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THE PUBLIC OFFICIAL ROLE OF THE NOTARY

MICHAEL L. CLOSEN*

[T]he court will take judicial notice of the seals of notaries public, for they are officers recognized by the commercial law of the world. - United States Supreme Court, 1883.¹

The very designation of 'notary public' indicates a relation which the incumbent of the office sustains to the body politic. - New York Court of Appeals, 1895.²

INTRODUCTION

The notary public is a government appointee, a creature strictly of legislation,³ and scores of case decisions in addition to the two noted just above have pronounced that notaries are public officials.⁴ For instance, the 1838 Alabama Supreme Court decision

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

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

3. See RICHARD B. HUMPHREY, *THE AMERICAN NOTARY MANUAL* 209 (4th ed. 1948) (stating "the law is sole source of [the notary's] authority . . ."); *Guide to Notary Commission Eligibility*, NAT'L NOTARY MAG., May 1997, at 23-25 (comparing certain notary statutory provisions of the 50 states and territories). See also BLACK'S LAW DICTIONARY 956 (5th ed. 1979) (defining notary public as, "[o]ne who is authorized by the state or federal government to administer oaths, and to attest to the authenticity of signatures"). Indeed, even the method of selection of notaries originally was the same as for other public officials. See RAYMOND C. ROTHMAN, *NOTARY PUBLIC PRACTICES & GLOSSARY*, at 2 (Nat'l Notary Ass'n 1978) (stating that "[d]uring the colonial period Notaries Public were elected or appointed in the same way as judges in each colony").

4. See *Britton v. Niccolls*, 104 U.S. 757, 765 (1881) (declaring that a notary is a public officer); *State v. Hodges*, 107 Ark. 272 (1913) (stating that a notary is a public officer); *Ashcraft v. Chapman*, 38 Conn. 230 (1871) (stating that a notary is considered a public officer); *May v. Jones*, 14 S.E. 552, 553 (Ga. 1891) (stating "the notary . . . is a public officer, sworn to discharge his duties properly"); *Pitsch v. Continental & Commercial Nat'l Bank*, 137 N.E. 198, 200 (Ill. 1922) (identifying a notary as a public officer); *Stork v. American Surety Co.*, 33 So. 742, 743 (La. 1903) (asserting that a notary is a public officer); *State v. Clark*, 31 P. 545, 546 (Nev. 1892) (noting that "[i]t has been fre-

of *Kirksey v. Bates* referred to notaries as public officers and cited, as its authority, an 1803 state notary statute.⁵ One President of the United States—Calvin Coolidge in 1923—was sworn into office by a notary.⁶ Importantly, the historic “affixation of a [notary] seal [has] impart[ed] an appropriate sense of officiality.”⁷ Every state and territory has enacted legislation creating and empowering the office of notary public.⁸ Nevertheless, the role of the notary as a

quently held that a notary is a public officer”); *Commercial Union Ins. Co. v. Burt Thomas-Aitken Constr. Co.*, 230 A.2d 498, 499 (N.J. 1967) (declaring that “a notary public is a public officer”); *Werner v. Werner*, 526 P.2d 370, 376 (Wash. 1974) (identifying “[t]he notary, as a public officer, . . .”); *Harris v. Watson*, 201 N.C. 661 (1931); *Clapp v. Miller*, 56 Okla. 29 (1916); *Commonwealth v. Haines*, 97 Pa. 228 (1881). Many other authorities also state that notaries are public officials. See, e.g., BLACK’S LAW DICTIONARY 1060 (6th ed. 1990) (referring to a notary public as a “public officer”); HUMPHREY, *supra* note 3, at 7 (stating that “[t]he office of notary public is a public office . . .”); ROTHMAN, *supra* note 3, at 1 (noting that the ancient Roman Notarius was a public official); Michael L. Closen & G. Grant Dixon, *Notaries Public From the Time of the Roman Empire to the United States Today*, 68 N.D. L. REV. 873, 873 (1992) (remarking that “[a] notary public is a public official with unusual powers for a non-judicial officer”). But see *Transamerica Ins. Co. v. Valley Nat’l Bank*, 462 P.2d 814, 817 (Ariz. App. 1969) (“designat[ing] a notary public as . . . , at best, . . . quasi- public [in] nature”); *Ely Walker Dry Goods Co. v. Smith*, 160 P. 898, 900 (Okla. 1916) (referring to the role of notaries as quasi-public).

5. 7 Port. 532 (Ala. 1838).

6. Lee Berton, *It’s A Proud Calling, But The Notary’s Lot Is Full Of Indignities*, WALL ST. J., June 15, 1993, at A1 (noting that the notary who swore President Coolidge was his own father and that “[t]he ceremony was later repeated, with a Supreme Court justice administering the oath of office”); cf. *Notary Swears in Governor*, NOTARY BULL., April 1995, at 8 (exposing that the governor of South Dakota was sworn into office by a notary in January 1995). A few cases have even held that notaries in the course of conducting depositions have the authority to hold a witness in contempt, which is considered a judicial power. *Bevan v. Krieger*, 289 U.S. 459, 462 (1933). Cf. *Gall v. Saint Elizabeth Med. Ctr.*, 130 F.R.D. 85, 86 (S.D. Ohio 1990) (stating that “Ohio notaries public have authority to compel the attendance of witnesses at depositions and to punish them for refusing to testify”).

7. *Do Use a Notary Seal on Each Document*, NOTARY BULL., Aug. 1995, at 11. See also BLACK’S LAW DICTIONARY 1060 (6th ed. 1990) (defining “notarial” in part as “evidencing [the notary’s] official character, as, a notarial seal”); NAT’L NOTARY ASS’N, *Preliminary Draft Notary Public Code of Ethics*, March 1, 1997, at Guiding Principle VII (referring to the notary seal as the “universally recognized symbol of office”). As this paper was going to press, the National Notary Association distributed a second draft re-titled *Semifinal Draft, Notary Public Code of Professional Responsibility* (March 1, 1998), which was substantially like the preliminary draft. It should be noted that about a dozen states have abolished the obligation of notaries to use a notary seal. See Vincent Gnoffo, Comment, *Notary Law and Practice for the 21st Century: Suggested Modifications for the Model Notary Act*, 30 J. MARSHALL L. REV. 1063, 1064-65 (1997) (discussing the abolishment of the notary seal requirement); *Guide to Notary Commission Eligibility*, *supra* note 3, at 23-25.

8. See *Guide to Notary Commission Eligibility*, *supra* note 3, at 23-25 (comparing certain statutory provisions of all 50 states and U.S. territories).

public officer is taken largely for granted today.⁹ Yet, this public official feature about the notary constitutes *the* fundamental concept from which virtually all other aspects of notarial law and practice have developed. That proposition is the thesis of this paper.

This article will survey the range of consequences of the notary being a public officer. It begins by addressing whether notaries become agents and fiduciaries of the parties for whom notarizations are performed. The paper then considers the closely related subjects of whether a notary has personal liability for either negligent or intentional misconduct and whether an employer can be held vicariously liable for the misconduct of an employee-notary. Additionally, the article reviews the presumption of validity which attaches to most notarizations, and explains the exceptions to that general rule. The article also notes the public service responsibilities of notaries public. Next, the paper explores the responsibility of notaries to avoid official misconduct and the attendant role of governmental oversight of this officially commissioned or licensed functionary. Lastly, the article discusses both interstate and international recognition of notarizations, stemming largely from the force of the official status of the notary. The author's hope is that the brief treatment of these topics within this essay will inspire other observers of the notarial office to expand upon these issues, for every one of them could and should be the subject of a full-scale article.

Not addressed here is the unfortunate consequence that during an earlier period in history women were denied the opportunity to serve as notaries, in large measure on the justification that women were disqualified from holding any public offices.¹⁰ Just as women were refused the right to vote and denied entry into the legal profession and many other occupations, women could not be notaries public.¹¹ The history of the feminization of the office of

See generally CHARLES N. FAERBER, NOTARY SEAL & CERTIFICATE: VERIFICATION MANUAL (Nat'l Notary Ass'n 1996).

9. Michael L. Closen, *Why Notaries Get Little Respect*, NAT'L L.J., Oct. 9, 1995, at A23 (discussing views and perceptions of notaries). *See also* Michael L. Closen & R. Jason Richards, *Cyberbusiness Needs Supernotaries*, NAT'L L.J., Aug. 25, 1997, at A19 (commenting that notaries are required to have few qualifications and their job is trivial); Berton, *supra* note 6, at A1 (having the subtitle of the article, "The Pay Is Lousy and the Work Is Pretty Much Thankless, As 4.2 Million Will Attest").

10. *In re* Opinion of the Justices, 62 A. 969, 971 (N.H. 1906) (holding that a woman could not be appointed a notary public). *See generally* EDWARD MILLS JOHN, JOHN'S AMERICAN NOTARY AND COMMISSIONER OF DEEDS MANUAL 9-10 (6th ed. 1951) (discussing the history of women as notaries).

11. *See* Lynn Schafran, *Credibility in the Courts: Why Is There a Gender Gap?*, JUDGES' J., Winter 1995, at 5 (stating that "[f]or most of this country's history, the law classed women with children and the mentally impaired and forbade us to own property, enter into contracts, or vote"). *See, e.g.*, Opinion

notary is worthy of a paper unto itself, which paper could reveal the fascinating chronology of developments starting with the backward times and decisions,¹² moving on to the somewhat more enlightened era and cases,¹³ and culminating in legislation, court opinions, and a federal constitutional amendment effecting the right of women everywhere in this country to vote and to become public officials generally and notaries in particular.¹⁴ Today, the great majority of notaries are women.¹⁵

Also omitted here is any discussion of the newest form of notary, the certification authority or "cybernotary."¹⁶ In the wake of technological advancements permitting electronic transactions with digital signatures, a notary-like agent is necessary to establish the authenticity and reliability of electronic documents in both the domestic and transnational arenas.¹⁷ That high-tech agent will

of the Justices, 43 A. 1074 (N.H. 1890) (holding that a woman cannot be admitted to practice as an attorney); *In re Ricker*, 29 A. 559, 583 (N.H. 1890) (stating that women cannot vote and cannot hold public office); *Minor v. Happersett*, 88 U.S. 162, 178 (1874) (upholding a statute limiting right to vote to males); *Bradwell v. Illinois*, 83 U.S. 130 (1873) (holding that a woman could not be admitted to the practice of law).

12. See *State ex rel. Atty. Gen. v. Adams*, 51 N.E. 135, 136 (Ohio 1898) (holding a statutory amendment to allow women to become notaries to be unlawful because it conflicted with other constitutional provisions restricting voting qualifications and holding of public office to men); cf. *In re House Bill No. 166*, 21 P. 473, (Colo. 1886) (finding the bill to be "unconstitutional, in so far as it provides for the appointment of women as notaries public"); *In re Opinion of the Justices*, 43 N.E. 927, 928 (Mass. 1896) (holding that women cannot be notary publics because it is contrary to the constitution); *Bickett v. Knight*, 85 S.E. 418 (N.C. 1915) (holding that women cannot be notary publics because it is contrary to the constitution); *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).

13. See *Ex parte Lockwood*, 154 U.S. 116, 116-18 (1894) (recognizing that a woman could be denied admission to a state bar even though admitted to the Supreme Court bar); *In re Opinion of the Justices*, 62 A. 969, 970 (N.H. 1906) ("Whether the progress of the age requires that this [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."); *Nicholson v. Eureka Lumber*, 75 S.E. 730 (N.C. 1912) (recognizing a Texas female notary's notarization to be valid, although North Carolina did not permit women to serve as notaries).

14. See U.S. CONST. amend. XIX (permitting women the right to vote); *Preston v. Roberts*, 110 S.E. 586 (N.C. 1922) (ruling that women may hold office of notary because 19th Amendment to the Federal Constitution removed the ineligibility).

15. See *Are You an 'Average' Notary?*, NOTARY BULL., Feb. 1996, at 14 (presenting preliminary results of a survey of the members of the National Notary Association in which 68% of the notaries were women).

16. See Closen & Richards, *infra* note 18, for a more complete discussion of the cybernotary.

17. Victoria Slind-Flor, *Legal Locksmiths Moving Into Cyberspace as Notaries: The Need to Authenticate Electronic Documents is a New Frontier for At-*

be statutorily created and will be either a public official, like the notary, or a publicly licensed agent. Again, the subject of the nature and functioning of the certification authority is worthy of an article of its own.¹⁸

I. THE NOTARY AS AGENT AND FIDUCIARY OF DOCUMENT SIGNERS

Fiduciaries appear in a variety of forms, including agents, partners, directors and officers, trustees, executors and administrators, receivers, bailees, and guardians. . . . The various fiduciaries, as well as the rules that govern them, share obvious and identifiable similarities, although there are marked differences among them. . . . The twentieth century is witnessing an unprecedented expansion and development of the fiduciary law. - Professor Tamar Frankel, 1983.¹⁹

There is a great deal of uncertainty and some disagreement about the very basic issues of whether a notary serves as an agent or as a fiduciary of the signers who enlist the notary (possibly for a fee) to notarize the signatures on documents. Is a notary an agent like an attorney, certified public accountant or real estate broker retained by a client to represent the client in the performance of professional services? Is a notary more like a trustee or executor/executrix? Or, is a notary similar to a witness to a document? Are there various degrees of agency, or more likely, are there agents with various degrees of authority for their principals? And, as a matter of sound business and legal policy, should notaries bear fiduciary responsibilities to those they serve? If so, which fiduciary duties should apply?

A. Notaries as Agents

That there is uncertainty and disagreement about whether notaries serve as agents and/or fiduciaries of the persons for whom notarizations are performed is evidenced by the results of a survey conducted by the author. Although the survey was not a truly scientific one, more than 330 notaries, law students and lawyers from across the country were surveyed in the Fall and Winter of 1997-98.²⁰ Among notaries surveyed, about 34% expressed the view that

torneys, NAT'L L.J., Dec. 18, 1995, at A1.

18. The first law review article on the subject has recently been published. Michael L. Closten & R. Jason Richards, *Notaries Public—Lost In Cyberspace, Or Key Business Professionals Of The Future?*, 15 J. MARSHALL J. COMPUTER & INFO. L. 703 (1997).

19. Tamar Frankel, *Fiduciary Law*, 71 CAL. L. REV. 795, 795-96 (1983).

20. The original surveys are on file with the author. Participants included a grand total of 336 notaries, law students and lawyers. Some students and lawyers were also notaries. More than 20 states and the District of Columbia were represented. The initial portion of the survey process was conducted at the Annual Conference of the American Society of Notaries in Atlantic City,

notaries act as agents of those for whom they notarize, while some 61% disagreed.²¹ Among law students, some 36% concluded that notaries become agents of document signers for whom they notarize, but about 62% believed to the contrary.²² And among the lawyers surveyed, only about 11% held the opinion that notaries serve as agents of the individuals for whom they notarize, and approximately 89% believed notaries do not become agents of document signers.²³ Thus, the overall belief of some 32% of the more than 330 individuals surveyed was that notaries act as agents of the parties for whom notarizations are performed.²⁴ With respect to fiduciary duties, there was also some disagreement (as will be more fully reported below).²⁵ It is abundantly clear that serious doubt exists among the individuals surveyed on a matter at the very foundation of the structure of notary ethics, practice and law.

An agent is one who agrees with a principal to act on behalf of the principal and subject to the principal's control.²⁶ Quite regularly, principals hire agents to accomplish things the principals cannot or should not personally do. For instance, a layperson who wishes to pursue a lawsuit will hire a licensed lawyer. Lawyers can engage in the practice of law; non-lawyers generally cannot (and should not even represent themselves). A would-be document signer cannot notarize his/her signature,²⁷ so a notary is retained to do so.

Some authorities on the subject of notarization have firmly

New Jersey in August of 1997. Several of the author's colleagues and friends assisted in the distribution and collection of the surveys, and their cooperation is genuinely appreciated. They are Klint Bruno, Lisa Fisher and Brian Scanlon.

21. A total of 126 notaries participated, with 43 of them stating that notaries are agents of document signers, and 77 of them disagreeing with that conclusion (six did not respond).

22. A total of 172 law students participated, with 62 of them opining that notaries act as agents of document signers, but 107 of them believing to the contrary (three did not respond).

23. A total of 38 lawyers participated, with 4 of them concluding that notaries serve as agents of document signers, whereas 34 of them disagreed.

24. Of the total of 336 individuals surveyed, 109 of them said that notaries are agents of document signers, and 218 of them said notaries are not agents of signers (nine did not respond).

25. See *infra* notes 60-63 and accompanying text for a more complete discussion of this issue.

26. See RESTATEMENT (SECOND) OF AGENCY § 2(2) (1958) ("A servant is an agent employed by a master to perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right to control by the master."). See *infra* note 33 for a definition of "agency."

27. It should be noted that some documents can be self-authenticated, without the need for a notarization. See 28 U.S.C. § 1746 (allowing for documents to be self-authenticated if done so under the penalties of perjury). See, e.g., Thomas W. Tobin, *The Execution 'Under Oath' of U.S. Litigation Documents: Must Signatures Be Authenticated?*, JAPAN INS. NEWS, July-Aug., 1995, at 34 (discussing the self-authentication of documents).

concluded that the notary cannot be the agent of document signers.²⁸ In his book *The American Notary Manual*, Richard B. Humphrey wrote, "Officially a notary public is the agent of the public only; he is not and can not be officially, as a notary public, the agent of any individual."²⁹ A few early cases declared that notaries were not agents of any of the entities involved. Notaries were held, while in the performance of their official acts, not to be agents of their employers.³⁰ Additionally, notaries were held not to be agents of the parties for whom notarizations were performed.³¹ It was sometimes observed that notaries could not serve as agents of any parties to notarized documents because notaries were required to be completely disinterested public officials, whereas agents would necessarily be retained to represent and further the interests of their principals.³² The author disagrees with that former conclusion and believes that notaries act as limited-purpose agents for document signers.

Importantly, an agent acts subject to the control, or at least the right of control, of the principal.³³ Most who hold the view that notaries are not agents of the individuals for whom they perform

28. See 66 C.J.S. *Notaries* § 6(a) (1950) ("The mere employment of a notary public to perform a notarial act does not constitute him the agent of the person paying him . . ."); JOHN, *supra* note 10, at 33 ("The notary is not an agent so as to be disqualified from being a witness, when one of the parties is deceased, as where a statute excludes the testimony of agents of deceased persons. . .").

29. HUMPHREY, *supra* note 3, at 14.

30. See, e.g., *May v. Jones*, 14 S.E. 552, 553 (Ga. 1891) (finding an employer-bank not liable for negligence of employee-notary because notary was public officer "under a higher control than that of a private principal"); *Cason v. Cason*, 93 S.W. 89, 93 (Tenn. 1905) (holding a notary employed to represent a firm in real estate transaction was not the firm's agent "although he was endeavoring to serve their interests in this matter").

31. *Cason*, 93 S.W. at 95 (holding as a matter of law that the notary "could not have been the agent of either party," including the signer of the document). See also *Borchers v. Barckers*, 138 S.W. 555, 556 (Mo. App. 1911) (determining that the notary was not "acting as agent for any party" in procuring assignment of an insurance policy which was notarized); *Ely Walker Dry Goods Co. v. Smith*, 160 P. 898, 899 (Okla. 1916) (declaring a notary not to be an agent of either party to the transaction including the signer; the notary "was employed solely to take the acknowledgment").

32. See *Cason*, 93 S.W. at 95 (holding that the notary could not have been an agent of the parties to the transaction, for the notary was a public official required to be "wholly disinterested"); cf. *Ely Walker*, 160 P. at 900 (ruling that the notary "in the exercise of his quasi public functions doubtless owed each of [the parties] the duty to see that the grantors understood the nature and contents of the mortgage").

33. See RESTATEMENT (SECOND) OF AGENCY § 1(1) (1958) ("Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act."). See *supra* note 26 for a definition of "servant."

notarizations conclude those individuals cannot exert control over notaries because notaries serve as public officers. The point seems simple—a private party cannot lawfully control a public official. Public officers have an independent basis for their authority arising from their public commissions, and it is sometimes said that notaries act as independent parties in performing notarizations.³⁴ But this control element in the law of agency does not require that the principal have absolute power over every detail of the agent's functions.³⁵ Thus, for example, an attorney or accountant obviously would not be obliged to violate a statute simply because directed to do so by the client. The key feature of the required control is that the principal must possess the ultimate authority in one form or another over the retention and discharge of the agent, along with the ability to determine the essential particulars of the activities to be carried out.³⁶ It would, therefore, seem that a notary could be a limited-purpose agent of a document signer.³⁷ A limited or special agent is one with a very narrow field of authority, such as a stock broker or real estate broker, who ordinarily conducts just one transaction or one kind of transaction for the principal.³⁸

34. A number of the survey respondents expressed the view that notaries act as independent parties. But, an analogy could be made to the relationship between guardian and ward, in which the guardian as agent of the ward (who is the principal) obtains authorization to serve from the state.

Although a guardian may be an agent in some respects, he is not merely an agent. The relation of guardian and ward is essentially different from the relation of principal and agent in that, while the guardian acts for and on behalf of his ward, he does not derive his authority so to act from the ward, while the agent derives his authority from his principal: 2A C.J.S. *Agency* § 13 (1972).

35. See FLOYD R. MECHEM, *OUTLINES OF THE LAW OF AGENCY*, at 5 (4th ed. 1952) ("The statement that the servant is subject to the control of the master does not mean that the master must stand by constantly and observe and supervise the work; it means merely that the relation presupposes a right on the part of the master to have the work performed in such manner as he directed.").

36. Unfortunately, as to lawyers who work as full-time in-house counsel for corporations and who have been directed by corporate executives to engage in unlawful activity, the law has regularly permitted those attorneys to be discharged for refusing to undertake the illegal activity and has denied those attorneys a cause of action for wrongful termination or retaliatory discharge. Michael L. Closten & Mark E. Wojcik, *Lawyers Out In The Cold*, 73 A.B.A.J., Nov. 1987, at 94; See generally Don J. DeBenedictis, *Fired In-House Counsel May Sue in California*, 80 A.B.A.J., Oct. 1994, at 24; John J. Kobus, Jr., Comment, *Establishing Corporate Counsel's Right To Sue For Retaliatory Discharge*, 29 VAL. U.L. REV. 1343 (1996).

37. See HAROLD G. REUSCHLEIN & WILLIAM A. GREGORY, *THE LAW OF AGENCY AND PARTNERSHIP*, at 15 (2d ed. 1990) ("It is difficult, if not impossible, to make a clearly defined distinction between general agents and special agents."). See *infra* note 41 and accompanying text for a discussion of agents.

38. See RESTATEMENT (SECOND) OF AGENCY § 3(2) (1958) ("A special agent

Moreover, there are many instances of the law recognizing licensed persons as agents subject to some degree of control by principals who do not hold such licensures.³⁹ Doctors and dentists are agents of their patients. Attorneys, certified public accountants and real estate brokers serve as agents of their clients. Licensed private detectives act as agents of the clients who hire them.⁴⁰ Likewise, it would seem that a notary could be an agent.⁴¹

Usually, under the law of agency, agents are not supposed to serve more than one principal at a time. An agent is to be absolutely loyal to the principal.⁴² The obvious risk is that otherwise a dual agent would often have divided and conflicted loyalties. However, many agents work in positions such that they commonly serve two or more principals. Lawyers, doctors, certified public accountants, dentists and real estate brokers serve both the firms or clinics with which they are associated as well as the clients or patients who retain them. Indeed, lawyers, doctors, certified public accountants, dentists and real estate brokers each becomes the agent of possibly hundreds of clients or patients during overlapping periods of time. Hence, it would seem that notaries could also become limited-purpose agents of document signers.⁴³

Numerous people who participated in the author's survey about notaries commented that notaries serve as witnesses, not as agents.⁴⁴ In addition, guidebooks for notaries regularly describe

is an agent authorized to conduct a single transaction or a series of transactions not involving continuity of service."). "The general agent is an agent authorized to conduct a series of transactions involving continuity of service. . . . The test, invariably, is continuity of the agent's service rather than the breadth of his power." REUSCHLEIN & GREGORY, *supra* note 37, at 15.

39. The principals would have the authority to retain the licensed agent in the first place, to set the terms of the employment, and to discharge the agent. See *infra* notes 40-41 and accompanying text for a further discussion of the relationship between principals and agents.

40. See MECHEM, *supra* note 35, at 36-38, 48 (citing as examples of agents—salesmen, real estate brokers, business managers and attorneys); REUSCHLEIN & GREGORY, *supra* note 37, at 17 ("In that group of independent contractors who are agents one finds attorneys, auctioneers, brokers, factors and like persons who conduct transactions for the principal.").

41. See MECHEM, *supra* note 35, at 38 (concluding that as to the relationship of real estate brokers and their seller-clients, "[i]t comes very close to being no agency at all," for it is "[c]ertainly to a very limited extent").

42. See RESTATEMENT (SECOND) OF AGENCY § 387 (1958) ("Unless otherwise agreed, an agent is subject to a duty to his principal to act solely for the benefit of the principal in all matters connected with his agency.").

43. See RESTATEMENT (SECOND) OF AGENCY § 3 cmt. b (1958) (stating that "one who is a general agent with respect to some matters may be a special agent with respect to a particular transaction"). See, e.g., MECHEM, *supra* note 35, at 6 (regarding the difference between general and special agents, "[p]lainly it is a difference in degree rather than a difference in kind"); REUSCHLEIN & GREGORY, *supra* note 37, at 15 (discussing the difficulty in distinguishing between general and special agents).

44. The original copies of the surveys are on file with the author. See *su-*

notaries as impartial witnesses.⁴⁶ Some witnesses, like notaries, may be asked to attest to the identity of document signers, to the competency of document signers, to the comprehension of documents by the signers, and/or to the willingness of document signers.⁴⁶ But, even a witness could be a limited-purpose agent of a document signer. Plenty of witnesses in the real world are not strangers serving gratuitously in witnessing for document signers. Witnesses, like notaries and agents, may be known to the parties they serve. Witnesses, like notaries and agents, may be compensated for their services, or at least reimbursed for travel costs and time.⁴⁷ Furthermore, witnesses, like notaries and agents, may serve a variety of functions. Some witnesses attest to wills, or to health care powers of attorney, or to contracts or to other kinds of documents—with varying legal standards of legitimacy governing the signers.⁴⁸ Notaries may or may not be asked to administer

pra note 20. See also *Preliminary Draft Notary Public Code of Ethics*, *supra* note 7, at Guiding Principle II (stating that “[t]he Notary shall act as an impartial witness . . .”).

45. See IOWA NOTARIES PUBLIC HANDBOOK 6 (5th ed.) (“The notary’s duties are confined to those of an impartial witness.”); NOTARY DEPT., MONTANA SECRETARY OF STATE, A GUIDE FOR NOTARIES PUBLIC PRACTICING IN MONTANA 1 (1995) (“A notary acts as an official, unbiased witness to the identity and signature of the person who comes before the notary . . .”); NOTARY DIV., NEBRASKA SECRETARY OF STATE, NOTARY PUBLIC REFERENCE GUIDE 2 (n.d.) (“Impartial Witness – The primary duty of a notary is to witness notarial writings and signatures.”).

46. There is a great deal of uncertainty about the duties of notaries, beyond the certain responsibility to identify document signers. There is some authority for the proposition that notaries should judge whether signers are competent to understand their documents, and freely sign them. See *Poole v. Hyatt*, 689 A.2d 82, 90 (Md. 1997) (holding that it is the notary’s duty to determine the signer’s willingness, understanding and capacity); *Ely Walker Dry Goods Co. v. Smith*, 160 P. 898, 900 (Okla. 1916) (declaring that the notary had the “duty to see that the grantors understood the nature and contents of the mortgage”); *Preliminary Draft Notary Public Code of Ethics*, *supra* note 7, at Guiding Principle III (“The Notary shall require the presence of each signer . . . and carefully screen each for identity, willingness and competence.”). But, there is much more support for the proposition that the sole function of the notary is to properly identify document signers. See *Butler v. Encyclopedia Britannica, Inc.* 41 F.3d 285, 293 (7th Cir. 1994) (“A notary’s function is simply to certify the validity of the signature . . .”); STATE OF NEVADA NOTARY HANDBOOK 16 (1995) (asserting that a notary is not obligated to determine that the signer understands what he or she is signing); *Closen & Bruno*, *infra* note 48 (commenting that 48 states do not require notaries to judge the competence or willingness of document signers).

47. That witnesses may know the parties to documents that are witnessed and may accept fees is quite clear. See 97 C.J.S. *Witnesses* § 45 (1957) (discussing the payment of expenses and witness fees); *Preliminary Draft Notary Public Code of Ethics*, *supra* note 7, at II-E-1 (“The Notary who is a salaried employee may notarize for any officer, executive, supervisor, co-worker, subordinate, client, or customer of the employing organization.”). See also *infra* note 56 and accompanying text.

48. See *Slorby v. Johnson*, 530 N.W.2d 307, 309-10 (N.D. 1995) (setting out

oaths to document signers, depending upon the kind of notarizations sought.⁴⁹ Notaries, agents, and witnesses are retained to provide a beneficial service. In the case of document signing, they are retained to provide a beneficial act for the document signers. Finally, the duration of the service of notaries and witnesses may be, and ordinarily is, quite brief. Yet, the brevity of an agency does not preclude its short existence.

For those who contend that notaries are akin to witnesses, a fascinating question is whether a notary can, therefore, serve in two positions on a single document which requires both witnessing and notarization? A few statutes prohibit this dual activity, while most laws do not address the question.⁵⁰ Caselaw has not quite considered this precise issue.⁵¹ The author is persuaded by the argument that a notary cannot serve both functions because "a signature of any kind appearing on the document makes the signer a party to the transaction Therefore, if it is the notary signing as a witness, that . . . constitutes a conflict of interest which disqualifies a notary from serving as both"⁵² Hence, to analogize between a notary and a witness does not dispose of the question of whether a notary becomes an agent of a document signer.

The fact is that notaries occupy a most peculiar place in government and business in this country. Notaries are said to be mere ministerial officials.⁵³ With more than four million of them,

the capacity standard for contracts, including real estate conveyances). *But see* Michael L. Closten & Klint L. Bruno, *To Judge, Or Not to Judge, Competence and Willingness*, AM. NOTARY, First Qtr. 1998, at 4 (arguing that notaries in 48 states do not have the duty to determine the competence or willingness of document signers). *See generally* *Lasche v. George W. Lasche Basic Profit Sharing Plan*, 111 F.3d 863 (11th Cir. 1997) (holding that the failure to obtain a notarization of a spouse's waiver of interest in a pension plan rendered it invalid); BLACK'S LAW DICTIONARY 1060 (6th ed. 1990) (defining a notarial will as "[a] will executed by the testator in the presence of a Notary Public and two witnesses").

49. In Illinois, for instance, the simplest notarization is to witness a signature, or to take an acknowledgment in an individual capacity, which do not require swearing of the signer. 5 ILCS 312/6-105(a)(d) (West 1996).

50. "May a notary serve as both a witness-signer and as a notary in the same transaction? . . . In a few states, the statutes address the question. In such states, the notary is specifically prohibited from serving as both a witness-signer . . . and as notary of that signature. However, most state notary laws are silent on the subject." *Witness Signatures and Notarizations*, NOTARY, July-Aug. 1997, at 1, 2.

51. The closest case decisions have determined that, when a notary executes a notarization on a document which did not require notarization but which did require witnessing, the notary's signature amounts to an effective witness attestation. *Matter of Estate of Martinez*, 664 P.2d 1007 (N.M. App. 1983); *In re Douglas' Will*, 83 N.Y.S.2d 641 (Surrogate's Court 1948).

52. *Witness Signatures and Notarizations*, *supra* note 50, at 1, 2. "The legal experts are divided on the answer to the question." *Id.*

53. *See* HUMPHREY, *supra* note 3, at 8 ("The official duties of a notary public are said to be of ministerial or clerical nature; that is to say, that they do

they are by far the most numerous of all public officers.⁵⁴ Unlike most other public officials, notaries do not serve full-time in their official capacity. It is a sideline to their principal positions.⁵⁵ Unlike any other contemporary public officer, the fees paid for their services are paid directly to the notaries (with the exceptions of those instances where the fees are paid to the employers of notaries or where fees are not assessed at all).⁵⁶ Citizens do not pay fees to county clerks, aldermen, police officers and other government officials themselves. Further, notaries while in the performance of their official duties have been held by many of the modern legal decisions to be agents for vicarious liability purposes of their non-governmental employers,⁵⁷ and have been said to be agents of the state (or the citizenry) which they serve.⁵⁸ Therefore, without undermining any feature of their role as ministerial public officials and without violating any principle of the law of agency in this unique situation, notaries should be recognized as special or limited-purpose agents of the document signers for whom they perform notarizations, for that characterization appropriately limits and accurately describes the realities of the notaries' service.

B. Notaries as Fiduciaries

Turning to the question of whether notaries act as fiduciaries of document signers for whom notarizations are performed, the survey previously referred to showed considerable differences of

not involve the element of judicial discretion.”).

54. Berton, *supra* note 6, at A1. See also HUMPHREY, *supra* note 3, at 9 (“The functions of the Notary’s office are called into action throughout the country far more often than those of any other public officer.”); Gnofo, *supra* note 7, at 1064 (noting that “[t]here are so many notaries [in this country] that, if you laid all of them together head to toe, their length would span 4,687 miles, or twice the diameter of the moon”).

55. See HUMPHREY, *supra* note 3, at 15 (remarking that “[t]he office of notary public [is] everywhere a ‘sideline’ rather than a principal occupation . . .”). “The contemporary office of notary public in the U.S. is not structured so that the typical notary can establish an independent, full-time practice. A notary public will typically serve the public in connection with another profession.” ALFRED E. PIOMBINO, NOTARY PUBLIC HANDBOOK 29 (1996).

56. See 51 C.J.S. *Justices of the Peace* §§ 15-17 (1967) (noting that under the old practice, justices of the peace were sometimes allowed to retain as their compensation the sums obtained through fines, fees and costs in the cases tried before them); PIOMBINO, *supra* note 55, at 27 (asserting that “a notary public is entitled to collect a fee in accordance with the legal limit, as he deems appropriate . . . collection of a fee is not legally required, but encouraged”). See also, JOHN, *supra* note 10, at 45 (perceiving that “a notary who hesitates to charge [fees, as fees are assessed by other officers] lowers the dignity of his office”).

57. Indeed, there is at least one case in which the employer argued that its employee-notary acted as its agent. *Kip v. People’s Bank & Tr. Co.*, 164 A. 253, 253-54 (N.J. 1933).

58. See *supra* note 2 and accompanying text.

views.⁵⁹ About 26% of the notaries queried concluded that notaries act as fiduciaries of document signers, while about 58% believed to the contrary.⁶⁰ Some 31% of the law students opined that notaries become fiduciaries, but about 67% felt otherwise.⁶¹ Only 8% of the attorneys expressed the view that notaries serve as fiduciaries, while approximately 92% disagreed with that conclusion.⁶² The overall result was that just 27% of the more than 330 individuals questioned held the view that notaries become fiduciaries of the parties for whom notarizations are conducted.⁶³ Once again, it is troublesome that such a vital point has not more clearly been resolved. The author's view is that notaries do indeed become fiduciaries of document signers for whom notarizations are executed, but that only a few fiduciary duties attach under the notarial circumstances.

Fiduciary duties arise as the result of one or more parties entrusting property or contract rights to a fiduciary, or as the result of parties entering into a confidential relationship (in which case each party might become a fiduciary of the other).⁶⁴ A fiduciary relationship is one exemplified by trust and confidence being reposed by one party (the entrustor) in another party, the fiduciary, who accepts such responsibilities.⁶⁵ Document signers certainly entrust information, sometimes valuable and/or personal information (such as one's name, address and signature, and perhaps one's thumbprint) to notaries, especially notaries who maintain journals of notarial activities.⁶⁶ A fiduciary is like a trustee, one who is to

59. See *supra* note 20 (discussing the surveys being referred to in the above text).

60. Of the 126 notaries who participated, 33 concluded notaries serve as fiduciaries of document signers, while 73 disagreed with that conclusion (twenty did not respond).

61. Of the 172 law students who participated, 54 concluded notaries serve as fiduciaries of document signers, while 115 disagreed with that conclusion (three did not respond).

62. Of the 38 lawyers who participated, 3 concluded notaries serve as fiduciaries of document signers, while 35 disagreed with that conclusion.

63. Of the total of 336 individuals surveyed, 90 of them concluded that notaries serve as fiduciaries of document signers, but 223 of them disagreed (twenty-three did not respond).

64. See BLACK'S LAW DICTIONARY 626 (6th ed. 1990) (defining a fiduciary relationship as "[a] relation subsisting between two persons in regard to a business, contract, or piece of property, or in regard to the general business or estate of one of them, of such a character that each must repose trust and confidence in the other and must exercise a corresponding degree of fairness and good faith."); REUSCHLEIN & GREGORY, *supra* note 37, at 11 ("A fiduciary is one who acts primarily for the benefit of another.").

65. See BLACK'S LAW DICTIONARY 626 (6th ed. 1990) (declaring that a fiduciary relation "exists where there is special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to interests of one reposing the confidence.").

66. Deborah M. Thaw, *Journal Thumbprinting Is 'The Notary Public's*

act primarily for another's benefit with respect to a particular undertaking.⁶⁷ A fiduciary must exercise scrupulous good faith and candor to protect the interests of the party or parties served.⁶⁸ As Judge Benjamin Cardozo wrote in perhaps the most famous passage describing fiduciary duties:

Many forms of conduct permissible in a workaday world for those acting at arm's length are forbidden to those bound by fiduciary ties. Not honesty alone but the punctilio of an honor most sensitive is the standard of behavior. There has developed a tradition about this standard that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity.⁶⁹

The circumstances surrounding the fiduciary relationship, especially the understandings of the parties and the nature of the transactions to be undertaken, will determine precisely which of the many fiduciary obligations apply in a particular setting, although it would seem that the fiduciary duties to act with loyalty and to act with reasonable skill and care will always apply.⁷⁰

Furthermore, Professor Frankel's observation, cited at the beginning of this section, cannot be forgotten. The law of fiduciaries is not exact and fixed; it is developing and expanding.⁷¹ As it should be. We have witnessed a time of declining ethics in this country particularly in the last two decades,⁷² and the profession of notary public has not been immune to the downward spiral toward the lowest common denominator of behavior. Indeed, the National Notary Association characterized it as a "crisis of responsibility."⁷³ Professor Frankel went on to say, "[F]iduciary law is becoming more important as it responds to basic changes in our society.

Strongest Weapon Against Fraud, NOTARY BULL., Aug. 1995, at 3. See also *Thumbprinting: The Notary's Best Anti-Fraud Weapon Now*, NOTARY BULL., June 1995, at 1 (asserting that a thumbprint would best prevent fraud).

67. See *County of Cook v. Barrett*, 344 N.E.2d 540, 545 (Ill. App. Ct. 1976) ("An agent is fiduciary to his principal and the relation is treated generally the same, and with virtually the same strictness, as that of trustee and beneficiary."); REUSCHLEIN & GREGORY, *supra* note 37, at 11 (asserting that "executors and administrators of estates, guardians, trustees and directors of corporations as well as agents" are all fiduciaries).

68. See REUSCHLEIN & GREGORY, *supra* note 37, at 11 (stating that fiduciaries "owe . . . duties of loyalty to their beneficiaries. Their obligation is to act only in the interest of their beneficiaries . . .").

69. *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928).

70. See *F.G. v. MacDonell*, 696 A.2d 697, 704 (N.J. 1997) (citing Restatement (Second) of Trusts §§ 170, 174 (1959) which states that "[t]he fiduciary's obligations to the dependent party include a duty of loyalty and a duty to exercise reasonable skill and care").

71. See Frankel, *supra* note 19 and accompanying text. See also GEORGE BOBERT, *THE LAW OF TRUSTS AND TRUSTEES* § 481 (2d ed. 1978) ("The exact limits of the term 'fiduciary relation' are impossible of statement.").

72. See NEBRASKA SECRETARY OF STATE, *supra* note 45, at 1 (noting that "[c]lasses of forgery and false identification are on the increase in our society").

73. *The Crisis of Responsibility*, NAT'L NOTARY MAG., May 1995, at 11.

Courts, legislatures, and administrative agencies increasingly draw on fiduciary law to answer problems caused by these social changes.⁷⁴ By way of example, the law is not settled on the issue of whether members of the clergy occupy fiduciary positions toward parishioners whom they counsel. Thus, in the context of numerous cases asserting inappropriate sexual relations between members of the clergy and parishioners involved in pastoral counseling, a few courts have declined to recognize a fiduciary relationship.⁷⁵ However, the slightly greater weight of case authority has recognized a fiduciary duty owed by clergy to their parishioners in counseling.⁷⁶

Although agents always become fiduciaries of the principals whom they serve, there are other ways to create fiduciary relationships.⁷⁷ As examples, the executor or executrix becomes the fiduciary of the heirs of an estate, and a trustee becomes the fiduciary of the beneficiaries of a trust.⁷⁸ Thus, whether or not a notary becomes a limited-purpose agent of those for whom notarizations are executed, a notary may still be regarded as serving in a fiduciary relationship with document signers. The central question should be whether it is intended and expected that certain fiduciary obligations will attach to notaries while in the performance of their official duties.⁷⁹

One category of fiduciaries is especially worthy of note here—the public official. It is commonly stated that public officials act as

74. Frankel, *supra* note 19, at 797. See also, e.g., *MacDonell*, 696 A.2d at 700 (allowing a cause of action for breach of fiduciary duty to proceed, despite the fact that a cause of action for clergy malpractice was precluded).

75. See, e.g., *Schmidt v. Bishop*, 779 F. Supp. 321, 325-26 (S.D.N.Y. 1991) (deciding the case regardless if any fiduciary duty exists between the parishioner and the clergy); *Scheiffer v. Catholic Archdiocese of Omaha*, 508 N.W.2d 907, 912 (Neb. 1993) (noting the constitutional difficulties in determining if a fiduciary duty exists between the parishioner and the clergy); *Strock v. Pressnell*, 527 N.E.2d 1235, 1243 (Ohio St. 1988) (disregarding whether there is a fiduciary relationship between the parishioner and the clergy because damages cannot be awarded even if such a relationship does exist); *Bladen v. First Presbyterian Church*, 857 P.2d 789, 795-96 (Okla. 1993) (noting the constitutional difficulties as well).

76. See *Sanders v. Casa View Baptist Church*, 898 F. Supp. 1169 (N.D. Tex. 1995); *Moses v. Diocese of Colorado*, 863 P.2d 310 (Colo. 1993); *F.G. v. MacDonell*, 696 A.2d 697, 702-03 (N.J. 1997) (finding a fiduciary duty to exist between the parishioner and the clergy); *Adams v. Moore*, 385 S.E.2d 799 (N.C. App. 1989); *Erickson v. Christenson*, 781 P.2d 383 (Or. App. 1989).

77. See *County of Cook v. Barrett*, 344 N.E.2d 540, 551 (Ill. App. Ct. 1976) (McGlooin, J., specially concurring) (“A fiduciary relationship may be created in many ways; an agency is but one relationship which creates fiduciary duties.”).

78. See *supra* note 67 and accompanying text.

79. See RESTATEMENT (SECOND) OF AGENCY § 376 (1958) (“The existence and extent of the duties of the agent to the principal are determined by the terms of the agreement between the parties . . .”).

fiduciaries of the public they serve.⁸⁰ This should be the rule, because public officers are agents of their governmental entities and of the people they represent. As a matter of public policy, public officers should be expected to act for the interest and benefit of the citizenry, to act always in good faith, and to act where appropriate to protect the confidentiality and privacy of the people. Again, the central question is whether notaries, as public officers, are thereby also bound to honor fiduciary responsibilities to signers for whom they notarize?

Of course, the notary statutes do not expressly address whether notaries occupy fiduciary positions. Some case decisions seem to announce that notaries, like other public officials, owe fiduciary obligations to the general public. To illustrate, it is sometimes reported that notaries occupy positions of public trust.⁸¹ On the other hand, cases and notary authorities have occasionally either reached the contrary result on the distinct issue of whether notaries serve as fiduciaries of document signers or have contributed to the uncertainty about the matter.⁸² Indeed, one recent trial court opinion concluded, "No duty, either to the public or to the signatories of the notarized . . . documents, arises from an individual's role as notary public."⁸³ What a shortsighted viewpoint.

As a matter of sound business policy and public policy, notaries should be held to relevant fiduciary standards. Even the parties to contracts owe obligations of good faith and fair dealing to one another. Under the Uniform Commercial Code, for instance, "Every contract . . . imposes an obligation of good faith in its performance or enforcement."⁸⁴ Further, the Code mandates that merchants must observe "reasonable commercial standards of fair dealing in the trade."⁸⁵ As noted, the notary has often been said to

80. See *Barrett*, 344 N.E.2d at 545 ("At all times and for all the transactions pertinent to the complaint Barrett was the fiduciary of the people of Cook County. As an elected public official [county clerk] he held a position of the highest public trust.").

81. See *Farm Bureau Fin. Co. v. Carney*, 605 P.2d 509, 514 (Idaho 1980) (finding that "the notary [is] a public officer in a position of public trust"); *Handing Your Notary Journal to the Government for Safe-Keeping: It May Not be as Safe as You Think*, NOTARY, Sept.-Oct. 1997, at 4, 5 ("The notary holds a very high public trust.").

82. As already observed, the cases and authorities have often suggested that notaries are not agents of document signers – a primary method of creating fiduciary relationships. See *supra* notes 28-32 and accompanying text; *infra* note 83 and accompanying text.

83. *Scanlan v. W.C. Canniff & Sons, Inc.*, No. Civ. A. 94-6722-C, 1996 WL 490170, at *4 n.6 (Mass. Aug. 29, 1996) (citing *New England Bond & Mortgage Co. v. Brock*, 169 N.E. 803, 804 (Mass. 1930) which is not a case addressing fiduciary duty, but rather a case addressing, and rejecting, the reasonable care duty owed by a notary to a third party who relies upon a notarization).

84. U.C.C. § 1-203 (1996).

85. U.C.C. § 2-103(1)(b) (1996).

occupy "a position of public trust."⁸⁶ It makes "good business sense" to hold notaries to fiduciary standards.⁸⁷ Such trust should be owed not only to the general public but also to document signers. Certainly, there are some features of the tasks of notaries which by their nature warrant guidance by the wisdom of fiduciary standards.

The Code of Ethics promulgated by the American Society of Notaries in May of 1980 declares that notaries must adhere to a standard of conduct which includes in part:

To not betray the confidence of any individual appearing before [the notary] . . . To never divulge the contents of any document nor the facts of execution of that document without proper authority . . . [and] . . . To exercise extreme care to insure that the notarial . . . records are kept in a safe place and not used by any other person.⁸⁸

Similarly, the Preliminary Draft of the Notary Public Code of Ethics of the National Notary Association, released in March of 1997, expresses the view that notaries must protect the confidentiality of document signers and notarized documents. It states in part as follows: "The Notary shall respect the privacy of each signer and not divulge personal or proprietary information disclosed during execution of a notarial act."⁸⁹ The duty to maintain the confidences of their entrustors is certainly one of the duties generally owed by fiduciaries.⁹⁰ Hence, it would appear that the two largest national notary membership organizations have impliedly endorsed the proposition that notaries are bound by certain

86. *Gombach v. Department of State*, 692 A.2d 1127, 1132 (Pa. Commw. Ct. 1997) (referring to the office of notary as a "position of public trust"). See *supra* notes 73, 81 and accompanying text.

87. One perspective suggested:

Ethics initiatives thus have become a vital factor in corporate management. They simply make good business sense . . . Perception is reality; if others perceive your industry (or organization) as ethical, they will treat it more favorably . . . As the business sector changes at an ever-increasing rate, the only true constants are the values and principles the industry (or the organization) holds.

Michael G. Daigneault, *Why Ethics?*, Ass'n Mgmt., Sept. 1997, at 29, 30.

88. CODE OF ETHICS OF THE AMERICAN SOCIETY OF NOTARIES (May 4, 1980). Actually, over the years two very similar versions of this Code have appeared, both bearing the same date.

89. See *Preliminary Draft Notary Public Code of Ethics*, *supra* note 7, at Guiding Principle IX; *infra* note 244 and appendix.

90. See RESTATEMENT (SECOND) OF AGENCY § 395 (1958) ("Unless otherwise agreed, an agent is subject to a duty to the principal not to use or to communicate information confidentially given him by the principal or acquired by him during the course of or on account of his agency or in violation of his duties as agent, in competition with or to the injury of the principal . . .").

fiduciary obligations.⁹¹ Otherwise, what is the source of these notarial responsibilities? The statutes and caselaw on notaries do not expressly impose them, nor does the law of contracts.⁹²

It seems nearly indisputable that notaries should, at the very least, owe a fiduciary responsibility to honor the confidentiality of the parties and their documents. This is so although the duty to protect confidential information about document signers is a duty which becomes most relevant and most important after the short relationships between notaries and document signers have ended.⁹³ After all, the main task of the notary in the notarization of signatures on documents involves accessing information about document signers and their papers. Although notaries ordinarily should not have occasion to learn the details of the contents of the documents (both documents of identification and transactional documents) with which they deal, there may be great variation from notarization to notarization. In fact, in cases involving signers who are blind or who speak other than English or other than the languages of their documents, state notary laws usually require notaries to insure that the documents are read to, or explained to, the signers.⁹⁴ Notaries have been advised "to skim the document before notarizing" in order to determine whether the document is incomplete and should be refused notarization.⁹⁵ Under such circumstances, notaries will undoubtedly be privy to details. Document signers should be entitled to expect that public officials performing notarizations will not reveal anything about the signers or the documents, unless permitted to do so by the entrustors or lawfully compelled to do so. Notaries should not even divulge the fact of a particular notarization. Included within this

91. In fairness to those organizations, of which the author is a member, neither group would really appear to support the author's positions that a notary serves as an agent of document signers or as a fiduciary of document signers.

92. Indeed, in the law of contracts, the two parties to a simple transaction are typically thought of as more akin to adversaries than fiduciaries—and that is so often how they end up in legal battles over the issues of contract formation and performance. See generally GERALD E. BERENDT ET AL., *CONTRACT LAW AND PRACTICE* (1998) (discussing the basic principles of contract law).

93. See RESTATEMENT (SECOND) OF AGENCY § 396 (1958) ("Unless otherwise agreed, after the termination of the agency, the agent: . . . (b) has a duty to the principal not to use or to disclose to third persons, . . . in competition with the principal or to his injury . . . confidential matters . . .").

94. See 5 ILCS 312/6-104(e) ("A notary public shall not take the acknowledgment of any person who is blind until the notary has read the instrument to such person."). See also 66 C.J.S. *Notaries* § 6(c) ("With respect to contracts, an instrument executed by the parties before a notary in the presence . . . of three witnesses if a party be blind, is an 'authentic act,' and is full proof of the agreement contained in it.").

95. *Incomplete Documents*, NAT'L NOTARY MAG., Jan. 1995, at 18.

confidentiality responsibility is the duty to protect the security of the notary journal, which contains information about each notarization.⁹⁶ Admittedly, the fleeting nature of notarial service to particular document signers is such that this duty of confidentiality really arises after the notarization is performed, which is after the brief agency relationship has ended. Although such circumstances seem odd in the law of agency and the law of fiduciary obligations, such situations are not unheard of and not without precedent.

The equally important companion fiduciary obligation of notaries is the duty not to appropriate specific information learned in the course of their official activities for self-dealing or personal gain. Fiduciaries generally owe a duty of loyalty to their entrustors that prohibits competition with the entrustors and that prohibits self-dealing by the fiduciaries at the expense of the entrustors.⁹⁷ These duties attach during the life of the fiduciary relationship and typically are extinguished with the termination of the relationship.⁹⁸ Except, there is special concern for, and thus special treatment of, the duties of fiduciaries who acquire specific confidential information (as opposed to generalized knowledge or information generally available to anyone) in the course of service to their entrustors, even after termination of the brief relationships between notaries and document signers.⁹⁹ The Restatement 2d of Agency covers this point about the lasting nature of these particular obligations not to disclose and not to compete, in part, as follows:

Unless otherwise agreed, after the termination of the agency, the agent:

96. The notary journal is often thought to provide nearly complete protection to the notary who meticulously maintains it. "The notary is much more protected when a record book is maintained." *Should Record Books Be Required?*, AM. NOTARY, July-Sept. 1997, at 4. While that is generally true, the danger can be that the journal, containing confidential information about notarizations, may be misplaced, lost, stolen, or appropriated by someone other than the notary-owner. California has recently become the first state to require by statute that notary seals and journals be kept under lock and key to prevent their unauthorized access and misuse. *Landmark Law Mandates Protection of Journal, Seal*, NOTARY BULL., Oct. 1997, at 13.

97. See generally *Funk v. Tift*, 515 F.2d 23 (9th Cir. 1975); *Monotronics Corp. v. Baylor*, 436 N.E.2d 1062 (Ill. App. Ct. 1982); *Desfosses v. Notis*, 333 A.2d 83 (Me. 1975).

98. See MICHAEL L. CLOSEN, AGENCY, EMPLOYMENT, AND PARTNERSHIP LAW, at 145 (1984) ("Ordinarily, the fiduciary duties end on the expiration of the agency."). See, e.g., *Prudential Ins. Co. v. Crouch*, 606 F. Supp. 464 (S.D. Ind. 1985).

99. See *Chalupiak v. Stahlman*, 81 A.2d 577, 581 (Pa. Commw. Ct. 1951) (holding that the defendant breached his fiduciary duty some 14 months after the agency terminated when he purchased a client's property at auction having learned of a title defect during the fiduciary relationship).

(a) has no duty not to compete with the principal;

(b) has a duty to the principal not to use or to disclose to third persons, on his own account or on account of others, in competition with the principal or to his injury, trade secrets, written lists of names, or other similar confidential matters given to him only for the principal's use or acquired by the agent in violation of duty. The agent is entitled to use general information concerning the method of business of the principal¹⁰⁰

The comments to this portion of the Restatement emphasize the dual responsibilities imposed upon agents and fiduciaries to avoid disclosure and to avoid competition with specific confidential information, information of the sort notaries may encounter in their official work. "The duty of the former agent is not only not to compete with the principal by the unfair use of information, but also not to use such information to the principal's disadvantage, as where he [the agent] sells it to a third person, or gives it general circulation."¹⁰¹

The important distinction between the previously-described duty of confidentiality and this duty to avoid utilizing confidential information is that notaries might not have to disclose confidential information to others in order to make personal use or gain of it themselves. Curiously, neither of the ethics codes of the American Society of Notaries nor the National Notary Association expressly imposes this responsibility on the notary not to use information acquired in the course of the notarial service to compete with document signers.¹⁰² This conspicuous deficiency should be cor-

100. RESTATEMENT (SECOND) OF AGENCY § 396 (1958).

101. *Id.* § 396 cmt. (d).

102. Although a number of sections of these two codes of ethics deal with what appear to be fiduciary duties of notaries, this particular duty (about post-termination competition by use of confidential information learned during the course of notarial service) is not addressed. CODE OF ETHICS OF THE AMERICAN SOCIETY OF NOTARIES, *supra* note 88. This Code states that a notary has the following five duties:

To uphold the trust placed in me by the public I serve; . . . To not betray the confidence of any individual appearing before me; . . . To never divulge the contents of any document nor the facts of execution of that document without proper authority; . . . To not use the office of Notary Public as a means of financial gain, for myself or others, in any other business or profession; To exercise extreme care to insure that the notarial seal, stamp and records are kept in a safe place and are not used by any other person.

Id. See also *Preliminary Draft Notary Public Code of Ethics*, *supra* note 7, at Guiding Principle II ("The Notary shall act as an impartial witness and not profit or gain from any document or transaction requiring a notarial act."); *id.* at Guiding Principle IX ("The Notary shall respect the privacy of each signer and not divulge personal or proprietary information disclosed during execution of a notarial act.").

rected.¹⁰³

Another of the well-recognized fiduciary duties is the duty to advise the entrustor of relevant information that comes to the attention of the fiduciary in the course of the fiducial activities.¹⁰⁴ Notaries should bear this responsibility to document signers, because within the bounds of the law notaries should facilitate notarizations for document signers. If, for example, a notary is aware that the wrong kind of notarization and notarial certificate is being proposed, the notary should suggest the correct versions to the document signer.¹⁰⁵ If a document signer asks the notary what kind of certificate of notarization to employ or what notarial language to use, the notary should answer the question. If the notary determines that an incomplete document has been tendered for notarization, the notary should raise this concern so that the signer can complete the document prior to the notarization.¹⁰⁶ If the notary observes a mistake in the certificate of notarization, such as the signer signing in the wrong place or the wrong date having been inserted by the signer, the notary should draw the error to the attention of the document signer and have it corrected immediately.¹⁰⁷ Fiduciaries should fully and accurately advise

103. Besides the fact that this fiduciary duty not to compete is very important, it is especially significant for notaries who are supposed to be, above all else, honorable and above temptation. Notaries may be quite tempted to violate their trusted positions due to greed. The codes of ethics should address this point.

104. See RESTATEMENT (SECOND) OF AGENCY § 381 (1958) ("Unless otherwise agreed, an agent is subject to a duty to use reasonable efforts to give his principal information which is relevant to affairs entrusted to him and which, as the agent has notice, the principal would desire to have and which can be communicated without violating a superior duty to a third person."); REUSCHLEIN & GREGORY, *supra* note 37, at 11 ("[T]he agent fiduciary must communicate all information relevant to the transaction he is to perform to his principal.").

105. The absence of a notarization (including the absence of a certificate of notarization), the absence of the proper form of notarization, or the absence of material elements of a notarization or certificate can cause a document and an entire transaction to be defective and, thus, invalid. See *Holsapple v. McGrath*, 521 N.W.2d 711, 712 (Iowa 1994) (holding that a quitclaim "deed was defective because it failed to include the necessary notary form").

106. See *Incomplete Documents*, NAT'L NOTARY MAG., Jan. 1995, at 18 ("Notaries should remind all signers that signing and notarizing (incomplete documents) 'as is' is akin to signing a blank check in terms of potential for fraud and liability is"). The official state notary handbook for California states that "[n]otaries with doubts about the completeness of a document should ask the signers if it is incomplete." *Id.*

107. A mistake in the certificate of notarization or notary journal must be corrected immediately and contemporaneously during the notarization proceeding, or it will be too late. Once a notarization is performed, it cannot be corrected or canceled. Douglass M. Fischer, *Cancel a Notarization?*, NAT'L NOTARY MAG., Sept. 1995, at 12-13. The correct date of notarization may be critical to the validity, or invalidity, of a document and the transaction it rep-

their entrustors on matters within the professional expertise of the fiduciaries, and that includes notaries.

It must be noted that numerous notary authorities would disagree with the author, and oppose the notary's suggesting the form of notarization or notarial certificate. Those well-intentioned experts express the opinion that doing so causes the notary to engage in the unauthorized practice of law.¹⁰⁸ But, that is silly, and according to the Notary Law Institute, it is "pure superstition."¹⁰⁹ It amounts to an attenuated and overly cautious interpretation of the standards on the practice of law. By analogy, when a licensed certified public accountant advises a client on a financial issue

resents.

It should tactfully be explained to . . . individuals [who ask notaries to pre-date or post-date certificates of notarization] that it is a criminal act for a Notary knowingly to certify false information as true and correct. . . . The only date that may lawfully be written on a jurat or acknowledgment certificate is the date the signer appeared in person for the notarization.

Don't Certify Falsehood Regarding A Date, NOTARY BULL., June 1995, at 11. See also *Preliminary Draft Notary Public Code of Ethics*, *supra* note 7, at Guiding Principle IV-B-2 ("The Notary shall not knowingly issue a certificate for a notarial act which indicates a date other than the actual date on which the notarial act was performed.").

108. See Karla Elliott, *The Unlicensed Practice of Law*, AM. NOTARY, July-Sept. 1997, at 1 (suggesting that a notary cannot even show a document signer where to sign without engaging in the unauthorized practice of law, and admitting that while this view is "perhaps" a "little extreme," "you can never be too careful" in avoiding such unauthorized practice). See also MODEL NOTARY ACT § 3-106(a) (Nat'l Notary Ass'n 1984) ("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."); *Preliminary Draft Notary Public Code of Ethics*, *supra* note 7, at Guiding Principle VI ("The Notary shall act as a ministerial officer and never provide legal advice nor exercise unauthorized independent judgment."); *id.* at Guiding Principle VI-A-1 ("The Notary who is not an attorney, or a professional duly trained or certified in a pertinent field, shall not determine or prescribe the particular type of notarial act or notarial certificate required in a given transaction."); *Do Be Helpful But Not Too Specific*, NOTARY BULL., Feb. 1995, at 11 ("The helpful Notary might provide the answer to these common questions [of] where to go to get a certificate of authority or apostille ."). "But Notaries are cautioned not to be too specific in some of their directions." *Id.*

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

Perhaps the most commonly taught notary superstition concerns the selection and writing of notarial certificates. Some people and notary groups believe a notary is not authorized or 'qualified' to select notarial wording for a customer's transaction. Some go as far as to argue that a notary may not even write or correct errors in the notarial wording on the customer's transaction. The justification most commonly given is that the selection and preparation of a notarial certificate constitutes the 'unauthorized practice of law'.

Id. at 1.

covered by the tax code, the accountant has not engaged in the unauthorized practice of law.¹¹⁰ 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.¹¹¹ 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.

The author has found no legal case, nor any statutory provision, ever suggesting that a notary engages in the unauthorized practice of law by recommending or selecting the form or content of notarizations, certificates of notarization or notary journal entries.¹¹² Yet, there have been several reported cases of notaries being charged with the unlicensed practice of law.¹¹³ Most certainly, the notary should not advise about the contents of documents or complete any part of the documents for signers, unless the notary holds professional qualifications or licensure that separately authorizes the holder in the relevant professional field (such as law, health care, accountancy, real estate, banking, and the like).¹¹⁴ To conclude this point, not only is it not unlawful for a notary to advise document signers about notarizations, it is incumbent upon notaries to do so under notarial law and fiduciary law.

Of course, fiduciaries have the customary duty to obey the

110. See MODEL NOTARY ACT, *supra* note 108, at § 3-106(b) ("This section does not preclude a notary who is duly qualified in a particular profession from giving advice relating to matters in that professional field."). *But see* Florida Bar v. Fuentes, 190 So. 2d 748, 751-52 (Fla. 1966) (enjoining a notary-accountant from preparing corporate and commercial documents); *In re Skobinsky*, 167 B.R. 45, 50 (E.D. Pa. 1994) (forbidding a notary-paralegal from assisting in bankruptcy procedures).

111. *Fuentes*, 190 So. 2d at 751-52.

112. The author is not the only one who has researched this matter. "There have never been any court cases ruling a notary is unauthorized to select and prepare notarial certificates. Moreover, there are no state statutes prohibiting such a service by a notary." *The Truth About Your Legal Authority: Selecting Notarial Certificates*, *supra* note 109, at 2. There have never even been any reported court cases in which that extreme position has been asserted.

113. See, e.g., *Fuentes*, 190 So. 2d at 749 (enjoining a notary from practicing law); *Skobinsky*, 167 B.R. at 47 (charging a notary with filing bankruptcy claims).

114. See ROTHMAN, *supra* note 3, at 45 ("If the Notary, who is not an attorney, is asked to perform a notarial act that requires the preparation of, or the giving of advice in regard to 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*." (emphasis added)).

reasonable instructions of their entrustors.¹¹⁵ Translated to the notarial case, this duty has only minor application because document signers can request notarial services but must adhere to the law and honor the procedure employed by the notary. With the exception of application of the duty to act with reasonable care (which the statutes and caselaw on the tort accountability of notaries has clearly made applicable and which is noted in the next portion of this paper),¹¹⁶ the remaining fiduciary duties that can be so important in many other settings appear to have no application to notarial activities. As an illustration, the duty to account to the entrustor for money and property obtained in the course of the fiduciary service can be quite critical in situations where the fiduciary is actually charged with the task of paying the entrustor's money or delivering the entrustor's property to a third party, or with the task of collecting payment for the benefit of the entrustor from a third party.¹¹⁷ Cases abound in which agents have appropriated their entrustors' money or property.¹¹⁸ However, notaries do not act as intermediaries between parties for payment and collection purposes. As a second illustration, the fiduciary duty not to serve as a dual agent without the consent of both principals can be significant for the purpose of avoiding dual and conflicting loyalties, but seems to have no application to notarial activities.¹¹⁹ It is understood that the service of notaries is short-lived and that notaries may execute notarizations for multiple parties without any

115. See RESTATEMENT (SECOND) OF AGENCY § 385(1) (1958) ("Unless otherwise agreed, an agent is subject to a duty to obey all reasonable directions in regard to the manner of performing a service that he has contracted to perform.").

116. See *id.* at § 379(1) ("Unless otherwise agreed, a paid agent is subject to a duty to the principal to act with standard care and with the skill which is standard in the locality for the kind of work which he is employed to perform and, in addition, to exercise any special skill that he has.") And, of course, an agent has a contractual duty with a principal "to act in accordance with [any contractual] promise" made to the principal. *Id.* § 377.

117. See *County of Cook v. Barrett*, 344 N.E.2d 540, 545 (Ill. App. Ct. 1975) (involving a county official authorized to purchase materials and services).

118. See *Barrett*, 344 N.E.2d at 543 (involving an elected county official who acted as agent of county and accepted bribes, which was money he held in constructive trust for the county); *Defosses v. Notis*, 333 A.2d 83, 85 (Me. 1975) (involving an agent who appropriated nearly \$17,000 tendered by his principal to purchase land).

119. See RESTATEMENT (SECOND) OF AGENCY § 387 (stating that "unless otherwise agreed, an agent is subject to a duty to his principal to act solely for the benefit of the principal in all matters concerned with his agency"); *id.* at § 394 (stating that "unless otherwise agreed, an agent is subject to a duty not to act or to agree to act during a period of his agency for persons whose interests conflict with those of the principal in matters in which the agent is employed"). Notaries typically work at some full-time employment and serve as a notary as a side-line of their primary employment. See *supra* note 55 and accompanying text for a discussion of notaries and their employment.

conflict whatsoever.

In summary, notaries serve as agents and fiduciaries of the state that appoints them, and may serve as agents and fiduciaries of their employers. Importantly, notaries also serve as limited-purpose agents of document signers, and notaries become fiduciaries of those signers, at least as to certain of the fiducial obligations.

II. NOTARY LIABILITY AND VICARIOUS RESPONSIBILITY

*[T]he veil of "public officialdom" behind which the notary may seek to conceal his misdeeds is far too thin to afford protection.*¹²⁰

As public officers, should notaries be immune from liability for negligence in the performance of their official acts? Historically, public officers generally enjoyed tort immunity for their negligence, though not for their intentional misconduct.¹²¹ The question posed in a number of early cases was whether notaries should be treated the same way as other public officers.¹²²

The modern notary statutes almost universally expressly announce that notaries do indeed have personal legal accountability for misconduct, whether it takes the form of negligent or intentional misconduct.¹²³ The statutes which establish the liability of notaries for violating their standard of reasonable care vary from state to state, but not a single statute was found exempting notaries from liability for such misconduct.¹²⁴ To illustrate, the Model Notary Act provides, in two relevant sections, "A notary is liable to

120. J. Michael Gottschalk, Comment, *The Negligent Notary Public-Employee: Is His Employer Liable?*, 48 NEB. L. REV. 503, 526 (1969).

121. See *Kermit Constr. Corp. v. Banco Credito Y Ahorro Ponceno*, 547 F.2d 1, 3 (1st Cir. 1976) (outlining the policy behind tort immunity of public officials); PIOMBINO, *supra* note 55, at 26 ("Paralegals, secretaries, administrative assistants, and court reporters assigned to federal government legal offices who sometimes serve as notaries as part of their official government duties are considered protected from personal liability under United States Law."); ROTHMAN, *supra* note 3, at 53 ("A Notary being a ministerial officer is liable for his negligence regardless of intention, as distinguished from judicial officers who are liable only for their corrupt and intentional misconduct."). Undoubtedly the most recent case of notoriety on the subject involved the claim of immunity of President Bill Clinton in the Paula Jones sexual harassment case. *Jones v. Clinton*, 72 F.3d 1354, 1356 (8th Cir. 1996).

122. See *Transamerica Ins. Co. v. Valley Nat'l Bank*, 462 P.2d 814, 817 (Ariz. App. 1969) (interpreting Arizona's Constitutional and statutory provisions as affording notaries public official status); *Rainey v. Credithrift of America #5, Inc.*, 441 So. 2d 278, 282 & n.5 (La. App. 1983) (stating that notaries are public officials).

123. See JOHN, *supra* note 10, at 36-39 (discussing the individual liability of notaries). See, e.g., 5 ILCS 312/7-101 (West 1997); CAL. GOV'T CODE § 8214 (West 1992); IDAHO CODE § 51-118(1) (1994).

124. See NEV. REV. STAT. § 240.150(1) (1992); MO. ANN. STAT. § 486.355 (West 1987); W. VA. CODE § 29C-6-101 (1993) for further examples of statutes imposing liability on notaries for misconduct.

any person for all damages proximately caused that person by the notary's official misconduct in performing a notarization,¹²⁵ and "[r]ecovery of damages against a notary, surety, or employer does not require that the notary's official misconduct be the sole proximate cause of the damages."¹²⁶ In addition, the cases of recent vintage have quite regularly found notaries civilly liable for their own negligent and intentional misconduct.¹²⁷ Such cases have often held notaries personally liable for sums far in excess of any applicable mandatory notary bonds.¹²⁸ Hence, the quotation that introduced this section accurately reflects the contemporary view that the official status or "officialdom" of the notary is not sufficient to insulate the notary from legal liability.¹²⁹

The corollary inquiry is whether the notary's employer can be held vicariously liable for the notary's misconduct. To earn their livelihoods, most notaries serve as full-time or part-time employees in occupations other than the provision of notarial services.¹³⁰ Their notary functions ordinarily account for a small part of the activities engaged in while at their jobs. Their notary functions may or may not be part of their job descriptions. And, even if their

125. MODEL NOTARY ACT, *supra* note 108, at § 6-101(a).

126. *Id.* § 6-102.

127. See *First Bank of Childersburg v. Florey*, 676 So. 2d 324, 331-32 (Ala. Civ. App. 1996) (holding a notary liable for fraudulent notarization); *City Consumer Servs. v. Metcalf*, 775 P.2d 1065, 1069 (Ariz. 1989) (holding a notary liable for negligently notarizing a forged quitclaim deed); *Biakanja v. Irving*, 320 P.2d 16, 18-19 (Cal. 1958) (holding a notary liable for negligently failing to have a will properly attested). See generally John D. Perovich, Annotation, *Liability of Notary Public or His Bond for Negligence in Performance of Duties*, 44 A.L.R.3d 555 (1973) (discussing notary liability).

128. Gnoffo, *supra* note 7, at 1086-87. That article stated:

For instance, in the 1994 Illinois case of *CNB National Bank v. Spiwak*, the court held the notary personally liable for more than \$23,000 although the notary's bond amount was only \$5000. In another case, *City Consumer Services v. Metcalf*, an Arizona court held a notary accountable for \$60,000 while the required bond amount for the notary was merely \$5000. A Louisiana court, in *Webb v. Pioneer Bank & Trust Co.*, found a notary liable for \$20,000 yet Louisiana only required a \$5000 surety bond for the notary. Similarly, in the 1976 case of *Iselin-Jefferson Financial Co. v. United California Bank*, the court held that the notary caused over \$70,000 to the plaintiff, however, the notary's bond only covered up to \$5000 in damages. Finally, in a 1969 Arizona case, *Transamerica Ins. Co. v. Valley Nat'l Bank*, the court found a notary liable for over \$84,000 in damages although the state-required surety bond was only \$5000.

Id. See also *Florey*, 676 So. 2d at 324, 326 (holding a notary liable for \$32,000); *McWilliams v. Clem*, 743 P.2d 577, 585 (Mont. 1987) (holding a notary liable for \$19,950).

129. See *supra* notes 120-128 and accompanying text for a discussion of notary liability.

130. See *supra* notes 55, 119 and accompanying text for a discussion of notaries and their employment.

employers do not require the notary-employees to perform notarizations as part of the employment, most employers know of and acquiesce in or encourage the performance of notary services by their notary-employees.¹³¹ Thus, employees of banks, accounting firms, hospitals, real estate and mortgage companies, law firms and almost all kinds of other entities may also be notaries public.

Generally, full-time employees as well as part-time employees act as agents or servants of their employers. Even independent contractors may serve as a kind of agent of those who hire them.¹³² As noted above, agent-employees typically are subject to the control or at least the right of control of their employers. Consequently, the usual rule is that employers will be vicariously responsible for the actions of their employees that are authorized or occur within the scope of the employment.¹³³ This rule of respondeat superior liability includes accountability for negligent torts and even for intentional torts such as conversion and fraud under certain circumstances (although the rule of agency is that employers are not vicariously liable for torts committed by their independent contractors).¹³⁴ Most importantly, since the vicarious liability of employers is purely derivative (and is truly the result of the long-standing public policy view that the more deeply-pocketed employers should be held accountable for the misdeeds of their employees), employers need not have been guilty of any fault that contributed to third parties' injuries.¹³⁵ Put simply, vicarious liability is a kind of no-fault liability, provided that the tortfeasor-employee was acting under the control or right of control of the employer and was acting within the scope of employment.¹³⁶

The issue that has been raised in the notarial employment context is whether employers should be held to the same vicarious liability for the negligence and intentional wrongdoing of employees who are notaries while in the performance of notarial activi-

131. See *infra* notes 139-141 and accompanying text for a discussion of employer encouragement. See generally Nancy P. Spyke, *Taking Note of Notary Employees: Employer Liability for Notary Employee Misconduct*, 50 MAINE L. REV. __ (forthcoming 1998).

132. See RESTATEMENT (SECOND) OF AGENCY § 2(3) (1958) (stating that an independent contractor "may or may not be an agent"). See, e.g., *Pamperin v. Trinity Mem'l Hosp.*, 423 N.W.2d 848, 849 (Wis. 1988) (basing their holding on the independent contractor's apparent authority).

133. See *McCalla v. Ellis*, 446 N.W.2d 904, 909 (App. Mich. 1989) (discussing vicarious liability of employers).

134. See, e.g., *Kane Furniture Corp. v. Miranda*, 506 So. 2d 1061, 1067 (Dist. Ct. App. Fla. 1987) (discussing vicarious liability of employers).

135. See *CLOSEN, infra* note 244, at 169-185 (examining "Master's Liability Without Fault (Respondeat Superior)"). See, e.g., *Fruit v. Schreiner*, 502 P.2d 133, 139-140 (Alaska 1972) (discussing the history of respondeat superior).

136. See *Schreiner*, 502 P.2d at 140 ("Since we are dealing with vicarious liability, justification may not be found[ed] on theories involving the employer's personal fault . . .").

ties. Some of the early decisions reached the conclusion that, because a notary was a public officer, the employer had no legal right to control the official actions of the notary.¹³⁷ Hence, the employer was not vicariously liable for the misconduct of an employee-notary. Few modern cases have reached this result. Indeed, the issue is no longer even addressed in most contemporary cases.¹³⁸

Now, courts have adopted a more realistic approach to the cases and have recognized that employers may very well promote notarial activity and exert control over the notary function of employees hired to perform principally non-notarial activities.¹³⁹ Some notary public statutes now contain sections establishing the circumstances under which employers will have vicarious legal liability for notarial actions. Thus, under either common law or statutory law, employers may be held legally responsible for notarial mistakes and misconduct.¹⁴⁰ By way of example, the management of a bank may have decided that it would be good for the bank's business to provide notarial services on-site at the bank for written transactions prepared and executed there and for customers who carry documents to the bank for notarization.¹⁴¹ The bank may encourage employees to become notaries by offering to pay the expenses associated with becoming and remaining a notary (the application, registration and renewal fees, bond premiums (if any), the cost of notary seals (if any), and any other amounts related to notarial commissioning and functioning).¹⁴² The bank may

137. See, e.g., *May v. Jones*, 14 S.E. 552, 554 (Ga. 1891) ("[T]he bank would have a right to rely upon the faithfulness of the notary as a public officer. As it could not command him to do its bidding in his official action, it cannot be presumed that it directed him to violate the law.")

138. *But see Transamerica Ins. Co. v. Valley Nat'l Bank*, 462 P.2d 814, 817-18 (Ariz. App. Ct. 1969) (noting that notary was quasi-public employee and refusing to grant the employer's motion for summary judgment).

139. See, e.g., *id.* at 818 (stating that a notary's presence could be a way of improving customer relations).

140. *Iselin-Jefferson Fin. Co. v. United Cal. Bank*, 549 P.2d 142, 145 (Cal. 1976). See also *Garton v. Title Ins. & Trust Co.*, 106 Cal. App. 3d 365, 375-76 (1980) (discussing respondeat superior liability principles). See generally *Gottshalk*, *supra* note 120 (discussing notary/employer liability).

141. See *Transamerica*, 462 P.2d at 815 (discussing a bank's notary-employee who provided services for bank customers for both bank business and non-bank business). See also *Florey*, 676 So. 2d at 326 (discussing a situation in which a bank branch manager was notary who provided customer notarial services); *Kip v. People's Bank & Trust Co.*, 164 A. 253, 253 (N.J. 1933) (discussing a situation in which a bank hired an employee notary for 22 years to protest commercial paper); *Independence Leasing Corp. v. Aquino*, 506 N.Y.S.2d 1003, 1004 (Erie Co. Ct. 1986) (identifying that the notary public who worked for the bank became a notary at the bank's request).

142. See *Transamerica*, 462 P.2d at 815 (stating that a bank's notary-employee "had obtained the commission at the direction and insistence of the [bank] who paid all fees required by the State for the commission, purchased her seal, paid premiums on her surety bond, and paid all renewal fees and

make the holding of a notary commission one of the qualifications for particular jobs at the bank.¹⁴³ The bank may reach an accord with the notary-employee about whether any notary fees are to be assessed to customers and about whether such fees are to be remitted to the bank.¹⁴⁴ The bank may encourage notarial services by advertising with signage on its premises or statements in its promotional literature and its on-line web page.¹⁴⁵ Such factors tend to reveal that the bank has control over notarial functioning and that notarial activities occur within the scope of a notary's employment. Vicarious liability is likely to result.¹⁴⁶

It is entirely possible that employers will even contribute to faulty performance by notaries, and consequently employers will be independently liable for injuries caused thereby.¹⁴⁷ Employers may establish written and unwritten policies regarding notarizations performed at their facilities. Unfortunately, these policies sometimes contradict notary law or sound notarial practice. Employers may wish to save the time of their employees.¹⁴⁸ So, employers may be guilty of directing notaries to notarize without ob-

premiums"). See also CAL. GOV'T CODE § 8202.7 (West 1992) ("A private employer, pursuant to an agreement with an employee who is a notary public, may pay the premiums on any bond and the cost of any stamps, seals, or other supplies required in connection with the appointment, commission, or performance of the duties of such notary public.").

143. See, e.g., *Transamerica*, 462 P.2d at 815 (discussing banks employing notaries).

144. See CAL. GOV'T CODE § 8202.7 (West 1992) (holding that an agreement between an employer and a notary-employee "may also provide for the remission of fees collected by such notary public to the employer . . ."). At least one case has held that it is unlawful for a bank to require a notary-employee to turn notarial fees over to the bank. *Kip*, 164 A. at 253.

145. See *Advertising Notarial Services*, NOTARY HOME STUDY COURSE, at VI 22 (1989) (noting that notaries might advertise in a sign, in a yellow pages advertisement, or on a business card); *Preliminary Draft Notary Public Code of Ethics*, *supra* note 7, at I-D-1 ("The Notary shall not advertise or allow advertisement or the Notary's services in an undignified or excessively commercial manner.") Illustration (h) then refers to the use of a Yellow Pages advertisement by a notary. See also, Aaron W. Brooks, *How to Protect Your Client's Web Site*, 86 ILL. BAR J. 70 (1998) ("World Wide Web sites are becoming important business tools. With many web sites coming into existence each day . . .").

146. See RESTATEMENT (SECOND) OF AGENCY § 220(2) (1958) (delineating factors used to determine control by employer of servant (or independent contractor instead)). See also *Aquino*, 506 N.Y.S.2d at 1009 (reinstating cause of action against bank and its notary-employee). See, e.g., *Floreys*, 676 So. 2d at 324 (holding a bank vicariously liable for fraudulent notarization by its notary-employee). See generally *Spyke*, *supra* note 131.

147. See *Closen & Richards*, *supra* note 18, at 713 ("Employers of notaries encourage or direct them to take shortcuts.").

148. See *Daigneault*, *supra* note 87, at 31 (answering to the question of why "good people do bad things," he suggests, among others, "[t]o meet goals or deadlines," and "[t]hey believe that the activity is in the organization's best interest").

taining evidence of the identities of document signers and to notarize without having document signers personally present to sign or acknowledge their signatures.¹⁴⁹ Employers may be guilty of discouraging or prohibiting notaries from maintaining a permanent, bound, chronological journal of their notarizations.¹⁵⁰

It cannot be overemphasized that regardless of whether employers of notaries have been guilty of any fault contributing to notary misconduct, employers may be held liable under the respondeat superior rubric. As already noted, that common law doctrine results in employer liability without employer fault, provided the employee is acting within the scope of employment at the time of the misconduct.¹⁵¹ Again, because of the wide range of content of notary statutes, employer liability may well be declared and defined by statute.¹⁵² Some of these laws are far more expansive in imposing employer liability than others. As an example, the notary law in Florida simply states, "The employer of a notary public shall be liable to the persons involved for all damages proximately caused by the notary's official misconduct, if the notary public was acting within the scope of his or her employment at the time the notary engaged in the official misconduct."¹⁵³ The Model Notary Act provides somewhat greater protection of employers:

An employer of a notary is liable to any person for all damages proximately caused that person by the notary's official misconduct in performing a notarization related to the employer's business, if the employer directed, encouraged, consented to, or approved the notary's misconduct, either in the particular transaction or, im-

149. See, e.g., *Dickey v. Royal Banks of Mo.*, 111 F.3d 580, 582 (8th Cir. 1997) (discussing a bank officer who directed a bank employee-notary to notarize a customer's signature even though the customer was not present); *Transamerica*, 462 P.2d at 815 (discussing allegations that bank officials had requested that notary-employee notarize without signers being personally present to sign).

150. The completion of a notary journal entry at least doubles the time it takes to perform a notarization. At least twice the amount of information must be produced and recorded. See MODEL NOTARY ACT, *supra* note 108, at § 4-102 (detailing the information to be included in a notary journal entry).

151. See RESTATEMENT (SECOND) OF AGENCY § 219(1) (1958) ("A master is subject to liability for the torts of his servants committed while acting in the scope of their employment."). See also *id.* § 228 (describing the scope of employment doctrine). See, e.g., *Thompson v. U.S.*, 504 F. Supp. 1087, 1090-91 (D. S.D. 1980) (discussing the scope of the employment doctrine).

152. It was especially likely that the notary statutes would address employer liability because of the historical concerns about such liability for public officials acting in the role of notaries. See *supra* notes 142-44 and accompanying text for a discussion of notary statutes addressing employer liability. See, e.g., 5 ILCS 312/7-102 (West 1997) (codifying employer liability as it relates to notaries).

153. FLA. STAT. ANN. § 117.05(7) (West 1996).

pliedly, by previous actions in at least one similar transaction.¹⁵⁴

On the other hand, the Illinois law is far more protective of employers, by providing that the employer will be liable only where the employee acted within the scope of employment and where the employer "consented to the notary public's official misconduct."¹⁵⁵

Thus, the state statutes either do not address employer liability at all, or impose employer liability under some circumstances. As with the liability of notaries themselves, no statute was discovered which completely exempts notary-employers from legal accountability.¹⁵⁶ Thus, the official status of a notary in contemporary times is not singularly sufficient to insulate against notary liability or notary-employer liability for notarial misconduct.

III. PRESUMPTION OF VALIDITY

*Indeed, being able to rely on documents is the purpose of having them notarized. . . . If business cannot depend on notaries doing [the] simple task [of properly identifying document signers and administering a proper oath to them], then there is no place for notaries in the world of commerce. - Florida District Court of Appeal, 1996.*¹⁵⁷

Case law regularly recites the adage that the acts of public officials enjoy the presumption of validity.¹⁵⁸ Since notaries are public officers, the case opinions have announced that notarial activities are entitled to the presumption of validity as well.¹⁵⁹ This presumption is announced even though the curious historical truth

154. MODEL NOTARY ACT, *supra* note 108, at § 6-101(c).

155. 5 ILCS 312/7-102 (West 1997).

156. Since there is an increasing propensity for courts to hold employers liable for the negligence and intentional misconduct of their employees, it would not be expected that modern notary statutes would relieve employers from accountability. See generally MICHAEL L. CLOSEN & GARY S. ROSIN, AGENCY AND PARTNERSHIP, at 161-214 (Carolina Academic Press 1992) (discussing employer liability).

157. *Ameriseal of North East Fla. Inc. v. Leiffer*, 673 So. 2d 68, 69-70 (Fla. Dist. Ct. App. 1996).

158. See, e.g., *In re Medlin*, 201 B.R. 188, 192 (E.D. Tenn. 1996) ("[P]resumption that sworn public officers have properly executed their duties absent evidence to the contrary."); *Eveleigh v. Conness*, 933 P.2d 675, 682 (Kan. 1997) ("[P]resumption that a public officer has performed the duties of his or her office faithfully"); *County of Ontario v. Western Finger Lakes Solid Waste Management Auth.*, 167 A.D.2d 848, 849 (N.Y. App. Div. 1990) (explaining the reason for the presumption is that "it protects the interests and reasonable expectations of the public, which must rely on the presumptively valid acts of public officials").

159. See JOHN, *supra* note 10, at 34 ("Like other public officers, there is a presumption in favor of the validity of acts of notaries. . ."). See also *Gombach v. Department of State*, 692 A.2d 1127, 1132 (Pa. Commw. Ct. 1997) ("[A] notary commission notifies the public that the Commonwealth believes the notary can be trusted to act properly.").

is that the very first notary in the American colonies was removed from office because of his fraudulent notarial activities. Appointed a notary in New Haven Colony in 1639, Thomas Fugill "was thrown out of office for falsifying documents."¹⁶⁰ Indeed, while the traditional view of the notary may be of an individual of honor and integrity, there exists a substantial basis for the opinion that many notaries are ill-equipped slackards and that many will resort to unscrupulous actions for the most nominal of reasons. Why was there a need for notaries public to be burdened with the obligation to obtain sizeable indemnity bonds in the earliest notary statutes?¹⁶¹ California, for example, required a \$5,000 bond in its 1850 notary law.¹⁶² Most other public and private officers have not been statutorily required to be bonded. Since at least 1858 in the case of *Fogarty v. Finlay*,¹⁶³ court decisions have identified notarial mistakes and misdeeds and have regularly held notaries liable for negligent and intentional misconduct.¹⁶⁴ Over the course of this nation's history, countless other instances of inept and dishonest notarial practices have also been noted.¹⁶⁵ Yet, the legal presumption of validity continues to attach to notarial functions—undoubtedly benefitting from transferred association with the same doctrine that is applied to the actions of other governmental officers.

Another important reason in support of the favorable presumption is that people generally do not know of the cloud on the reputation of notaries. The public is only vaguely familiar with the office of notary and its occupants. The public vaguely knows of the noble notary of an origin dating to antiquity.¹⁶⁶ The public thinks that notaries are bonded, and that therefore they must be honorable and diligent.¹⁶⁷ The public does not stay abreast of the

160. *Notaries Public In American History*, NOTARY BULL., Apr. 1997, at 3.

161. See Michael L. Closten & Michael J. Osty, *The Illinois Notary Bond Deception*, ILL. POL., Mar. 1995, at 13 (discussing notary bonds).

162. See MICHAEL L. CLOSTEN ET AL., NOTARY LAW AND PRACTICE, at 5 (1997) (quoting Nat'l Notary Ass'n., *A History of Notaries in California*, NOTARY HOME STUDY COURSE at 53, app. A (Cal. Supp. 1989)).

163. 10 Cal. 239 (1858).

164. See *supra* notes 4, 7, 18 and accompanying text for a discussion of the negligent and intentional misconduct of notaries.

165. The problem among notaries has been so bad that the country's largest notary membership organization has described it as a "Crisis of Responsibility." See *supra* note 73 and accompanying text for a discussion of notary growth and organizations. See generally Spyke, *supra* note 131.

166. See JOHN, *supra* note 10, at 3 (stating that "[n]otaries are of ancient origin . . ."). Some of the favorable impression about notaries may derive from their association with the church. "The English notary is an ecclesiastical officer, although his duties are mainly secular, having at one time been appointed by the Popes . . ." *Id.* See also Closten & Dixon, *supra* note 4, at 874-78 (discussing notaries and their history).

167. See *Farm Bureau Fin. Co. v. Carney*, 605 P.2d 509, 514 (Idaho 1980)

incidence of notary misconduct, because not often do such incidents make the news media's coverage of events. Most assuredly, episodes of notary mistakes and dishonesty tend not to make front-page stories.¹⁶⁸ The notary image remains untarnished and noble. "Perception is reality; if others perceive your industry (or organization) as ethical, they will treat it more favorably."¹⁶⁹

The favorable presumption as applied generally to public officials is variously stated in the law. Sometimes it is called the presumption of validity, sometimes the presumption of regularity.¹⁷⁰ Decisions have also referred to "a presumption that sworn public officers have properly executed their duties absent evidence to the contrary,"¹⁷¹ and to "the presumption that a public officer has performed the duties of his or her office faithfully."¹⁷² It has even been elevated to a "strong" presumption - "A notary public's certificate of acknowledgment, regular on its face, carries a strong presumption of validity."¹⁷³ What does this presumption really mean? Is it an important feature of the public official status of a notary?

The presumption of validity certainly carries evidentiary weight. That is, a notarization should generally be recognized or accepted without independent proof of its validity. Ordinarily in

("A notary public is a bonded public official appointed by the governor."). See also Michael L. Closten & Michael J. Osty, *Illinois' Million-Dollar Notary Bond Deception*, CHI. DAILY L. BULL., Mar. 2, 1995, at 6 ("The general public is misled because at best they appreciate only that notaries have to be bonded. Seldom do members of the public know the trivial amount of the required bond . . . [A] false sense of confidence attends the public image of notaries").

168. Such stories do not even make the front page of notary publications. See, e.g., *Notary Pleads Guilty To False Certification*, NOTARY BULL., Oct. 1997, at 9 (regarding a story involving a false certification by a notary).

169. Daigneault, *supra* note 87, at 30.

170. See, e.g., *Medlin*, 201 B.R. at 192 (discussing the presumption of regularity of public duties by public officials); *Carney*, 605 P.2d at 514 (stating that presumption notaries "have properly carried out the duties of their office").

171. *Medlin*, 201 B.R. at 192.

172. *Eveleigh*, 933 P.2d at 682. The source of this particular presumption may be the Notary Public oath of office. See ROTHMAN, *supra* note 3, at 46 ("[T]he Notary in almost all states does take an oath of office that binds him to perform his duties faithfully, with skill, diligence, integrity and honesty.").

173. *Lombardo v. United Tech. Corp.*, 1997 WL 289669, at *2 (D. Conn. 1997); *Lasche v. George W. Lasche Basic Profit Sharing Plan*, 111 F.3d 863, 866 (11th Cir. 1997); *Butler v. Encyclopedia Britannica, Inc.*, 41 F.3d 285, 294 (7th Cir. 1994). Similarly, some decisions have required strong evidence to overcome the presumption of notarial validity. See JOHN, *supra* note 10, at 33 (stating that "clear, convincing and satisfactory proof of the falsity or fraud is required" to impeach a notarization). See also *Witt v. Panek*, 97 N.E.2d 283, 285 (Ill. 1951) (holding that "the certificate of acknowledgment can be overcome only by proof which is clear, convincing and satisfactory, and by disinterested witnesses"). There is even some authority for the proposition that a notarization is conclusive or irrebuttable. See *Trowbridge v. Bisson*, 44 N.W.2d 810, 812 (Neb. 1950) (stating that "acknowledgment, in the absence of fraud, will be conclusive in favor of those who in good faith rely upon it").

the case of documentary evidence, a foundation must be laid to ascertain the legitimacy of a document.¹⁷⁴ Perhaps the party who created the document will be called to testify to the details of its preparation, including the time, place, and other circumstances of its drafting. Or, perhaps a party who signed an original document, or a party who has been custodian of the document in the ordinary course of business, will testify that the document is original and remains unchanged from its original substance.¹⁷⁵ Yet, if that same document has also been notarized, there is usually no need to elicit proof of the notarization ceremony because the notarization is presumptively valid.¹⁷⁶ Courts have occasionally concluded that the presumption rises to such a level of acceptance so as to qualify for recognition by way of judicial notice, as the United States Supreme Court announced in the quotation that introduced this paper, holding that the Court would "take judicial notice of the seals of notaries public."¹⁷⁷ In other words, the proponent of a notarization ordinarily needs only to tender it, and the facial appearance of the certificate of notarization will suffice—a most minimal evidentiary burden.

However, if there is a challenge to the notarization, the situation becomes different. The party objecting to the notarization must come forward with evidence because the burden to overcome the presumption lies there. The proponent of the notarization may elect to counter with evidence to support the notarization. For instance, there may be an error or omission on the face of the certificate of notarization.¹⁷⁸ The courts generally accept the substantial

174. See THOMAS A. MAUET, TRIAL TECHNIQUES 147-149 (4th ed. 1996) (discussing how to lay a foundation for exhibits, including such methods as authenticating the genuineness of signatures on documents and establishing the procedure for maintaining business records through testimony of the keeper of those records).

175. See MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE 555 (Edward W. Cleary, ed., 2d ed. 1972) (noting that as to the issue of admissibility of evidence the issues are the genuineness and relevance of the evidence). Authentication of written evidence by direct proof could include testimony of a document signer acknowledging the execution, or testimony of the custodian of business records that the document is part of those records. *Id.* at 545. See also FED. R. EVID. 1002, 1003; MCCORMICK'S, *supra*, at 559 (discussing the "best evidence" rule).

176. See JOHN, *supra* note 10, at 32 (stating that "a notarial certificate . . . is competent without further proof"). See also FED. R. EVID. 902(8) ("Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following: . . . Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public . . ."); *supra* notes 159, 173 and accompanying text.

177. See *supra* note 1 and accompanying text. See also FED. R. EVID. 201 (discussing judicial notice); JOHN, *supra* note 10, at 35 (discussing judicial notice).

178. See, e.g., *Fabec v. Beck*, 922 P.2d 330, 341-42 (Colo. 1996) (discussing incorrect and altered dates on notarized constitutional initiative petitions).

compliance doctrine in notarization cases.¹⁷⁹ That is, as long as there has been substantial compliance with the notarization procedure, it will be found valid. The notarization does not have to have been perfectly executed. Thus, courts will allow testimony of witnesses to the notarization or other kinds of evidence to correct or supplement patent errors and omissions on certificates of notarization.¹⁸⁰ By its nature, a presumption is subject to being rebutted or defeated in the wake of sufficient damning evidence. The ultimate outcome on the question of whether the notarization will be held valid will depend upon a weighing of any conflicting evidence in light of the presumption of validity.

The presumption of validity of notarial acts should probably be reconsidered and modified to more precisely reflect the presumption that notaries act with honesty. They may not fully understand their responsibilities and may not act with thoroughness, but usually they are not dishonest. As a practical matter, the presumption of validity of a notarization is terribly important. Notarizations are so readily accepted that almost no one seems to give them a second glance. Even notarizations containing blatant, patent defects are seldom questioned. The simple reason—a public official has performed the notarization.

IV. PUBLIC SERVANT FUNCTION

Public 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. - Richard B. Humphrey, 1948.¹⁸¹

It is often repeated in notary circles that one who becomes a notary serves as “a notary *public*, not a notary *private*.”¹⁸² As previously mentioned, a notary has been described as “a public officer in a position of public trust,”¹⁸³ on whom it is “incumbent [to serve]

179. See JOHN, *supra* note 10, at 34 (“The errors or mistakes of notaries will not be visited upon the parties who act before him.”). See, e.g., Gargan v. State, 805 P.2d 998, 1005 (Alaska Ct. App. 1991) (applying substantial compliance doctrine); Carney, 605 P.2d at 509 (same); Eveleigh, 933 P.2d at 689 (same).

180. See, e.g., Carney, 605 P.2d at 515 (discussing remedies for defects in certificates of notarization).

181. HUMPHREY, *supra* note 3, at 7.

182. See *Legislators Make the Rules—But You Can Make the Difference*, NAT'L NOTARY MAG., May 1996, at 3 (describing the possible effect of a proposed New Jersey law, the article says, “Get Lost, I'm A Notary Private”). See also *Preliminary Draft Notary Public Code of Ethics*, *supra* note 7, at Introduction (noting that notaries occupy a “unique status as both public and private functionaries”).

183. See *supra* note 81 and accompanying text for a discussion of the pub-

the body politic."¹⁸⁴ The New York Court of Appeals stated the obvious in 1926 when it pointed out, "[o]ffices are created for the benefit of the public."¹⁸⁵ This official position certainly obligates notaries to be reasonably available to provide public service.

Notaries 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. Thus, notaries must not refuse services to individuals due to those factors listed above.¹⁸⁶ Notaries must not assess higher fees to individuals due to those factors. And, notaries who otherwise do not charge for their services must not charge fees due to those factors. 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 "[t]he Notary shall as a government officer and public servant serve all of the public in an honest, fair and unbiased manner."¹⁸⁷

Clearly, some notarizations may be made more difficult and time-consuming because of circumstances beyond the control of the parties. To illustrate, some elderly citizens may possess little evidence of their own identities.¹⁸⁸ Some people suffering from physical disabilities may find difficulty in signing their names.¹⁸⁹ 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 accom-

lic's trust in notaries.

184. See *supra* note 2 and accompanying text for a discussion of a notary's duty.

185. *Sylvia Lake Co. v. Northern Ore Co.*, 147 N.E. 158, 159 (N.Y. 1926).

186. *Preliminary Draft Notary Public Code of Ethics*, *supra* note 7, at I-A-3 ("The Notary shall not refuse to perform a lawful and proper notarial act due to the signer's race, nationality, ethnicity, citizenship, religion, politics, lifestyle, gender or sexual preference.").

187. See MODEL CODE OF ETHICS, *supra* note 108; *Preliminary Draft Notary Public Code of Ethics*, *supra* note 7, at Guiding Principle I.

188. See CLOSEN, *supra* note 162, at 183 (proposing the problem of a 90 year old nursing home resident with no standard documents of identification); "Notary Q&A," NOTARY VIEW (Fla.), Issue 1, 1998, at 4 9 ("I live in an area with many retired persons and am called upon frequently to notarize for senior citizens with no identification.")

189. See *Notary Answer*, AM. NOTARY, Nov.-Dec. 1996, at 7 (report that where a signer is blind a notary in several states including Florida, Illinois, and Indiana is required to read the document to the signer); *Embracing the Disabled Signer*, NAT'L NOTARY MAG., Jan. 1996, at 7 ("Notaries in recent years have had more and more encounters with physically-challenged people who prefer doing things for themselves, person to person Yet, . . . these encounters . . . are at times problematic for the Notary.").

modate such persons. Even those involuntarily confined in jails and prisons should have reasonable access to the services of notaries.¹⁹⁰ Notaries in appropriate circumstances should be entitled to charge reasonable fees for travel time and travel costs, provided the persons seeking their notarizations have agreed in advance to pay such reasonable fees.¹⁹¹ And of course, there are countless stories of notaries going far above and beyond the call of their public duty to provide gratuitous notarial services to those in need.¹⁹²

The public service responsibility of notaries also means that notaries while at their workplaces should honor reasonable requests for the performance of notarial acts. That is, notaries should not restrict their notarial activity to servicing only their employers or to servicing only clients of their employers or themselves.¹⁹³ Notaries are not supposed to be notaries private. Nor should "a notary 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"¹⁹⁴ Recall the pronouncements of the ethical standards of both the American Society of Notaries and the National Notary Association that all of the members of the public are to be accorded equal

190. Far more than a million people are presently incarcerated for substantial periods of time in jails and prisons in this country. See STATE RANKINGS 1997, at 64 (Kathleen O. Morgan & Scott Morgan, eds., 8th ed. 1997) (reporting that the national total of prisoners in state correctional institutions in 1996 was 1,060,634); Dep't of Commerce, STATISTICAL ABSTRACT OF THE UNITED STATES 1996, at 219 (116th ed. 1996) (listing that the total number of state and federal prisoners at the end of 1994 was 1,016,760). See also *Bounds v. Smith*, 430 U.S. 817, 824-25 (1977) ("It is indisputable that indigent inmates must be provided at state expense with paper and pen to draft legal documents with notarial services at authenticate them, and with stamps to mail them."); *Gentry v. Duckworth*, 65 F.3d 555, 558 (7th Cir. 1995) (noting that prisoners have a right to have access to notary services).

191. See *Do Use Care When Charging A Fee*, NOTARY BULL., Oct. 1996, at 15 ("Private fees, such as those for travel, should always be agreed upon by the signer before the notarial act is performed."). See also PIOMBINO, *supra* note 55, at 28 ("The fee for any travel in connection with the performance of a notarial matter should be considered as a separate compensation. Further, any additional services or related expenses, such as photocopies, postage, telephone tolls, stenographic service, translation service, government fees, or similar items should be itemized along with the notarial fee."); *Limits Set on Travel Expenses [in Nevada]*, NOTARY BULL., Apr. 1998, at 8.

192. See *Do Aid Those In Need With Your Service*, NOTARY BULL., Aug. 1995, at 11 ("[A]s a humanitarian gesture, many Notaries do visit and notarize for such [bedridden] individuals, and a surprising number don't charge for their notarial acts nor for their travel.").

193. See *Don't Drop Everything*, NAT'L NOTARY MAG., Mar. 1997, at 21 ("Notaries are public servants, not slaves, and they needn't honor unreasonable requests."); *Preliminary Draft Notary Public Code of Ethics*, *supra* note 7, at V-B-1, V-B-2.

194. *Preliminary Draft Notary Public Code of Ethics*, *supra* note 7, at I-B-2.

treatment. However, this notion that notaries while in their workplaces have the responsibility to honor reasonable requests for notarial services from outsiders is being eroded by employers who direct their employee-notaries otherwise and by legislation that approves of such employer restrictions.¹⁹⁵ If this erosion occurs widely, we will see many more notaries private, than notaries public.

Of course, the potential exists for some notaries in their workplaces to be unable to abruptly interrupt their regular work in order to perform notarizations for outsiders. Parties seeking notarial services should not expect instantaneous service on every occasion. Nevertheless, unless a state notary statute permits notaries to suspend their public service role while at work, notaries have the duty to make their services available to non-customers reasonably promptly and upon reasonable terms (including fees charged for notarial services).¹⁹⁶

At most, notaries bear the responsibility to make their services available for public consumption. Although some backward people may refuse to utilize the services of a particular notary for dishonorable reasons such as the age, gender, sexual orientation, race, religion, or physical disability of the notary, little can really be done to prevent such subjective discrimination. To some extent, the office of notary garners such little respect as to cause it to be avoided in some quarters if at all possible. In what may have been the most notorious refusal case, in the aftermath of President John Kennedy's assassination in 1963, Vice President Lyndon Johnson declined the opportunity to more promptly be sworn into office by a notary and awaited the arrival of a federal judge to perform the

195. Interestingly, when more than 100 notaries responded to the question of whether "private companies (should) have the right to limit notarial duties," slightly more than 60% of those notaries opposed such restriction. *Feedback - Should Private Companies Have the Right to Limit Notarial Duties?*, NOTARY BULL., Apr. 1995, at 14. Hence, almost 40% of the notaries opined that the availability of notary services could and should be limited in the workplace, principally because those notaries "felt notarizing during office hours takes valuable time from their other job duties." *Id.* See CAL. GOV'T CODE § 9202.8 (West 1992) ("[A] private employer of a notary public who has entered into an agreement with his or her employee . . . may limit, during the employee's ordinary course of employment, the providing of notarial services by the employee solely to transactions directly associated with the business purposes of the employer."). See also, *New Bill May Limit Notaries' Public Service*, NOTARY BULL., Apr. 1995, at 10 (reporting about legislation proposed in New Jersey to allow notary-employees to refuse requests for notarizations of nonbusiness documents or from nonemployees).

196. *Do Try For Consistency In Levying Any Fees*, NOTARY BULL., Aug. 1995, at 11 ("To avert unjust accusations of 'discrimination,' the Notary's safest policy is to be consistent in levying fees for notarial services: charge all the same for the same acts, or charge none at all.").

ceremony.¹⁹⁷ In the main, however, notaries discharge their public service function by being reasonably available to serve the public.

V. OFFICIAL MISCONDUCT AND ADMINISTRATIVE OVERSIGHT

The consequences of a notary's malfunctioning or ignorance may be serious and even tragic. 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. - Chief Judge Charles Desmond, 1963.¹⁹⁸

As publicly appointed officers, notaries serve at the pleasure of the governmental entities that commission or license them—more or less under the watchful eyes of the states and subject to the standards established by the respective states. State supervision of notaries takes at least two other forms not previously addressed in this paper. First of all, the states have enacted laws defining official misconduct or notary misconduct, and imposing civil and/or criminal penalties for violations. Secondly, the states have created administrative agencies to administer and supervise the notarial system.

The state laws establishing civil and criminal offenses for notary misconduct vary markedly. Sometimes the laws take the form of general criminal statutes defining the offense of official misconduct or a similarly named offense.¹⁹⁹ But, sometimes there are sections of the notary statutes creating special offenses that only notaries can violate.²⁰⁰

197. See Berton, *supra* note 6, at A1.

198. Chief Judge Charles Desmond, New York Court of Appeals, Forward to J. Skinner, *Skinner's Notaries Manual* (3d ed. 1963) at ii.

199. In addition, fraudulent notarial acts might well constitute other criminal offenses under general criminal codes. See, e.g., *Matter of Ballinger*, 625 N.Y.S.2d 225, 225 (N.Y. App. Div. 1995) (stating that the appropriation of notary seal by non-notary and fraudulent notarization were part of federal crimes of making false statements in support of a loan application and wire fraud); *Forging a Notary's Signature Among Conviction Courts*, NOTARY BULL. Apr. 1998, at 3 (reporting that a North Carolina attorney forged a notary's signature on a real estate deed).

200. See COLO. REV. STAT. § 12-55-116 (West 1996) (identifying what activities constitute misconduct); IDAHO CODE § 51-112 (1994) (defining official misconduct of a notary). Additionally, notaries may commit the offense of perjury if they falsify information (such as their criminal records) on their applications for appointment as notaries. See also Marc A. Birenbaum, *Enforcing the Law*, NAT'L NOTARY MAG., Sept. 1997, at 10, 12 (discussing offenses committed by notaries). There may be special provisions on the unauthorized practice of law by notaries. See, e.g., 5 ILCS 312/7-109 (West 1997); MODEL NOTARY ACT, *supra* note 108, at § 3-206. See generally *In re Skobinsky*, 167 B.R. 45 (E.D. Pa. 1994); *Biakanja v. Irving*, 320 P.2d 16 (Cal. 1958); *Florida Bar v. Fuentes*, 190 So. 2d 748 (Fla. 1966). These cases all discussed offenses committed by notaries.

Most jurisdictions have enacted legislation which creates the criminal offense of official misconduct, or a similarly captioned crime. For example, the Illinois version of the law provides as follows:

Official Misconduct. A public officer or employee commits misconduct when, in his official capacity, he commits any of the following acts:

- (a) Intentionally or recklessly fails to perform any mandatory duty as required by law; or
- (b) Knowingly performs an act which he knows he is forbidden by law to perform; or
- (c) With intent to obtain a personal advantage for himself or another, he performs an act in excess of his lawful authority; or
- (d) Solicits or knowingly accepts for the performance of any act a fee or reward which he knows is not authorized by law.²⁰¹

Such laws typically denote the official misconduct offense as a misdemeanor.²⁰² Obviously, only a public official can be guilty of the crime of official misconduct. Private citizens are not in jeopardy of prosecution and conviction for this offense. And further, an individual is subject to the law on official misconduct only while acting in the public officer capacity, as the Illinois statutory illustration above expressly points out.²⁰³ Certainly, public officers have private lives too, and they are not governed by the official misconduct laws while "off duty."²⁰⁴

201. 720 ILCS 5/33-3. See, e.g., FLA. STAT. ANN. § 839.25 (West 1994); IND. CODE ANN. § 35-44-1-2 (Michie 1994).

202. See, e.g., IND. CODE ANN. § 35-44-1-2(6); MO. ANN. STAT. § 486-370 (West 1987); NEB. REV. STAT. § 28.294 (1995); OR. REV. STAT. § 194.990 (1991); WASH. REV. CODE § 9A.80.010 (1997). While the Illinois general statutory provision indicates that official misconduct is a Class 3 felony, 720 ILCS 5/33-3, the Illinois notary statute designates official misconduct by notaries as a misdemeanor, 5 ILCS 312/7-105.

203. "Misconduct in office" or "official misconduct", criminal or otherwise, which was committed by a person who happened to be a public officer, but which was not connected with his official duties, and such conduct was sometimes called "private misconduct" to distinguish it from official misconduct." *State v. Cohen*, 153 A.2d 688, 689-90 (N.J. Super. Ct. App. Div. 1959) *rev'd on other grounds*, 158 A.2d 497 (N.J. 1959). "[O]fficial misconduct statutes are intended to punish activities of public officials who have exploited their official positions to the detriment of the public good." *Wright v. City of Danville*, 675 N.E.2d 110, 118 (Ill. 1996). See *supra* note 201 and accompanying text for a discussion of related statutes.

204. Particularly in light of the historical debate about the status of a notary—concerning the public official role in contrast to the private role of the notary—this is an important distinction. See 66 C.J.S. *Notaries* § 6(a), at 613-614 ("[W]here a notary does an act which is no part of his official function, the

Notaries as public officers are covered by the laws defining official misconduct, at least with respect to the performance of their notarial duties. Many of the notary statutes incorporate by reference the laws on official misconduct.²⁰⁵ But, even in the absence of an express reference in the notary law to official misconduct, the state's general statutory provision on official misconduct applies to notaries.²⁰⁶ Although prosecution of notaries for official misconduct is not commonplace, it does occur, and notaries have been convicted for that offense.²⁰⁷

Additionally, there are numerous state notary laws that create the separate offense of notary misconduct. These provisions may be either civil, or criminal in nature, or both.²⁰⁸ The penalties may include fine, imprisonment, or both.²⁰⁹ The offenses are almost always designated as misdemeanors, although sometimes no designation of the level of offense is expressly stated.²¹⁰ In such latter cases, there may be no express misdemeanor designation because the violation is considered a civil infraction, or because the general criminal code defines the offense to be a misdemeanor.²¹¹ And, some statutes incorporate measures for the revocation of a notary's license or commission in the event of notarial miscon-

notary acts, not as a notary, but as the agent of the one who employs him.").

205. See COLO. REV. STAT. ANN. § 12-55-116 (West 1997) (discussing official misconduct by a notary public); IDAHO CODE § 51-112 (1997) (discussing official misconduct).

206. See CLOSEN, *supra* note 162, at 300 ("Of course, since notary misconduct may constitute violations of both notary-specific and general criminal laws, authorities may pursue multiple-count prosecutions.").

207. See *Johnson v. State*, 238 N.E.2d 651, 655 (Ind. 1968) (convicting a notary for falsely attesting an affidavit). See also *Lewis v. Agric Ins. Co.*, 82 Cal. Rptr. 509, 512-13 (App. 1969) (finding that a notary's act of falsely certifying purported signature of individual who did not personally appear constituted official misconduct). If the notary is also a licensed attorney, the law license could be affected as the result of lawyer disciplinary action. See, e.g., *In re West*, 805 P.2d 351, 355-60 (Alaska 1991) (suspending an attorney for 90 days for notary misconduct); *In re Crapo*, 542 N.E.2d 1334, 1334-35 (Ind. 1989) (mandating a 90 day suspension); Committee on Prof. Ethics & Conduct v. Bauerle, 460 N.W.2d 452, 452-53 (Iowa 1990) (imposing an indefinite suspension); *In re Stockman*, 502 N.W.2d 209, 209-13 (Minn. 1993) (suspending respondent indefinitely); *In re Finley*, 261 N.W.2d 841, 842-46 (Minn. 1978) (authorizing public censure for misconduct).

208. See JOHN, *supra* note 10, at 44 ("Statutory provisions exist in a large number of states imposing penalties for various violations of duty by notaries [including] neglect, misconduct, malfeasance or misfeasance.").

209. See, e.g., 5 ILCS 312/7-105; MO. ANN. STAT. § 486.370. See generally *State v. Stevens*, 537 A.2d 774 (N.J. Super. Ct. App. Div. 1988) *aff'd*, 558 A.2d 833 (N.J. 1989) (holding that consecutive 3 year terms of imprisonment for 2 counts of official misconduct was not excessive).

210. See CAL. GOV'T CODE § 8214 (West 1992) (providing for civil liability but not designating a criminal offense); CONN. GEN. STAT. ANN. § 3-94(l) (West Supp. 1997) (same).

211. See, e.g., CAL. GOV'T CODE § 8214.15 (providing for civil penalties, but not for criminal sanctions).

duct.²¹² Many states have enacted separate statutory sections describing the circumstances under which a notary's license or commission can be suspended or revoked.²¹³ Additionally, state law may deny renewal or re-application to one whose notary commission or license has been revoked.²¹⁴

Even without express statutory provisions empowering the state to oversee, review and revoke notary commissions, every state has developed some sort of official agency process for doing so as part of its inherent powers. In some states, notaries are supervised under the auspices of the governor's office, in most states under the authority of the secretaries of state, and in other states under the authority of other agencies or special notary departments.²¹⁵ Of course, in some places the oversight of notarial appointments and practices and the enforcement of notary laws is more vigorously and effectively pursued than in other places.²¹⁶

212. And, if the notary happens to be an attorney, the attorney's license to practice law could be jeopardized. See *supra* note 207 and accompanying text for a discussion of the attorney disciplinary cases. See also *Jefferson Bank v. Progressive Casualty Ins. Co.*, 965 F.2d 1274, 1278-87 (3d Cir. 1992) (discussing an attorney who defrauded lenders in part by using an accomplice who impersonated a notary); *In re Ballinger*, 625 N.Y.S.2d 225, 225-26 (App. Div. 1995) (discussing a non-notary attorney who appropriated notary seal and fraudulently notarized documents and was convicted of federal crimes including wire fraud, and finally disbarred).

213. See, e.g., CAL. GOV'T CODE § 8214.1 (setting out the grounds to suspend or revoke a notary's commission); 5 ILCS 312/7-108 (identifying misstatement/omission on notary application and conviction of a felony or official misconduct as grounds for revocation); MO. ANN. STAT. § 486.385 (stating 11 grounds for revocation of notary commission); OR. REV. STAT. § 194.166 (listing 15 separate grounds for suspension or revocation).

214. See, e.g., CAL. GOV'T CODE § 8214.1(c) (permitting the state to refuse a notary commission to anyone who has had a professional license suspended or revoked for causes relating to the performance of a notary's duties); COLO. REV. STAT. ANN. § 12-55-107 (Supp. 1996) (requiring a notary whose commission has been revoked must wait seven years to reapply); WASH. REV. CODE § 42.44.030 (allowing the denial of commission to any person who "has had a notary appointment or other professional license revoked" in any state).

215. See JOHN, *supra* note 10, at 13 (noting that some notaries serve at "the pleasure of the governor"). See also CAL. GOV'T CODE § 8200 (same); 5 ILCS 312/2-101 (indicating Secretary of State appoints and commissions notaries); *Legislative Review*, NOTARY BULL., Oct. 1997, at 6 (noting that a recently enacted Georgia law transfers some authority for oversight of notaries to the Superior Court Clerk's Cooperative Authority).

216. Pennsylvania seems to be a state with an extensive system for the oversight of notaries, with a full array of fairness protections for notaries accused of misdeeds, and with an effective enforcement structure. See John T. Henderson, Jr., *Accused Notaries Are Allowed Their 'Day In Court'*, NOTARY BULL., Feb. 1997, at 5 (discussing Pennsylvania's system of notary oversight). See also Birenbaum, *supra* note 200 (describing California and Florida as two states with extensive notary oversight and enforcement systems). See, e.g., *Gombach v. Department of State*, 692 A.2d 1127 (Pa. Commw. Ct. 1997) (discussing a situation in which a state refused a notary commission renewal

Statutes and administrative agency regulations establish the procedures for receiving or initiating complaints and charges of notary misconduct, for investigating such allegations, for evidentiary hearings, for imposing discipline of various gradations, for internal agency review or reconsideration, and ultimately for judicial review.²¹⁷ Hopefully, the procedures that are adopted and invoked case-by-case comport with appropriate fairness protections to which each notary is entitled. After all, every individual, including every notary, enjoys the right to the safeguards of due process of law.²¹⁸

Because the notary is a statutorily created and governmentally appointed public official, the state possesses the right and obligation to regulate and oversee the notarial office. Indeed, there are increasing calls for greater state involvement in the qualification, training, testing, and retention/renewal of notaries.²¹⁹ Those proposals for more demanding credentialing and education of notaries is due to the combination of such factors as the minimal requirements presently in place in most jurisdictions for the appointment of notaries, the lack of respect accorded to the notarial office by both notaries and non-notaries, and the frequency of mistakes and intentional misconduct committed by notaries.²²⁰ Because the notary is a public officer, the state has delegated to the

to applicant convicted of tax evasion, after following administrative agency procedures); *Matter of Maneri*, 660 N.Y.S.2d 26 (A.D. 1997) (describing revocation of both a real estate broker's license and a notary commission).

217. See Birenbaum, *supra* note 200 (discussing notary disciplinary procedures in Pennsylvania); Henderson, *supra* note 216 (discussing notary disciplinary procedures in several states). See also CAL. GOV'T CODE §§ 8214.1, 8214.3 (setting out grounds for revocation and suspension of a notary commission, and for hearing); JOHN, *supra* note 10, at 13 ("Some statutes contain more or less definite provisions concerning removal, providing for hearing and notice . . . appeal to the courts may be had by the removed officer.").

218. See Birenbaum, *supra* note 200 (describing some of the procedures in the California and Florida systems); Henderson, *supra* note 216 (detailing some of the procedural safeguards of the Pennsylvania system). See also *Gombach*, 692 A.2d at 1129 ("The right to due process of the law is equally applicable to administrative agencies as it is to judicial proceedings.").

219. See generally Closen & Richards, *supra* note 18 (asserting that states can improve notary performance through training and testing); Gnoffo, *supra* note 7 (stating that continuous education and testing would cure notaries' ills); Closen, *supra* note 9 (suggesting that states raise standards and requirements to improve professionalism and trustworthiness of notaries).

220. Closen, *supra* note 9, at A23-24. The lack of respect accorded notaries is not a new phenomenon. Some 70 years ago, Prof. Wigmore wrote that "[t]he time has come for a revival of soul and practice. The notary must be restored to the position of respect which his office merits." John H. Wigmore, *Notaries Who Undermine Our Property System*, 22 ILL. L. REV. 748, 749 (1928). Additionally, as the United States Supreme Court observed, "[T]he significance of the position [of notary public] has necessarily been diluted by changes in the appointment process and by the wholesale proliferation of notaries." *Bernal v. Fainter*, 467 U.S. 216, 223 n.12 (1984).

notary as its agent the authority to execute notarizations, and the state owes the special responsibility to its citizenry to ensure that it promotes competent performance by the notarial officer.

VI. INTERSTATE AND INTERNATIONAL RECOGNITION OF NOTARIAL ACTS

A public notary is considered not merely an officer of the country where he is admitted or appointed, but as a kind of international officer, whose official acts, performed in the state for which he is appointed, are recognized as authoritative the world over. - Minnesota Supreme Court, 1890.²²¹

Essential to the efficient functioning of domestic and transnational commerce is the interstate and international recognition of notarial acts. The recipients of documents passing from state to state and from country to country must have some degree of confidence in their trustworthiness, or else commerce would falter.²²² Historically, the principal source of assurance of authenticity of the signatures on documents has been the notary public.²²³

Again, it is the public official feature about the notary that inspires reliability. It is not a mere private citizen who notarizes a signature. Rather, a public officer, bound by that official responsibility, authenticates and certifies the signature. As the passage quoted above points out, the notary seems not to be merely a statewide officer,²²⁴ but rather the notary is a virtual national and international official.

Within the United States, constitutional law mandates the interstate recognition of notarial acts. Article IV, Section 1, of the Federal Constitution recites in part that: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."²²⁵ Within the bounds of the public acts and records referenced are notarial acts and any official

221. *Wood v. St. Paul City Ry. Co.*, 44 N.W. 308, 308 (Minn. 1890).

222. The first notary in Virginia was appointed in 1662 because "certificates and other instruments to be sent out of this country have not that credit given them in foreign parts as duly they ought." W. Hamilton Bryson, Book Review, 38 AM. J. LEGAL HIST. 89, 90 (1994). See *infra* notes 271-272 and accompanying text for a brief historical look at notaries related to this topic.

223. See Closen & Dixon, *supra* note 4, at 874-78; Closen & Richards, *supra* note 18, at 716-19 (recounting the historical rise of the notary).

224. *Wood*, 44 N.W. at 308.

225. U.S. CONST. art. IV, § 1. Even before this Constitutional mandate, the Articles of Confederation included a comparable provision. "Full faith and credit shall be given in each of those States to the records, acts and judicial proceedings of the courts and magistrates of each other State." Articles of Confederation, Art. IV. See, e.g., *Frost v. County Officers Electoral Bd.*, 673 N.E.2d 443 (Ill. App. Ct. 1996) (holding that Illinois gives recognition to electoral nomination papers notarized by a notary commissioned in Washington, D.C.).

public records that are created, such as notary journals. To illustrate, in the 1889 case of *Pape v. Wright*, the Indiana Supreme Court gave recognition to the act of a New York notary, quoting approvingly the attached certificate of a New York county clerk which recited that "all of [the notary's] official acts as such are entitled to full faith and credit."²²⁶ Consequently, if a notarial act is lawful in a state or United States territory where it is performed, that notarization must be recognized by other states and territories.²²⁷ Its recognition is not discretionary.²²⁸

What constitutes a lawful notarization in a state other than the forum state can occasionally be open to a substantial degree of difference of opinion.²²⁹ But, the procedure for deciding is clear. In cases on interstate recognition issues (other than notarizations), the almost exclusive approach is to test the validity of the official act under the law of the state where it was rendered.²³⁰ The same

226. 19 N.E. 459, 462 (Ind. 1889).

227. See EUGENE F. SCOLES & PETER HAY, CONFLICT OF LAWS 968-69 (2d ed. 1992) ("Mandatory recognition of a judgment under the [Full Faith and Credit] Clause presupposes a *valid* judgment of a sister state."). See, e.g., *Stearns v. Chenault*, 23 S.W. 351, 351 (Ky. 1893) (holding that Kentucky recognizes an Ohio notarization "in compliance with the law of Ohio"). "Deeds executed out of the state and within the United States, when certified under his seal of office by a notary to have been acknowledged as required by the statute, may be admitted to record." *Id.* But, if the notarization is not lawful where performed, it cannot be recognized in the forum state. See *State v. Haase*, 530 N.W.2d 617 (Neb. 1995) (holding that an Iowa notary could not legally notarize in Nebraska); *United Services Auto. Assn. v. Ratterree*, 512 S.W.2d 30 (Tex. App. 1974) (holding that Texas notary could not lawfully notarize for affiant who was in the state of Kentucky). See, e.g., *Donegan v. Wood*, 20 Am. Rep. 275, 277-82 (Ala. 1873) (finding a notarization invalid in part because the notary had not been commissioned by a lawful government—the Confederate States of America).

228. It must be recognized as a matter of constitutional right. See SCOLES & HAY, *supra* note 227, at 102 ("It is the purpose of the Full Faith and Credit clause to insure extraterritorial effect for the government acts of a state and to provide a uniform nationwide rule where needed.")

229. The requirements for notarization vary somewhat from state to state, and this variation is increasing with passing years.

[M]any millions of notarized documents pass from jurisdiction to jurisdiction in the United States each year. People and businesses move and carry their documents with them across state lines. Parties from multiple jurisdictions enter into commercial transactions, or a business transaction involves multiple jurisdictions. Documents for litigation are prepared in various jurisdictions other than the forum state.

CLOSEN, *supra* note 162, at 217.

230. See SCOLES & HAY, *supra* note 227, at 970 ("The effect to be given the judgment is generally determined by the local law of the rendering court."). Furthermore, there seems to be a presumption of validity of sister state notarizations, just as there is the standard presumption of validity discussed earlier in this paper. See *Wood*, 44 N.W. at 308 (referring to the "recognition . . . of the regularity of affidavits sworn to outside the state"). See also *supra* notes 158-77 and accompanying text (discussing presumptions of validity and

approach is used in judging whether to accord interstate recognition to notarial acts.²³¹ This uniformity of procedure prevents differences in notary laws from state to state from obstructing interstate recognition and reliability of notarized documents.²³² For instance, one of the old landmark cases involved a notarization performed in Texas by a female notary at a time when North Carolina still did not allow women to serve as notaries. Nevertheless, the North Carolina court approved the Texas notarization, because it was lawful in Texas.²³³

In connection with the interstate recognition topic is the fairly recent trend to expand the authority of notaries. States are increasingly allowing notaries who reside in neighboring states or even non-contiguous states to obtain notary appointments, so that a notary might hold notary commissions or licenses from a number of states.²³⁴ A few states now have enacted reciprocity laws which authorize a notary from a neighboring state to act as a notary in the forum state provided the neighboring state has adopted a reciprocity provision.²³⁵ Finally, a few states authorize their notaries to act beyond the boundaries of those home states of commissioning or licensure provided the documents notarized are intended for filing or recording in the home states of the notaries.²³⁶

There have also been a number of other statutory efforts to promote the interstate recognition of notarial acts.²³⁷ Such laws date back to at least the 19th century.²³⁸ The Uniform Acknowledgement Act provided that notarizations performed in one state were to be given effect in another state if the notarization was lawful where performed.²³⁹ According to its successor the Uniform

states' recognition of sister state notaries).

231. See *supra* notes 226-27 and accompanying text; *infra* note 239 and accompanying text.

232. See *supra* notes 222-23, 227-28 and accompanying text.

233. *Nicholson v. Eureka Lumber*, 75 S.E. 730, 731 (N.C. 1912).

234. See *Three More States Accept Nonresidents*, NOTARY BULL., Oct., 1997, at 1, 8 (indicating that about 25 states now approve appointment of nonresidents as notaries under some circumstances).

235. See *New Law May Enact Reciprocal Notary Privileges In Six States*, NOTARY BULL., June, 1997, at 8 (pointing out that Montana and Wyoming have adopted such reciprocity laws).

236. See *Rothman*, *supra* note 3, at 5-6 (noting that official authority outside of one's home state found its precedent in the Commissioners of Deeds, who "are rarely known or used today").

237. See *infra* notes 238-41 and accompanying text.

238. See *Smith v. Gale*, 144 U.S. 509, 522 (1891) ("In January 1873 . . . an act was passed by the legislature of Dakota providing 'that the proof or acknowledgment of any deed, mortgage or other instrument may be made either within or without this Territory and within the United States, before any public officer having an official seal, including notaries public' . . .").

239. UNIFORM RECOGNITION OF ACKNOWLEDGMENTS ACT, § 1, 14 U.L.A. 233, 238-39 (1990) ("Notarial acts may be performed outside this State for use in this State with the same effect as if performed by a notary public of this

Law on Notarial Acts:

A notarial act has the same effect under the law of this State as if performed by a notarial officer of this State, if performed in another state, commonwealth, territory, district, or possession of the United States by any of the following persons:

- (1) a notary public of that jurisdiction . . . ²⁴⁰

Numerous states which have not adopted the Uniform Law, have however enacted statutory provisions comparable to the one set out above.²⁴¹ The Model Notary Act, unfortunately, does not currently contain such a term.²⁴²

In the global arena of notarizations and their recognition across national boundaries, matters are not so clear. Whether a state or agency of the United States will recognize the notarial acts of other countries depends upon state notary statutes,²⁴³ the Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents,²⁴⁴ or upon the doctrine of comity and its

State [if they are performed by] any . . . person authorized to perform notarial acts in the place in which the act is performed.”)

240. UNIFORM LAW ON NOTARIAL ACTS § 4(a), 14 U.L.A. 125, 132 (1990).

241. *See, e.g.*, ARIZ. REV. STAT. ANN. § 33-501 (West 1990); COLO. REV. STAT. ANN. § 12-55-203 (West 1990); HAWAII REV. STAT. § 502-45 (1993); IOWA CODE ANN. § 9E.11 (West 1995).

242. The Model Notary Act of 1984 drafted by the National Notary Association is about to undergo a review and revision process that is supposed to be completed by about January 1, 2000. Milton G. Valera, *Preparing For The Next Millennium: Updating The NNA's Model Notary Act*, NOTARY BULL., June 1996, at 3. *See* Gnoffo, *supra* note 7 and accompanying text.

243. Wisconsin, using language typical of the other state statutes, has a statute which reads:

Foreign notarial acts. (a) A notarial act has the same effect under the law of this state as if performed by a notarial officer of this state if performed within the jurisdiction of and under authority of a foreign nation or its constituent units or a multinational or international organization by any of the following persons: 1. A notary public or notary.

WIS. STAT. ANN. § 706.07 (West Supp. 1997). *See* D.C. CODE ANN. § 45-626 (1981); MINN. STAT. ANN. § 358.46 (West 1991); MO. CODE ANN. § 1-5-608 (1997). *See also infra* notes 246-48 and accompanying text.

244. Convention for Multilateral Judicial Procedure: Abolishing Requirement of Legalization for Foreign Public Documents, 33 U.S.T. 883; Hague Conference on Private International Law: 1961 Convention Abolishing the Requirement of Legislation Foreign Public Documents, Oct. 5, 1961, 20 I.L.M. 1405. *See* Marian N. Leich, *The Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents*, 76 AM. J. INT'L L. 182, 182-83 (1982) (explaining the purpose and effect of the Convention); William C. Harvey, Comment, *The United States and the Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents*, 11 HARVARD INT'L L. J. 476, 476-89 (1970) (offering a detailed discussion of the Convention and its interest to the United States). A copy of the Hague Public Documents Convention can be found in the appendix in CLOSEN, *supra* note 162, at 539-45; and in the appendix in PIOMBINO, *supra* note 55, at 243-52.

contemporary counterparts.²⁴⁵ Some states have enacted laws or have common law decisions that promote recognition of foreign notarizations.²⁴⁶ To illustrate, the Uniform Law on Notarial Acts declares:

A notarial act has the same effect under the law of this State as if performed by a notarial officer of this State if performed within the jurisdiction of and under authority of a foreign nation or its constituent units or a multi-national or international organization by any of the following persons:

(1) a notary public or notary . . .²⁴⁷

However, many states and territories have no such provisions in their laws.²⁴⁸

While the Hague Public Documents Convention was drafted and approved by some countries in 1961, it was not ratified by the United States until 1981.²⁴⁹ The purpose of this treaty is to ease the burden of authenticating documents that originate in other countries.²⁵⁰ If the document in question originated in a nation that is also a signatory to the Hague Convention and contains the appropriate "Apostille" and if the document is covered by the Convention, it will be recognized in the United States, although the meaning, credibility, and weight accorded the document depends upon the particular circumstances.²⁵¹ As the Uniform Law on No-

245. See JOHN, *supra* note 10, at 33 (stating that the acts of notaries "are valid everywhere and prove themselves by the comity of nations").

246. The following states have adopted the Uniform Law on Notarial Acts: Delaware, Iowa, Kansas, Minnesota, Oklahoma, Oregon, and Wisconsin. 14 U.L.A. 125, 125 (1990). See *infra* note 247 and accompanying text. See, e.g., Wood, 44 N.W. at 308 (promoting national and international notary recognition). There appears to be a virtual presumption of the validity of foreign country notarizations. "Affidavits taken before notaries in foreign countries have uniformly been received by the courts of England . . . [t]he same practice seems to have obtained in the American courts." *Id.* at 308.

247. UNIFORM LAW ON NOTARIAL ACTS § 6(a).

248. The Model Notary Act, for example, does not include provisions on the recognition of foreign country notarizations, even though the Act contains provisions about the apostille prescribed in the Hague Public Documents Convention. Model Notary Act, *supra* note 108, at §§ 8-101, 8-103.

249. See Multilateral Judicial Procedure, *supra* note 244, at 189. See also *Esposito v. Adams*, 700 F. Supp. 1470, 1479-80 & n.10 (N.D. Ill. 1988) (noting that the Hague Public Documents Convention of October 5, 1961 became effective in the United States on October 15, 1981).

250. See SCOLLES & HAY, *supra* note 227, at 1001 & n.8 (suggesting that the "single standardized form of a certificate" prescribed by the Hague Convention has the purpose "[t]o simplify the process" of according legal effect to an official foreign act); PIOMBINO, *supra* note 55, at 48-51 (explaining the streamlined process of authentication under the Hague Convention in contrast with the multi-step legalization process of chain certification).

251. There are a number of U.S. cases addressing whether to recognize documents pursuant to the Hague Public Documents Convention. See *gener-*

tarial Acts announces: "An 'Apostille' in the form prescribed by the Hague Convention of October 5, 1961, conclusively establishes that the signature of the notarial officer is genuine and that the officer holds the indicated office."²⁵²

Other documents may be recognized under the rules of comity, which is a discretionary doctrine, or successor approaches to United States recognition of official international acts.²⁵³ The strong propensity today is for the United States to recognize the notarizations of most other countries, under analyses comparable to the test for interstate recognition.²⁵⁴ But, it depends. Some countries do not have notaries at all. From nation to nation the position and authority of notaries varies considerably.²⁵⁵ While there are less than 550 notaries in all of Japan, the United States has more than 4 million of them.²⁵⁶ In most jurisdictions of Central and South America and in Puerto Rico, only lawyers can also occupy the position of *notario publico*.²⁵⁷ The *notario publico*, the Japanese *koshonin*, and the French *notaire* all possess vastly greater authority than our notaries.²⁵⁸ The United States tends to give effect to notarizations of many other countries because their notaries tend to be more highly educated, trained, authorized, and respected than our notaries.²⁵⁹ That is also why other nations do

ally United States v. Chu Kong Yin, 935 F.2d 990 (9th Cir. 1991) (discussing Hague Convention in an immigration case); *Esposito*, 700 F. Supp. at 1474 (discussing the Hague Convention in an extradition case); Estate of McDermott, 447 N.Y.S.2d 107 (Sur. Ct., 1982) (applying the Hague Convention to estate proceedings).

252. UNIFORM LAW ON NOTARIAL ACTS § 6(b).

253. See *supra* note 245 and accompanying text.

254. See *Choi v. Kim*, 50 F.3d 244, 250-53 (3d Cir. 1995) (Lewis, J. concurring) (analyzing whether to recognize a document notarized in South Korea based upon its validity where notarized); CLOSEN, *supra* note 162, at 417 ("Section 6 of the Uniform Law on Notarial Acts makes it clear that foreign country notaries are entitled to the same respect given to United States notaries.").

255. See generally Guillermo F. Margadant, *The Mexican Notariate*, 6 CAL. W. L. REV. 218 (1970) (discussing Mexican notaries).

256. See generally Berton, *supra* note 6 (discussing in depth the role of Latin Notaries); Clozen, *supra* note 9 (detailing the overabundance of notaries in the United States); Shinichi Tsuchiya, A COMPARATIVE STUDY OF THE SYSTEM AND FUNCTION OF THE NOTARY PUBLIC IN JAPAN AND THE UNITED STATES (1996) (noting that the United States has more notaries than the combined number of doctors, lawyers, and accountants).

257. See generally Pedro A. Malavet, *Counsel for the Situation: The Latin Notary, A Historical and Comparative Model*, 19 HASTINGS INT'L & COMP. L. REV. 389 (1996) (discussing in depth the role of Latin Notaries).

258. See Richard Howland, *The Notary and Family Law*, AM. NOTARY, July-Aug. 1996, at 6 ("In the French Civil System, a Notaire continues to be a legal professional who draws legal documents, supervises commercial transactions from a legal perspective, and is regarded in high esteem.").

259. See CLOSEN, *supra* note 162, at 417 ("In other nations, however, the situation is quite different. There, notaries are legal professionals who enjoy great respect, have significant responsibilities, and charge handsome fees.").

not as often approve notarizations originating in the United States.²⁶⁰

The fact the United States has signed the Hague Public Documents Convention does not eliminate the concerns about international acceptance of United States notarizations. Not all countries have ratified or joined the Hague Convention. At most recent count, approximately sixty countries have done so, and they include the most significant of the developed nations (with the exception of Canada).²⁶¹ But, that leaves a much larger number of other countries that may not be at all inclined to recognize notarizations originating in the United States.²⁶² Especially troublesome to the foreign recognition of United States notarizations is the fact that several states do not require the use of a seal, particularly an embossing seal which is customary in most other countries.²⁶³

260. See Closen & Richards, *supra* note 18, at 714.

The institutional inattention to notaries in the United States, the lack of professionalism of notaries in this country, and the extent of abuses of practice by notaries here have led to international suspicion about our notarizations. Consequently, in many foreign countries, our notarizations are not taken seriously, and our documents are too often refused recognition.

Id. In an effort to counter this foreign perception of U.S. notarizations, Florida, in 1997, enacted legislation creating the office of Florida international notary. *New Office Created: Florida International Notary*, NOTARY VIEW, Issue 1, 1998, at 6 (noting that this new office is limited to licensed attorneys having at least five years experience).

261. See CLOSEN, *supra* note 162, at 544-45 (listing some 50-60 countries that have adopted the Hague Public Documents Convention); *Apostilles: Authenticating Documents For Use In Foreign Countries*, AM. NOTARY, Apr.-June 1997, at 7 ("Approximately 60 nations participate in the treaty, a difficult number to quote exactly due to the constantly changing political scene.").

262. It is nearly impossible to know the exact number of countries at any given time, due to variations in the definition of what is a country and due to the changing political landscape on certain continents of the world. Nevertheless, it seems that there are approximately 190 to 200 countries. See THE LEGAL RESEARCHER'S DESK REFERENCE 1996-97, at 275-279 (Arlene L. Eis, ed., 1995) (listing about 200 countries of the world). See also THE STATESMAN'S YEAR-BOOK, at xii-xvi (Brian Hunter, ed., 1997) (listing about 192 countries of the world). Thus, if some 60 countries have joined the Hague Public Documents Convention, then about 130 to 140 countries have not.

263. See *Notary Answer*, AM. NOTARY, Nov.-Dec., 1996, at 7 ("Most countries require that an embossing seal be used for notarizations."). "[O]n any notarized document that will be sent out of the state, and particularly out of the country, the absence of a seal impression can delay acceptance of the document or even cause its rejection." *Do Use A Notary Seal On Each Document*, NOTARY BULL., Aug. 1995, at 11. In the United States, about 14 states do not require the use of a notary seal at all. Moreover the vast majority of states that require use of notary seals allow the use of an ink-stamp seal (because they photocopy better than the embossed seals) or an embosser. Only five states still require use of an embosser seal. See *State Requirements of Seals and Format*, AM. NOTARY, Mar.-Apr. 1995, at 3 (listing seal requirements and formats for all 50 states).

Once again, the public official status of the notary is significant. To the extent that notarizations are afforded recognition across state and national boundaries, it stems primarily from the force of governmental sanction in the place of origin of the notarization. Remember the remark of the United States Supreme Court that introduced this paper, to the effect that notaries "are officers recognized by the commercial law of the world."²⁶⁴

VII. CONCLUSION

[A] notary's duties... are essentially clerical and ministerial. - United States Supreme Court, 1984.²⁶⁵

... Notaries Public have always provided fascinating footnotes to American history. - National Notary Association, 1997.²⁶⁶

Notaries have been on the North American continent for more than 350 years.²⁶⁷ They have been a part of this nation's history from its very beginning, and even in the Confederate States throughout the effort to divide the country during the Civil War.²⁶⁸ Although the office of notary public has become a genuine institution in this country, there remain incredible gaps in the law's treatment and understanding of some of the most fundamental aspects of notarial practices.²⁶⁹

As the two quotations immediately above correctly suggest, the notary as a mere ministerial public official has not been at the forefront of commerce or government, and has been relegated to supplying "footnotes to American history." In a surprising front-page focus on the office of notary public, the Wall Street Journal nevertheless proceeded to describe the "thankless" work of notaries and reported that notaries regard themselves as "about the least visible, most underpaid group in the population."²⁷⁰ Yet, the fact is that notaries in their role as public officials are absolutely vital to both commerce and government. That very same Wall Street Journal article concluded that notaries "witness the signa-

264. *Pierce v. Indseth*, 106 U.S. 546, 547 (1883). See also HUMPHREY, *supra* note 3, at 7 ("The office (of notary public) is known to the law of nations.").

265. *Bernal v. Fainter*, 467 U.S. 216, 216-17 (1984). See also ROTHMAN, *supra* note 3, at 2-3 (noting that even in Colonial times the notaries' "duties were of a ministerial rather than a judicial nature.").

266. *Notaries Public In American History*, NOTARY BULL., Apr. 1997, at 3.

267. *Id.* (reporting that the first notary was appointed in the American colonies in 1639).

268. See *Donegan v. Wood*, 20 Am. Rep. 275, 277 (Ala. 1873) (referring to a notary commissioned by the Confederate States of America).

269. "The law rarely provides clear-cut answers to our questions. Notary law is no exception." *Witness Signatures & Notarizations*, THE NOTARY, July-Aug. 1997, at 1, 2.

270. Berton, *supra* note 6, at A1.

tures on all that paper that keeps the nation ticking.”²⁷¹ And as notary expert Richard B. Humphrey remarked 50 years ago, “Clearly enough if we did not have the office of notary public, we’d have to create it or something like it to take its place.”²⁷² The reliability of literally billions of documentary transactions each year truly depends in large measure on this unheralded public official—the notary public.

271. *Id.* See *Moser v. Board of County Comm’rs*, 201 A.2d 365, 367 (Md. 1964) (“In the civil law countries notaries public have a variety of important duties. In the common law countries, the duties of the office are more limited but are nonetheless important and essential.”).

272. HUMPHREY, *supra* note 3, at 9.