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BEING THERE: THE IMPORTANCE OF PHYSICAL PRESENCE TO THE NOTARY

CHARLES N. FAERBER*

INTRODUCTION

The notary public who wishes never to be sued in civil, criminal or administrative court might adopt as a motto the title of that most celebrated of legal writs: *habeas corpus*.¹

"You have the body" would be an apt imperative for any cautious and conscientious notary intent both on deterring fraud and staying out of court. The "body," of course, would be that of the signer of any document presented for notarization, for it is the frequent failure of notaries to ensure the signer's physical presence before them at the time and place of the notarial act that has been a major cause of their legal problems in recent decades.

Knowing their purpose is to detect and deter fraud, most notaries are well prepared for the threat posed by impostors with false identification documents. They are on high alert when a stranger approaches, requests a notarial act and presents a driver's license or other identification to prove identity.

However, their guard is down when it is a friend, relative, associate, client or supervisor who requests their notarial services. And when that friend, relative, associate, client or supervisor presents a document apparently signed by an absent third party, assuring the notary that the signature is genuine, that the signer is ill or unavailable, and the urgency such that immediate notarization is essential, the notary will frequently waive normal precautions and procedures as a favor to this trusted person. Too often, that trust is misplaced and the signature a forgery.

Today it is a sad and ironic reality that notaries are much more likely to be fraudulently exploited by trusted acquaintances, family members and business associates than by perfect strangers. The notary's trust and friendship are readily discarded by the in-

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1. See BLACKS LAW DICTIONARY 709 (6th ed. 1990) (defining *habeas corpus*).

dividual whose overriding priority is to gain control of joint assets in a crumbling marriage or business relationship.

Court dockets, surety firm files and a staggering volume of anecdotes amassed through the National Notary Association's "Information Service"² chronicle two common illegal scenarios:

SCENARIO A

The exploiter, well known to the notary, introduces a stranger with little or no identification as a spouse or associate, then pressures the notary to notarize the stranger's signature on a property deed or other valuable paper and to ignore the inadequate documentary identification as a favor (e.g., "She forgot her purse—don't make us drive home to get it!"), sometimes hinting at or threatening repercussions for not notarizing (i.e., loss of job, business or friendship). The complying notary must complete a false acknowledgment certificate containing a statement such as, "... Jane Doe, whose identity is personally known to me ...," or, "... Jane Doe, whose identity was proven to me on the basis of satisfactory evidence. ..."

SCENARIO B

The exploiter, well known to the notary, presents a property deed or other valuable document bearing the signature of an absent spouse or associate, often also well known to the notary, then pressures the notary to notarize the signature and to ignore the signer's absence as a favor (e.g., "You know his signature—you've seen it many times."), sometimes hinting at or threatening repercussions. The complying notary must complete a false acknowledgment certificate containing a statement such as, "... acknowledged before me by Richard Roe ...," or, "... before me personally appeared Richard Roe, who acknowledged ..."

Both scenarios spell major trouble for the complying notary. In both, the notary, at the least, is guilty of the criminal act of making a false certificate, a felony or misdemeanor for a public officer, depending on state law; if the signature proves a forgery, the notary may further be charged with participating in a criminal conspiracy to defraud, possibly facing additional fines and/or imprisonment.

Because there is a high likelihood in both scenarios that the signature is indeed a forgery, the victim whose signature was

2. The NNA's "Information Service" telephone hotline daily fields and answers 130 to 170 questions on notarial practice from its ranks of over 150,000 notary members around the country. Many of these questions stem from situations in which the notary has been asked, usually by an employer and sometimes by an attorney, to notarize the signature of an absent person. *The National Notary*, the NNA's membership magazine, often reports lawsuits involving nonappearance and forgery (as well as other notary misconduct) in its regular department "Court Report."

forged will almost certainly sue the notary to recover losses, imposing the major costs of a settlement or judgment on the notary, not to mention attorney and court costs.

In addition, criminal and civil actions against the notary, however disposed, often reveal misconduct that imposes administrative fines and/or penalties of revocation, suspension or denial of a current or future notary commission, while also threatening current and future licenses of all kinds (e.g., law, real estate, insurance) in all states.

In describing and discussing misconduct by notaries, this article will focus on Scenario B, perhaps the least excusable of any type of notarial impropriety. With Scenario A the notary may at least claim to have a body on hand, though it is the wrong body, and there may be mitigating circumstances, such as the stranger's presentation of *some* identification, albeit flimsy, and perhaps no exact statutory definition of "known to me" or of "satisfactory evidence of identity." These conditions may make the notary's act seem less egregious to a judge or jury.

With Scenario B, however, what can mitigate the bald act of not requiring the signer to appear? If state notarial codes are clear on anything, it is that the signer must be in the notary's presence at the time of the notarial act. The Uniform Law on Notarial Acts (1982) of the Uniform Law Commission and the Model Notary Act (1984) of the National Notary Association—both of whose definitions of "acknowledgment" and "verification upon oath or affirmation" (i.e., "jurat") have been widely adopted among the states, clearly declare that personal appearance is a requirement for these two notarial acts.

The Model Notary Act provides:

Acknowledgment means a notarial act in which a notary certifies that a signer, whose identity is personally known to the notary or proven on the basis of satisfactory evidence, has admitted, *in the notary's presence*, having signed a document voluntarily for its stated purpose. (Emphasis added.)

Jurat means a notarial act in which a notary certifies that a signer, whose identity is personally known to the notary or proven on the basis of satisfactory evidence, has made, *in the notary's presence*, a voluntary signature and taken an oath or affirmation vouching for the truthfulness of the signed document. (Emphasis added.)³

3. MODEL NOTARY Act, §§1-105(1), 1-105(4) (NAT'L NOTARY ASS'N 1984). The *Model Notary Act* of 1984 is an update of the National Notary Association's *Uniform Notary Act* of 1973, which was drafted with the assistance of Yale Law School. The *Model Notary Act's* 19-member drafting panel included five secretaries of state, two law professors, a judge and NNA founder Raymond C. Rothman. Parts of both the *Uniform Notary Act* and the *Model Notary Act* have been adopted in dozens of states and U.S. jurisdictions, most

The Uniform Law On Notarial Acts provides:

In taking an acknowledgment, the notarial officer must determine, either from personal knowledge or from satisfactory evidence, that *the person appearing before the officer* and making acknowledgment is the person whose true signature is on the instrument. (Emphasis added.)

In taking a verification upon oath or affirmation, the notarial officer must determine, either from personal knowledge or from satisfactory evidence, that *the person appearing before the officer* and making the verification is the person whose true signature is on the statement verified. (Emphasis added.)⁴

Furthermore, state statutory notarial forms reiterate the need for the signer to be in the notary's presence. For example, Iowa's statutory form states:

This instrument was acknowledged *before me* on _____ (date) by _____ (name[s] of person[s]). (Emphasis added.)

Signed and sworn to (or affirmed) *before me* on _____ (date) by _____ (name[s] of person[s] making statement). (Emphasis added.)⁵

Florida prescribes similar forms:

The foregoing instrument was acknowledged *before me* this ___ day of _____, 19___, by _____ (name of person acknowledging). (Emphasis added.)

Sworn to (or affirmed) and subscribed *before me* this ___ day of _____, 19___, by _____ (name of person). (Emphasis added.)⁶

If there remains any doubt about the need for the signer's appearance before the notary, statutes and official notary handbooks often further emphasize the point:

extensively in the Territory of Guam and the Commonwealth of the Northern Marina Islands.

4. UNIFORM L. ON NAT'L ACTS (ULONA), §2(a) (1982). The *Uniform Law on Notarial Acts* was drafted and approved by the National Conference of Commissioners on Uniform State Laws (Uniform Law Commission) in 1982, and approved by the American Bar Association at its annual meeting in 1983. The *Uniform Law* has since been adopted *in toto* in the statutes of Delaware, District of Columbia, Kansas, Minnesota, Montana, Nevada, New Mexico, Oklahoma, Oregon and Wisconsin. Its notarial forms have been adopted in several other states.

5. IOWA CODE §§ 9E.15(1), .15(3) (1996). Wording indicating a venue and affixation of the notarial officer's signature, seal (optional) and title/rank has been omitted.

6. FLA. STAT. ch. 117.05(16)(b), .05(16)(a) (West 1997). Wording indicating a venue, affixation of the notary's signature, seal and typed, printed or stamped name, and the kind of identification presented has been omitted.

In the acknowledgment, the notary public certifies:

1. That the signer personally appeared before the notary public on the date indicated.

...

In the jurat the notary public certifies:

1. That the signer personally appeared before the notary public on the date indicated and in the county indicated.⁷

A notary public may not notarize a signature on a document if: (a) The person whose signature is being notarized is not in the presence of the notary public at the time the signature is notarized. Any notary public who violates this paragraph is guilty of a civil infraction, punishable by penalty not exceeding \$5,000, and that conduct constitutes malfeasance and misfeasance in the conduct of official duties. It is no defense to the civil infraction specified in this paragraph that the notary public acted without intent to defraud.⁸

That statutes and official directives so forcefully state the need for the signer's physical presence before the notary is a testament to the often tragic consequences of nonappearance. One victim of such nonappearance told her story to *The National Notary* magazine;⁹ the notary in this instance had notarized at the direction of a supervisor, who was doing a favor for a longtime friend, the victim's ex-husband.

I discovered to my utter disbelief that my signature had been forged on a trust deed secured against my home—notarized without me personally appearing before a Notary, contrary to state law. Since then, my life has been turned upside down, and I have been consumed by the ramifications of the transaction. And I still cannot adequately express the absolute shock, subsequent pain and unbelievable suffering my three children and I have experienced as a result of this violation against me.

I have been through a financial holocaust, and my life has been ruined. We were evicted from our home and forced to relocate about 130 miles away where we have no friends nor family. I lost my own business. I lost my entire life's work: all of my savings and retirement investments; my children's college funds; my credit reputation; and all my cars. I was forced into bankruptcy and paid hundreds of thousands of dollars to finance a lawsuit—still without a "final" resolution—all because of the ramifications of the employer's instruction to the Notary-employee, the execution of the forged cer-

7. NOTARY PUBLIC HANDBOOK, CAL. SECRETARY OF STATE (1998), at 8-9.

8. FLA. STAT. ch. 117.05(6)(a) (West 1997).

9. *A Victim of Nonappearance*, NAT'L NOTARY MAG., July 1995, at 10-11. The author of this article requested anonymity.

tificate, the fraudulent transaction and the Notary-employee's and employer's later refusal to do the right thing and finally fess up to the deception they undertook together.

I wonder if while completing the notarial certificate the Notary even gave one moment's thought to how performing that notarization would affect me! And this was done by a Notary whom I had met several times and had even notarized a document for me when I did, in fact, personally appear.¹⁰

A notary who does not require the physical presence of the signer of a given document has negligently abdicated the notarial duty to screen each signer for identity, willingness and competence. When there is no "body" on hand for the notary to identify, question and observe, the door is open to a multitude of frauds through a signature that may have been forged, coerced or incompetently made.

In the next section, we shall look at how different courts have interpreted the notary's statutory responsibility to require a document signer's physical presence. We shall also see that, in a civil court room, the notary may sometimes be forgiven for the signer's nonappearance if there is no resulting harm, though stiff penalties may still be imposed on the notary by licensing authorities for breach of duty.

NONAPPEARANCE: PUNISHED AND UNPUNISHED

A 1984 Nebraska Supreme Court case illustrates how rigorously courts have come to interpret "physical presence."

*Christensen v. Arant*¹¹ involved a real estate agent-notary who visited a married couple to notarize their signatures on a \$50,000 contract for the sale of their house.¹² While the agent notarized the husband's signature without problem, the wife remained unseen in another room nursing a baby.¹³ Conversing with her from the hall, the notary allowed the wife to sign and acknowledge the contract out of sight behind a closed door.¹⁴

A month later, however, the couple executed another sales contract for their house, this one for \$64,000, and declared they would not honor the first agreement.¹⁵ The initial purchaser took the couple to court, but the Nebraska Supreme Court ruled the first contract unenforceable, since the wife had not actually been in the notary's presence.¹⁶

10. *Id.*

11. 358 N.W.2d 200 (Neb. 1984).

12. *Id.* at 201.

13. *Id.* at 201-02.

14. *Id.*

15. *Id.*

16. *Id.* at 202.

It is clear that for Nebraska notaries, merely being under the same roof and in direct voice contact with a signer does not constitute personal appearance. The ruling in *Christensen* makes perfect sense, Chicago Title Insurance counsel Rick Klarin explained in *The National Notary*:¹⁷

(Klarin) asks how did the Notary know the husband didn't force the wife to sign behind that closed door? How was the Notary to know if the two weren't giggling over the legal loophole they just created by sequestering themselves in the room? 'It was the Notary's job to find that out. You can't do that behind a door or in another room.'

Though *Christensen* helped define the parameters of "physical presence," it is a highly unusual and perhaps unique case. In the typical nonappearance lawsuit (i.e., Scenario B), the putative signer is not within hailing distance under the same roof but elsewhere and "unavailable;" and the exploiter of the notary's negligence is not the true signer but a forger.

*McWilliams v. Clem*¹⁸ is just such a typical case. Here, with the wife absent, a husband persuaded a Montana notary to execute a certificate of acknowledgment for both of their signatures on a deed conveying jointly owned real property.¹⁹ The wife's signature proved a forgery and the wife, Joan McWilliams, sued to recover \$19,950 from the notary, Jean Clem, and the surety for the notary's statutory bond, Reliance Insurance Company.²⁰ When Reliance paid the wife the bond penalty of \$1,000, notary Clem then became liable to Reliance for \$1,000 and to Joan McWilliams for the remainder of the damages.²¹

Out-of-court settlements are often negotiated in nonappearance lawsuits, especially when the notary carries errors and omissions "liability" insurance and is defended by the attorneys of the insurance company, which, in most cases, will be the same firm providing the notary with any required bond. Even when the notary's misconduct is clear and an errors and omissions insurer might have grounds to contest its duty to indemnify the notary, settling with the victim may be the most economical course for the company. In such cases, the negligent or dishonest notary may be spared the financial consequences of official misconduct; though, as we shall see, there may be other adverse repercussions for the

17. Douglass M. Fischer, *Being There: The Dangers of Nonappearance*, NAT'L NOTARY MAG., July 1995, at 12.

18. 743 P.2d 577 (Mont. 1987).

19. *Id.* at 580-81.

20. *Id.* at 581.

21. *Id.* at 582, 854-85. Contrary to a surprisingly widespread belief, the notary's surety bond is not insurance for the notary and any funds expended by the surety company on the notary's behalf must be repaid by the notary. Bond penalties range from \$500 (New Mexico, Wisconsin, Wyoming) to \$15,000 (California). Notary bonds are required in 31 states.

notary.

On occasion, a civil court will absolve a notary of liability in a nonappearance case when the notary's misconduct is judged not to have directly caused the plaintiff's damages. In *Dickey v. Royal Banks of Missouri*,²² for example, a notary employed by Royal Banks did not require James M. Dickey to appear for the notarization of his authentic signature on an assignment of annuity presented to the bank by Barney Sandow.²³ Sandow had convinced Dickey to use the annuity as collateral for a loan from Royal Banks which Sandow would reinvest for Dickey at a higher rate of return than the annuity provided.²⁴ Sandow, however, defaulted on the loan and the annuity, worth \$110,000, was turned over to Royal Banks.²⁵

Dickey sought to recover the annuity from the lender, based on the improper nonappearance notarization by Royal Banks employee Laurie Trigg-Brown.²⁶ She had acted on the instruction of a bank loan officer, who first telephoned Dickey to explain that the annuity could be lost if the loan went bad; Dickey nonetheless wanted to proceed and admitted the signature to be his.²⁷

After a jury found in favor of Dickey due to the notary's misconduct in not requiring his presence, an appellate court reversed:

The jury . . . awarded relief in this case based on a Missouri statute that makes a notary, and his or her employer, responsible for damages that are proximately caused by professional misconduct. See Mo. Rev. Stat. Sections 486.355-486.365. The theory of this count would appear to rest on the premise that Mr. Sandow's fraudulent scheme would have been uncovered if only Mr. Dickey had appeared before a notary when he executed the assignment.

There is more than one difficulty in the way of this theory, not least the fact that Mr. Dickey admits that the signature on the assignment is his. This admission removes the notary from any responsibility for the execution of the assignment and the harm that befell Mr. Dickey, because "the notary's duty is [merely] to acknowledge the authenticity of the signature." *Herrero v. Cummins Mid-America, Inc.*, 930 S.W.2d 18, 22 (Mo. Ct. App. 1996). The court in *Herrero*, rejecting the claim that the role of the notary was to make sure that the signatory knew what he was signing, said that "[b]ecause the plaintiff here did not dispute the genuineness of her signature, [the defendant] did not commit official misconduct, which would subject her to liability for notarizing the form outside of [the]

22. 111 F.3d 580 (8th Cir. 1997).

23. *Id.* at 582.

24. *Id.*

25. *Id.*

26. *Id.* at 582-83.

27. *Id.* at 582.

plaintiff's presence." *Id.*

....

Neither Ms. Trigg-Brown, nor Royal Banks, can be found liable in these circumstances.²⁸

The *Dickey* case featured an inanimate "villain" that has increasingly complicated the professional lives of notaries for more than a century: the telephone. In the eyes of many notaries, a signer's physical presence becomes less necessary and the signer's absence less egregious when that person, as did James M. Dickey, telephones to acknowledge the signature and confirm agreement with the document's terms.

Yet, the dangers of "telephone acknowledgments" are real. With just a disembodied voice in an earphone and no "body" present to question and observe, the notary can never be completely sure of the speaker's identity or volition. Even if the voice is well known to the notary, it is entirely possible that the speaker is being threatened by an unseen third party, or that the document has been fraudulently switched without the speaker's knowledge.

Courts have proven to be uncompromising about "telephone acknowledgments." In voiding a deed of trust bearing a signature acknowledged over the phone, a Texas court pungently declared:

A notary can no more perform by telephone those notarial acts which require a personal appearance than a dentist can pull a tooth by telephone. If a telephone conversation is a personal appearance, we may suppose that a letter or telegram to a notary would also be as good or maybe even better.²⁹

As we shall see courts have proven more flexible when it comes to certain other notarial acts performed over the telephone, particularly oaths and depositions.

While notaries are sometimes rescued from liability because, as in *Dickey*, their nonappearance notarization was not a proximate cause of a victim's loss, more often such misconduct is judged a proximate cause and the notary held accountable. For example, in *Iselin-Jefferson Financial v. United California Bank*,³⁰ notary Harold S. Minden, employed by the Bank, notarized the purported signature of a person neither present nor personally known to him, Marilyn Durkin, after a Bank officer said he had compared the signature with others Durkin had on file and that it was genuine.³¹ The signature, however, was a forgery.³² Its appearance on a writ-

28. *Dickey*, 111 F.3d at 584.

29. *Charlton v. Richard Gill Co.*, 285 S.W.2d 801, 803 (Tex. App. 1955).

30. 549 P.2d 142 (Cal. 1976).

31. *Id.* at 143.

32. *Id.* at 143-44.

ten authorization persuaded Iselin-Jefferson to pay \$76,000 for an account receivable which Durkin and several others controlled.³³ When the debtor defaulted on the account, the plaintiff successfully sued the Bank to recover the loss, based on the notary's failure to require the signer's presence.

Minden's negligent act must be viewed as a proximate cause of plaintiff's injury because the act induced plaintiff to enter into an agreement it would not have otherwise made resulting in its substantial losses

The record discloses that plaintiff relied on Minden's acknowledgment of the genuineness of Mrs. Durkin's signature, and that but for this reliance plaintiff would not have entered into the transaction which caused it the damages it now seeks to recover.³⁴

As a result, notary Minden and employer United California Bank were found liable for the plaintiff's loss of about \$71,500, while the surety for the notary's bond was liable for \$5,000.³⁵

While it is not reported whether the deep pockets of the Bank financially rescued the notary in the aftermath of *Iselin-Jefferson*, that is certainly the case with some notary-employees found liable for acts required or encouraged by their employers.

Though notaries in different ways may often sidestep financial accountability for losses resulting from an unlawful nonappearance notarization, they may still suffer a devastating financial blow: their ability to earn a living may be impaired through removal of their notarial powers by commission revocation, suspension or denial. Indeed, to be alerted to possible violations, some states require notary-bonding firms to report any claims against the bond.³⁶

*Bernd v. Fong Eu*³⁷ provided an example of a notary vigorously contesting even the temporary removal of her notarial powers. For failing to require the personal appearance of a document signer and to maintain a notarial record of the transaction, California notary Betty E. Bernd was penalized by an administrative law judge by imposition of two concurrent six-month suspensions of her commission.³⁸ Bernd appealed, claiming it was an inadvertent clerical error that caused her to complete an acknowledgment certificate stating the signer had appeared; she said she had in-

33. *Id.* at 143.

34. *Id.* at 143-44.

35. *See id.* at 145 (for the monetary findings of the case).

36. *See, e.g.,* FLA. STAT. ch. 117.01(8) (1997) (stating, "[u]pon payment to any individual harmed as a result of a breach of duty by the notary public, the entity who has issued the bond for the notary public shall notify the Governor of the payment and the circumstances which led to the claim").

37. 100 Cal. App. 3d 511 (1979).

38. *Id.* at 513.

tended instead to use a subscribing witness form certifying that a third party swore to have witnessed the signing.³⁹ The appellate court was not impressed by this argument, stating that the “[p]laintiff’s complete failure to read the certificate before signing it was gross negligence and consequently a failure to ‘faithfully’ perform her notarial duty as a matter of law. . . .”⁴⁰ The court further cited the similar 1858 California Supreme Court case of *Fogarty v. Finlay*:

If the notary read the certificate before signing it, this omission must have been known to him; if he did not, he is equally guilty of negligence, for an officer who affixes his official signature and seal to a document (thereby giving to it the character of evidence,) without examining it to find whether the facts certified are true, can scarcely be said to faithfully perform his duty according to law.⁴¹

Official misconduct by a notary also endangers other state licenses that may be held by that notary, including the license to practice law. The following four cases illustrate how an attorney under pressure may take unlawful shortcuts that compromise the integrity of the notarial act. An often convenient shortcut is to dispense with the necessity that the signer actually appear before the notary at the time of the notarial act.

*In re Crapo*⁴²

An attorney forged a client’s signature on a Verified Petition to Modify Visitation, then notarized the false signature.⁴³ The client had just left the attorney’s office, but neglected to sign the petition; the attorney falsified the notarization in order to expedite the transaction for his client.⁴⁴ The court determined that the attorney had committed a criminal act and violated the Rules of Professional Conduct.⁴⁵ Penalty: 90-day suspension from the practice of law.⁴⁶

*In re Boyd*⁴⁷

To avoid probate, an attorney directed a client to forge her deceased father’s signature on a warranty deed.⁴⁸ He then directed a notary in his office to complete a false certificate stating that the father had appeared and acknowledged the signature on an earlier

39. *Id.* at 513-14.

40. *Id.* at 518.

41. *Id.* (citing *Fogarty v. Finlay* 10 Cal. 239, 245 (1858)).

42. 542 N.E.2d 1334 (Ind. 1989).

43. *Id.* at 1334-35.

44. *Id.*

45. *Id.* at 1335.

46. *Id.*

47. 430 N.W.2d 663 (Minn. 1988).

48. *Id.* at 663-64.

date.⁴⁹ That no harm was caused by the transaction was found by the court to be immaterial, because the attorney's conduct was criminal in nature; involving the attorney's own staff in the deceit was deemed to make the conduct even more inexcusable.⁵⁰ Penalty: six-month suspension from the practice of law.⁵¹

*Iowa State Bar Association v. West*⁵²

An attorney directed a secretary to notarize signatures on three real estate documents without the personal presence of the signers.⁵³ The court determined that the attorney had violated the Code of Professional Responsibility by aiding and abetting the secretary in the commission of a crime.⁵⁴ Though there was no evidence that the attorney acted for personal gain, there were numerous other ethical violations.⁵⁵ Penalty: indefinite suspension from the practice of law.⁵⁶

*In re Finley*⁵⁷

An attorney notarized "Bingo Information Sheets" without the presence of the signers.⁵⁸ The attorney argued that it was "customary" for notaries in his locale to execute acknowledgment certificates without the acknowledger's appearance if the notary reasonably believed the transaction was authorized by the acknowledger.⁵⁹ Accepting that the attorney did not intend to defraud anyone and that moral turpitude was not involved, the court nevertheless found that the attorney had violated the Code of Professional Responsibility.⁶⁰ With a clean prior record, the attorney pled guilty to the misdemeanor of false certification by a notary and cooperated with disciplinary officials.⁶¹ Penalty: public censure.⁶²

Considering that "members of the bar are held to a higher standard of morality than the public generally,"⁶³ it is ironic that NNA "Information Service"⁶⁴ counselors view attorneys as the too

49. *Id.* at 664.

50. *Id.* at 667.

51. *Id.* at 667-68.

52. 387 N.W.2d 338 (Iowa 1986).

53. *Id.* at 340.

54. *Id.* at 342.

55. *Id.*

56. *Id.*

57. 261 N.W.2d 841 (Minn. 1978).

58. *Id.* at 842-43.

59. *Id.* at 845.

60. *Id.* at 846.

61. *Id.* at 845-46.

62. *Id.* at 846.

63. *Finley*, 261 N.W.2d at 846.

64. See *supra* note 2 for a description of NNA's Information Service.

frequent nemeses of law-abiding notaries. Said one veteran NNA counselor with nearly two decades of experience in advising notaries:

Among all the professional groups that regularly use the services of notaries, attorneys are most often the bullies, the intimidators, the arrogant so-and-sos who say, "I know the law and you don't, so just do it." Well, they usually don't know notarial law, or they think the rules are trivial. It almost seems that their familiarity with the law has bred a contempt for it.⁶⁵

In the belief that most of the attorneys who request improper acts of notaries do so out of ignorance rather than criminal intent, the NNA in 1997 launched a campaign to educate attorneys about the critical but widely misunderstood principles and practices of notarization. One of the foremost principles, of course, is the need for each document signer to be face-to-face before the notary at the time of the notarial act. By publishing *Notary Law & Practice: Cases & Materials*, authored by five law school professors with experience as notaries, the NNA provided a systematic text that may be used to teach notarization to law students and to practicing attorneys in continuing education sessions. NNA President Milton G. Valera explained the purpose of the new book in its introductory pages:

[T]oo few attorneys are fully aware of the unique demands of the office of Notary Public. They do not appreciate that Notaries are not mere expediting factotums in the legal process but government officials who must speak out when they detect impropriety.

Ironically, the attorneys who should be the main upholders of due process in the execution of legal documents are today too often its circumventers—largely because of a void in their legal training.

The purpose of *Notary Law & Practice: Cases & Materials* is at long last to fill that void.⁶⁶

Valera believes that if every law student took a short course on the basic "dos and don'ts" of notarization, with emphasis on the "do nots", and their career-ending ramifications for attorneys, notaries would field far fewer requests to perform illegal nonappearance notarizations.⁶⁷

ALLOWED NONAPPEARANCE: TELEPHONE DEPOSITIONS

While "telephone acknowledgments" are disallowed virtually

65. Interview with NNA Counselor, Nat'l Notary Ass'n, in Chatsworth, California (Dec. 19, 1997).

66. MICHAEL L. CLOSEN ET AL., *NOTARY LAW & PRACTICE: CASES & MATERIALS* iii (1997).

67. *See id.*

everywhere, depositions and oaths are two notarial acts that some states or courts do permit to be executed over the telephone.

In the codes of many states, the notarial act of "taking" a deposition or an affidavit is a holdover from the 19th century, when one of the notary's main duties was to act as a kind of public scribe. Today, only skilled shorthand reporters (i.e., "court reporters") with a notary commission or *ex officio* oath-administering powers will generally be asked to transcribe spoken words into deposition or affidavit form. Nevertheless, the authority for notaries to take a deposition or an affidavit remains in many state codes.

Notaries who are unskilled stenographically will generally only become involved with depositions in administering an oath to a deponent at the beginning of the deposition session, or in executing a jurat when the deponent signs the transcript.

The Federal Rules of Civil Procedure, amended as of December 1, 1993, authorize telephone depositions.

The parties may stipulate in writing or the court may upon motion order that a deposition be taken by telephone or other remote electronic means. For the purposes of this rule and Rules 28(a), 37(a)(1), and 37(b)(1), a deposition taken by such means is taken in the district and at the place where the deponent is to answer questions.⁶⁸

While this rule recognizes depositions taken over the telephone and by other electronic means, it does not, of course, grant notarial authority to take such depositions, nor does it address the questions of whether an oath may be administered over the phone and whether a phone-in deponent may be outside the notary's jurisdiction.

The Attorney General of Florida in 1992 addressed both of these questions in response to a query by the Governor, whose office is responsible for disciplining the state's notaries.

As to the first question, whether an oath may be administered over the telephone, the Florida Attorney General stated:

The purpose of requiring the personal presence of the affiant appears to be that the officer administering the oath can identify that individual as the person who actually took the oath, not that the officer knows him to be the person he represents himself to be. This purpose would not be satisfied by the interested parties stipulating as to the person's identity. Accordingly, I am of the opinion that a notary public may not administer an oath to a person over the telephone even though the attorneys for all interested parties stipulate as to the person's identity.⁶⁹

The Attorney General further held that the Florida statute

68. FED. R. CIV. P. 30(b)(7).

69. 92 Op. Fla. Att'y Gen. 95 (Dec. 23, 1992).

requiring notaries to specify in their certificates how an affiant was identified "appears to require the person giving the oath to be in the presence of the notary for identification purposes."⁷⁰

As to the second question, whether a phone-in deponent may be outside the notary's jurisdiction, the Florida Attorney General continued:

[W]ith the advances in technology, it is possible to conduct a deposition through the use of interactive video and telephone system where the participants can hear and see each other. In such cases, the purpose of requiring the affiant to be in the presence of the officer administering the oath, i.e., that the officer can identify the individual as the person who actually took the oath, would appear to be satisfied. *Inasmuch as the powers of a notary public, as an officer of the state, are coextensive with the territorial limits of the state, the participants using such an interactive video and telephone system should be located within the state.* It may be advisable to seek legislative or judicial clarification through the crafting of legislation or rules to accomplish this.⁷¹ (Emphasis added.)

Even when teleconferencing equipment is not used, the Florida Attorney General encouraged telephone depositions as "an efficient and cost-saving procedure," as long as oaths are not administered over the telephone and "arrangements (are) made for a notary public to be present where the affiant is located to administer the oath."⁷²

While Florida notaries may administer oaths to deponents in their presence prior to a telephone deposition, they may not themselves take depositions, either in or out of a deponent's presence. A Florida appellate court in 1996 ruled that the taking of a deposition by a notary public, paralegal or other non-attorney without the presence of a supervising attorney constitutes an unauthorized practice of law.⁷³

Other states, including California, Indiana and Minnesota, continue to give all notaries the theoretic power to take depositions, and some extend this power to telephone depositions and oaths. For example, the *Notary Public Handbook of Maryland*,⁷⁴ where notaries may take depositions, declares, "[b]y written agreement of the parties or by court order, a deposition may be taken by telephone. The law provides that the officer before whom

70. *Id.*

71. *Id.* The state of Florida has thus far been the nation's pioneer in legislating rules for notaries in an electronic environment. In 1997, the state created a new class of notaries with registered private and public computer keys who may perform "electronic notarizations."

72. *Id.*

73. *State v. Foster*, 674 So.2d 747, 753 (Fla. Dist. Ct. App. 1996); *see also* the Florida GOVERNOR'S REFERENCE MANUAL FOR NOTARIES 13-14 (1998).

74. *See* NOTARY PUBLIC HANDBOOK STATE OF MARYLAND 10-11 (1996). The handbook is issued by the Governor and Secretary of State, at 10 -11.

such a deposition is taken may administer the oath by telephone.⁷⁵

Most states do not authorize telephone depositions and oaths by their notaries. In the states where the practice is found, there may not be express statutory authorization for it. For example, a Nebraska official told the NNA that administration of oaths over the telephone by notary-court reporters is not allowed "technically by statute," but that it nonetheless appears to be a "fairly standard practice and is not challenged."⁷⁶

With lawful telephone depositions, the notary will not abide by the motto, *habeas corpus*, but at least will have a voice, albeit disembodied, and the assurances of an attending attorney about the telephonic transaction's propriety. With certain other forms of "allowed nonappearance," however, there will be neither body nor voice and the assurer of propriety will often be a perfect stranger with no standing as an attorney or court officer.

ALLOWED NONAPPEARANCE: SIGNINGS BY PROXY

Every state permits notarization of the signatures of representatives, whether these individuals are signing on behalf of "artificial persons," such as corporations, or on behalf of other "natural persons." When the principal being represented is a human being, there is no requirement that this person appear before the notary at the time of the notarial act, or even be known to the notary.

The Uniform Law on Notarial Acts (ULONA)⁷⁷ helpfully defines the different common representative capacities:

"In a representative capacity" means:

- i. for and on behalf of a corporation, partnership, trust, or other entity, as an authorized officer, agent, partner, trustee, or other representative;
- ii. as a public officer, personal representative, guardian, or other representative, in the capacity recited in the instrument;
- iii. as an attorney in fact for a principal;
- iv. in any other capacity as an authorized representative of another.⁷⁸

Since one person may not take an oath or affirmation for another, this act being a highly personal commitment of conscience, only acknowledgments are adaptable to representative signers and

75. *Id.*

76. Telephone Interview with anonymous Nebraska official, Lincoln, Nebraska (Oct. 24, 1997).

77. ULONA, *supra* note 4.

78. *Id.* §1(4).

never verifications upon oath or affirmation (i.e., "jurats"). Representative acknowledgers, however, may sometimes be directed by law to state under oath that they have authority to sign for another person or entity.⁷⁹ Such an oath is not required by the ULONA, which defines the representative acknowledger's duty as follows:

"Acknowledgment" means a declaration by a person that the person has executed an instrument for the purposes stated 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.* (Emphasis added.)⁸⁰

The biggest challenge for the notary with representative signers is ascertaining whether the appearing person actually has been given authority to sign for the nonappearing person. Often this will not be difficult because either or both of the appearing and nonappearing individuals will be personally known to the notary, as will their relationship as representative and principal. However, when the representative is a stranger, the notary normally must rely on documentary evidence not only to establish identity but also representative capacity.⁸¹

For an attorney in fact, the documentary proof of representative capacity is the power of attorney signed by the principal granting authority to the attorney in fact. For a guardian or conservator, the best proof is the court instrument appointing and investing the guardian or conservator with power to sign for an incompetent principal.

As the qualifications for notaries have lowered and the office has become more ministerial, relying on notaries to scrutinize such

79. For example, the following acknowledgment certificate for a signing by a corporate representative, as prescribed by the Tennessee statutory compilation requires administration of an oath by the notary:

State of Tennessee)
County of _____)

Before me, _____ of the state and county mentioned, personally appeared _____, with whom I am personally acquainted (or proved to me on the basis of satisfactory evidence), and who, *upon oath*, acknowledged himself/herself to be president (or other officer authorized to execute the instrument) of the _____, the within named bargainor, a corporation, and that he/she as such _____, executed the foregoing instrument for the purpose therein contained, by signing the name of the corporation by himself/herself as _____.

Witness my hand and seal, at office in _____, this ____ day of ____.
(Emphasis added.)

TENN. CODE. ANN. § 66-22-108(a) (1994).

80. ULONA, *supra* note 4, at §1(2).

81. State laws typically also allow the notary to rely on the vouching under oath or a personally known credible witness to identify a stranger and establish his or her representative capacity.

complicated legal instruments as powers of attorney has proven increasingly problematic in the past half century. Many notaries have neither the training nor the aptitude to analyze a power of attorney to determine who is thereby empowered, with what authority and under what circumstances. This is hardly a judgment for the ministerial notary. As a result, many state legislatures have worded their statutory acknowledgment forms to remove this responsibility from the notary. The following acknowledgment certificates for attorneys in fact are examples of the type that oblige the notary only to identify the attorney in fact as an individual and not as an authorized representative:

- (1) "The foregoing instrument was acknowledged before me this _____(date) by _____(name of attorney in fact) as attorney in fact . . ."⁸² and (2) " . . . personally appeared _____, known to me (or proved to me on the oath of _____) to be the person who is described in and whose name is subscribed to the within instrument as the attorney in fact of _____ . . ."⁸³

In the above forms, the notary certifies that an identified person signed as attorney in fact, not that the person is known by the notary to be an attorney in fact.

In 1982, the California legislature reworded three statutory representative-capacity acknowledgment forms so that notaries would no longer be obliged to verify a signer's capacity.⁸⁴ Below, for example, are portions of the "before" and "after" partnership certificates:

- (1) "personally appeared _____, known to me (or proved to me on the oath of _____) to be one of the partners of the partnership that executed the within instrument . . ."⁸⁵ and (2) " . . . personally appeared _____, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person that executed this instrument, on behalf of the partnership . . ."⁸⁶

Effective January 1, 1993, the California Legislature replaced

82. FLA. STAT. ch. 695.25(4) (West 1997).

83. N.D. CENT. CODE § 47-19-29 (1993).

84. The three California certificates amended in 1982 so that the notary would no longer have to ascertain representative capacity were: the corporate acknowledgment form, CAL. CIV. CODE § 1190 (West 1997), the partnership acknowledgment form, CAL. CIV. CODE § 1190(a) (West 1997) and the form for an acknowledgment by a public corporation, agency or political subdivision of the state, CAL. CIV. CODE § 1191 (West 1997). Even before 1982, the attorney in fact acknowledgment certificate, CAL. CIV. CODE § 1192 (West 1997) directed the notary only to ascertain the acknowledger's identity and not authority to sign (i.e., " . . . personally appeared _____, known to me [or proved to me on the oath of _____] to be the person whose name is subscribed to the within instrument as the attorney in fact of . . .").

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

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

five statutory acknowledgment forms with one so-called "all-purpose" certificate; this unique form does not require the notary to determine the signer's claimed representative capacity, nor does it even ask the notary to report this representative capacity.⁸⁷ The form reads, ". . . personally appeared _____, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies)"⁸⁸

In the space of 10 years, the above three statutory forms arguably demarcate the transformation of the California notary office from a quasi-judicial position (pre-1982) to a ministerial position (pre-1993) to a quasi-secretarial position (post-1993). The only appreciable judgment now left by statute to the California notary, and the notaries of many other states, is determining each acknowledger's personal identity. Of course, the prudent and conscientious notary will also render a layman's judgment about each signer's volition and competence, even when these determinations are not expressly required by statute.

With any nonappearance notarization involving a representative signer, the notary must always be alert to the possibility of fraud. For example, an attorney in fact who requests notarization of a document conveying valuable property to that same attorney in fact should be carefully questioned by the notary; in such a case it would be wise to ask to see the power of attorney, regardless of the wording of any statutory notarial form. The notary who customarily questions, challenges and goes beyond narrow statutory requirements will be the most successful in deterring fraud and staying out of court.

ALLOWED NONAPPEARANCE: PROOF OF EXECUTION BY SUBSCRIBING WITNESS

Of all the nonappearance notarizations, lawful and unlawful, perhaps the one most laden with potential for fraud is the proof of execution by subscribing witness.

In taking a proof, the notary notarizes the signature of an absent person based solely on the sworn word of a present person,

87. The "all-purpose" certificate prescribed by CAL. CIV. CODE § 1189(a) (West 1997) became mandatory for any and every acknowledgment performed in the state, effective January 1, 1995. Yet, the form's lack of specificity about signing capacity proved problematic and it was widely rejected in other states. This problem was largely solved, however, by a law that took effect January 1, 1997, allowing out-of-state acknowledgment certificates to be used by California notaries but only on documents to be filed out of state. CAL. CIV. CODE § 1189(c).

88. See CAL. CIV. CODE § 1189(a) for California's "all purpose" form after January 1, 1993.

known as the subscribing witness. This witness swears (or affirms) to the notary that he or she was in the presence of the absent principal when that person signed, or acknowledged signing, the particular document. Most states stipulate that the subscribing witness be either personally known to the notary, or personally known to a credible witness who is personally known to the notary, though a few permit identification of a subscribing witness through identification cards.⁸⁹ Some states stipulate that the subscribing witness not be a grantee or beneficiary of the document.⁹⁰ A few states require that at least two subscribing witnesses be present for a proof of identification.⁹¹ The subscribing witness is so called because this person must *subscribe* his or her signature on the notarized document after the principal has signed.

The danger of a proof by subscribing witness lies in the fact that the notary has forfeited any opportunity to screen the missing principal signer for identity, volition or competence; thereby reposing total trust in the scruples of the witness. That law may require this witness to be personally known to the notary, as we have seen, may heighten rather than lessen the likelihood of fraud.

Generally, proof by subscribing witness is an acceptable substitute for an acknowledgment on a land conveyance or other recordable instrument. Yet, due to the proof's high potential for fraud, a number of states do not statutorily recognize it as a notarial act; and several, namely Florida, Maryland and Washington, have expressly discouraged notaries from performing them. Indeed, the *Florida Governor's Reference Manual for Notaries* carries this warning, "Remember then, if a co-worker, family member, or anyone else asks you to notarize another person's signature based on a sworn statement that he or she saw the person sign the document, JUST SAY NO!!"⁹²

One state, California, sanctions proofs but prohibits their use on any "grant deed, mortgage, deed of trust, quitclaim deed, or security agreement . . . though proof of the execution of a trustee's deed or deed of reconveyance is permitted."⁹³

Taking proof of execution by subscribing witness was inten-

89. See, e.g., N.Y. REAL PROP. LAW § 304 (1995) (permitting the identification of a subscribing witness through such "satisfactory evidence" as a driver's license or a credible witness). See also WILLIAM A. CAMPBELL, NOTARY PUBLIC GUIDEBOOK FOR NORTH CAROLINA 20 (7th ed. 1995) (discussing the identification of subscribing witnesses).

90. See, e.g., N.C. GEN. STAT. § 47-12.2 (1995) (stipulating that subscribing witness not be a grantee or beneficiary of the document).

91. See, e.g., TENN. CODE ANN. § 66-22-101 (1994) (requiring at least two subscribing witnesses be present for proof).

92. See GOVERNOR'S REFERENCE MANUAL FOR NOTARIES 50 (1997). This handbook and guide for Florida's notaries is published by the Notary Section of the Executive Office of the Governor.

93. CAL. CIV. CODE § 1195(b).

tionally omitted as a notarial power by the Attorney General of the Commonwealth of the Northern Mariana Islands during the comprehensive rewriting of the Commonwealth's rules for notaries in 1992:

[W]e agree that notarizations of absent party signatures by way of a subscribing witness are inherently unreliable and should not be authorized in these regulations.

....

The proper procedure in case of proof of the signature of an absent party would be for the subscribing witness to sign a declaration or affidavit under penalty of perjury, attesting to the validity of his or her own signature if subscribed on the document in question, or to the validity of the absent person and setting forth facts supporting this assertion. Such a declaration, if properly notarized, could be separately recorded. In the case of land transactions, the public will now be able to make its own assessment of the validity of the absent person's signature and will place on the subscribing witness possible liability for slander of title. This modification of the proposed regulations frees the notary from unintentional involvement in absent party signature fraud by requiring that notaries only attest to signatures of persons actually appearing before them.⁹⁴

The proof is not recognized as a notarial act by the Uniform Law on Notarial Acts of 1982, though it was by the model statute replaced by the ULONA, the Uniform Recognition of Acknowledgments Act of 1968. While the NNA's Model Notary Act of 1984 does not empower notaries to take proofs of execution,⁹⁵ it does provide a "Subscribing Witness for Absent Signer" certificate, in recognition of the proof's utility and widespread use; the Act provides an explanatory note in the "Commentary" section for its Article V:

For signers who cannot appear before a notary, a subscribing-witness acknowledgment certificate (also known as a "witness jurat" is provided in Section 5-102. To heighten the integrity of this third-party form of notarization, the notary may not rely on documentary evidence in identifying the subscribing witness. The commissioning official should encourage the use of such certificates only in the event of a signer's death, inaccessibility, or unknown whereabouts and not as a matter of convenience, since this type of notarization is more vulnerable to fraudulent use than other types without a third party.⁹⁶

94. 14 N. MAR. I. REG. 9, 9640 (Sept. 15, 1992). In rewriting its Notary regulations, the Marina Islands adopted the National Notary Association's *Model Notary Act* almost *in toto*.

95. MODEL NOTARY ACT § 3-101 (NAT'L NOTARY ASS'N 1984). The *Model Notary Act* empowers notaries to perform four notarial acts: acknowledgments, oaths/affirmations, jurats and copy certifications. *Id.*

96. *Id.* at § 5-102.

The perhaps unfortunate reality is that proofs today too often are used as a matter of convenience rather than of last resort. They are more frequently performed to avoid disturbing clients or employers than to avoid hardship in the case of signers unexpectedly called away before they are able to personally present signed documents to a notary. Proofs were an important legal mechanism in the pre-automobile age when transportation was slower, less reliable and often too enervating to be used by the less than vigorous; today, with the proliferation of notaries and the convenience of modern transportation, there seem to be fewer valid reasons why a signer cannot quickly get to a notary, or a notary to a signer.

Still, it cannot be denied that even today occasions arise when there is no alternative but the proof of execution, particularly when an individual has disappeared or deceased after signing an important document affecting the affairs of others present and living. Furthermore, the statutes of many states provide procedures for notarization through recognition of handwriting for instances when *both* principal and subscribing witness have died or disappeared before getting to a notary:

If all of the subscribing witnesses have died, have left the state, or have become incompetent or unavailable, the instrument may be proved by any person who will state under oath that he or she knows the handwriting of the maker of the instrument and that the signature on the instrument is the maker's. The instrument may also be proved if the person states under oath that he or she knows the handwriting of a subscribing witness and that the signature on the document is that of the subscribing witness. Again, if the subscribing witness is a beneficiary or grantee in the instrument, his or her signature may not be proved.

If the instrument has no subscribing witnesses, it may be proved by any person who will state under oath that he or she knows the handwriting of the maker, and that the signature on the instrument is the maker's.⁹⁷

Though it might seem constructive from the standpoint of fraud deterrence to repeal every vestige of the proof of execution from the statute books, the fact that these often ancient legal mechanisms remain in place in so many state codes testifies to their continuing utility. Rather than repealing proof of execution statutes, a more constructive course might be to perfect and modernize these laws, while considering such alternatives as that proposed above by the Attorney General for the Commonwealth of the Northern Mariana Islands. Certainly, one statutory provision needed in almost every state is the disqualification of would-be subscribing witnesses who are named in or affected by the docu-

97. See Campbell, *supra* note 89, at 21.

ment they wish to have notarized by proof.

DISCUSSION

It would be unfair to assign responsibility for the damages caused by illicit nonappearance notarizations solely to the negligence and dishonesty of notaries. Part of the blame must rest with the many lawmakers who value vagueness and lack of rigor in notarial regulations and profess they want to "cut through the red tape" and streamline the operations of commerce and law; yet, on countless occasions in recent decades attorney-legislators have rejected the most commonsensical of notarial precautions: e.g., a mandatory journal of notarial acts or a disqualification for notaries with a monetary interest, arguing they would be disruptive to the workings of law offices. Another part of the blame must rest with the officials who commission and regulate notaries, due to their glaring failure in many states to educate both notaries and employers on the important responsibilities of the notarial office and on the damaging impact of misconduct on the rights and property of private citizens.

State lawmakers are not always easily persuaded about the societal benefits of having each signer appear in person before the notary. In 1985, for example, Washington State's Legislature adopted two new short-form notarial certificates whose wording did not expressly state that the signer was in the notary's presence: one for an acknowledger in an individual capacity and the other for an acknowledger in a representative capacity.⁹⁸ Below is verbiage (in part) for the individual acknowledgment form: "I certify that I know or have satisfactory evidence that _____ (name of person) signed this instrument and acknowledged it to be (his/her) free and voluntary act for the uses and purposes mentioned in the instrument."⁹⁹

The above certificate was enacted into law despite strenuous objections by the NNA and others who understood the inevitable adverse consequences of this notarial wording. In effect, the wording authorized notarizations based on the notary's mere familiarity with a person's signature, or on the informal word of a third party, if the notary believed this constituted "satisfactory evidence." Within three years, the form's flaw had opened the door to so many problems that Washington legislators saw the wisdom and fraud-deterrent public benefit of including the phrase "appeared before me" in the certificate. In 1988, the Legislature amended both the individual and representative short-form ac-

98. WASH. REV. CODE §§ 42.44.100(1)-.100(2) (1996). The legislation was Washington House Bill 155 of 1985.

99. See *id.* for Washington's acknowledgment by individual, effective January 1, 1986.

knowledge certificates.¹⁰⁰ Below is the resulting, and current, short-form individual acknowledgment certificate:

I certify that I know or have satisfactory evidence that _____ (name of person) is the person who appeared before me, and said person acknowledged that (he/she) signed this instrument and acknowledged it to be (his/her) free and voluntary act for the uses and purposes mentioned in the instrument.¹⁰¹

While the Washington Legislature must be given credit for seeing the error of its notarial ways, if ever there were an award for continuing lack of notarial perspicacity by a state legislative body, Arkansas' General Assembly would be the front-runner. In 1989, it enacted a law allowing notarization of any signature if the notary either: "(1) Witnesses the signing of the instrument and personally knows the signer or is presented proof of the identity of the signer; or (2) *Recognizes the signature of the signer by virtue of familiarity with the signature.*"¹⁰² (Emphasis added.)

Thus, though experienced professional handwriting analysts may differ about the authenticity of a given signature, Arkansas' 60,000¹⁰³ notaries are assumed to be able to tell at a glance whether a signature is genuine, and are thereby empowered to dispense with the personal appearance of the signer.¹⁰⁴ Of course, forgeries are regularly foisted on notaries (remember Scenario B) who profess to be familiar with the signature of a purported signer.

Eliminating the requirement that the document signer appear before the notary holds a surprising initial appeal for attorneys in general and attorney-legislators in particular. The deliberations of the panel of 13 attorneys who drafted the influential Uniform Law on Notarial Acts in 1981 and 1982 offer a case in point.¹⁰⁵

Remarkably, the first draft of the ULONA permitted notari-

100. WASH. REV. Code § 42.44.100 (1996).

101. *Id.*

102. ARK. CODE § 21-14-111(a) (1995).

103. See *The 1997 NNA Notary Census*, NAT'L NOTARY MAG., May 1997, at 30-31. The Notary populations of all 50 states and U.S. jurisdictions are estimated therein.

104. ARK. CODE § 21-14-202 (1995). The Arkansas General Assembly perhaps topped its ill-advised 1989 bill in 1995 by allowing qualified notaries to "affix a notary certificate bearing the notary public's facsimile signature and facsimile seal in lieu of the notary public's manual signature and rubber or embossed seal. . . ." *Id.* In effect, this law authorizes certificates with pre-printed notary signatures and seals, thereby making it easy for "notarizations" to be performed without the notary's knowledge and presence. *Id.* Arkansas legislators not only have a knack for creating bad notary laws but also for labeling their enactment as an urgent need.

105. Officers of the NNA, including the author of this article, were present as advisers during the *Uniform Law on Notarial Acts'* drafting sessions in Chicago (1981) and Monterey (1982).

zation based either on a telephone call to the notary from the signer or on the notary's recognition of the signature. These non-appearance provisions won narrow approval on first reading at the 1981 annual meeting of the National Conference of Commissioners on Uniform State Laws (NCCUSL), held in New Orleans, though there was strenuous objection by some commissioners, notably Judge Eugene A. Burdick of North Dakota.¹⁰⁶

Due to opposition from commissioners and from the NNA, the panel in April of 1982 issued a second draft that offered a compromise: notarization would be permitted without the signer's appearance but only if the notary *both* received a telephone call and recognized the signature.¹⁰⁷

However, by the time of the NCCUSL's next annual meeting, late in the summer of 1982, a majority of the commissioners had been persuaded to oppose *any* nonappearance provision, in no small part due to the activism of the NNA, represented at the drafting sessions as an adviser. Finally, the commissioners voted to reverse their position, stipulating that all notarial acts defined in the ULONA must require the personal appearance of the signer before a notary.

The following year, the ULONA was approved by the American Bar Association at its annual meeting, in New Orleans, and, within about a decade, nine states and the District of Columbia had adopted it.¹⁰⁸ But the margin of victory for the foes of nonappearance had been a narrow one. Many of the NCCUSL commissioners would have preferred, and still do, that telephone acknowledgments, and notarizations based on mere familiarity with a signature, be the law of the land.

When document frauds involve the active participation of a duped, intimidated or unscrupulous notary public (rather than the use of a stolen or forged notary seal), the failure of the document signer to appear before the notary is the predominant cause of scams in the case of real property deeds, automobile titles and other valuable instruments. There are far fewer frauds involving coerced or incompetent signings than there are forged signings under *Scenarios A* and *B*, as described early in this article.

Can anything be done to reduce the number of illegal nonappearance notarizations? Yes. There are obvious measures that

106. Judge Burdick was one of the principal drafters of the NNA's UNIFORM NOTARY ACT (1973) and its MODEL NOTARY ACT (1984).

107. For a more complete chronicling, see *Achievement Award '84: Robert A. Stein—Shaping the Notary's Future*, NAT'L NOTARY MAG., May 1984, at 20-22.

108. Charles N. Faerber, *Table of Enactment of Uniform Laws*, in NOTARY SEAL & CERTIFICATE VERIFICATION MANUAL 395-96 (1998-1999). The *Uniform Law on Notarial Acts* was first adopted by Delaware, District of Columbia, Kansas, Minnesota, Montana, Nevada, New Mexico, Oklahoma, Oregon and Wisconsin. Its certificates have also been adopted by Illinois and Iowa. *Id.*

may be taken, but state legislators and notary regulators must take the initiative.

If most document frauds involve an unscrupulous, duped or intimidated notary; then perhaps one-third of the solution is to stiffen the background screening of notary commission applicants to eliminate those with criminal backgrounds. Incredibly, California is the only state which has the capability to screen out a convicted criminal applying for a notary commission with an alias.¹⁰⁹ A computerized Automated Fingerprint Identification System (AFIS) has allowed California to match notary commission applicant prints against those of criminals in law enforcement files, all but eliminating the problem, rampant in the 1970s, of criminals applying for and later misusing notary commissions under different false names.¹¹⁰

As for those noncriminal notaries who may be fooled or cowed into abetting a document fraud; education and clear, workable statutory guidelines are the preventative keys. First, every state notary code needs a clear-cut definition of "satisfactory evidence of identity" that includes a statutory list of reliable and acceptable identification cards. At present, only the statutes of California, Florida and Tennessee provide their notaries with such a helpful list.¹¹¹

Every state notary code needs a provision as clear, specific and forceful as the Florida law stipulating a \$5,000 civil fine for performing a nonappearance notarization.¹¹² Every state notary code must require notaries to keep and safeguard a journal of their notarial acts, including the signature of each document signer and witness and, ideally, each signer's fingerprint. Statutory journal signature requirements have demonstrated that they can deter forgers, discourage false claims of nonappearance by signers with second thoughts, and provide invaluable evidence for prosecutors of fraud. Furthermore, notary journal fingerprint requirements have proven to be startlingly effective in reducing real property deed forgeries.¹¹³

109. CAL. GOV. CODE § 8201.1 (requiring all commission applicants to submit fingerprints).

110. After criminals in California were prevented from obtaining notary commissions using aliases, many resorted to stealing or forging notary seals to accomplish their frauds. To address this problem, a 1992 California law prohibits vendors and manufacturers from providing a notary seal to anyone without presentation of a "certificate of authorization" from the state. CAL. GOV. CODE § 8207.3. (West 1997).

111. CAL. CIV. CODE § 1185 (West 1997); FLA. STAT. ch. 117.05(5) (West 1997); TENN. CODE ANN. § 66-22-106 (1994).

112. See *supra* note 9.

113. Since January 1, 1996, California has been the only state to require notaries to obtain the fingerprint (i.e., right thumbprint) of real property deed signers, after a three-year pilot program in Los Angeles County noticeably re-

Every state notary code needs a requirement that notaries undergo classroom training and pass a meaningful written test before taking on their important official duties.¹¹⁴ Every state notary code needs workable mechanisms for revoking or suspending the commissions of miscreant notaries. Amazingly, a number of states do not yet empower the commissioning official to revoke a notary commission.

Clear and workable notary laws are not enough. The secretaries of state and governors who commission and regulate notaries must make the continuing education of their commissionees and the raising of their morale a much higher priority. A good starting point would be publishing an official state notary handbook that explains notarial duties in layman's terms. Such a handbook must emphasize that any conflict between the state's notary code and the dictates of an employer must be resolved in favor of the law. Too many notaries buckle to pressure from employers because they feel they are alone and without support.

To eliminate illicit nonappearance notarizations, each state must first inform notaries, in no uncertain terms, that such acts are wrong and will be punished, and then let them know that the state will stand firmly behind them when they resist pressure to break the law.

With technology now enabling "teleconferences" between parties in different cities, or even different nations, the future will likely bring broadened statutory definitions of "personal appearance" whereby a notary in Los Angeles might attest to a televised signature affixation by a person in London. The notary's audial interaction with the absent signer and real-time acquisition of the signer's video image would seem prerequisites for such remote electronic notarizations.¹¹⁵ Yet, while these electronic notarial acts, with the notary at one site and the acknowledger or affiant at another, are at least conceivable without audial interaction, as the

duced the forgery caseloads of county police departments. CAL. GOV. CODE § 8206(a)(2)(G) (West 1998).

114. At present, only the state of North Carolina requires notaries to undergo classroom training, at community colleges. N.C. GEN. STAT. § 10A-4(b) (1997). The states currently requiring some kind of written or oral test of notary commission applicants are: Alaska, California, Connecticut, Hawaii, Maine, New York, Rhode Island, South Dakota and Wyoming.

115. FLA. STAT. ch. 117.20 (West 1997). Florida is the only state now authorizing "electronic notarizations," though the signer must still be in the notary's physical presence. *Id.* Florida law allows notaries with registered computer "keys" to amend their commissions to certify electronic documents using their digital signatures. *Id.* The Statute reads, in part: "An electronic notarization shall include the name of the notary public, exactly as commissioned, the date of expiration of the commission of the notary public, the commission number, and the notary's digital signature. Neither a rubber stamp seal nor an impression-type seal is required for an electronic notarization." *Id.*

widespread use of electronic mail demonstrates, visual interaction seems a *sine qua non*. How else for the notary to determine that a remote signer is not being blatantly coerced and to record a visual image providing evidence that the transmitter was not an impositor using a stolen private key?

Just as the Nebraska Supreme Court in 1984 (*Christensen v. Arant*) held that mere audial contact through an intervening door did not suffice as physical presence in the traditional legal sense, so it is likely that mere electronic contact through a nonvisual medium will not suffice as physical presence in the futuristic legal sense.

With any future remote electronic notarizations, the notary's byword of *habeas corpus*, "you have the body," must be replaced by a new motto of *videas corpus*, "you see the body."