline of the Americans with Disabilities Act*, 29 ARK. L. REV. 38, 38 (1995) (noting that “historically, society tended to isolate and segregate individuals with disabilities.”)

to work or have an education, much less likely to vote, and much less likely to participate in public events, or even leave home, than other persons.<sup>13</sup> But these unfortunate facts are not so much the result of unmotivated disabled persons as they are the result of society's negative stereotypical assumptions about persons with disabilities<sup>14</sup> and, on a more basic level, of society's general fear of people who are different.<sup>15</sup>

For those reasons, the plight of disabled persons is similar to that of other minorities, especially to that of female notaries in the early history of this country. During our colonial period, English common law and custom, which governed the American colonies, prohibited women from voting and from holding any public office.<sup>16</sup> Since the very name of *notary public* denotes public official status,<sup>17</sup> women were prohibited from holding the office of notary.<sup>18</sup> Moreover, only qualified members of the electorate—registered voters—could hold public office.<sup>19</sup> Thus, by law “[w]omen could not

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13. Burgdorf, *supra* note 10, at 415; Kay Schriner & Todd G. Shields, *Empowerment of the Political Kind: The Role of Disability Service Organizations in Encouraging People with Disabilities to Vote*, 1998 J. REHAB. 33 (1998).

14. See 42 U.S.C. § 12101(a)(7) (1998); Jeffrey O. Cooper, *Overcoming Barriers to Employment: The Meaning of Reasonable Accommodation and Undue Hardship in the Americans with Disabilities Act*, 139 U. PA. L. REV. 1423, 1423 (1991) (discussing limits imposed by disabilities). As Congress has found, “[t]wo-thirds of persons who consider themselves disabled and who are old enough to work are not working; of that group, two-thirds want work.” Weber, *supra* note 12, at 1090 (citing H.R. REP. NO. 485, 101st Cong., 2d Sess., pt. 2, at 32 (1990), reprinted in 1990 U.S.C.C.A.N. 267, 314).

15. See John F. Stanton, Note, *The Immigration Laws from a Disability Perspective: Where We Were, Where We Are, Where We Should Be*, 10 GEO. IMMIGR. L.J. 441, 443 (1996). Disability discrimination has existed in one form or another for a very long time, as illustrated by the following passage:

[d]iscrimination against people with disabilities is hardly a novel phenomenon. The Ancient Greeks made a practice of abandoning deaf newborns on mountaintops to be devoured by wolves because they commonly interpreted their physical imperfections as a sign of spiritual defectiveness. Several references in the Bible equate physical disability with sin or evil. In fact, nearly every society has consistently envisioned people with disabilities as an undesirable burden to the community—a prophecy that almost invariably becomes self-fulfilling.

*Id.*

16. Michael L. Closen, *The Public Official Role of the Notary*, 31 J. MARSHALL L. REV. 651, 653 (1998) [hereinafter *Public Official*]; Deborah M. Thaw, *The Feminization of the Office of Notary Public: From Femme Covert to Notaire Covert*, 31 J. MARSHALL L. REV. 703, 708 (1998).

17. See *People v. Rathbone*, 40 N.E. 395, 396 (N.Y. 1895) (noting that “the very designation of ‘notary public’ indicates a relation which the incumbent of the office sustains to the body politic.”)

18. See *State ex rel. Peters v. Davidson*, 22 S.W. 203 (Tenn. 1893) (declaring that women are ineligible to hold public office, including the office of notary).

19. See Thaw, *supra* note 16, at 708. See also *In re Opinion of the Justices*, 62 A. 969 (N.H. 1906) (stating “[w]hether the progress of the age requires that

become Notaries, because state[s] [typically] required applicants to be electors and women weren't then allowed to vote.<sup>20</sup> The belief that women were unable to perform on par with men in the notary profession (and elsewhere) during this period was pervasive, finding support not only in the law but in public policy. The policy rationale "was that women's supposed fragile, passive and malleable nature was unsuited to the rough and tumble of the public arena."<sup>21</sup> This kind of sanctioned discrimination seems quite foreign by today's standards. Nevertheless, such pronouncements were the standard in this country for a very long time. In 1955, for instance, by virtue "of constitutional or statutory provision, or judicial determination," women were still prohibited from acting as notaries in a dozen states and the District of Columbia.<sup>22</sup> And as recently as 1976, male notaries in Alabama had state-wide authority, while female notaries in the state had only county-wide jurisdiction.<sup>23</sup>

By 1980, the justifications for denying or limiting a woman's ability to hold the office of notary had disappeared,<sup>24</sup> yielding to reason and the realization that gender rarely has anything to do with one's ability to perform an occupation.<sup>25</sup> Why, however, a society should ever have been willing to accept in advance the notion that a woman's nature was unsuited for public office, which lawmakers would thereafter agree on, is a larger question deserving reflection; this observation accompanies weightier questions about how the founding fathers could have endorsed slavery, why people and governments could have abused

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[disqualification from appointment as a notary], as well as other disabilities of the common law with which women have been burdened, should be removed, is not a question for either the executive or the judicial departments of the government.") *Id.* at 970. The "progress of the age," as the court put it, would not occur in the State of New Hampshire until well into the twentieth century, when females were finally permitted to become notaries public. *See* Thaw, *supra* note 16, at 711.

20. MICHAEL L. CLOSEN ET AL., NOTARY LAW & PRACTICE 4 (1997) [hereinafter NOTARY LAW]. *See also* *In re* Opinion of the Justices, 43 N.E. 927, 928 (Mass. 1896) (holding that women cannot be notaries public because it is contrary to the constitution); *Bickett v. Knight*, 85 S.E. 418 (N.C. 1915) (stating same); *State ex rel. Atty. Gen. v. Adams*, 51 N.E. 135, 136 (Ohio 1898) (holding that a statutory amendment to allow women to become notaries was unlawful because it conflicted with other constitutional provisions restricting voting qualifications and holding public office to men); Thaw, *supra* note 16, at 711 (describing the prohibition of women as electors).

21. Thaw, *supra* note 16, at 708.

22. *See* Thaw, *supra* note 16, at 724 (quoting LAWRENCE G. GREEN, LAW OF NOTARIES PUBLIC 11 (1955)).

23. *See id.*

24. *See id.*

25. Cornelius J. Peck, *Employment Problems of the Handicapped: Would Title VII Remedies Be Appropriate and Effective?*, 16 U. MICH. J.L. REFORM 343, 349-50 (1983).

individuals suffering with AIDS, and the like.<sup>26</sup> But the fact remains that laws are in large part socially driven. Thus, any attempt to change the plight of the minorities in this country must begin with a genuine shift in society's perception of the disadvantaged.<sup>27</sup>

The struggles of African Americans and other minorities for equal rights in the 1960s and 1970s represented the beginning of such a shift for the later disability rights movement as well.<sup>28</sup> Caught in the wave of successful protest marches, acts of civil unrest and court actions of the time,<sup>29</sup> the United States Congress took a major step toward banning discrimination against the disabled with the enactment of the Rehabilitation Act of 1973.<sup>30</sup> Its substantive civil rights provision, section 504, provided that "[n]o otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . ."<sup>31</sup> While the Rehabilitation Act was a significant step, its reach was severely hampered by its limited application. Because its provision applied only to recipients of federal funds, a great deal of the public and private sectors remained unaffected.<sup>32</sup> For instance, a city department receiving federal funding for road construction is covered, but non-funded offices, including the office of notary, do not appear to be. Nevertheless, the spirit and symbolism of the Act, for its relatively early timing, were historic achievements.

In an attempt to remove the remaining barriers facing people with disabilities, and as one of the few positive outgrowths of the HIV-AIDS epidemic of the 1980s,<sup>33</sup> Congress passed the Americans with Disabilities Act ("ADA") of 1990,<sup>34</sup> which extends the protections of the Rehabilitation Act to private sector employers and state and local government operations.<sup>35</sup> The ADA is divided

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26. See Michael L. Closen, *The Decade of Supreme Court Avoidance of Aids: Denial of Certiorari in HIV-AIDS Cases and Its Adverse Effects On Human Rights*, 61 ALB. L. REV. 897, 905-13 (1998) (discussing the societal abuses of persons with HIV-AIDS). See generally WOMEN'S AMERICA: REFOCUSING THE PAST 1 (1991) (Linda D. Keber & Jane De Hart-Mathews, eds., 1991); Karin M. Morin, *Political Culture and Suffrage in Anglo-American Women's West*, 19 WOMEN'S RTS. L. REP. 17 (1997); Sandra Day O'Connor, *The History of the Women's Suffrage Movement*, 49 VAND. L. REV. 657 (1996).

27. Burgdorf, *supra* note 10, at 426.

28. *Id.* at 427.

29. *Id.*

30. 29 U.S.C. §§ 701-703 (1998).

31. 29 U.S.C. § 794 (1998).

32. Cooper, *supra* note 14, at 1424.

33. Closen, *supra* note 16, at 903.

34. 42 U.S.C. § 12101 (1998).

35. See Maryann Jones, *And Access for All: Accommodating Individuals*

into five titles, each designed to incorporate the Rehabilitation Act's general prohibition against discriminating against persons with disabilities.<sup>36</sup> The sections most pertinent to this discussion appear in Title II, which covers discrimination by state and local government programs, services and activities, and Title I, which concerns the employment requirements of the Rehabilitation Act.

### III. TITLES I & II OF THE ADA

The public entity provision of the ADA, Title II, like its predecessor, the Rehabilitation Act, is designed to protect qualified persons from discrimination. To effectuate this purpose, Title II prohibits public entities from discriminating against a disabled person in the participation in, or benefits of, services or activities of the public entity.

To qualify under the ADA, an individual must be considered disabled. A person is "disabled" if he or she has "a physical or mental impairment that substantially limits one or more of the major life activities of such individual; [has] a record of such an impairment; or [is] being regarded as having such an impairment."<sup>37</sup> A physical or mental impairment means "[a]ny physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or [a]ny mental or psychological disorder . . ."<sup>38</sup> Major life activities are those tasks associated with the basic activities performed by the average person in society, "such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."<sup>39</sup> Being substantially limited under the ADA means that an individual is unable to perform a major life activity in the same manner, under the same conditions and in the same amount of time as an average person in the general population.<sup>40</sup> Factors that may be used in making this determination include the nature and severity of the impairment, the duration of the impairment and the permanent or long-term impact of the impairment.<sup>41</sup>

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*with Disabilities in the California Courts*, 32 U.S.F. L. REV. 75, 77 (1997) (discussing civil rights protection for the disabled).

36. Lisa E. Key, *Voluntary Disabilities and the ADA: A Reasonable Interpretation of "Reasonable Accommodations,"* 48 HASTINGS L.J. 75, 76-78 (1996).

37. 42 U.S.C. § 12102(2) (1998).

38. 29 C.F.R. § 1630.2(h) (1998).

39. *Id.* § 1630.2(i).

40. *Id.* § 1630.2(j)(1).

41. *Id.* § 1630.2(j)(2).

If this disability requirement is met, then the employment provisions of Title I, which are incorporated into Title II,<sup>42</sup> provide that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."<sup>43</sup> Taken together, then, Titles I and II of the ADA prohibit state and local governmental entities from discriminating against "a qualified individual with a disability,"<sup>44</sup> or, put another way, a person "who, with or without reasonable accommodation, can perform the essential functions" of the job he or she seeks or currently holds.<sup>45</sup>

The term "essential functions" refers to the fundamental, rather than marginal, elements of the position.<sup>46</sup> Generally speaking, a job function is considered essential if the position exists to fulfill a particular function, if there are only a few employees to whom the function can be assigned or if the job function is highly specialized and the individual was hired to perform the specialized function.<sup>47</sup> Evidence that may be considered in determining whether a job function is essential includes written job descriptions, the amount of time spent on the job performing the function, the work experience of previous and current employees in the same or similar jobs, the consequences of relieving the employee of performing that particular function, and the employer's judgment.<sup>48</sup> It should be noted that while the employer's judgment in determining the essential requirements of a particular job is relevant, it is not conclusive.<sup>49</sup> The ultimate determination concerning essential job functions remains a factual inquiry to be made on a case-by-case basis.<sup>50</sup>

Beyond determining the essential job functions to be qualified under the ADA, a person must also be able to perform those job functions with or without reasonable accommodation. Examples of reasonable accommodations would include "part-time or modified

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42. ADA TITLE II ACTION GUIDE: FOR STATE AND LOCAL GOVERNMENTS 25 (1992) [hereinafter ACTION GUIDE]; Weber, *supra* note 12, at 1120.

43. 42 U.S.C. § 12112(a) (1998).

44. *Id.*

45. *Id.* § 12111(8).

46. 29 C.F.R. § 1630.2(n)(1) (1998); ACTION GUIDE, *supra* note 42, at 25; Weber, *supra* note 12, at 1120.

47. See 29 C.F.R. § 1630.2(n)(1).

48. See *id.*; ACTION GUIDE, *supra* note 42, at 26.

49. See Karin Mika & Denise Wimbiscus, *Responsibilities of Employers Toward Mentally Disabled Persons Under the Americans with Disabilities Act*, 11 J.L. & HEALTH 173, 183 (1997) (stating that the determination of an essential job function should be on a case-by-case basis).

50. See *id.*



work schedules, job restructuring, job reassignment, providing auxiliary aids and services, or modifying the work environment itself to make work stations accessible or usable."<sup>51</sup>

The counterbalance to an employer's responsibility to provide an accommodation is the point where a requested accommodation imposes an undue hardship on the employer.<sup>52</sup> The ADA defines undue hardship as an accommodation that would require "significant difficulty or expense."<sup>53</sup> Among the factors to be considered by an employer in determining whether an accommodation request poses an undue hardship are the nature of the accommodation sought, the employer's financial resources, the effect of the accommodation on the operation of the business, the size of the business and the number of personnel employed.<sup>54</sup> An employer may also consider whether an individual poses a significant risk to the health and safety of other persons.<sup>55</sup> In such a case where an individual is considered a "direct threat" to the workplace and, thus, not protected by the ADA, the employer is not required to make a reasonable accommodation.<sup>56</sup>

#### IV. DISABLED NOTARIES

As noted above, Title II of the ADA requires that the services, programs or activities of a public entity be accessible to individuals with disabilities.<sup>57</sup> Specifically, Title II provides that "[n]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."<sup>58</sup> This "qualified individual" analysis requires a two-prong inquiry.<sup>59</sup> The first prong requires a determination of "whether the individual satisfies the requisite skill, experience, education and other job-related requirements of the employment position that such individual holds or desires."<sup>60</sup> The second prong requires a decision as to "whether the individual, with or without reasonable accommodation, can perform the essential functions of the position

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51. ACTION GUIDE, *supra* note 42, at 27.

52. 42 U.S.C. § 12112(b)(5)(A) (1998).

53. *Id.* § 12111(10)(A); ROTHSTEIN, *supra* note 2, at 263. For example, if an employer can show that its "costs are excessive in relation either to the benefits of the accommodation or to the employer's financial survival or health," then accommodation by the entity is not required. *Vande Zande v. Wisconsin Dept. of Admin.*, 44 F.3d 538, 543 (7th Cir. 1995).

54. 42 U.S.C. § 12111(10)(B) (1998).

55. *Id.* § 12111(3).

56. *Id.*

57. *Id.* § 12132.

58. *Id.*

59. *Deane v. Pocono Med. Ctr.*, 142 F.3d 138, 145 (3d Cir. 1997).

60. *Id.*

held or sought.”<sup>61</sup> The objective of this analysis is “[t]he ADA require[ment] that people with disabilities are assured an equal opportunity to participate in the programs and activities offered by state and local governmental entities.”<sup>62</sup> To illustrate, consider the following two examples.

Example #1: Jane, who is deaf, is seeking a variance from the city zoning board. If she does not have access to what is said, she does not have an equal opportunity to benefit from attending the public zoning board meeting. Therefore, an effective means of communication, such as a sign language interpreter, must be provided.<sup>63</sup>

Example #2: Tina is a senior staff member in the City Department of Health. She is deaf and, although she is an excellent lipreader in one-to-one communication settings, she needs the assistance of a sign language interpreter for group meetings and to handle her telephone work. The City contracts with an interpreter to work with Tina for twenty hours per week. Tina arranges her schedule so that her meetings and telephone work are scheduled for the times the interpreter is present.<sup>64</sup>

Thus, the law seems relatively straightforward—a public entity cannot lawfully deny a person with a disability the opportunity to participate in the programs and activities offered by state and local governmental units if that person satisfies the job prerequisites and can perform the essential functions of the job with or without reasonable accommodations. The question that remains, then, is to what extent can a state deny or revoke a notary commission or license of a person with a disability? Before considering this question, it must first be determined whether notary services are attributable to the government or its agents, and whether they amount to public activities so as to bring disabled notaries or disabled notary applicants within the purview of the ADA. In other words, it must be decided (1) whether the process of *licensing* a notary is the conduct of a public entity, and (2) whether the *duties* of a notary public qualify as “services, programs, or activities of a public entity.”<sup>65</sup>

First, with respect to licensing, Title II defines the term “public entity” to include “any State or local government [or] any department [thereof] . . . .”<sup>66</sup> This definition alone enables one to conclude that the act of licensing notaries is the action of a public entity for the simple reason that notaries are government

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61. *Id.*

62. ACTION GUIDE, *supra* note 42, at 13.

63. *Id.*

64. *Id.* at 27.

65. 42 U.S.C. § 12132 (1998).

66. *Id.* §§ 12131(1)(A), (B) (1998).

appointees, commissioned by the state (typically the Governor or Secretary of State) to perform state-authorized functions.<sup>67</sup>

Second, as to whether a notary's conduct is that of a public entity, again the answer is in the affirmative. A notary is, after all, "a notary *public*, not a notary *private*."<sup>68</sup> Indeed, notaries have served in the public domain for over 350 years, dating back to the American colonial period.<sup>69</sup> In the early days, notaries public were elected or specially appointed (typically by the President of the United States and state governors).<sup>70</sup> However, as the need for qualified notaries grew, this procedure became too cumbersome, so state legislatures took over the appointment and supervisory function of notaries.<sup>71</sup> The states primarily retain these powers today, whereupon notaries undertake these special activities based upon their long-recognized status as "public officials."<sup>72</sup> As Richard B. Humphrey's *American Notary Manual* reported over fifty years ago:

[p]ublic office is a public agency, or trust. One, therefore, who holds a public office is an agent, or trustee, of the public. Public offices are created for the purpose of effecting the end for which government has been instituted, which is the common good, and not for the mere profit, honor or private interest of any one man, family, or class of men.<sup>73</sup>

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67. Closen, *supra* note 16, at 651; 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. 703, 719 (1997) [hereinafter *Lost in Cyberspace*].

68. *Public Official*, *supra* note 16, at 685.

69. *See id.* at 701.

70. *See* Michael L. Closen & G. Grant Dixon III, *Notaries Public from the Time of the Roman Empire to the United States Today, and Tomorrow*, 68 N.D. L. REV. 873, 873 (1992) (noting that "[a] notary public is a public official with unusual powers for a non-judicial officer.")

71. *See id.* at 876.

72. *See, e.g.,* *Pierce v. Indseth*, 106 U.S. 546, 549 (1883) (stating "the court will take judicial notice of the seals of notaries public, for they are officers recognized by the commercial law of the world"); *Public Official*, *supra* note 16, at 701 (stating "[t]o the extent that notarizations are afforded recognition [of public officialdom] across state and national boundaries, it stems primarily from the force of governmental sanction in the place of origin of the notarization"); Christopher B. Young, Comment, *Signed, Sealed, Delivered . . . Disbarred? Notarial Misconduct By Attorneys*, 31 J. MARSHALL L. REV. 1085, 1090 (1998) (stating "[o]ne of the most important features of notaries is their status as public officials"). *See generally* *Kirksey v. Bates*, 7 Port. 529 (Ala. 1838); *Britton v. Nicolls*, 104 U.S. 757 (1881); *Commercial Union Ins. Co. of New York v. Burt Thomas-Aiken Constr. Co.*, 230 A.2d 498 (N.J. 1967); RAYMOND C. ROTHMAN, *NOTARY PUBLIC PRACTICES & GLOSSARY* 2 (1978) (discussing the public official role of notaries).

73. RICHARD B. HUMPHREY, *THE AMERICAN NOTARY MANUAL* 7 (4th ed. 1948). *See also* EDWARD MILLS JOHN, *THE AMERICAN NOTARY MANUAL* 7 (2d ed. 1904) (commenting that "[a]s a public officer [the notary's] office affects the

Having established that notaries are both government officers and public servants, and thus protected from unlawful discrimination by the ADA, the key to determining whether a public entity may nevertheless revoke or deny a notary commission remains whether the disabled notary is "qualified" to perform the duties of the office. It is on this point that notary authorities differ. On one hand, there is the broad view that disabled notaries should be given every opportunity to hold the post of notary. According to Linda S. Adams, the Notary Education Coordinator with the Executive Office of the Governor of Florida, the law ought "to allow persons with disabilities to enjoy the prestige of serving this state as a notary public . . . ."<sup>74</sup> For instance, she believes that there is "no reason for [disabled persons] to be excluded just because they cannot sign their name in the traditional form."<sup>75</sup> Accordingly, Florida recently became the first state in the country to permit physically disabled notaries to use a signature stamp in lieu of a handwritten authorization to execute notarizations.<sup>76</sup>

However, other commissioning jurisdictions and notary authorities oppose any physically-unfit notary's ability to hold office.<sup>77</sup> One proponent of this view summarizes the position as

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people generally, and does not concern alone a particular district or private individuals."). *See generally Public Official, supra* note 16, at 685-89 (describing the public servant function of notaries).

74. *Disabilities, supra* note 7, at 10.

75. *Disabilities, supra* note 7, at 10.

76. *See Disabilities, supra* note 7, at 10. Florida's statute provides:

[a] notary public may not sign notarial certificates using a facsimile signature stamp unless the notary public has a physical disability that limits or prohibits his or her ability to make a written signature and unless the notary public has first submitted written notice to the Department of State with an exemplar of the facsimile signature stamp.

FLA. STAT. ANN. § 117.107(2) (West 1998). *But see* CAL. GOV'T CODE § 8205(a)(2) (West 1998) (requiring that certificates "shall be signed by the notary public in the notary public's own handwriting"); TENN. CODE ANN. § 8-16-302 (1998) (requiring notaries to sign all notarized documents "in ink by the notary's own hand").

77. *See, e.g.,* P.R. LAWS ANN. tit. 4, § 2104 (1994). Puerto Rico's law provides:

[i]n case of the death or the permanent mental or physical disability of a notary, or when he voluntarily or compulsorily ceases in the performance of his functions, or in the event that the surety company requests the termination of his bond, or when he accepts permanent appointment to any judicial or executive office which, under the laws of Puerto Rico, is incompatible with the free exercise of the legal or notarial profession, it shall be the duty of the notary, his heirs, successors, or assigns, to surrender within thirty (30) days, his protocols and registries of affidavits, duly bound to the Office of Notarial Inspection for their inspection.

If this surrender is not made voluntarily within said term, the Supreme Court of Puerto Rico may issue the corresponding order to such effects.

follows.

By far the most stringent requirements of the commissioning jurisdictions are those which relate directly to the applicant demonstrating that he is able to successfully discharge the duties and responsibilities of being a notary public. Through the establishment of these requirements at the outset, the commissioning authorities seek to eliminate or decrease the problems that can arise in conjunction with the successful applicant exercising his notarial public commission in the future.

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Related to this requirement is the requirement that the applicant demonstrate that he will be able to physically act as a notary public. This requirement is not specifically set forth in most commissioning jurisdictions[] statutes, but is an inherent requirement. Accordingly, an applicant must be physically able to perform all duties integral to the notarization process. These would include being able to administer oaths, being able to identify individuals who appear before them and being able to complete a notarial certificate.<sup>78</sup>

Toward this end, the *Notary Public Code of Professional Responsibility* ("Code") takes the following view on disabilities in the notary profession.

**Resignation if Impaired**

The Notary shall resign from office if any impairment change in the Notary's physical status would prevent or significantly impair the proper performance of notarial duties.

ILLUSTRATION: The Notary is a retiree whose eyesight has deteriorated considerably in recent years. Even with glasses, the Notary is only able to read if the letters are unusually large and bold; distinguished faces is very difficult.

*The Ethical Imperative:* The Notary must immediately resign the commission, since such poor eyesight prevents the careful scrutinizing of ID cards and faces required for proper performance of notarial duties and protection of the public from document fraud.

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Once the protocols surrendered pursuant to this section have been examined and approved they shall be placed under the custody of the custodian of notarial protocols of the corresponding district.

*Id.* Puerto Rico's law continues:

[w]hen the notary ceases to be disabled or to hold the judicial or executive office to which he was appointed, the General Custodian of the district shall return his protocols to him if he should resume the practice of the notarial profession, and the notary so requests it.

*Id.* § 2106.

78. John T. Henderson & Peter D. Kovach, *Administrative Agency Oversight of Notarial Practice*, 31 J. MARSHALL L. REV. 857, 863 (1998).

Any physical condition that prevents a Notary from directly and personally gleaning information about a signer's identity and about the circumstances of a particular notarization, without reliance on an assistant or intermediary to make such determinations, is a disqualifying one.<sup>79</sup>

The comments to this portion of the *Code* emphasize the "professional role of the notary," and advise that "health problems" that make notarizing "problematic" should be avoided.<sup>80</sup> The *Code* maintains such disqualifications "are commonsense, reasonable restrictions that are beyond dispute."<sup>81</sup> A few cases have declared as much. For example, a quadriplegic notary public who was physically unable to complete a notarial certificate was prohibited from obtaining a notary commission in Connecticut.<sup>82</sup>

In reaching such a result, however, these pronouncements do violence to the spirit and purpose of federal anti-discrimination legislation, in which the United States Congress lamented that "individuals with disabilities continually encounter . . . overprotective rules and policies, failure to make modifications to existing . . . practices, [and] exclusionary qualification standards and criteria . . ."<sup>83</sup> But these authorities err, even under their own utilitarian standard, overlooking fundamental precepts of the ADA's anti-discrimination requirements.

Take, for example, the *Code's* rationale for exclusion, which is representative of the other rationales. Those favoring exclusion purport to defend their position on the basis of an officer's "professional role as a Notary,"<sup>84</sup> which is commonly understood to mean that notaries must be able to perform their official duties in an effective and competent manner<sup>85</sup> without assistance.<sup>86</sup> As

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79. THE NOTARY PUBLIC CODE OF PROFESSIONAL RESPONSIBILITY, Guiding Principle I, Art. E, § I-E-1 (1998).

80. *Id.* § I-E-1 Commentary.

81. *Id.*

82. See *Quadriplegic Can't Retain Commission*, NOTARY BULL., Apr. 1993, at 1, 9.

83. 42 U.S.C. § 12101(5) (1998).

84. THE NOTARY PUBLIC CODE OF PROFESSIONAL RESPONSIBILITY, Guiding Principle I, Art. E, § I-E-1 Commentary (1998).

85. See *Bulter v. Olshan*, 191 So. 2d 7, 21 (Ala. 1966) ("A notary public . . . is under a duty to his clients to act honestly, skillfully and with reasonable diligence" (quoting *Aetna Cas. & Sur. Co. v. Commonwealth*, 25 S.W.2d 51, 53 (Ky. Ct. App. 1930))); *Lost in Cyberspace*, *supra* note 67, at 724 (stating "[i]n theory, noble notaries are supposed to perform their official duties with competence, diligence and integrity, as the occupants of positions of public trust.")

86. Modern notary law prohibits a notary public from delegating official functions to someone else. See ALFRED E. PIOMBINO, NOTARY PUBLIC HANDBOOK: PRINCIPLES, PRACTICES & CASES 23 (1996). However, notaries may enlist the aid of assistants for certain basic tasks. *Id.*

Previously, many states in the U.S. permitted notaries public to appoint deputies and clerks to assist the officer in performing their official

noted above, the objective is to uphold the integrity of the office as well as insulate notaries from liability for misfeasance, since notarial wrongdoing can subject notaries to civil liability,<sup>87</sup> criminal liability,<sup>88</sup> or both.<sup>89</sup> Pursuant to this "professional notary" model, the *Code* opines that a visually-impaired notary unable to adequately identify a document signer without assistance cannot properly perform an essential function of the office, with or without accommodation.<sup>90</sup> Hence, those supporting

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duties. Modern law does not authorize a notary public to delegate these responsibilities and privileges to another person.

No other person, other than the individual notary public, may . . . execute the signature on behalf of a notary public in his absence. It is not legally possible for a notary public to authorize or delegate another individual to legally act in his absence.

Although the actual, official notarial duties and ceremonies cannot be carried out by another person, certain clerical tasks may be performed by another person. Acting in this fashion as a 'para-notary,' another person might complete a notarial certificate for the notary's signature. Such certificate will then be signed by the notary after the official ceremony/s are performed.

*Id.*

87. See, e.g., *City Consumer Servs. Inc. v. Metcalf*, 775 P.2d 1065 (Ariz. 1989) (finding that notary negligently notarized deed of woman based solely upon representation); *Biakanja v. Irving*, 320 P.2d 16 (Cal. 1958) (invalidating will where the notary failed to properly attest to its signing); *Webb v. Pioneer Bank & Trust Co.*, 530 So. 2d 115 (La. Ct. App. 1988) (holding notary negligent for failing to properly ascertain the genuineness of a signature allegedly affixed in his presence); *Succession of Killingsworth v. Schlater*, 292 So. 2d 536 (La. 1973) (holding attorney-notary liable to legatees for failing to use proper care in confecting a will); *Howcott v. Talen*, 63 So. 376, 379 (La. 1913) (finding notary "gross[ly] negligent in accepting, conveying, and placing on record titles to property which belonged to others, merely upon the faith of . . . representations"); *Willow Highlands Co. v. United States Fidelity & Guar. Co.*, 73 A.2d 422 (Pa. 1950) (holding notary liable for negligently certifying that property owners had personally appeared before him and acknowledged a mortgage where the property owners had in fact neither appeared before the notary nor had the notary acknowledged the transaction).

88. See, e.g., *Johnson v. State*, 238 N.E.2d 651, 655 (Ind. 1968) (convicting a notary for falsely attesting an affidavit).

89. See, e.g., 5 ILCS 312/7-105 (West 1998); MO. ANN. STAT. § 486.370 (West 1998). If the notary also happens to be a licensed attorney, his or her license could be affected. See, e.g., *Florida Bar v. Farinas*, 608 So. 2d 22 (Fla. 1992) (holding illegal conduct of attorney-notary in failing to personally acknowledge signature before notarizing document warranted public reprimand); *Iowa State Bar Assoc. v. Bauerle*, 460 N.W.2d 452 (Iowa 1990) (imposing indefinite suspension of attorney-notary's license for falsely certifying documents); *Iowa State Bar Assoc. v. O'Donohoe*, 426 N.W.2d 166, 169 (Iowa 1988) (reprimanding attorney-notary for "knowingly mak[ing] a false statement of fact on a document filed for public record").

90. For purposes of the ADA, if a disabled person is unable to perform an essential function of the job he or she currently seeks or holds, then the individual is not qualified for the position and no accommodation is necessary. See, e.g., *Ethridge v. Alabama*, 860 F. Supp. 808 (M.D. Ala. 1994) (holding that a police department was not required to employ a person whose disability

exclusion assert that the notary is not "otherwise qualified," and thus, no reasonable accommodation need be made.

But the process by which such rationales dispense with the ADA's "essential function" requirement is dubious. Criteria are properly considered "essential functions" only if they are "necessary and substantially related to a person's ability to perform . . . the job."<sup>91</sup> Thus, the only way that this argument can be squared with federal anti-discrimination legislation is if the performance of every notarial function is essential to being a notary. For that reason, the essential function aspect of the ADA must now be addressed.

According to the Equal Employment Opportunity Commission's ("EEOC") interpretations of the ADA, four main factors should be considered in determining whether a particular job function is essential. The initial inquiry "focuses on whether the employer actually *requires* employees in the position to perform the functions that the employer asserts are essential."<sup>92</sup> The next factor is whether the position exists to fulfill a particular function. Additionally, it must be determined whether there are other persons to whom the function can be assigned and still have the function be accomplished. The final inquiry is the degree of specialization required to perform the function and whether the individual was hired specifically to perform that function.<sup>93</sup> Thus the question remains: is it legally permissible for the *Code* to advocate that "impaired" notaries surrender their commissions if they are unable to perform a single notarial function? Arguably, no.

At first blush, identifying a document signer would appear to be an essential function of a notary's position. However, upon closer examination, neither the law nor notary practice itself bears this out. In applying the factors noted above to the notary profession, the *Code's* position is untenable. Surprisingly, it is the initial inquiry—whether or not the employer *actually requires* employees in the position to perform the asserted essential functions—that is fatal to the *Code's* chances of mounting an "essential function defense."<sup>94</sup> Certainly, if the individual who

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prevented him from safely handling a firearm where "there is no genuine dispute that the ability to shoot . . . is an essential function that must be performed by police officers in Alabama.")

91. *Rios v. Indiana Bayer Corp.*, 965 F. Supp. 919, 922 (S.D. Tex. 1997).

92. 29 C.F.R. § 1630, App. at 351 (1996) (emphasis added).

93. To illustrate, in *Martinson v. Kinney Shoe Corp.*, the court held that an epileptic shoe salesman's seizures, which he was unable to control, rendered him unqualified to perform the essential function of his job (which entailed maintaining store security) where normally the store was manned by only two or three employees, but on some occasions the plaintiff was the only one available to provide security to the store. 104 F.3d 683, 687 (4th Cir. 1997).

94. See 29 C.F.R. § 1630, App. at 351 (1996).



holds the position is not actually "required" or "obligated" to perform the job the employer asserts is an essential function, then the function cannot reasonably be considered "essential."<sup>95</sup> In this regard, a review of the notary's public service obligation is telling.

As stated earlier, notaries are commissioned by the state to perform public functions.<sup>96</sup> Importantly, however, notaries may generally not be compelled to perform specific acts. This is because most jurisdictions *authorize* or *empower* notaries to perform certain functions, but *do not require* them to honor all customer requests.<sup>97</sup> Some states specifically give notaries discretion in performing their official duties.<sup>98</sup> As the *Code* itself advocates, "[t]he Notary shall decline to notarize if the Notary does not feel sufficiently . . . competent to perform properly any requested notarial act."<sup>99</sup> Moreover, the *Code* interprets the term "competency" to include not only the notary's understanding of the requested act, but also the notary's ability or capacity to perform the task. In the *Code's* own words, notaries should not be required to "drop everything" to accommodate a customer.<sup>100</sup> Hence, notaries may refuse service for "requests that would be particularly time-consuming or disruptive to business (e.g., notarize 100 documents immediately) . . ."<sup>101</sup> as well as for other legitimate reasons.<sup>102</sup> Under these circumstances, the *Code* and

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95. See, e.g., *Norris v. Allied-Sysco Food Servs., Inc.*, 948 F. Supp. 1418 (N.D. Cal. 1996) (reversing a finding of summary judgment where a jury question existed as to whether the employer actually required employees to perform the functions that the employer claimed were essential); *Antic v. Arcade Bldg. Serv.*, 1998 WL 142402, at \*4 (N.D. Ill. Mar. 24, 1998) (denying plaintiff's motion for summary judgment where issue existed as to whether the employee was actually "obligated" to perform the job).

96. See Michael L. Closen & Klint L. Bruno, *To Judge, Or Not to Judge, Competence and Willingness*, AM. NOTARY, 1st Qtr. 1998, at 4.

97. See THE NOTARY PUBLIC CODE OF PROFESSIONAL RESPONSIBILITY, Guiding Principle I, Art. A, Commentary (1998). See, e.g., ARK. CODE ANN. § 21-14-104 (Michie 1998); COLO. REV. STAT. § 12-55-110 (1998); TEX. GOV'T CODE ANN. § 406.014 (West 1998). But see UTAH CODE ANN. § 46-1-8(2) (1998) (providing "a notary shall perform notarial acts in lawful transactions for any requesting person"); CAL. GOV'T CODE § 8205(a) (West 1998) (imposing "the duty of a notary public, when requested" to perform acts authorized in the section).

98. See THE NOTARY PUBLIC CODE OF PROFESSIONAL RESPONSIBILITY, Guiding Principle I, Art. A, Commentary (1998). See, e.g., IOWA CODE § 9E.8 (1998) (permitting a notary to exercise "reasonable discretion" in deciding whether or not to perform notarial services); CONN. GEN. STAT. § 3-94f (1998) (providing that a notary shall not "unreasonably refuse" to perform notarial acts).

99. THE NOTARY PUBLIC CODE OF PROFESSIONAL RESPONSIBILITY, Guiding Principle I, Art. E, § I-E-2 (1998).

100. THE NOTARY PUBLIC CODE OF PROFESSIONAL RESPONSIBILITY, Guiding Principle I, Art. A, § I-A-4 (1998).

101. *Id.*

102. See PIOMBINO, *supra* note 86, at 64. See, e.g., GA. CODE ANN. § 45-17-

other authorities recommend that the notary "refer the signer to another nearby notary available to perform the act . . . ."<sup>103</sup>

Thus, according to the *Code's* own "professional responsibility" standard, notaries complete their public function and duties by being "reasonably available" to serve the public, and not by being "required" to do so.<sup>104</sup> This standard requires notaries to be reasonably available to perform public functions to the extent that they are sufficiently able and competent to do so; otherwise, they should refer the customer to another available notary.<sup>105</sup> With this as the prevailing code of conduct for notaries, it is inconsistent for the *Code* to advocate a standard of professional responsibility under which disqualification is required if a notary is unable to perform a single notarial function because of a disability, yet otherwise able to perform others, while at the same time fail to require that non-disabled notaries perform those same

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8(b)(2)-(3) (1998) (stating that "[n]o notary shall be obligated to perform a notarial act if he feels such act is . . . [f]or a person who is being coerced, [or] [f]or a person whose demeanor causes compelling doubts about whether the person knows the consequences of the transaction requiring the notarial act . . . .")

103. THE NOTARY PUBLIC CODE OF PROFESSIONAL RESPONSIBILITY, Guiding Principle I, Art. A, § I-A-4 (1998). See also PIOMBINO, *supra* note 86, at 64 (stating "[i]f [a notary is] unavailable at a particular time . . . [the notary should] tactfully explain this to the client [and] suggest a few other notaries public who may be available"); *Disabilities*, *supra* note 7, at 10 (stating "[i]f [the notary] cannot perform the requested service, assist the person in finding someone who can").

104. THE NOTARY PUBLIC CODE OF PROFESSIONAL RESPONSIBILITY, Guiding Principle I, Art. A, Commentary (1998). Surprisingly, a literal reading of some state notary statutes would seem to impose upon notaries the duty to act "when requested." CAL. GOV'T CODE § 8205(a) (West 1998). Thus, the notary would theoretically be "on-call" 24 hours a day, seven days a week. Surely, however, the proponents of this legislation did not intend for such provisions to be enforced as written. After all, "[n]otaries are public servants, not slaves, and they needn't honor unreasonable requests." *Don't Drop Everything*, NATIONAL NOTARY MAG., Mar. 1997, at 21. See also *Public Official*, *supra* note 16, at 690 (stating that "[c]ertainly, public officers have private lives too, and they [should not be] governed by the official misconduct laws while 'off duty'"); THE NOTARY PUBLIC CODE OF PROFESSIONAL RESPONSIBILITY, Guiding Principle I, Art. A, Commentary (1998) (stating that "there is no expectation that a Notary either be 'on-call' or at the 'beck and call' of the public"). See generally PIOMBINO, *supra* note 86, at 54 (noting that New York law prohibits notaries from taking civil depositions on Sunday, "reflect[ing] the traditional Christian Sabbath Day or Sunday laws still in force in some states throughout the United States"). Even assuming that these statutes were enforced as written, it is highly unlikely that a notary's refusal to act under truly unreasonable circumstances—a constituent's request for services in the middle of the night—would be successfully challenged in a court of law. See *id.*

105. See *Public Official*, *supra* note 16, at 686 (noting that the public official "position certainly obligates notaries to be reasonably available to provide public service").

functions in practice. Notarial functions cannot be essential in law but discretionary in practice; they are either essential or they are not.<sup>106</sup>

Second, some positions exist to perform a particular function. For example, if an individual were hired as a typist, the ability to type would be an essential function, since this is the "only reason the position exists."<sup>107</sup> But the office of notary is not such a position. While a notary's authority to act varies from jurisdiction to jurisdiction, no state notary statute limits notaries to performing a single notarial function. Quite the contrary: notaries are authorized to perform numerous functions, many of which are unrelated except to the extent that each is authorized under applicable state law. For example, "notaries in some states can perform weddings, can protest commercial paper, can open and inventory abandoned bank deposit boxes, can certify copies of some kinds of documents, and can do other prescribed acts."<sup>108</sup> Further, "all notaries are given the power to take acknowledgments and administer oaths . . . ."<sup>109</sup> Admittedly, some notarial functions may be performed more frequently than others, but other functions exist, and the notary may be called upon to perform them. In other words, even though notaries may commonly be asked to administer oaths and affirmations, this does not mean that administering oaths and affirmations is the only reason the office exists.

Third, unlike a situation where the staff size is small compared to the volume of work that must be done,<sup>110</sup> the office of notary is arguably a saturated profession.<sup>111</sup> Currently, the office has over four million members in the United States alone,<sup>112</sup> and with few exceptions, that number is increasing exponentially.<sup>113</sup>

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106. See, e.g., *Wenner v. City of New York*, 1996 WL 30289, at \*3 (S.D.N.Y. Jan. 24, 1996) (denying employer's motion for summary judgment where, among other things, employment "practices" raised a question of fact as to whether the asserted functions were essential).

107. 29 C.F.R. § 1630, App. at 351 (1996).

108. *Lost in Cyberspace*, *supra* note 67, at 723. See S.C. CODE ANN. § 26-1-90 (Law Co-op. 1998) (stating that "[a] notary public may . . . [take] renunciations of dower.")

109. Nancy Perkins Spyke, *Promoting the Intermediate Benefits of Strict Notary Regulation*, 31 J. MARSHALL L. REV. 819, 828 (1998). See also NOTARY LAW, *supra* note 20, at 187 (stating that "every jurisdiction today grants notaries the power to administer oaths and affirmations.")

110. See, e.g., *Treadwell v. Alexander*, 707 F.2d 473 (11th Cir. 1983).

111. See Michael L. Closen, *Why Notaries Get Little Respect*, NATIONAL L.J., Oct. 9, 1995, at A23 [hereinafter *Little Respect*] (stating that "[f]our and a half million notaries is at least 4 million too many.")

112. See Lee Burton, *It's A Proud Calling, But The Notary's Lot Is Full Of In dignities*, WALL ST. J., June 15, 1993, at A1.

113. See Klint L. Bruno, Comment, *To Notarize, Or Not to Notarize . . . Is Not a Question of Judging Competence or Willingness of Document Signers*, 31

There is more than one notary on average “for every 49 citizens in Alaska and Tennessee, for every 34 citizens in Florida, and for every 24 citizens in South Carolina.”<sup>114</sup> By contrast, there are thirty states that have fewer than four and one-half million residents in each of them, and Japan has fewer than 550 notaries in all.<sup>115</sup> Many professions and occupations—including police officers, school teachers, doctors and lawyers—have fewer than four and one-half million members.<sup>116</sup> The number of notaries is astronomically high. One commentator captured the problem in an especially colorful observation: “[t]here are so many notaries that, if you laid all of them together from head to toe, their length would span 4,687 miles, or twice the diameter of the moon.”<sup>117</sup> Even the United States Supreme Court has noted that “the significance of the position [of notary public] has necessarily been diluted by . . . the wholesale proliferation of notaries.”<sup>118</sup> Accordingly, it cannot seriously be argued that the demand for notarial services outweighs supply.

Fourth, whereas certain professions (i.e., medicine or law) require a special degree of expertise or skill to perform the particular functions, the same cannot be said of the office of notary. In fact, the qualifications for holding notarial office are surprisingly minimal.<sup>119</sup> Generally, to become a notary, individuals (1) must be at least eighteen years of age, (2) may be required to read and write the English language, (3) may be required to be a United States Citizen, (4) cannot have a felony conviction within a certain number of years, and (5) must be a resident of the county or state of application.<sup>120</sup> However, states rarely make an effort to verify this very basic information.<sup>121</sup>

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J. MARSHALL L. REV. 1013, 1020 (1998) (observing the “relative ease” with which one can become a notary). *See also* Henderson & Kovach, *supra* note 78, at 858-59 (noting that “with few exceptions, the commissioning jurisdictions have reported that the number of notaries public being commissioned is increasing.”)

114. *Little Respect*, *supra* note 111, at A23.

115. *See Little Respect*, *supra* note 111, at A23; *Public Official*, *supra* note 16, at 699.

116. *See Little Respect*, *supra* note 111, at A23.

117. Vincent Gnoffo, Comment, *Notary Law and Practice for the 21st Century: Suggested Modifications for the Model Notary Act*, 30 J. MARSHALL L. REV. 1063, 1064 (1997).

118. *Bernal v. Fainter*, 467 U.S. 216, 223 n.12 (1984).

119. *See* Michael L. Closten & R. Jason Richards, *Cyberspace Needs Supernotaries*, NATIONAL L.J., Aug. 25, 1997, at A19 (commenting that notaries need only minimal qualifications and their job is trivial); Bruno, *supra* note 113, at 1018 (stating same); *Little Respect*, *supra* note 111, at A23 (noting that the qualifications for holding notarial office are minimal).

120. *See* 5 ILCS 312/2-102 (West 1998).

121. *See Little Respect*, *supra* note 111, at A23; Henderson & Kovach, *supra* note 78, at 861. *See generally* R. Jason Richards, *The Utah Digital Signature Act as “Model” Legislation: A Critical Analysis*, 17 J. MARSHALL J. COMPUTER

Furthermore, very few states mandate that notaries undertake any kind of basic testing or training,<sup>122</sup> and no notary statute requires that notaries obtain a minimum level of general education prior to being commissioned.<sup>123</sup> "Thus, a grade school drop-out barely proficient in the relevant language can become a notary . . . ."<sup>124</sup> Nor do any states provide for continuing notary education or any type of retraining for notaries seeking to renew their commissions.<sup>125</sup> Similarly, few states require notaries to submit to any kind of training or study in notary ethics, law or practice.<sup>126</sup> Because of these lax standards, most "notaries either learn about notarial practice on their own, or they do not learn at all."<sup>127</sup> A clear illustration of this point is the "ministerial" or "clerical"<sup>128</sup> role that notaries in the United States play in commerce today, in contrast to the notaries of ancient Rome, where Charlemagne, the emperor of the West, ordered that every bishop, abbot and count have a *notarius*, or, more recently, the notaries of many Central and South American countries, where *notarios publicos* command much more respect and possess much greater authority than notaries in the United States.<sup>129</sup>

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& INFO. L. 873 (1999) [hereinafter *Utah Act*]. This fact is unfortunate in a profession where "[i]t is not uncommon for notary applicants to lie on their applications . . . ." *Go to Jail*, *supra* note 11, at 888 n.56.

122. See Bruno, *supra* note 113, at 1018. Only California, Connecticut, Louisiana, New York, North Carolina and Pennsylvania require notarial education or testing. See Gnoffo, *supra* note 117, at 1069-70 n.53.

123. See *Lost in Cyberspace*, *supra* note 67, at 722.

124. See *Lost in Cyberspace*, *supra* note 67, at 722.

125. See Bruno, *supra* note 113, at 1020.

126. See *generally Lost in Cyberspace*, *supra* note 67, at 722.

127. Gnoffo, *supra* note 117, at 1069.

128. See Closen & Bruno, *supra* note 96, at 5 (commenting that the notary's duties are merely ministerial or clerical); Closen & Dixon, *supra* note 70, at 873 n.3 (noting that "most [notarial] duties are clerical or ministerial in nature . . ."); 58 AM. JUR. 2D *Notaries Public* § 29 (1989) (commenting that the duties are clerical or ministerial); HUMPHREY, *supra* note 73, at 7 (noting that the duties are clerical); Gerald Haberkorn & Julie Z. Wulf, *The Legal Standard of Care for Notaries and Their Employers*, 31 J. MARSHALL L. REV. 735, 736 (1998) (stating that "[t]he official duties of a notary are essentially ministerial or clerical in nature"). See also *Bernal v. Fainter*, 467 U.S. 216 (1984) (observing that the duties are clerical); *Jii v. Rhodes*, 577 F. Supp. 1128 (S.D. Ohio 1983) (noting that the duties are ministerial); *Sicard v. Sicard*, 426 So. 2d 299 (La. Ct. App. 1983) (stating same).

129. See *Lost in Cyberspace*, *supra* note 67, at 704 (noting that U.S. notaries do not demand the "respect reminiscent of the notaries of ancient Rome, or, the civil law notary, the Japanese notary, and the *notario publico* of some Hispanic countries in modern times"); PIOMBINO, *supra* note 86, at 3 (stating that "[o]ur [U.S.] notary public is a person of very slight importancel, whereas t]he civil law notary is a person of considerable importance"); Keith D. Sherry, Comment, *Old Treaties Never Die, They Just Lose Their Teeth: Authentication Needs of a Global Community Demand Retirement of the Hague Public Documents Convention*, 31 J. MARSHALL L. REV. 1045, 1047-48 (1998) (stating

Accordingly, notaries in this country do not necessarily exercise any special degree of expertise or skill in performing their duties.

All of these factors, taken together, illustrate that no single notarial function is "essential" as defined under the ADA. As a result, it is improper to disqualify per se a disabled notary or disabled notary applicant on the sole basis of his or her inability to perform every function of the job. That being the case, it is the Author's opinion that commissioning jurisdictions have an affirmative obligation to make reasonable accommodations for disabled notaries, so long as these notaries meet the other job-related requirements (e.g., age, residency, etc.) of the position.

The principle purpose remaining for this section, therefore, is to elaborate this finding, to use it to dispel some myths about disabled notaries and to suggest some alternative ways to accommodate such notaries in practice. The Author's basic suggestion is that notary law should enable disabled notaries or applicants to engage in tasks that they are capable of performing and should not require them to carry out tasks that they cannot perform. An appropriate determination would, of course, require inquiry into the notarial functions authorized by applicable state law, and a corresponding case-by-case assessment of the limitations, if any, that should be placed on the performance of the disabled notary's official duties. Certainly, disabled notaries should not be put in a position where they could be used as a pawn for unscrupulous document signers. At the same time, however, the notary profession should not deny disabled notaries alternative notarial opportunities reasonably available under existing, or perhaps modified, policies.<sup>130</sup>

By way of example, if a blind notary were asked to perform a notarization for a stranger, then the notary should be disqualified from performing that particular notarial function. Because the requesting party is a stranger, the notary must be able to exercise his or her official discretion in ascertaining the signer's identity.<sup>131</sup>

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that "[n]otaries public in nations such as Mexico, Germany and Japan must meet more rigid requirements to obtain their notarial commissions, and they possess authority and functionality far greater than their notarial counterparts in the United States"); Carol Daugherty Ransic, *EC Legal Systems: An Introductory Guide*, 9 N.Y. INT'L L. REV. 97, 103 (1996) (observing that German, French and Italian notaries public are highly respected professionals who are carefully trained as notaries and whose membership is strictly limited). See generally Pedro A. Malavet, *Counsel for the Situation: The Latin Notary, A Historical and Comparative Model*, 19 HASTINGS INT'L & COMP. L. REV. 389, 432-33 (1996); Steward Baker & Theodore Barassi, *The International Notarial Practitioner*, 24 INT'L L. NEWS 1 (Fall 1995); JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION* 113-15 (1969).

130. See *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 289 n.19 (1987).

131. See, e.g., OHIO REV. CODE ANN. § 147.53 (Anderson 1998) (stating notary must use satisfactory evidence to establish signer's identity).

However, the notary's disability would not permit detailed scrutiny, and notary law prohibits the notary from delegating such an official function to anyone else (i.e., an assistant). Thus, because the risk to the public (in the form of commercial fraud) is real and cannot be eliminated or reduced to an acceptable level, the notary should refuse the request for services and refer the individual to another notary who can perform the task.

On the other hand, even blind notaries in appropriate circumstances should be entitled to perform notarizations.<sup>132</sup> For instance, it is entirely reasonable to permit a blind notary to execute a request from a person known to him or her. More often than not, notaries are asked to perform notarial services from someone familiar to them. Indeed, it is not uncommon for notaries to be approached by friends, neighbors or acquaintances to perform various notarial tasks. And of course, notaries are frequently called upon to execute notarizations for co-workers. In fact, it is not uncommon for some business employers to "insist that their employees maintain notary commissions, and some employers pay for the expense attendant to such commissioning (such as filing fees, notary bond premiums and the costs of notary seals and other supplies)."<sup>133</sup> Whatever the circumstances surrounding such a request, the crucial point here is that the notary's inability to see the document signer has no bearing on his or her ability to perform the notarization. This is because, where the document signer is known to the notary through voice identification, there is no essential difference between requiring the signer to speak and having the notary see the signer for purposes of identification.<sup>134</sup> Additionally, numerous safeguards could ensure that the notary is not duped and that the requesting party actually signs the document requiring notarization. For example, perhaps the notary could place his or her hand atop the signers as the writing occurs, and have a trusted assistant to the

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132. See PIOMBINO, *supra* note 86, at 9-10 (observing that "[a]n applicant who is partially blind, and therefore unable to read, has been held to be eligible for appointment as a notary public.")

133. *Go to Jail*, *supra* note 11, at 885.

134. See *State v. Ferris*, 326 N.W.2d 185, 187 (Neb. 1982). See also *Commonwealth v. Torres*, 327 N.E.2d 871 (Mass. 1975) (admitting an out-of-court voice identification of the defendant with an in-court identification by a blind woman as substantive evidence of guilt); *Hambrick v. State*, 330 S.E.2d 383, 384 (Ga. Ct. App. 1985) (upholding conviction for robbery even though victim was "nearly blind," where victim "knew the sound of [the defendant's] voice" and was not deceived by the attempted scam); *Walton v. State*, 637 N.E.2d 808 (Ind. 1994) (upholding conviction for murder and attempted murder based in part upon testimony of husband of victim who, although blind, recognized defendant's voice from a previous conversation); *State v. Moore*, 218 S.E.2d 499 (N.C. Ct. App. 1975) (upholding conviction for breaking and entering based upon testimony of blind victim who was able to identify the defendants by their voices).

notary perform the clerical task of verifying that the signing actually occurred. Permitting an assistant to perform such a non-discretionary function poses little risk of harm.

Similarly, even deaf and mute notaries should be permitted to execute notarizations.<sup>135</sup> Here, it would be reasonable for the notary to identify the document signer and then proceed to administer the oath or affirmation in written or electronic form, have the signer read it to himself or herself, and then acknowledge the acceptance of the oath to the notary with an affirmative nod of the head.<sup>136</sup> In this case, the notary's physical presence during the administration of the oath or affirmation is sufficient to fulfill the notary's professional obligation—here, judging the signer's awareness to act (i.e., the signer's ability to understand the significance of what he or she is doing).<sup>137</sup>

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135. See *Notary Turns Hearing Disability from a Liability into an Asset*, NOTARY BULL., Feb. 1999, at 3 (celebrating the story of a 65 year-old deaf New York notary who has served the office for over 20 years as a way to "help out" her community) [hereinafter *Disabled Notary*].

136. See generally P.R. LAWS ANN. tit 31, § 2184 (1994) (providing that "[a] person who is absolutely deaf shall read his will himself; if he does not know how or cannot do so he shall designate two persons to read it in his name, always in the presence of the witnesses and of the notary.")

137. THE NOTARY PUBLIC CODE OF PROFESSIONAL RESPONSIBILITY, Guiding Principle III, Art. C, § III-C-1 Commentary (1998). See also ROBERT S. MENCHEL, RIGHTS OF THE HEARING IMPAIRED: ILLINOIS ADVISORY COMMITTEE TO THE UNITED STATES COMMISSION ON CIVIL RIGHTS 194 (1990) (commenting that society "must be made aware that the hearing-impaired person has the same capacity and motivation as a hearing person[, and] [w]ith some accommodations and understanding the hearing-impaired person can overcome barriers to upward mobility").

On the point of signer awareness, it is important to distinguish between signer "awareness" and signer "willingness." THE NOTARY PUBLIC CODE OF PROFESSIONAL RESPONSIBILITY, Guiding Principle III, Art. C, § II-C-1 Commentary. "The 'willingness' problem arises when a person with full control of his or her mental faculties is being improperly persuaded or forced to act. The 'awareness' problem involves only the signer, and focuses on whether or not the signer understands what he or she is doing." *Id.* There is considerable debate and confusion in the legal community over whether notaries should screen document signers for competence and willingness. Compare FLA. STAT. ANN. § 117.107(5) (West 1998) (requiring a notary to refrain from acting if it appears the signatory is "mentally incapable of understanding the nature and effect of the document"), GA. CODE ANN. § 45-17-8(b)(3) (1998) (giving the notary the opportunity to decline to act if he has "compelling doubts" about whether the signer "knows the consequences of the transaction requiring the notarial act"), *Disabled Signer*, *supra* note 5, at 9 (stating that the "signer must . . . appear before the Notary in person and be painstakingly screened for . . . willingness and competence") with THE NOTARY PUBLIC CODE OF PROFESSIONAL RESPONSIBILITY, Guiding Principle III, Art. C, Commentary (1998) (opining that "if the signer merely seeks to have a document 'witnessed,' there is no authority requiring the notary to determine the signer's competence"), Closen & Bruno, *supra* note 96, at 4 (highlighting the "numerous reasons that explain why notaries do not, and should not, have



These proposals are not unlike the present system of assessing the functionality of other public officials and public servants, such as lawyers, judges, jurors and so forth. Blind judges are routinely permitted to enlist the aid of assistants in trial to perform clerical functions that do not invoke judicial discretion.<sup>138</sup> Similarly, jurors with hearing and sight impairments are not automatically disqualified from performing their public service obligation where they may be reasonably aided by a signing interpreter<sup>139</sup> or other reasonable accommodation.<sup>140</sup> Therefore, without undermining any feature of their role as public officials and without violating any principle of notary law as it relates to the notary's performance of official functions, notaries should be able to serve in the public domain so long as they can fulfill their particular public service obligation, with or without reasonable accommodation, even if they are unable to perform nearly all of the functions that non-disabled notaries perform.<sup>141</sup>

At some point, of course, disabilities may make the performance of notarial services so difficult as to be unreasonable, at which time the disabled notary should resign his or her

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the legal responsibility to judge" the document signer's competence and willingness), Bruno, *supra* note 113, at 1043 (arguing that "notaries should not make determinations such as competence or willingness of document signers"). Indeed, "[a]lthough most notaries think they have the duty to judge both the competence and willingness of document signers, that does not appear to be the law anywhere in the United States except in" a handful of jurisdictions. Clozen & Bruno, *supra* note 96, at 4. As with many of the issues addressed in this Article, it is unfortunate that such a significant point has not more clearly been decided.

138. See, e.g., *People v. Hayes*, 923 P.2d 221 (Colo. Ct. App. 1995) (holding that juvenile is not denied due process when accommodations are made for blind judge); *City of San Augustine v. Johnson*, 349 S.W.2d 653 (Tex. App. 1961) (upholding administration of an oath by a clerk at the direction of a blind judge); *People v. Johnson*, 521 N.Y.S.2d 512 (1987) (holding that blind judge could preside at pretrial hearing which did not involve visual inspection of any exhibits). Cf. *People v. Brown*, 465 N.E.2d 362 (N.Y. 1984) (stating that blind judge could not preside at suppression hearing where lineup photograph was crucial piece of evidence).

139. See *People v. Gusman*, 555 N.E.2d 259 (N.Y. 1990) (discussing the role of signing interpreters).

140. See, e.g., *People v. Caldwell*, 603 N.Y.S.2d 713 (N.Y. Crim. Ct. 1993) (permitting documentary evidence to be read into record); *Galloway v. Superior Court*, 816 F. Supp. 12 (D.D.C. 1993) (allowing physical evidence not requiring actual observation to be described). Cf. *Commonwealth v. Susi*, 477 N.E.2d 995 (Mass. 1985) (noting that blind juror could not sit on case where composite drawings were used and where eyewitness identification was critical issue).

141. See *Antic v. Arcade Bldg. Serv.*, 1998 WL 142402, at \*3 (N.D. Ill. Mar. 24, 1998) (finding that "although [the employee] was unable to perform most of the functions that the [other employees] performed, it is not clear that it was essential that [the employee] be able to perform all of these functions in order to work [in that position].")

commission. As noted above, this issue should be resolved based on the facts of each case. But in considering the issue, the observations of the United States Congress are worth repeating—that “individuals with disabilities continually encounter . . . overprotective rules and policies, failure to make modifications to existing . . . practices, [and] exclusionary qualification standards and criteria . . . .”<sup>142</sup>

## V. DISABLED SIGNERS

“Without full knowledge of his powers, obligations and limitations, a notary public may be a positive danger to the community in which he is licensed to act.”<sup>143</sup> This observation is especially true in the case of disabled document signers, where the absence of state laws have left many notaries puzzled about how to proceed under such circumstances. To be sure, the lack of statutory guidance in this area presents some thorny issues for notaries public, especially for notarizations that are complicated by physical infirmities or disease.<sup>144</sup> Even so, it is important to emphasize that, notwithstanding such ailments, notaries retain their public service responsibilities at all times.

Notaries are public officers placed “in a position of public trust,”<sup>145</sup> on whom it is “incumbent [to serve] the body politic.”<sup>146</sup> This means that “[n]otaries should bear the responsibility to treat all people equally—not to discriminate in the performance of their official duties on the basis of race, religion, national origin, age, physical disability, gender, or sexual orientation.”<sup>147</sup> Thus,

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142. 42 U.S.C. § 12101(5) (1998).

143. Chief Judge Charles Desmond, New York Court of Appeals, *Forward to J. SKINNER, SKINNER'S NOTARIES MANUAL* ii (3d ed. 1963).

144. See *Public Official*, *supra* note 16, at 686. For example, some elderly citizens may possess little evidence of their own identities. Some people suffering from physical disabilities may find difficulty in signing their names. Some individuals with illnesses or disabilities, some people of advanced age, and some individuals having little resources may effectively be confined at home, in hospitals, or in long-term care facilities and may not be able to travel to the standard sites where notaries are available—so that notaries may be asked to travel to accommodate such persons. Even those involuntarily confined in jails and prisons should have reasonable access to the services of notaries.

*Id.* at 686-87.

145. *Farm Bureau Fin. Co. v. Carney*, 605 P.2d 509, 514 (Idaho 1990).

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

147. *Public Official*, *supra* note 16, at 686. Similarly, it is written that [the] Code of Ethics of the American Society of Notaries provides that the notary shall ‘treat each individual fairly and equally,’ and the Preliminary Draft of the Notary Public Code of Ethics of the National Notary Association declares that ‘the Notary shall as a government officer and public servant serve all of the public in an honest, fair and unbiased manner.’

*Id.*

notaries have a "responsibility to honor reasonable requests for notarial services" and may not withhold such services for any unlawful reason.<sup>148</sup> Additionally, a notary should not "base the charging or waiving of a fee for performing a notarial act, or the amount of the fee, on the signer's status as a client or nonclient, or a customer or noncustomer . . . ."<sup>149</sup> Thus, the public servant responsibility of notaries is clear—"[t]he Notary shall, as a government officer and public servant, serve all of the public in an honest, fair and unbiased manner."<sup>150</sup>

The public service obligation makes it clear that notaries may not discriminate against disabled signers. However, this gets notaries no closer to understanding the manner in which they may assist disabled signers, primarily because many states fail to address the issue directly.<sup>151</sup> For example, in a situation where there is no applicable state statute and the notary is asked to perform a notarial act for a signer who is paralyzed and therefore unable to hold or move a pen, the notary may be unsure how to proceed. Some notary authorities take the position that this notarization could not take place in most states without an attorney-in-fact or legal guardian to sign for the paralyzed individual.<sup>152</sup> But that is simply untrue. While it is the case that proxies

may sometimes be directed by state law to state under oath that they have authority to sign for another person or entity, . . . [e]very state permits notarization of the signatures of representatives, whether these individuals are signing on behalf of 'artificial persons,' such as corporations, or on behalf of other 'natural persons.'<sup>153</sup>

Certainly, a competent but paralyzed document signer should be afforded this same privilege. Admittedly, it is still the case in some states that laws foster the stereotype of people with physical disabilities being mentally diminished.<sup>154</sup> This idea, unfortunately, has prevailed throughout history.<sup>155</sup> Thus, the assumption that

148. *Id.* at 688.

149. *See id.* at 687 (quoting *Preliminary Draft Notary Public Code of Ethics* § I-B-2).

150. THE NOTARY PUBLIC CODE OF PROFESSIONAL RESPONSIBILITY, Guiding Principle I (1998).

151. *See* PIOMBINO, *supra* note 86, at 65.

152. *See Disabled Signer*, *supra* note 5, at 7.

153. Charles N. Faerber, *Being There: The Importance of Physical Presence to the Notary*, 31 J. MARSHALL L. REV. 749, 764-65 (1998). *See, e.g.,* TENN. CODE ANN. § 66-22-108(a) (1994). *See also* NOTARY LAW, *supra* note 20, at 117 (noting that some states require the notary to verify that the proxy has authority to sign for the other person).

154. *See* Closen & Bruno, *supra* note 96, at 4 (referencing a Washington state statute).

155. *See* Lewis C. Vollmar Jr., *The Effect of Epidemics on the Development of*

physical disability renders a competent person unable to appoint an agent to act on his or her behalf, without resorting to the courts, is of debatable validity.

It may well be, then, that in appropriate circumstances the notary could perform a dual role, serving in his or her official capacity as notary as well as the agent of the paralyzed signer. So long as the signer has given the notary permission to act and the notary then agrees, a principle-agent relationship arises. Indeed, this method of notarizing for paralyzed document signers seems more reasonable than the common practice of having the notary place a writing instrument in paralyzed people's mouths or between their toes to enable them to make their mark.<sup>156</sup>

Seven states—Colorado, Florida, Hawaii, Louisiana, Michigan, Texas and Washington—have thus far agreed with the basic proposition that notaries perform a dual role.<sup>157</sup> These state laws specifically permit the disabled signer to direct the notary to sign on his or her behalf. While the ultimate goals of these statutes are similar, the procedures and nomenclature vary markedly. For example, Hawaii's law provides:

[a] notary may sign the name of a person physically unable to sign or to make a mark . . . provided[:]

the notary is satisfied that the person has voluntarily given consent for the notary to sign . . .

the notary writes in the presence of the person: 'Signature affixed by notary pursuant to section 456-19, Hawaii Revised Statutes,' beneath the signature . . .

a doctor's written certificate is provided to the notary certifying that the person is unable to physically sign or make a mark due to a disability and that the person is capable of communicating his or her intentions.<sup>158</sup>

In comparison, Michigan's law states:

[a] notary public may sign the name of a person whose physical characteristics limit his or her capacity to sign or make a mark on a document presented for notarization if all of the following

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*English Law From the Black Death Through the Industrial Revolution*, 15 J. LEGAL MED. 385, 396 (1994) (noting that "lepers were historically banished to leper colonies and the insane were locked away in asylums.") See Charles Cheifec, Comment, *Disclosure of An Adoptee's HIV Status: A Return to Orphanages and Leper Colonies?*, 13 J. MARSHALL J. COMPUTER & INFO. L. 343 (1995) for further discussion.

156. See *Disabled Signer*, *supra* note 5, at 7.

157. See *Disabilities*, *supra* note 7, at 11; COLO. REV. STAT. § 12-55-110.5 (1998); LA. CIV. CODE ANN. art. 1578 (West 1999).

158. *Disabilities*, *supra* note 7, at 11; HAW. REV. STAT. ANN. § 456-19 (Michie 1998).

circumstances exist:

- (a) The notary public is orally, verbally, or through electronic or mechanical means provided by the person directed to do so by that person.
- (b) The person is in the physical presence of the notary public.
- (c) The notary public inscribes beneath the signature: 'signature affixed pursuant to section 55.132(2) of the Michigan Compiled Laws.'<sup>159</sup>

These statutes are monumental achievements. They will force other states to consider and address the subject, as evidenced by the recent introduction of similar bills in several states.<sup>160</sup> They will probably cause states to reconsider other notary disability issues as well. This effect will be significant because notary reform in this country is long overdue. In some cases, the law has not changed in over 125 years.<sup>161</sup> But, clearing up the confusion surrounding notarizing for physically disabled document signers and its accompanying efficiency for the parties to the transaction are not the only reasons prompting the enactment of such laws. An incidental, but nevertheless important, corollary is the hope and expectation that, as more states consider such laws a primary objective of disability legislation, they will "empower individuals with disabilities to maximize . . . independence and inclusion and integration into society."<sup>162</sup>

Other than paralysis, perhaps the most problematic physical disabilities confronting notaries are those where the notary and signer must overcome communication barriers, such as those presented by blind, partially-sighted or deaf signers.<sup>163</sup> Again, however, there are almost no applicable state laws to be found.<sup>164</sup> The result is that notaries are often times put in a catch-22 situation. For instance, in the case of a notary notarizing for a blind signer, the parties may find it helpful or even necessary for the notary to direct the disabled signer's hand to the signature line on the document. However, many notary authorities opine that, in the absence of express statutory authority, showing a document signer where to sign exposes the notary to legal liability in the

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159. MICH. COMP. LAWS ANN. § 55.132(2) (West 1998)

160. See *Disabled Signer*, *supra* note 5, at 7. But see PIOMBINO, *supra* note 86, at 65 (noting that a recently proposed bill in New York that "would have permitted a physically handicapped person to orally direct a notary public to sign on his behalf, and that] would have held the notary public responsible for ascertaining the competence of the disabled individual . . . died in committee").

161. See *Little Respect*, *supra* note 111, at A23 (stating that some states' \$500 notary bond provisions were enacted between 1849 and 1876).

162. 29 U.S.C. § 701 (1998).

163. See *Disabled Signer*, *supra* note 5, at 8.

164. See *Disabled Signer*, *supra* note 5, at 8.

form of the "unauthorized practice of law."<sup>165</sup> Admittedly, this fear is perhaps a "little extreme," yet it is not totally unfounded.<sup>166</sup> To be sure, a notary should never explain or advise as to the contents of the document(s) with which they deal, unless the notary is also professionally qualified or so licensed.<sup>167</sup> Consistent with this principle, and with the belief that notaries are essentially ministerial public officers, commentators have expressed that notaries should not be too specific in assisting another person in "completing . . . a document or transaction requiring a notarial act,"<sup>168</sup> especially where such an act involves "exercis[ing] unauthorized independent judgment."<sup>169</sup>

Other notary experts would disagree. This camp believes that such fears are unjustified and just plain "silly,"<sup>170</sup> and the Notary Law Institute proclaims that such views are "pure superstition."<sup>171</sup> They assert that prohibiting a notary from showing a blind document signer where to sign "amounts to an attenuated and overly cautious interpretation of the standards on the practice of law."<sup>172</sup>

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165. Karla Elliott, *The Unauthorized Practice of Law*, AM. NOTARY, July-Sept. 1997, at 1 (intimating that showing a document signer where to sign is tantamount to engaging in the unauthorized practice of law).

166. *Id.* See, e.g., *Florida Bar v. Fuentes*, 190 So. 2d 748, 749 (Fla. 1966) (prohibiting a notary from practicing law); *In re Skobinsky*, 167 B.R. 45, 47 (E.D. Pa. 1994) (charging a notary with filing bankruptcy claims).

167. See *Disabled Signer*, *supra* note 5, at 8; *Disabilities*, *supra* note 7, at 10. See also ROTHMAN, *supra* note 72, at 45 (stating "[i]f the Notary, who is not an attorney, is asked to perform a notarial act that requires the preparation of . . . a legal document or form, the Notary should always obtain the advice of an attorney unless he has had special education and training.") To ensure notarial compliance with this general prohibition, many states require all non-attorney notaries who advertise their services to conspicuously post or otherwise include along with the advertisement certain statements. For example, in Florida, notaries must state: "I am not an attorney licensed to practice law in the State of Florida, and I may not give legal advice or accept fees for legal advice." FLA. STAT. ANN. § 117.05(10) (West 1998).

168. See MODEL NOTARY ACT § 3-106(a) (National Notary Ass'n 1984) (stating "[a] non-attorney notary may complete but may not select notarial certificates, and may not assist another person in drafting, completing, selecting, or understanding a document or transaction requiring a notarial act"); *Do Be Helpful But Not Too Specific*, NOTARY BULL., Feb. 1995, at 11 (noting "[t]he helpful notary might provide the answer to . . . common questions[,] but Notaries are cautioned not to be too specific in some of their directions").

169. PRELIMINARY DRAFT NOTARY PUBLIC CODE OF ETHICS, Guiding Principle VI (1997). "The Notary shall act as a ministerial officer and never provide legal advice nor exercise unauthorized independent judgment." *Id.*

170. *Public Official*, *supra* note 16, at 672.

171. *The Truth About Your Legal Authority: Selecting Notarial Certificates*, AM. NOTARY, Sept-Oct. 1997, at 1, 2.

172. *Public Official*, *supra* note 16, at 672. In support of this position, Professor Closen writes:

[b]y analogy, when a licensed certified public accountant advises a client

Putting this debate to rest requires legislative reform. To date, however, only a handful of states have addressed the issue of blind document signers—and none of these states has taken on the issue of the unauthorized practice of law. For instance, Illinois' statute provides "[a] notary public shall not take the acknowledgment of any person who is blind until the notary has read the instrument to such person."<sup>173</sup> To its credit, Illinois is one of the few states even to have addressed the issue of notarizing for blind document signers. At the same time, what does Illinois' law really do? As noted above, it fails to address the extent to which notaries may assist blind signers in writing their signatures, thus leaving notaries to question the manner in which they should proceed under such circumstances so as not to run afoul of the unauthorized practice of law doctrine. Thus, the only goal the legislators had in mind in adopting this law appears to have been to protect blind document signers from becoming the victims of fraud. Such antiquated laws, however, only foster the stereotype of physically disabled persons as mentally diminished.

Moreover, no state has yet passed legislation directed at performing notarizations for deaf signers. But this fact has not discouraged some notary law advocates from lobbying to deliver more services for disabled notary customers.<sup>174</sup> According to Betty Ann Gonser, a deaf New York State notary, "[a]ll states should work to pass notarial laws accommodating deaf signers."<sup>175</sup> In doing so, she believes that states should permit the notary to use any form of communication reasonably available to perform the required notarial tasks.<sup>176</sup> Here, the importance of implementing

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on a financial issue covered by the tax code, the accountant has not engaged in the unauthorized practice of law. Nor does it constitute the unauthorized practice of law where a licensed real estate broker advises a client on the terms of a real estate sales contract, although the law regulates aspects of such conveyancing. The reason the accountant and broker can and should give the advice hypothesized is that they are qualified, licensed professionals in fields that overlap with the law (and every profession finds some overlap with the law). Similarly, a notary is a commissioned public official who specializes in notarizations and who should be fully qualified to advise about the notarization, the notarial certificate, and the notarial journal.

*Id.* at 672-73.

173. 5 ILCS 312/6-104(d) (West 1998). Florida and Indiana are the only other states to have adopted legislation specifically addressing blind document signers. See FLA. STAT. ANN. § 117.05(14)(a) (West 1998) (stating "[a] notary public may notarize the signature of a person who is blind after the notary public has read the entire instrument to that person.")

174. See *Disabled Notary*, *supra* note 135, at 3.

175. *Disabled Notary*, *supra* note 135, at 3.

176. See *Disabled Signer*, *supra* note 5, at 9. As a practical note, Ms. Gonser suggests that when lip-reading, "it is important to look at the person [when speaking]." *Disabled Notary*, *supra* note 135, at 3 (quoting Betty Ann Gonser). Similarly, Ms. Gonser believes that notaries should also be encouraged to take

mandatory notary education, testing and training requirements, including information relating to servicing disabled signers, increases. Indeed, "[i]f anything, a signer's physical challenge should cause a heightening of the Notary's attentiveness to the propriety of a notarization, not a relaxing."<sup>177</sup>

Obviously, many other disabilities affecting document signers deserve critical analysis, but cannot be discussed here. This section sought simply to shed light on some of the more obvious disabilities that cause confusion among notaries public and impose unnecessary burdens on disabled document signers. States can avoid many of these problems by merely adopting legislation applicable to people with disabilities in the notary profession. In doing so, states need to consider carefully the rights and obligations of both the notary and the impaired signer, with an eye towards practicality and convenience. The passage of the ADA spawned considerably more interaction between the disabled and the non-disabled. This is an opportunity where commissioning jurisdictions can come to play a small, but significant, role in the lives of a large number of disabled individuals.

## VI. CONCLUSION

This country has done very little to affect the rights of people with disabilities in the notary profession. The result is two-fold. In some cases, it is the disabled notary himself or herself that is the victim of overly protective rules and exclusionary practices. On this point, this Article has attempted to prove that such rules and policies are unwarranted, and that people with disabilities cannot and should not be prohibited from becoming a notary on the basis of disability alone. In other cases, the disabled document signer is the victim, falling prey to antiquated stereotypical assumptions and uninformed notaries. In both cases, however, it is the lack of notarial change that is to blame.

The ADA aims to promote the principle of independence in the lives of the disabled and to establish, for the benefit of public and private entities, the appropriate framework whereby disabled persons may be integrated into the mainstream of society. Now states must do their part. Fortunately, laws such as those recently passed in Florida<sup>178</sup> and Michigan<sup>179</sup> offer some hope that the resistance to change in notary law and practice is declining. Indeed, as suggested by President Lyndon B. Johnson's remark

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classes in sign language, in order to alleviate the awkwardness many people feel when communicating with the deaf. *See id.*

177. *Disabled Signer*, *supra* note 5, at 9.

178. *See* FLA. ST. ANN. §. 117.107(2) (West 1998) (allowing physically disabled notaries to use a signature stamp in lieu of hand-written signature).

179. *See* MICH. COMP. LAWS § 55.113(2) (1998) (permitting a physically disabled document signer to direct the notary to sign on his or her behalf).



that introduced this Article, “[i]t is time now to write the next chapter—and to write in the books of law.”<sup>180</sup>

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180. BARTLETT, *supra* note 1, at 723.