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THE LEGAL STANDARD OF CARE FOR NOTARIES AND THEIR EMPLOYERS

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Then men learned to write, and it was found that cold letters remain after the fragile structures of memory failed. So transfers began to be made in writing. But it would inevitably happen that A or B or C would sign a paper and thereafter say he did not sign it; and that D or E or F would learn to forge another's name. So that, notwithstanding it had been at first thought that a written transfer would forever settle all disputes, it was found that a writing was only helpful, not always conclusive. So someone hit upon the idea of having the signature witnessed. From this it was but another step to having as such witness an officer under bond. The notary is that officer, that witness, and his authentication certificate means that he guarantees upon his oath as an officer, and subject to suit upon his bond, that the paper authenticated is indeed the very paper it purports to be, insofar as the signer and the signature are concerned.[1]

A notary public is a "public officer"[2] who occupies a unique status in our legal system because it is the seal of a notary that is often a mandatory legal prerequisite to the valid execution of many different documents.[3] As a public officer, a notary has the

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1. RICHARD B. HUMPHREY, THE AMERICAN NOTARY MANUAL 11-12 (4th ed. 1948).

2. Although a notary is designated as a public officer, some would argue that he is not a public officer in the ordinary sense of the term. Transamerica Ins. Co. v. Valley Nat'l Bank, 462 P.2d 814, 817 (Ariz. Ct. App. 1969). At best, a notary holds a position that is quasi-public in nature because a notary may hold other offices, does not receive compensation from the state and is allowed to charge the public a fee for his services, and he is not elected nor appointed by state. *Id.* Yet, it appears that most scholars agree that a notary public is a public official. Michael L. Closen & G. Grant Dixon, III, *Notaries Public From The Time Of The Roman Empire To The United States Today, And Tomorrow*, 68 N.D. L. REV. 873, n. 2 (1992).

3. Werner v. Werner, 526 P.2d 370, 375 (Wash. 1974). For instance, a "notary's certificate of acknowledgment of a deed is the pillar of our property

duty to "take reasonable precautions to assure that his seal will not be the vehicle by which a fraudulent transaction is consummated."[4] This Article explores the legal standard of care for notaries as well as their employers. First, this Article analyzes the standard of care for a notary set forth by statute and interpreted by case law. Second, this Article explains an employer's liability for an employee notary's breach of the standard of care. Lastly, this Article suggests how an employer can ensure that its notaries do not breach their standard of care.

I. THE STANDARD OF CARE FOR A NOTARY

To understand the level at which a notary must perform his duties, it is essential to understand a notary's basic functions. This section first sets forth the purpose of a notary and the function a notary serves in society today. Next, this section explains the standard of care for a notary. Lastly, this section briefly explores the liability that results from a notary's breach of the standard of care.

A. The Purpose and Basic Functions of a Notary

The creation of the notary dates back to Roman times when a *literate notorius* would charge for the creation of documents and their safe-keeping.[5] Over the centuries, the carrying on of modern business has come to rely on the notary.[6] For instance, banking institutions and law firms heavily rely on the notary.[7]

The official duties of a notary are essentially ministerial or clerical in nature.[8] Although titled as a "public officer," a notary's responsibilities do not involve the element of judicial discretion.[9] A notary public is authorized to perform "notarial acts" which in-

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rights." *Id.* "All titles depend on official records; and all official records depend on the notary's certificate of acknowledgment." *Id.*

4. *Id.* at 376.

5. Closen & Dixon, *supra* note 2, at 874-75.

6. HUMPHREY, *supra* note 1, at 9.

7. *See* Commercial Union Ins. Co. of N.Y. v. Burt Thomas-Aitken Construction Co., 230 A.2d 498, 501 (N.J. 1967) (articulating that notary issues concern banks as well as attorneys). Both the courts and legislatures have given significant importance to the notarial seal. J. Michael Gottschalk, Comment, *The Negligent Notary Public-Employee: Is His Employer Liable?*, 48 NEB. L. REV. 503, 508 (1969). For instance, the notary's seal validates a real property transaction. *In re* Walter, 427 P.2d 96, 96 (Or. 1967).

8. HUMPHREY, *supra* note 1, at 8. Each state sets forth its own set of rules involving the conditions, requirements, and functions of a notary. Closen & Dixon, *supra* note 2, at 873 n.2. In fact, the Commissioner's on Uniform State Laws approved a uniform law regarding notaries in 1983 which many of the current statutes are modeled. *Id.* at 876-77.

9. HUMPHREY, *supra* note 1, at 8. In fact, a notary has no discretion in the performance of his official duties. *Id.* at 9. See *supra* note 2 for a more detailed discussion of the characterization of notaries as public officials.

clude taking an acknowledgment,[10] taking a verification upon oath or affirmation, witnessing or attesting a signature, and administering an oath or affirmation.[11] In short, a notary's principal duty today involves authenticating a written instrument[12] by attaching his official certificate.[13] When a notary engages in any authorized notarial act, he must conform to the standard of care placed upon him by law.

B. The Standard of Care for a Notary

The standard of care of a notary "is one common to tort law."[14] A notary is required to act as a reasonably prudent notary in the same situation.[15] Under all state statutes, a notary's duties[16] re-

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10. Acknowledgment is defined as:

> a declaration by a person that the person has executed an instrument for the purposes sated therein and, if the instrument is executed in a representative capacity, that the person signed the instrument with proper authority and executed it as the act of the person or entity represented and identified therein.

5 ILCS 312/6-101(b) (1996). To acknowledge a written instrument, the signer of the instrument confesses, admits or declares that he executed the instrument. HUMPHREY, *supra* note 1, at 112.

11. STATE OF ILLINOIS, ILLINOIS NOTARY PUBLIC HANDBOOK (1996).

12. "[A]uthenticating a written instrument is to properly prove and establish it, upon the basis of competent legal authority, as being the very paper it purports to be." HUMPHREY, *supra* note 1, at 11. Thus, a notary's authentication "render[s] the instrument available as evidence of its won content, without further proof of its execution, and/or to entitle it to public record." *Id.* at 10.

13. *Id.* Although it appears that a notary performs other tasks in addition to attaching his certificate, every act done by him only become effective when it results in his official certificate. *Id.*

14. Closen & Dixon , *supra* note 2, at 888.

15. *Id.* at 896 n.98. *See also* Villanueva v. Brown, 103 F.3d 1128, 1137 (3rd Cir. 1997) (noting that a notary has a duty to refrain from acts or omissions which constitute negligence); Werner v. Werner, 526 P.2d 370 (Wash. 1974) (concluding that a notary must act reasonably); Webb v. Pioneer Bank & Trust Co., 530 So. 2d 115, 118 (La. Ct. App. 1988) (determining that a notary is negligent if he fails to exercise ordinary care); Immerman v. Ostertag, 199 A.2d 869, 872 (N.J. Super. Ct. Law Div. 1964) (finding that a notary may be liable for negligence).

16. A notary's duty to perform according to the standard of care proscribed by law is owed to anyone who employs him or relies on his notarial acts. WESLEY GILMER, JR., ANDERSON'S MANUAL FOR NOTARIES PUBLIC 283 (5th ed. 1976).

> The duty of a notary public in acting officially is not confined to the one to whom he directly renders service. His duty is to the public and those who may be affected by his act. The public has the right to rely upon the verity of a certificate, and, if one sustains injury as the proximate [result] of a willful violation of his official duty with respect to that certificate, the officer becomes liable to him.

Gottschalk, *supra* note 7, at 510 n.24 (quoting American Surety Co. v. Boden, 50 S.W.2d 10 (Ky. Ct. App. 1932)).

quire that he positively identify the party requesting notarization.[17] Specifically, a notary "must determine, either from personal knowledge or from satisfactory evidence, that the person appearing before the notary and making the acknowledgment is the person whose true signature is on the instrument."[18] In Illinois, satisfactory evidence that a person is the person whose true signature is on a document if that person: (1) is personally known to the notary; (2) is identified upon the oath or affirmation of a credible witness personally known to the notary; or (3) is identified on the basis of identification documents.[19] Therefore, a notary is required to exercise ordinary or reasonable care, or that degree of care exercised by an ordinarily prudent businessperson in carrying out his statutory duties.[20]

A common example in which a notary failed to conform to the standard of care occurred in *Villanueva v. Brown*.[21] In that case, a notary employed by a law firm notarized an instrument called a Power of Attorney.[22] As a favor to the client, the notary notarized the document even though she did not know the person who signed the document nor did she witness the signature.[23] The district court and the Third Circuit Appellate Court held that the notary clearly breached her duty of care.[24] Specifically, the Court found that the notary affixed her notarial seal without "taking any steps reasonably calculated to insure the genuineness of the signature."[25] Therefore, the court held that the notary's acts were clearly negligent and a breach of her duty of care owed to the public as a notary.[26]

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17. 5 ILCS 312/6-102 (1996).

18. *Id.* §6-102(a).

19. *Id.* §6-102(d).

20. 1 AM. JUR. 2D *Acknowledgments* § 94 (1994). *See also* Butler v. Olshan, 191 So.2d 7, 16 (Ala. 1966) (deciding that "a notary public is not an insurer, but he is under a duty to his clients to act honestly, skillfully, and with reasonable diligence."); St. Louis v. Priest, 152 S.W.2d 109, 112 (Mo. 1941) (providing that the "negligence on the part of an officer consists only in a failure to use that degree of care which an ordinary reasonably and prudent man would exercise under the same or similar circumstances and conditions"); First Bank of Childersburg v. Florey, 676 So.2d 324, 331 (Ala. Civ. App. 1996) (analyzing the care that a notary must exercise); Manufactures Acceptance Corp. v. Vaughn, 305 S.W.2d 513, 522 (Tenn. Ct. App. 1957) (determining that a notary must exercise the care of a reasonable business person).

21. 103 F.3d 1128 (3rd Cir. 1997).

22. *Id.* at 1130.

23. *Id.*

24. *Id.* at 1137. New Jersey law "requires nothing more of the notary than the use of a reasonable care to satisfy himself or, in other words, to become satisfied in his own conscience that the signers are the persons they purport to be." *Id.* (citing Immerman v. Ostertag, 199 A.2d 869, 873 (N.J. Super. Ct. Law Div. 1964).

25. *Id.*

26. *Id.* The court went on to conclude that in order for the plaintiff to re-

Another common example of a notary's breach of standard of care was in *City Consumer Services, Inc. v. Metcalf*.[27] In that case, the notary was an attorney who notarized a quit claim deed purporting to transfer a wife's interest in a family residence to her husband.[28] The husband went to the notary's office and introduced a woman as his wife to the notary.[29] The husband also presented the quit claim deed to the notary with the wife's signature already signed and dated.[30] The notary did not ask the woman if she was the individual who previously signed the deed, request that the woman present identification, or obtain an acknowledgment of her signature.[31] Instead, the notary relied on the husband's representation that the woman was his wife.[32] The notary then changed the date on the deed and notarized it.[33]

The Supreme Court of Arizona found that the notary breached the standard of care by failing to perform his notary duties as imposed by Arizona statute.[34] The Arizona statute,[35] like most state statutes, requires that the person whose signature is being acknowledged appear before the notary and acknowledge that he executed the document.[36] The statute also requires that the notary know the person whose signature is being acknowledged or obtain "satisfactory evidence that the person acknowledging was the person described in and who executed the document."[37] The court held that the notary violated the statute because he did not require the wife to acknowledge the signature that already appeared in the deed.[38] Furthermore, the court held that the notary violated the statute because the notary did not actually know the person introduced as the wife. Therefore, the notary was required

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cover against the notary, it is not enough that the notary is found negligent. *Id.* A causal relationship between the notary's negligence and the plaintiff's loss must be shown. *Id.*

27. 775 P.2d 1065 (Ariz. 1989). *See also* Werner v. Werner, 526 P.2d 370, 377 (Wash. 1974) (finding that a notary breached the standard of care when he relied on the word of a law partner as to the identity of the individuals before the notary).

28. *Metcalf*, 775 P.2d at 1066. The couple originally acquired their house as joint tenants with right of survivorship. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* The husband then took the quit claim deed in which he had had an apparent sole interest in the property and obtained a loan from City Consumer Services, Inc. *Id.* City loaned money to the husband and, as security, took a deed of trust on the house. *Id.* The husband's real wife was completely unaware of the husband's action and never approved the loan. *Id.*

34. *Metcalf*, 775 P.2d at 1068.

35. ARIZ. REV. STAT. ANN. §§ 33-503 et seq. (1995).

36. *Id.* §§ 33-503(1).

37. *Id.* §§ 33-503(2).

38. *Metcalf*, 775 P.2d at 1068.

to obtain "satisfactory evidence that the person acknowledging the signature was the person who had executed the instrument."[39] The court reasoned that the notary's reliance on the husband's introduction of a stranger whom he asserted was his wife was not satisfactory evidence.[40] According to the court, the notary should have asked the wife for identification or an acknowledgment of her signature.[41]

As demonstrated from the above cases, a notary must not stray from his or her specific statutory duties. If a notary does not strictly conform his notarial actions to the "reasonably prudent notary" standard and statutorily proscribed requirements, he will be liable for all damages that are proximately caused by his breach.[42] Civil liability of a notary for breaching the standard of care is clear-cut and well-settled law.[43]

C. *The Liability of a Notary for Breaching the Standard of Care*

In order to become a notary, a substantial number of states require that the notary possess a notary bond.[44] The original pur-

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39. *Id.*

40. *Id.* The court further reasoned that although the attorney did work for the husband on one prior occasion, the relationship between the two parties was only one of "causal acquaintances." *Id.* Therefore, the court held that the husband's introduction alone was not enough to satisfy the notary's statutory duty to obtain "satisfactory evidence" that woman was in fact who she was represented to be. *Id.*

41. *Id.* at 1068-69.

42. Werner v. Werner, 526 P.2d 370, 377 (Wash. 1974); *See also* Garton v. Title Ins. & Trust Co., 165 Cal. Rptr. 449, 455 (Cal. Ct. App. 1980) (mandating that a plaintiff show that the damages were proximately caused by the breach of the notary in order for the court to impose liability); McDonald v. Plumb, 90 Cal. Rptr. 822 (Cal. Ct. App. 1970) (holding that a notary's misfeasance does not have to be the sole cause of the plaintiff's loss but only a proximate cause of the injury). Typically, a plaintiff's cause of action against a notary is found in negligence or breach of contract. Closen & Dixon, *supra* note 2, at 891.

43. *Garton*, 165 Cal. Rptr. at 455; Iseling-Jefferson Financial Co. v. United California Bank, 549 P.2d 142 (1976); Common Wealth Ins. Systems, Inc. v. Kersten, 115 Cal. Rptr. 653 (1974). *See also* 5 ILCS 312/7-101 (1996) (setting forth liability of notary and surety). The *Illinois Notary Public Handbook* provides the following:

> A notary is held personally liable for all damages caused by his or her official misconduct. 'Official misconduct' means the unauthorized, unlawful, abusive, negligent, reckless or injurious performance of a duty. The notary bond does not protect the notary against such liability. The bond gives protection only to the person who is damaged by the notary's misconduct. The bonding company will then recover its loss from the notary.

STATE OF ILLINOIS, ILLINOIS NOTARY PUBLIC HANDBOOK 11 (1996).

44. Approximately 30 states require notary bonds and approximately 20 states have abolished the requirement. MALCOLM L. MORRIS & E. CHRISTOPHER CARAVETTE, NATIONAL NOTARY ASSOC., 18TH ANNUAL CONFERENCE OF NOTARIES PUBLIC: EMPLOYER RESPONSIBILITY (1997).

pose behind requiring a notary to be bonded was to establish public confidence in notaries. Moreover, a notary bond was required for the purpose of protecting parties who accepted notarized documents because they could seek recovery from the bond company if damage resulted from the notarization.[45] However, the amounts of notary bonds today are insufficient to protect the public.[46] Although both the public and notaries may believe that the bond is a type of insurance, it is not by any means.[47] The bond limits the amount of recovery that can be received against the bond company;[48] however, the amount of a notary bond will not limit the amount of recovery a plaintiff can seek against the notary.[49] Furthermore, if the bond company is required to pay because of the misconduct of a notary, the bond company can seek reimbursement from the notary for the amount of money the bond company had to pay.[50] Essentially, a notary is liable for his notarial acts when he "deliberately[51] or ignorantly[52] violates the rules of [notary] law."[53] A notary will be held personally liable for all damages that are proximately caused by his official misconduct.[54] It is not neces-

45. *Id.* In earlier times, the bond amounts were significant and thus compensated parties for their loss resulting from a notary's wrongful acts. *Id.* For instance, in 1819, the first Illinois notary bond amount was $500. *Id.* This amount was subsequently increased in 1872 to $1,000. *Id.*

46. *Id.* Some examples of the amount of notary bonds are: $10,000 bond required in Alabama, California, Idaho, Michigan, Missouri, Nebraska, Nevada, Tennessee, Washington; $7500 bond required in Kansas, North Dakota, and South Dakota; $5000 bond required in Florida, Illinois, Indiana, Louisiana, Mississippi, Montana, Utah; $1000 bond required in Alaska, Arizona, Hawaii, Oklahoma; $500 bond required in New Mexico, Wyoming, Wisconsin. *Id. See also* Michael L. Closen & Michael J. Osty, *Illinois' Million-Dollar Notary Bond Deception*, 141 CHI. DAILY L. BULL., March 2, 1995, at 6 (noting that the nominal amount of the bond may not serve a worthwhile purpose).

47. Closen & Osty, *supra* note 46, at 6. In fact, some would assert that the statutory requirement of a notary bond is a "mere symbol, left over from legislation outdated generations ago." *Id.*

48. *Id.*

49. HUMPHREY, *supra* note 1, at 211.

50. Vincent Gnoffo, Comment, *Notary Law and Practice for the 21st Century: Suggested Modifications for the Model Notary Act*, 30 J. MARSHALL L. REV. 1063, 1086 (1997).

51. A notary who takes part in intentional misconduct can be liable for the appropriate tort consequences, such as fraud or conversion. Closen & Dixon, *supra* note 2, at 892. If the notary conspired with others to participate in intentional misconduct, the notary can be liable for conspiracy. *Id.* A notary can also be held to be criminally liable for misconduct. *Id.*

52. A notary must know the applicable law as to his notarial conduct because ignorance of the law is no justification for a breach of a notary's duty of care. HUMPHREY, *supra* note 1, at 214. Moreover, the excuse that the notary followed common practice is not an acceptable justification for misconduct. City Consumer Serv., Inc. v. Metcalf, 775 P.2d 1065, 1069 (Ariz. 1989).

53. HUMPHREY, *supra* note 1, at 209.

54. 5 ILCS 312/7-101 (1996). "Official misconduct" is defined as the "wrongful exercise of a power or the wrongful performance of a duty." 5 ILCS

sary that the notary's misconduct be the sole cause of the injury or loss in order for a notary to be liable for damages.[55] However, before a notary will be found liable for damages, the plaintiff must prove the amount and value of the actual injury he suffered as a result of the notary's official misconduct.[56] Therefore, it is not uncommon for courts to hold notaries liable for sizable sums that often exceed the required amount of their bond.[57]

II. THE STANDARD OF CARE AND LIABILITY OF THE NOTARY'S EMPLOYER

Courts have imposed liability on the employers of notaries under two theories. Under the first theory, a court will find a private employer of a notary liable for the damages resulting from the notary's misconduct if the employer participated in that misconduct.[58] Thus, if an employer encourages or asks its notary to act without appropriate inquiry, the employer is liable for the damages that result from the notary's acts.[59] This theory of liability speaks for itself by the fact that the employer is an active wrongdoer and should be accountable under tort principles.

This Part, however, confines its analysis to the second theory of liability. Under the second theory, courts justify holding an employer liable for its notary's misconduct using traditional agency principles.[60] The first half of this Part explains general agency principles. The second half of this Part analyzes the courts' application of agency principles in finding employer liability for the misconduct of its notary.

312/7-104. The term "wrongful" is defined as "unauthorized, unlawful, abusive, negligent, reckless or injurious." *Id.*

55. A negligent notary will not be held liable for damages if the direct cause of the loss was the intervening negligence of another party. Burck v. Buchen, 116 P.2d 958, 961 (Cal. Ct. App. 1941).

56. HUMPHREY, *supra* note 1, at 211. A notary will be liable for all damages that can be proved. *Id.* For instance, a notary is not liable to plaintiff if the plaintiff suffers no damages proximately caused by the notary's lack of compliance with his notarial duties. Kirk Corp. v. First Am. Title Co., 270 Cal. Rptr. 24, 40-41 (Cal. Ct. App. 1990). The notary's actions, however, may be grounds for revocation or suspension of his commission. *Id.*

57. Gnoffo, *supra* note 50, at 1087. For example, in Cook County, Illinois, a notary was held personally liable for more than $23,000 for breaching the standard of care in notarizing a document, despite the fact that the State of Illinois requires a notary to possess a $5000 bond. NCNB Nat'l Bank v. Spiwak, Circuit Court of Cook County, Illinois, No. 89-L-13696 (April 20, 1994).

58. Commercial Union Ins. Co. of N.Y. v. Burt Thomas-Aitken Constr. Co., 253 A.2d 469, 470 (N.J. 1967).

59. *Id.* Moreover, a notary's employer may be held liable if "it led another to believe the notary was acting for it and on its credit or responsibility." *Id.*

60. Transamerica Ins. Co. v. Valley Nat'l Bank, 462 P.2d 814, 818 (Ariz. Ct. App. 1969).

A. Basic Agency Principles

An agency relationship between a master and a servant is defined as, "[t]he fiduciary relation which results from the manifestation of consent by one person [the master] to another that the other [the servant] shall act on his behalf and subject to his control, and consent by the other so to act."[61]

To serve as a master, a party must have the capacity to give legal consent and capacity to do the act for which the servant is authorized to do for him.[62] Furthermore, to serve as a servant, a party must only possess the physical or mental capacity to do the tasks he has been assigned to complete.[63]

Until the late seventeenth century, a master was not liable for torts committed by a servant unless the servant committed the tort under the master's direct command or subsequent assent.[64] However, since 1699, the modern doctrine of *respondeat superior* was developed. That is, a master is vicariously liable for his servant's torts committed within the scope of employment.[65] This theory of vicarious liability did not result as a rule of logic, but rather as a rule of public policy.[66]

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61. MICHAEL L. CLOSEN, AGENCY, EMPLOYMENT, AND PARTNERSHIP LAW 6 (1984) [hereinafter AGENCY, EMPLOYMENT] (citing REST. (SECOND) OF AGENCY § 1 (1959)).

62. *Id.* at 7.

63. *Id.* Essentially, nearly anyone can serve as a servant. *Id.* For instance, an infant or an insane person may have the capacity to cause liability of his master. *Id.*

64. *Id.* at 3.

65. *Id.*

66. AGENCY, EMPLOYMENT, *supra* note 61, at 4 (citing Stockwell v. Morris, 22 P.2d 189, 194 (Wyo. 1933)). Several theories have emerged that justify imposing liability on a master for the torts of his servant. First, and perhaps the greatest reason, is based on the "deep-pocket" theory. *Id.* The deep-pocket theory justifies imposing liability on the master because the master is in a better financial position to pay for the losses. *Id.* Essentially, this is premised upon the fact that it is more likely that a master will have insurance and a servant will not have insurance. *Id.* at 4-5. Although the deep-pocket theory is the most "popular basis for the devotion to the general rule of accountability" of master, curiously it is the least articulated reason by the courts. *Id.* at 5.

A second justification for master accountability is the "identity theory", or sometimes referred to as the "extension theory." *Id.* The identity theory rests on the fiction that the master and servant are one or that the servant is a mere extension of the master. *Id.* Thus, the master is liable for the servant's conduct in "at least a theoretical way." *Id.*

A third justification for master accountability is the "deterrence theory." *Id.* Under this theory, it is assumed that if a master is held liable for a servant's actions, the master will be more cautious in selecting, training, and supervising his servant. *Id.*

Lastly, a fourth justification for master accountability is the "enterprise theory." *Id.* The enterprise theory works on the assumption that risk of loss is basic to the operation of a business/enterprise. *Id.* Thus, the busi-

In order for vicarious liability to be imposed on a master under the doctrine of *respondeat superior*, one party must qualify as a servant. Specifically, there must be (1) a fiduciary relationship; (2) a consensual relationship between the master and the servant; (3) control or right to control the servant by the master;[67] and (4) servant's action on behalf of the master.[68] An important limitation of vicarious liability is that the servant must be acting within his scope of employment at the time he commits a tort.[69] The Restatement 2d of Agency describes the modern test of whether a servant is acting within his scope of employment.[70] It states:

> (1) Conduct of a servant is within the scope of employment if, but only if:
>
> (a) It is of the kind he is employed to perform;
>
> (b) It occurs substantially within the authorized time and space limits;
>
> (c)It is actuated, at least in part, by a purpose to serve the mas-

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ness/enterprise "should bear the cost of the losses in the form of premiums for insurance converge and other expenses that are passed along to the customers." *Id.*

Injustice would result if a master was permitted to gain from the "intelligent cooperation" of his servants without having the responsibility of the servant's mistakes. REST. (SECOND) OF AGENCY § 219 cmt. a (1959).

67. The theory of vicarious liability of an employer comes from an "outgrowth of the idea that within the time of service, the master can exercise control over the physical activities of the servant." REST. (SECOND) OF AGENCY § 219 cmt. a (1959).

68. AGENCY, EMPLOYMENT, *supra* note 61, at 173.

69. *Id.* at 209. Earlier case law attempted to analyze the scope of employment issue through the use of two terms: frolic and detour. *Id.* A detour was used to describe a servant's act that was a minor deviation/departure from his Employment. *Id.* A servant's act that was considered a detour was not outside the servant's scope of employment. *Id.* Thus, the servant's employer would be liable for damages resulting from the detour.

A frolic was used to describe a servant's act that was a major deviation/departure from his employment. *Id.* A servant's act that was considered a frolic was an act committed while outside the servant's scope of employment. *Id.* Thus, the servant's employer would not be liable for damages resulting from the frolic. *Id.*

A master will be subject to liability of his servant's actions outside the scope of his employment if: (1) the master intended the conduct or consequences; (2) the master was negligent or reckless; (3) the conduct violated a non-delegable duty of the master; or (4) the servant purported to act on behalf of the master and the third party relied upon the apparent authority of the servant. REST. (SECOND) OF AGENCY § 219(2)(a)-(d) (1959).

70. REST. (SECOND) OF AGENCY §228. The determination of whether an act was done within the scope of employment is a question of fact for a jury to decide. Gottschalk, *supra* note 7, at 523 n.23 (citing Stone v. Hills, 45 Conn. 44, 29 Am. Rep. 635 (1877)). "Each case must be determined with a view to the surrounding facts and circumstance, the character of the employment and the nature of the wrongful act." *Id.*

ter; and

(d)If force is intentionally used by the servant against another, the use of force is not unexpectable by the master.

(2) Conduct of a servant is not within the scope of employment if it is different in kind from the authorized, far beyond the authorized time or space limits or too little actuated by a purpose to serve the master.[71]

In other words, a master is liable for a servant's misconduct when the servant's misconduct is within the scope of employment. The general agency rules discussed above are the basis for which courts have found an employer liable for its notary's negligence.

B. The Application of Agency Principles in Finding an Employer Liable for the Negligence of its Notary

The courts have met a formidable task in determining whether an employer is liable for its employee-notary misconduct under agency rules. First, some courts have avoided determining that an employer was liable for its employee-notary misconduct because of the public official or quasi-official designation given to a notary.[72] However, courts that have specifically addressed this issue hold that a notary's public official or quasi-official status cannot, in and of itself, protect its employer from liability arising out of a notary's negligence.[73] The Supreme Court of Washington merely stated that "[w]hile the notaries are public officers, it may be assumed that there is a sufficient agency relationship with their employers to render the employers also subject to [the] forum's jurisdiction."[74] Accordingly, a court must determine whether the

71. REST. (SECOND) OF AGENCY § 228.

72. Commercial Union Ins. Co. v. Burt Thomas-Aitken Constr. Co., 230 A.2d 498 (N.J. 1967). In *Commercial Union*, the plaintiff sued on an indemnity agreement to recover loss on a performance bond. *Id.* at 498-99. One of the indemnitors claimed that his signature on the agreement was forged. *Id.* The plaintiff joined the notary who negligently notarized the forged signature and her employer, a bank. *Id.* at 499. The New Jersey Supreme Court upheld the granting of the defendant bank's motion for summary judgment. *Id.* at 499-501. The defendant bank's prevailing argument was that when its employee was acting in his capacity of notary public, he was not an employee of the bank but a public official. *Id.* at 499. Thus, the defendant bank was not liable for its employee while he acted as a notary. *Id.*

73. TransAmerica Ins. Co. v. Valley Nat'l Bank, 462 P.2d 814 (Ariz. Ct. App. 1969). The court reasoned that the conclusion that a notary's public official or quasi-official status cannot insulate the notary's employer from liability from the notary's negligence is not inconsistent with prior court holdings. *Id.* at 818. Specifically, the court rationalized that prior court decisions have held an employer liable for the notary's breach of standard of care if the employer participated in the breach. *Id.* Thus, the court inferred that holding an employer liable under agency law reaches the same result. *Id.*

74. Werner v. Werner, 526 P.2d 370, 376 (Wash. 1974).

employee-notary was acting within the scope of employment when he engaged in misconduct or negligent acts.[75]

A second hurdle that courts have met while determining whether an employer is liable for an employee-notary's negligence is the requirement that the master employer must have control or the right to control that servant notary.[76] However, with respect to a notary, there is little activity to actually control. Specifically, every state statute proscribes the conduct that a notary must engage to properly notarize a document. The statutes do not allow for any deviation or discretion on the part of the notary.

In light of the strict manner in which a notary must conduct his notarial affairs, it is not clear how the employer controls or has the right to control the notary's acts. Rather, the only individual who may be said to exercise any type of control over the notary is the person seeking notarization.[77] For instance, the individual seeking notarization can decide "whether or not to obtain notarial services and if so, what notary to approach."[78]

Although courts are short on their analysis of how an employer controls the notary's official acts, a court might consider a notary's acts under the control of the employer because it is the employer who decides whether or not the employee may offer notarial services. Courts appear to side-step the control issue because they find the more important analysis is whether the employer benefited from the notary's services. Courts are willing to find a notary's employer liable because of the theory of deep pockets and the willingness to compensate the victim of misconduct. Thus, courts appear to find a notary a servant of the employer even in the absence of direct control.[79]

The last hurdle some courts have encountered is whether the notary's official acts can be said to be within the scope of his employment. Fortunately, courts have offered sufficient explanation of how a notary's official acts fall within the scope of his employment. For instance, in some situations the employer will supply "all the necessary paraphernalia" for its employee to acts as a notary.[80] Furthermore, an employee will often choose to become a notary at the request of his employer and therefore his notary acts are done for the sole benefit of the employer.[81] These types of circumstances have been sufficient to establish that the conduct of

75. *TransAmerica*, 462 P.2d at 818.
76. Gottschalk, *supra* note 7, at 520.
77. *Id.* at 521.
78. *Id.* at 522.
79. Some state statutes specifically provide that an employer of a notary is liable for the notary's negligence if the notary was acting within the scope of employment at the time the notary engaged in the notarial misconduct. *See, e.g.*, 5 ILCS 312/7-102(a) (1996); FLA. STAT. ANN. §117.05(7) (West 1996).
80. *TransAmerica*, 462 P.2d at 818.
81. *Id.*

the notary was in the scope of his employment. Therefore, a notary's employer is liable for the notary's negligence.

As discussed previously, a notary's breach of the standard of care will result in the notary's personal liability for all damages. Furthermore, the notary's employer will also be liable for the notary's breach of care if such conduct is done within the scope of the notary's employment. It is therefore in the best interests of the notary and his employer to prevent any deviation from the standard of care.

III. PREVENTING A NOTARY'S BREACH OF THE STANDARD OF CARE

Every state statute sets forth the rules by which a notary must perform his notarial acts. Although notaries have a duty to strictly adhere to such rules, they often fail to do so. This failure to conform to the standard of care puts the notary and his employer at risk of personal liability. Therefore, to safeguard against liability under these strict statutes, a notary's employer should establish office procedures to ensure the notary does not breach his duty of care. This Section sets forth general guidelines that an employer might take to prevent negligent conduct by its notaries.

First, an employer should encourage a notary to read, understand and learn the state law by which they are required to abide. Ignorance of the rules of notarization is no defense to negligence or misconduct. Unfortunately, only six states require notary education or testing.[82] Therefore, a notary's employer must administer its own education, training and/or testing to its employee's that become notaries.

Second, an employer should require an employee to request two forms of identification from every individual who will sign the notarized document. The identifying documents should contain a signature and a photograph of the individual. This will eliminate a notary's discretion in deciding whether he has sufficient personal knowledge of the individual.

Third, an employer should require that an employee keep an active notary journal of all official acts performed as a notary.[83] The journal should be available for review by the employer at its request and the employer should periodically spot check the journal to verify that it conforms to office policy. Also, the journal should include basic information such as: (1) the date, time and type of each official act; (2) the character of every instrument acknowledged or proved before the notary; and (3) the signature of

82. Gnoffo, *supra* note 50, at 1089 n.218. The only states requiring notary education or testing are: California, Connecticut, Louisiana, New York, North Carolina and Pennsylvania. *Id.*

83. CAL. GOV. CODE § 8206(a)(2) (West 1998).

each person whose signature is being notarized.[84] Furthermore, the notary should include in the journal the type of identifying documents that the individual produced to show his identity.[85] Lastly, the notary should require that the individual signing the document thumbprint the document and the notary journal.[86]

An employer needs to take reasonable steps to ensure that an employee is strictly adhering to his statutory duties. Although most employers would rather not look over the shoulders of its notaries every time they notarize documents, a strict adherence and application of state notary statutes leaves an employer no other choice but to redefine its policies to prevent notary negligence. Therefore, it is imperative that an employer set forth clear internal procedures and guidelines for its notaries.

CONCLUSION

Although the creation of a notary dates back to early Roman times, a notary's function is essential in many professions. Accordingly, it is imperative that a notary act as a reasonably prudent notary and conform his conduct to the law. Failure to conform to the standard of care subjects a notary to personal liability of the damages arising out of his misconduct. The notary's employer will also be held accountable for a notary's negligence if it occurs within the scope of the notary's employment. Therefore, employers who allow its employees to notarize documents must establish procedures that go beyond state requirements to ensure that its notaries are not breaching their standard of care.

84. *Id.*

85. ARIZ. REV. STAT. § 41-319 (West 1997).

86. CAL. GOV. CODE § 8206 (a)(2)(G) (West 1998). Thumbprinting the document and notary journal would prevent fraud and would make it easier to track down wrongdoers. Gnoffo, *supra* note 50, at 1092-93.