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Peter J. Van Alstyne

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THE NOTARY'S DUTY TO METICULOUSLY MAINTAIN A NOTARY JOURNAL

PETER J. VAN ALSTYNE*

INTRODUCTION

The idea that notaries should diligently maintain a journal record of every notarial act they perform is not new. It has been around for centuries. In fact, one of North America's earliest notaries, William Aspinwall of the Massachusetts Bay Colony, argued strenuously against having to turn over his notary records to his successor in office.¹ He told the General Court in 1652, "The bookes are mine own, bought at my owne chardge & Register therein my owne voluntary & handy worke, and as prople mine as any thing I possess is mine."²

Notary journals have been in various degrees of use across the country for decades. For the most part, the value and importance of notary journals has been widely underestimated. Notary journals are often referred to as "notary records," "notary ledgers" or "notary logs." The most commonly used term is "notary journal."

The notary's journal constitutes independent physical evidence that an instrument was signed or acknowledged on a particular date by an individual who was positively identified by a public official - the notary.³ The notary journal is an official record

* Peter J. Van Alstyne, founder and President of the Notary Law Institute in Salt Lake City, Utah; Former Director of the Utah Division of Corporations and Commercial Code. J.D., University of Utah College of Law, 1982; M.A., Urban and Regional Planning from the University of Pittsburgh, 1976; B.A., University of Utah, 1974. The author has served on the legislative staff of U.S. Senator Jake Garn and U.S. Secretary of Education Dr. T.H. Bell in Washington, D.C. Mr. Van Alstyne has published numerous national articles on issues of law, land use planning and growth management and has delivered by invitation several white papers in European and Eastern European forums on government modernization and urban planning. Mr. Van Alstyne is the recipient of the 1988 McCarthy Award for Innovative Government Management from the Council of State Governments and the Exemplary State and Local Government Award from Rutgers University in 1990.

1. See *California's Record Retention Law; Is It Worth the Effort?*, AM. NOTARY MAG., May-June 1985, at 2.

2. *Id.*

3. See, e.g., Michele S. Willer, *Using Journal Signatures to Help Prevent Fraud*, NAT'L NOTARY MAG. March 1998, at 23 (indicating that "[a] journal signature provides proof that the signer did indeed appear before the No-

whose purpose it is to protect the instrument signer, the notary and the public.

Most states do not require notaries to keep a journal.⁴ The keeping of a notary journal is statutorily required in fourteen states and the District of Columbia, and is recommended by state officials in another fourteen states.⁵ It is reasonable to assume that the majority of American notaries do not journalize their notarial services. Much of this is due to a lack of awareness that such a practice is encouraged or expected of the notary.⁶ For some, record keeping is viewed as an added burden and tends to be avoided.⁷

It is not uncommon for employers of notaries to discourage notary journal keeping because it might inconvenience them or their clients.⁸ When the purpose of notary journalization and its extensive legal protections are understood, it is reasonable to conclude that every notary should keep a notary journal, even if it is not required by state law.

Notaries hold a public office.⁹ The records they maintain as to the exercise of their legal powers and authority are the official records of that office. The importance of such record keeping is so great that it cannot be overstated. It is every notary's inherent duty of reasonable care to make a careful and complete record of every notarization performed. If properly maintained, the notary's journal will demonstrate that reasonable care was exercised in every aspect of a notarial act. It will further establish that the notary routinely exercises reasonable care in the performance of his or her notarial duties. The notary journal guides the notary through correct notarial procedures for every act, thus minimizing

tary").

4. *Id.*

5. Notaries are required to maintain journals in Alabama, Arizona, California, Colorado, Hawaii, Maryland, Mississippi, Missouri, Nevada, Oklahoma, Oregon, Pennsylvania, Tennessee, Texas and the District of Columbia. The states of Kentucky, Louisiana, North Dakota and Ohio only require notaries to journalize notarial protests. Journal record keeping is recommended by state officials in Alaska, Connecticut, Florida, Idaho, Maine, Massachusetts, Michigan, Nebraska, New Hampshire, New Mexico, South Dakota, Utah, Vermont and Wisconsin.

6. See Willer, *supra* note 3, at 23 (providing that the National Notary Association recommends keeping a journal).

7. Willer, *supra* note 3, at 24.

8. See, e.g., Willer, *supra* note 3, at 24 ("Attorneys in Texas claimed a 1987 journal signature law was so burdensome that they helped repeal their state law in 1989, arguing that it was inconvenient for Notaries to carry their journals with them in order to get signatures.").

9. See 58 AM. JUR. 2D *Notaries Public*, § 1 (1989). ("A notary public is defined as a public, civil or ministerial officer and an impartial agent of the state . . ."). See also *Farm Bureau Fin. v. Carney*, 605 P.2d 509, 514 (Idaho 1980) (providing that a notary holds a public trust and betrays that trust when notarizing falsely).

any potential for serious mistakes. As a result, the notary journal is a valuable protection for the notary against groundless accusations of wrongdoing. It is especially useful for refreshing the notary's memory about a notarial act that took place years ago.

The keeping of certain records is an inherent responsibility of nearly every responsible adult. Record keeping is vital to the survival and legal protection of any business enterprise, for example. As taxpayers we must be prepared to produce personal financial records in the event of a tax audit. In many ways, the failure to maintain a minimal set of records is negligent behavior.¹⁰

As a public official, the notary is under a duty to the signer, for whom he or she notarizes, to exercise reasonable care in notarizing signatures and safeguarding the notary journal. The document signer has every right to expect that the notarization is being performed correctly and that it will withstand challenges to its validity. The signer has a right to expect the notary to be able to show by documentation that the signature on the instrument was notarized in accordance with prescribed notarial procedures.¹¹

A properly maintained notary journal record will provide invaluable documentation in four respects:

1. It shelters the instrument signers and other parties from risks if the instrument is lost, wrongfully altered or challenged;
2. It shelters the notary from groundless allegations of wrongdoing by documenting that reasonable care was exercised in performing the notarization;
3. It discourages groundless threats of litigation, and facilitates quicker resolutions of disputes outside of court; and
4. It aids officials in investigating and prosecuting acts of fraud.

The journal documents key information showing for whom the notarization was performed, when it was performed, on what type of transaction it was performed and how the signer's identity was verified. The journal will indicate the signer's address, evidence the signer's mental capacity to enter into the transaction and provide other valuable information about the notarial procedures followed in a particular notarization. The rules of evidence clothe notary journal entries with an invaluable presumption of truthfulness. The old cliché, "If it isn't written, it didn't happen," is especially true for notaries and their notary journals.

I. THE EVIDENTIARY VALUE OF NOTARY JOURNALS

In most jurisdictions notary journal entries are clothed with a

10. See *Safety Spelled J-O-U-R-N-A-L*, NAT'L NOTARY MAG., November 1996, at 16-18 (discussing the protection against liability afforded by the use of notary journals).

11. *Id.*

presumption of genuineness or authenticity as to their contents.¹² In most states, the rules of evidence allow certain documents and writings to be admissible without extrinsic evidence of their genuineness or authenticity. Additionally, the routine keeping of a notary journal constitutes evidence of habit or routine practice on the part of the notary.¹³

Under the Federal Rules of Evidence, notary journals are admissible into evidence under the business records exception to the hearsay rule if the journal entries are made in the regular course of the notary's services and at the time of the notarial act.¹⁴ The admissibility of business records and notary journals is necessitated by the record's presumed reliability. Like businesses, notaries rely on their records in order to manage their affairs and have a motive to see that their records are accurate. Moreover, such records are routinely relied upon to prove a business transaction, a sale, a receipt or other matter. Under the business records exception, the business record must be in writing, thus eliminating photographs, audio or videotape recordings.¹⁵

It is common for some notaries to retain photocopies of notarial certificates and signers' identification cards in the belief it constitutes a valid substitute for a proper notary journal.¹⁶ There is no worthy substitute for the properly maintained notary journal. The value of photocopies of executed notarization certificates and signers' identification cards pales in comparison to the supreme value of a notary journal. Photocopies will fail to demonstrate consistent proper performance on the part of the notary. They do not prove the signer personally appeared before the notary, and they show nothing concerning the signer's willful making of the document signature. Depending upon what appears on the photocopies of the notarial certificates and signer identification, questions regarding the signer's privacy can also be raised. At best, such photocopies saved in a folder or a file will merely show the good, but naïve, intentions of the notary and little else.¹⁷

12. *Prudential Trust Co. v. Coghlin*, 144 N.E. 283, 284 (Mass. 1924) "Notaries public hold office under our Constitution . . . and entries made by them in a book kept in the regular course of business are deemed original acts, and are admissible to the extent that the facts stated are within the scope of their duty as defined by custom or statute." *Id.*

13. FED. R. EVID. 402.

14. *Id.* 803(6).

15. *Id.* 100(1).

16. *Willer*, *supra* note 3, at 24 (discussing one California case in which a notary's commission was suspended for failure to maintain a sequential journal). The court of appeals cast aside the notary's argument that document photocopies are adequate. *Id.*

17. *See Bernd v. Fong Eu*, 100 Cal. App. 3d 511 (1979) (revoking a notary's commission for failure to maintain a sequential log of official transactions). The notary defended herself by arguing that the California code then in effect required only the maintenance of any type of record of the required informa-

Rule 803(6) of the Federal Rules of Evidence provides that the written record must be made in the regular course of business.¹⁸ It is those books and records that are regularly relied upon in the operation of the business.¹⁹ The rule does not apply to records of "businesses" only.²⁰ The rule may also apply to household records, government records, records of non-profit entities and individually kept records.²¹ To be admissible, the record must document an act, condition or event and may even contain opinions or diagnoses.²² The record must be made "at or near" the time of the event or act recorded.²³ This is essential to reduce the risk of inaccurate recollection. Every notary journal entry should be made contemporaneously with the performance of the notarization.

The notary's journal will be admissible as a business record if it is faithfully utilized to document every notarial act performed.²⁴ Ad hoc and irregular recordations in a notary journal jeopardize the admissibility of that journal under the business records exception. Journal recordations must be made consistently. Under the Federal Rules of Evidence, a business record is inadmissible if it is not trustworthy because of substantial flaws in the method or timing of its preparation.²⁵

Likewise, the notary journal can protect a notary from accusations of having performed a notarial act that the notary had never, in fact, performed.²⁶ Too frequently a notary's employer or associate will take the notary's official seal to "notarize" a document in the notary's absence. The perpetrator usually has no malicious intent. Rather, they are foolishly attempting to expedite business procedures in the seriously flawed belief that the notarization "doesn't matter anyway." As most perpetrators will not realize that a journal entry must accompany every notarial act, the absence thereof will be the smoking gun pointing to the perpetra-

tion, not necessarily a sequential log and that the photocopies of records met the state's requirement. *Id.* at 514.

18. FED. R. EVID. 803(6).

19. *People v. DeLuca*, 178 A.D.2d 426, 427 (N.Y. App. Div. 1991).

20. *Id.* A business record is "any writing or article" maintained by any type of "enterprise for the purpose of evidencing or reflecting its condition or activity." *Id.* See also FED. R. EVID. 803(6) (providing that the term "business" means any occupation and/or "calling of every kind, whether or not conducted for profit.").

21. FED. R. EVID. 803(6).

22. *Id.*

23. *Id.*

24. *McCormick v. Mirrored Image, Inc.*, 454 N.E.2d 1363, 1365 (Ohio Ct. App. 1982) (citing rule 803(6) of the Federal Rules of Evidence).

25. *Id.* The court discussed the four conditions set forth in 803(6) and stated that the failure "satisfy any one of these fundamental conditions" would lead to inadmissibility of the evidence. *Id.*

26. Where signers falsely claim *not* to have appeared before a notary, a journal signature can also provide much needed proof. *Willer, supra* note 3, at 23.

tor's misdeed.

Under the "Silent Hound" exception to the Federal Rules of Evidence,²⁷ the absence of a journal entry can be used to prove false an accusation that a notarization occurred.²⁸ If an event or procedure would have normally been recorded had it taken place, the fact that there is no record of the event or procedure in the notary's journal can prove the event never occurred.²⁹ If a notary thoroughly and properly journalizes every notarial service performed, the "Silent Hound" exception will render valuable protection against false accusations of journalization. Suppose the notary is meticulous about his or her record keeping and always indicates in the journal the method used to verify a signer's mental capacity to sign an instrument when the signer is elderly, severely ill or suffering from diminished capacity. The absence of any written comment to that effect, under the "Silent Hound" exception, will protect the notary if a signer's family claims the signer was legally incompetent to sign the instrument and it was therefore notarized fraudulently.

When a notary faithfully keeps a journal, the Federal Rules of Evidence afford an extraordinary level of protection. It is so remarkable that it makes no sense for any notary or employer of a notary not to insist on the meticulous keeping of such a record. The courts hold the notary as the guarantor of the probative force accorded the notarial certificate.³⁰ Notaries are personally responsible for the truthfulness of every word of the notarial certificate they execute. For this reason, the notary and his or her journal should be inseparable.

II. CONTENTS AND FORM OF A JOURNAL ENTRY

Because journal entries should document every material aspect of the notarial certificate, the contents of the journal entry are important. Superficial, vague notations will not suffice. Only six states statutorily define what information shall be recorded in a notary journal.³¹ The journal entry should document nine material items about the notarization:³²

27. FED. R. EVID. 803(7).

28. *Id.*

29. *Id.*

30. See *Joost v. Craig*, 63 P. 840, 841 (Cal. 1901) (citing section 1185 of the California Civil Code, the court determined that notaries must guarantee the validity of signatures). See also *Garton v. Title Ins. and Trust Co.*, 165 Cal. Rptr. 449, 455 (Ct. App. 1980) (citing section 1185 of the California Civil Code).

31. The contents of a notary journal are statutorily mandated in the states of Arizona, California, Hawaii, Nevada, Oregon and Texas.

32. See *Your Notary Journal Is More Than a Ledger, It's Your Legal Protection*, NAT'L NOTARY MAG., May-June 1997, at 1-3 [hereinafter *Your Notary Journal*] (discussing the benefits of keeping a notary journal).

1. The document signer's signature. This feature evidences the personal appearance of the document signer before the notary. It also establishes that the signer's ID card presented the notary was reasonably reliable because the signatures in the journal and on the ID match. The journal signature will also match the signature on the document to be notarized. Because acknowledgment notarizations do not require the signer to make their signature to the instrument before the notary, having the journal signed by the person enables the notary to verify its genuineness. The journal signature also helps to substantially demonstrate the signer's intent and mental capacity to execute the instrument on which the notarization is to be performed.³³

2. The signer's printed name adjacent to the signature;³⁴

3. The address of the person for whom the notarization is performed;³⁵

4. The date and time of the notarial act;³⁶

5. The date, if any, of the instrument;³⁷

6. Identification of the type of instrument on which the notarization is performed;³⁸

7. What notarial service was performed on the instrument;³⁹

8. A statement on how the notary verified the signer's true identity;⁴⁰ and

9. Additional comments by the notary, which clarify important aspects or determinations the notary had to make in the course of performing the notarial act.⁴¹

The heart of the importance of the certificate and the notarial act documented thereby is three-fold. The certificate asserts that the signer personally appeared before the notary, the notary took reasonable care to verify the signer's identity and the signer either signed the instrument or acknowledged his signature on the instrument willingly before the notary.⁴² Each of these material facts is documented to be true through the recordation of the nine items of information found in the journal entry.

All of the benefits of journalizing notarial acts can be lost if care is not taken to utilize a secure, well-designed notary journal. Not all notary journals are alike. Just because it is labeled "Notary Journal" on the cover does not assure that it passes muster. The journal record pertains to services and instruments that

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Your Notary Journal, supra* note 32, at 1-3.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

may be in effect and have enforceability on the notary for many years. The journal must be permanently bound, constructed of quality materials and be tamper-proof.⁴³

The meticulously maintained notary journal is most useful in demonstrating a notary's consistency, especially with regard to proper performance of notarial act. Since it documents the notary's habitual exercise of reasonable care, the journal should provide an uninterrupted chronology of services rendered. Journal pages and entry spaces should be in permanent sequential order. The notary journal should be permanently bound with a sewn binding. Journals in the form of a loose leaf or spiral notebook do not meet the requirement. Pages can be easily removed without a trace, leaving open a question of the record's completeness.⁴⁴

Conventional wisdom suggests that a notary carefully select a journal for use. Design and format can vary widely, and user-friendliness is important. It is often tempting to skip a journal entry or cut corners when the notarization is rushed. That is when serious mistakes are often made. The journal should be designed in such a manner so as to guide the notary through the correct notarial steps, where the recordation is thorough yet simple.

III. THE NOTARY JOURNAL AS A PUBLIC RECORD

In every state where journal record keeping is statutorily mandated, the journal is also designated a public record.⁴⁵ Elsewhere, the voluntarily kept journal is impliedly a public record. The office of the notary is a public office, ministerial in nature.⁴⁶ The official records of public offices and officers are inherently public records, including the journal of the notary.⁴⁷

The notary's journal should be available for inspection by interested parties.⁴⁸ As a general rule, where journals are mandated by statute, the notary is required to provide photocopies of journal entries upon request. Of course, a notary is entitled to reasonable notice for such requests and he or she is permitted to charge a nominal fee for supplying photocopies of the journal pages. However, the notary does not enjoy a right to withhold the journal from public inspection. There is no protected right to privacy accorded a notary journal. In a number of states, the notary's refusal to provide copies of journal entries upon reasonable notice and payment

43. See Willer, *supra* note 3, at 24 (stating that "the Notary Journal [should be kept] in a locked and secured place to avoid tampering").

44. *Id.*

45. See *supra* note 9 and accompanying text.

46. See *supra* note 9 and accompanying text.

47. See *Bernd v. Fong Eu*, 100 Cal. App. 3d 511, 514 (1979) (declaring that a notary journal is an official record).

48. NAT'L NOTARY ASS'N, THE NOTARY RECORDBOOK: HOW A JOURNAL OF NOTARIAL ACTS PROTECTS THE PUBLIC 7.

of a fee, can result in the notary's personal liability for damages sustained as the proximate result from such a refusal.⁴⁹

While the journal is deemed a public record, it may be appropriate for the notary to invoke his or her discretion when it comes to honoring a request to view the journal. A vague request to view a journal for the purpose of conducting a "fishing expedition" may warrant the notary's refusal to honor a request. The notary's journal will contain information pertaining to matters that are often considered very private by the signers and owners of the documents serviced by the notary. Hence, there is a conflict between two public policies. First, the authority and actions of a notary are public and, therefore, the records are public. However, the second public policy issue concerns the transactions on which notarial services are provided. These transactions are often profoundly confidential to the document signers. The parties to any transaction required to undergo notarization and journalization do not and should not have to forfeit their rights to privacy by risking public disclosure of the transaction.

The public's right of access to the notary's journal must be weighed against the document signer's right to privacy. The public policy objectives for requiring journal recordations are three-fold: 1) to provide a means whereby, at a subsequent date, the validity of a notarization can be verified; 2) to protect the notary, the document signer and the public from baseless accusations of notarial wrongdoing; and 3) to guide the notary to perform every notarial service accurately and truthfully.⁵⁰

Broadly speaking, a notary journal is intended to facilitate resolution of disputes by providing accurate records of events and transactions. They are not intended for public reading per se. Unless a person seeking to view a notary journal and its entries is doing so with a purpose concerning the validity of or a challenge to a specific notarial act then the request to view the journal is suspect. Such requests should not supersede the right to privacy of the parties who are referenced in the journal entry.

When responding to a request to view a journal entry or for a

49. A notary's journal must be made available for public inspection or for photocopies of journal entries in Alabama, Arizona, California, Colorado, District of Columbia, Hawaii, Maine, Maryland, Mississippi, Missouri, Nevada, Oklahoma, Oregon, Pennsylvania and Texas. A notary may be fined and held liable for damages for refusal to provide the journal for inspection or copies thereof upon request and payment of fee, or for the concealment or destruction of the journal in Arizona (\$500 fine plus personal liability for concealment or destruction of the journal), California (fine and personal liability), Maine (\$200-\$1,000 fine for concealment or destruction), Massachusetts (\$1,000 fine for concealment or destruction), Michigan (\$500 fine for concealment or destruction), Nevada (fine and personal liability) and Oregon (\$500 fine for concealment or destruction).

50. NAT'L NOTARY ASS'N, *supra* note 48, at 2.

copy of an entry, the notary should exercise reasonable care in accommodating such a request. First, the notary should take steps to verify the request is legitimate. Second, the notary can take simple steps to obscure other entries in the journal with blank sheets of paper, if it is warranted, to protect the privacy of the parties to those recordations.

Notaries are under a duty of care to safeguard their notary journal from loss, unauthorized alteration, destruction and theft.⁵¹ In several states, statutes provide sanctions for the intentional destruction of a notary's journal record.⁵² The legal standard by which the notary is judged is the exercise of reasonable care. Accidents may happen, journals can be lost or destroyed for reasons beyond the control of the notary. The notary's legal defense is showing that reasonable care was taken to protect the journal from such a mishap. However, some suggestions for safeguarding a journal can exceed basic tenets of reasonable care and deserve thoughtful review. For example, some commentators have suggested that notaries keep journals under lock and key and away from children and pets.⁵³

The State of California, effective January 1, 1998, statutorily mandates that a notary's seal and journal "must be kept in a locked and secured area under the direct and exclusive control of the notary."⁵⁴ This unique provision, the first of its kind anywhere,

51. See Marc A. Birenbaum, *Protecting Your Invaluable Journal*, NAT'L NOTARY MAG., Nov. 1977, at 12.

52. See *supra* note 49 for a list of states where notaries are subject to fines and liability for destruction of a notary journals.

53. See Birenbaum, *supra* note 51, at 13. A preliminary draft of the Notary Public Code of Ethics, promulgated and released by the National Notary Association, proposes seven preventive measures notaries would be obligated to take to safeguard their notary journals:

Always keep the journal in a secure place under lock and key, particularly on weekends and during vacation; The journal should never be left unattended during the day, especially in the workplace where co-workers have access to the notary's workspace. The journal should be secured out of view along with the notary seal in a place only the notary is permitted to access;

Protect the journal from liquids and abrasive substances;

Never leave the journal in a vehicle. The notary should keep the journal nearby when attending an out-of-office meeting where notarizations may be performed;

When notarizing at home be especially careful with the journal around children and pets;

Inform co-workers, supervisors and others with access to the workplace that it is illegal for anyone but the notary to have and use the notary journal; and

Guard the journal with the same mind-set of a county official guarding publicly recorded documents.

NOTARY PUBLIC CODE OF ETHICS (Nat'l Notary Ass'n, Preliminary Draft 1997).

54. CAL. GOV'T. CODE § 8206(a)(1) (West 1992 & Supp. 1996).

is a quantum shift in public policy with potentially significant ramifications. The new California law holds the notary personally liable for damages proximately caused by the notary's failure to keep the seal and journal under lock and key.⁵⁵

The new requirements in California serve as direct notice to employers and co-workers of notaries that notary seals and journals are not to be tampered with. However, it imposes the burden of notarial crime prevention on the notary, the private individual in public service to the community. Proponents may not view the requirement of keeping notarial tools under lock and key as onerous. After all, locked liquor cabinets and gun cabinets are obviously essential for public safety. However, requiring the same safeguarding for notary seals and journals may be going too far. For every new regulation passed, there are often some unforeseen, negative ramifications. In this case, the new regulations will, at the very least, foster distrust and ridicule in the working environments of thousands of California notaries. Instead of placing the onus on the notary, state governments could impose stiffer criminal sanctions for tampering with a notary's seal and journal, including substantial fines and damages payable to the notary and the state.

The requirement of lock and key under the exclusive control of the notary will foreseeably pose practical challenges for many. For example, will the single notary living alone easily satisfy the regulation every time the front door to the home is locked? Will the journal have to be locked in a cabinet if the housecleaner has been entrusted with a copy of the house keys? Likewise, notaries in many workplaces may have no practical means of exclusively securing their seal and journal without considerable expense for the notary or their employer. Contemporary principles of employee and business management are premised on concepts of trust, integrity, teamwork and openness. Forcing notaries to keep their seals and journals under lock and key in the modern workplace is anathema to those principles.

IV. RETENTION OF THE NOTARY JOURNAL

No state has enacted a statute of limitations pertaining to the enforceability of notarial certificates. Certificates are generally binding on the transaction and the notary who executed it for as

55. *Id.* § 8206(2)(d). Section 8206(2)(d) provides that a notary's commission may be suspended or revoked for failure to comply with the new journal and seal safekeeping requirements. *Id.* California now statutorily prohibits the surrendering to the notary's employer or any other person the notary's seal or journal seal and journal. *Id.* If requested by an employer, the notary must provide copies of all transactions "directly associated with the business purposes of the employer," but matters unrelated to the employer's business may be withheld by the notary. *Id.*

long as the transaction it appears on is in full force and effect. The notary journal documenting the execution of the notarization is an especially valuable protection to the notary, the signer and the parties relying on the notarization for indeterminate lengths of time. As a matter of public policy, the notary's journal should be carefully preserved and safeguarded to ensure its availability for resolution of disputes and validation of notarizations performed long past. But, who should have the duty of preserving the journal to ensure its availability - the notary or the government? Furthermore, how long should a notary's journal be preserved for public access?

Throughout the middle and late 1980s, numerous states responded to this question by adopting certain provisions of the Model Notary Act,⁵⁶ promulgated by the National Notary Association on September 1, 1984. The Act provides for the mandatory delivery of the notary's journal to a designated government office "upon the resignation, revocation, or expiration of a notarial commission, or death of the notary".⁵⁷

Presently, twenty-four states require their notaries to convey their notary journals (although not required to be maintained in many of these states) to a government agency upon completion of notarial service. In some states, the journal is filed with the Secretary of State, while in others it is filed with the county or court clerk.⁵⁸ Where mandatory filing of the notary journal with a government entity is required, conflicts in public policy can be found.

The journal is the notary's official record of notarial services performed. Under the business records exception in the Federal Rules of Evidence, the journal is admissible if the person who is a personal witness to the events documented therein prepares it.⁵⁹ The notary has a very immediate and direct personal interest in the accuracy of the journal, its long-term protection and safekeeping, and in its immediate availability for reference should questions arise over a notarial act documented therein. Compulsory filing of the journal with the government upon completion of notarial service denies the notary the opportunity to protect these interests. Moreover, such requirements may actually be detrimental to the larger public purpose for maintaining a notary journal. The necessity for the journal and its invaluable benefits do not dimin-

56. MODEL NOTARY ACT § 4-104 (Nat'l Notary Ass'n 1984).

57. *Id.*

58. Notary journals are required to be filed with the state government upon the discontinuation of the notary's service in Alaska, Colorado, Hawaii, Maine, Minnesota, Nevada, New Hampshire, North Dakota, West Virginia and Wisconsin. In the following states the notary must file the journal with their county government clerk: Alabama, Arizona, Arkansas, California, Kentucky, Massachusetts, Michigan, Mississippi, Montana, Ohio, Oklahoma, Pennsylvania and Texas.

59. FED. R. EVID. 803(6).

ish, let alone expire, upon the termination of a notary's commission to serve. The individuals and parties to the transaction on which the notarization is performed have a stake in the validity of the notarization and a right to expect that it can be readily documented at an indeterminate future date. The first point of contact to check a notary's journal will most likely be the notary. After all, it is the notary's name, seal and signature appearing on the notarization certificate. It is far easier to track down "retired notaries" than it is to locate their old journals. This is especially true in many jurisdictions where the government entity receiving the notary's journal has a short retention schedule or none at all.⁶⁰

Arguments in favor of having government serve as the official repository of notary journals to better serve the public's interest are difficult to justify. A 1985 report on the issue concluded that fewer than ten percent of local government entities required to receive notary journals for filing do not comply with the law.⁶¹ Few notaries comply with the requirement by turning their journals in to the government, and they are readily discarded because there are so few requests by anyone to see them.⁶² This alarming fact no doubt has our seventeenth century Massachusetts Bay Colony notary, William Aspinwall, trundling in his sempiternal sepulcher.

One of the primary reasons government entities are not generally dependable archivists and repositories of notary journals is due in large part to a lack of understanding regarding the journal's purpose and value to the public. In addition, governmental retention of any public documents and records is costly, and state and local government political winds blow in favor of reducing government paperwork and expense. Appropriations for notary journal repositories for a meaningful length of retention have very low political priority. It is surely a disservice to the notary and the public for statutes to require the notary to turn over the journal to the government and then fail to retain it for a period time which reasonably coincides with the foreseeable number of years in which a notarization may come into question.

60. See *California's Record Retention Law*, *supra* note 1, at 3 for a discussion of California's record retention law. The governmental repository should be held to the same standards a notary would be held to concerning identification of inquirer, reason why entry is sought, etc. to prevent "fishing expeditions," conceal other unrelated entries, charge reasonable fees for copies and require reasonable prior notice. An informal telephone survey of various county clerk offices in several states, in preparation for this article, found that most of the county clerks contacted do not retain the journals of notaries that are turned in as required by law. In fact, several clerks suggested that the notaries in their jurisdictions should keep their journals and instead submit a letter of commitment to personally keep their journals and make them available for public access.

61. *Id.*

62. *Id.*

The policy reasons behind compulsory governmental repository of notary journals in generations past were soundly rooted in a society lacking modern technological advances. Until some seventy-five years ago, America's population was primarily rural. Communication, travel and the mail were slow. The ability to hunt down a notary's journal for any reason would have been an enormous endeavor, especially if the notary had kept possession of it and had moved from the community. Requiring the notary to file the journal in a central repository made sense. There were fewer notaries serving a much smaller population, and the pressures on government for services were fewer. The costs for archiving relatively small volumes of public records were nominal. By virtue of the statute, the community was on notice that the office of the clerk of that county or the office of the Secretary of State kept journals of former notaries from that county. Modern technology has eliminated the practical justifications for filing notary journals with the government.

Today's telecommunication technology and document transmission capabilities enable us to access, photocopy and transmit the copy of a notary journal entry, regardless location. Moreover, with that same technology it is far easier to locate people and former notaries than it was generations ago. Indeed, America's population is much more mobile today than only a few decades ago. Nevertheless, unless state and local governments can begin to commit significant resources to proper archival procedures and facilities for America's millions of notary journals, the public is far better served by requiring the notary to personally retain his or her journal for life.

The rules of evidence grant a valuable presumption of truthfulness to the contents of a notary's journal because the notary presumably seeks to protect himself or herself by making truthful and accurate recordations. The same can be said about the notary's incentive to safeguard the notary journal. It is self evident that a notary who personally retains the journal in perpetuity will presumably have nearly instantaneous access to the journal for any reason.

It is not at all unreasonable to impose the responsibility on the notary to safeguard, keep and make available for public review the notary journal. It involves very little expense to the notary. And, as a matter of policy, the journal should be viewed as it is under California's new notary journal protection requirements. The new statute declares the notary's journal to be "the exclusive property of that notary public."⁶³

There is a propensity for some employers to feel justified in requiring a notary to deposit the notary's journal with the em-

63. CAL. GOV'T CODE § 8206(2)(G)(d) (West 1992 & Supp. 1996).

ployer upon change of employment. The tendency towards this view is based upon the employer's assumption that a journal purchased with the employer's funds is "company property". Moreover, if the notary has been recording notarial services performed while in the scope of employment, then it would stand to reason that the journal constitutes an official company record belonging to the company. In states where the journal is required to be deposited with a government entity, the employer's claim on the notary journal directly conflicts with statute and places the notary in a difficult position.

The Oregon notary statutes address the matter by allowing the notary to enter into an agreement with the employer for the retention and final disposition of the journal.⁶⁴ This compromise may be comforting to employers of notaries, but does not address the public's need to readily access the notary's journal. Unless a third party has notice that the journal documenting a particular notarial act in question is in the custody of the notary's former employer, it may never be found.

Typically a person's first step in tracking a notary's journal is to reference the notarial certificate in question.⁶⁵ The certificate will provide the notary's name, the state in which the notary is appointed and very often the county in which the notary resided while serving as a notary. It will also indicate the county in which the notarial act was performed. If the state is one in which the journal must be archived with the government, then the search for the journal would begin with the appropriate governmental repository. Otherwise, the inquiry can be made of the state agency that appointed the notary for the notary's last address of record. If the notary journal is ultimately located in the possession of a notary's former employer, that employer may feel no obligation to provide the journal for inspection, if it has not already been discarded.

An employer's retention of a notary's journal raises considerable public policy issues and several legal concerns. Although a state can legislate retention schedules and public access standards for employers of notaries who keep the journals of their employee-notaries, it is not as effective and beneficial to the public as it is to require state or local government or the notary to retain the journal in accordance with certain standards. Employer retention of the journal complicates and impedes the public's access to the journal. Moreover, an employer's claim to the journal based on proprietorship, company confidentiality or protection against potential claims of liability for notarial misconduct are outweighed by the compelling need to make the journal readily available for public access as a public record.

64. OR. REV. STAT. § 194.152(3) (1996).

65. FED. R. EVID. 803(6).

The best strategy for protecting the notary and the public's need for access to the notary's journal is to statutorily require the notary to permanently retain the journal. Placing the burden on the notary is not especially onerous, particularly as it serves to provide the notary the advantage and protection of immediate access to the record to refute any questions or allegations of wrongdoing. Maine's notary statute⁶⁶ provides an excellent model for the retention and safekeeping of a notary's journal:

The notary shall safeguard and retain exclusive custody of these records. The notary may not surrender the records to another notary or to an employer. The records may be inspected in the notary's presence by any individual whose identity is personally known to the notary or is proven on the basis of satisfactory evidence and who specifies the notarial act to be examined.⁶⁷

In statutorily mandating the notary's retention of the journal, the statute should also define several procedural standards for compliance. As in the Maine model, the notary should be permitted to require the inquiring party to provide proof of identification and to specify the journal entry sought. The notary should be entitled to reasonable prior notice of the request and be permitted to charge a reasonable fee for providing a certified photocopy of the journal entry requested. The notary should be expected to take reasonable safeguards to protect and conceal from view other unrelated journal entries.

The most effective way to inform notaries of the obligation to retain journals is at the time of making application to become a notary. As part of the application material and oath of office, the notary can be given clear instruction on the requirements to maintain the journal during and after service as a notary.

As there is no defined statute of limitations on liability for the performance of a notarial act, there are no instructions as to how long a notary ought to personally retain the notary journal. Every transaction for which a notarization is performed and journalized is potentially unique. Every situation in which a notary notarizes is potentially unique. The effective life of a living will or durable power of attorney will vary with each individual. Notarized vehicle titles will probably be short-lived in comparison to the notarized quitclaim deed to a person's home. As it would be bad public policy to arbitrarily affix a statute of limitations on the notarial act and the notary's liability for negligently performing it, it is likewise imprudent to arbitrarily affix a term of years over which a journal should be retained.

The notary should be required to retain the journal for life.

66. ME. REV. STAT. ANN. tit. 19, § 955-B (West 1993).

67. *Id.* Maine does not now require its notaries to maintain a notary journal. However, Maine does recommend that notaries maintain records. *Id.*

The notary should be held liable to parties damaged as the result of the notary's negligent or intentional concealment, destruction or alteration of the journal, as is already statutorily provided in seven states.⁶⁸

Of the twenty-one states requiring the notary to surrender the journal to the government upon termination of notarial service, eighteen states require this to be done even upon the death of the notary (as it is proposed in the Model Notary Act). While a number of these state requirements do not specify who bears the burden to convey the decedent's notary journal, it can be safely assumed the burden lies with the decedent's family or employer. In some cases, punitive sanctions may be imposed for non-compliance.⁶⁹

The issue of whether the public is best served if the journal of a deceased notary is deposited with the government is relatively unexplored, and it is not discussed in the commentary of the Model Notary Act. The value of the journal to the public verifying a notarial act or resolving a dispute is not diminished upon the death of the notary.

It is not even settled whether a cause of action for notarial negligence can be maintained against the deceased notary's estate. The journal may offer little insight into the deceased notary's possible liability for prior negligent acts. The need for long-term retention may be less compelling in this kind of situation.

There are inherent and often unforeseeable risks in the long-term keeping of any public records. Acts of God and negligent acts of mankind inadvertently destroy records of profound importance. Notaries should be entitled to statutory relief from liability if their notary journal is lost, destroyed or stolen. The notary should always be responsible for the reasonable safeguarding of the journal, subject to limited liability for its loss or destruction due to gross negligence. However, if the notary can establish that reasonable care in safeguarding the journal had been exercised and that the journal's loss or destruction was the result of some cause not directly related to the negligent safeguarding of the journal (such as a house fire or flood), the notary should be absolved of liability for loss. Moreover, since the journal serves as the notary's first line of protection against accusations of notarial misconduct, the loss of the journal should not unduly expose the notary to such accusations.

68. See *supra* note 49 for a list of states where alteration, destruction or concealment of a notary journal can lead to liability on the part of the notary.

69. If a notary dies, the journal and records of that notary must be deposited with the state or local government agency having jurisdiction over that notary's journal in Alabama, Alaska, Arizona, Colorado, Hawaii, Kentucky, Minnesota, Mississippi, Montana, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Texas, West Virginia and Wisconsin.

Upon loss, destruction or theft of a journal the notary should be statutorily required to provide written notice thereof to the office of the Secretary of State. By giving such notice, the notary should be granted a presumptive benefit of the doubt concerning accusations of misconduct involving a notarial act in the journal. The burden of proof, on the part of the accuser, would thereby be heightened. If in fact the notary committed notarial misconduct during the time period covered by the destroyed notary journal, there would be a presumption in favor of the notary providing that if the journal had not been destroyed, the notarial act in question would be documented by journal entry. Also, because the notary maintained such a journal, there would be a refutable presumption that the notary was not inclined nor likely to engage in misconduct because the journal would have exposed such conduct and implicated the notary.

V. REQUIRING INK THUMBPRINTS IN NOTARY JOURNALS

There has been considerable interest in the California model for requiring notaries to obtain the thumbprints of document signers in the notary journal.⁷⁰ Fingerprinting document signers is characterized by proponents as another means for notaries to protect against notarizing for imposters, and thereby minimizing the perpetration of certain types of fraud. California is the only state so far to have enacted such procedures by statute or administrative rule.

Taking document signer thumbprints in notary journals began in Southern California in 1992 as a pilot program in an effort to combat significantly high rates of real estate fraud in the Los Angeles area.⁷¹ The three-year pilot program began January 1, 1993 wherein the notary was required to obtain the right thumbprint "of any person attempting to notarize a deed, quitclaim deed or deed of trust involving real property located in Los Angeles County."⁷² The legislation enacting the pilot program also provided for the Los Angeles County Recorder to notify property owners of deed recordations and assessor identification numbers on the deed as a condition precedent to its filing with the Los Angeles County Recorder.⁷³

The Los Angeles County pilot program was initiated after a twenty-year gradual increase in real estate fraud starting in the

70. *California Notaries to Take Thumbprints in Pilot Plan*, STATE NOTARY BULL., Dec. 1992, at 1.

71. Vincent Gnoffo, Comment, *Notary Law and Practice for the 21st Century: Suggested Modifications for the Model Notary Act*, 30 J. MARSHALL L. REV. 1063, 1084 (1997).

72. *Id.*

73. *Id.*

1970s.⁷⁴ Southern California experienced unprecedented increases in property values and homeowners found themselves with high accumulations of equity in their properties.⁷⁵ By 1990, this new-found wealth became a target for fraud. Between July 1990 and November 1992, approximately \$131 million dollars were stolen from homeowners in Los Angeles County by con-artists.⁷⁶

The nature of real estate fraud involved the forging of property owner signatures on blank deeds, having them notarized by careless or unscrupulous notaries and filing them for recordation with the Los Angeles County Recorder.⁷⁷ Upon recordation, the perpetrator, or "new owner", applied for mortgage financing secured by the forged quitclaim deed and a new deed of trust. The perpetrator then fled with the funds.⁷⁸ This scheme succeeded primarily with mortgage brokers who likewise were careless or unscrupulous, failed to obtain proper appraisals for title insurance and failed to conform to conventional due diligence procedures.⁷⁹ Other scams involved perpetrators posing as door-to-door salesmen promoting home improvement products and services.⁸⁰ Unbeknownst to the homeowner, among the purchase agreements the buyer signed were lien contracts on the home.⁸¹ Suddenly, the homeowners found themselves owing large sums to finance companies under threat of foreclosure on their homes.⁸²

California lawmakers turned to the notary journal as the first line of defense against these types of property fraud. The theory behind requiring a thumbprint in a notary journal is that a thumbprint constitutes the "ultimate identifier" of a person, be it on a murder weapon, the steering wheel of a stolen car, or in a notary's journal. Therefore, the thumbprint in the notary journal, proponents argue, is inherently the most effective deterrent to fraudulent real estate transactions.⁸³

Proponents cite several compelling reasons for requiring thumbprints in journals. The first reason is that it may be an effective deterrent to criminal fraud, as no impostor or forger would engage the services of a notary if they must leave their incriminat-

74. *Id.*

75. Corrie M. Anders, *With Home Fraud Down, L.A. Project Getting Thumbs Up*, THE SAN DIEGO UNION-TRIB., June 4, 1995, at H14.

76. *Id.*

77. ASSEMBLY JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 1828, at 1 (May 3, 1995).

78. Marsha K. Seff, *New Rule of Thumb Helps Put Finger on Scam Artist*, THE SAN DIEGO UNION-TRIB., June 4, 1995, at H14.

79. *Id.*

80. Anders, *supra* note 75, at H14.

81. *Id.*

82. *Id.*

83. *Thumbprinting: "The Notary's Best Anti-Fraud Weapon" Now*, NOTARY BULL., June 1995, at 1, 13 [hereinafter *Thumbprinting*].

ing thumbprint in the journal.⁸⁴ Second, the thumbprint effectively protects the notary from allegations of carelessness and failure to properly verify the signer's identity prior to notarizing the transaction.⁸⁵ Third, the requirement protects the public from fraud and gives clear notice of the importance of the notarial act upon the transaction they are about to sign.

Proponents of mandatory thumbprinting in notary journals deemed the three-year test a success. Claims were made that the incidence of real estate fraud dropped. "As for the property-owner notification part of the Los Angeles County program, in one 10-month period, more than 3,400 real-property owners were notified of deed filings they had not authorized and 372, 571 notices of deed recordings were mailed out."⁸⁶ Proponents also cited numerous written endorsements from law enforcement and consumer affairs investigators, and from prosecutors claiming their forgery caseloads "significantly diminished since the thumbprint requirement has been in effect."⁸⁷

In 1992, California became the first and only state to enact state-wide mandatory thumbprinting requirement in notary journals for notarizations when certain real estate transactions are involved.⁸⁸ The new law is imposed on any notarizations of quitclaim deeds, warranty deeds and deeds of trust.⁸⁹ The law exempts notarizations of signers to deeds of reconveyance and trustee's deeds that result from a decree of foreclosure or a nonjudicial foreclosure.⁹⁰ Enactment of statewide mandatory thumbprinting by notaries passed overwhelmingly in the California legislature.⁹¹

Mandatory thumbprinting by notaries, although popular among law enforcement and consumer protection groups, has not been universally popular with other segments of the population. Some groups object to the requirement on the grounds that it unduly interferes with the signer's right of privacy. Others question whether the requirement is overkill and warranted by the data under the three-year test program. This particular question cannot be easily dismissed.

The Los Angeles County three-year test program involved three procedural tests: mandatory thumbprinting, Recorder's office disclosure to property owners of deed filings and compulsory disclosure of assessor identity on the deed. In the literature and re-

84. *A Journal Thumbprint: The Ultimate ID*, NAT'L NOTARY MAG., May 1996, at 9, 11.

85. *Id.* at 10.

86. *Id.*

87. *Id.*

88. *Id.* at 13.

89. *A Journal Thumbprint: The Ultimate ID*, NAT'L NOTARY MAG., May 1996, at 10.

90. *Id.*

91. *Id.* at 11.

ports written on this important experiment, there is an absence of empirical data detailing the incidence of fraud for the period of time leading up to the implementation of the test. There is also an absence of empirical data detailing the levels of fraud during and after the three-year test was conducted. Instead, there is only the often-repeated conclusion that "[j]ournal thumbprinting is a four-month-old, permanent success story in California, where it is dramatically reducing the incidence of forged real estate deeds."⁹²

The imposition of mandatory thumbprinting is a radical new public policy with far reaching legal and public policy ramifications. Advocates of mandatory thumbprinting in notary journals urge its nation-wide adoption. However, before another state adopts mandatory thumbprinting, there must be better documentation of the efficacy journal thumbprinting with respect to the reduction of real estate fraud in Southern California. Advocates need to substantiate their advocacy by factually demonstrating that the rest of the nation currently suffers from a comparable rate of real estate fraud and that mandatory thumbprinting is the only effective and least intrusive way to solve the problem. Advocates claim the reduction in Los Angeles County's real estate fraud was the direct result of mandatory journal thumbprinting. However, thumbprinting was only one of three procedures tested. It is reasonable to suspect that the other two procedures also produced positive results. For example, over 3,400 property owners in a ten-month period were given notice of unauthorized deed filings affecting their properties, a clear indication mandatory reporting of deed filings had a very substantial beneficial effect.⁹³

There is no other reason to doubt advocates' justification of mandatory thumbprinting. Advocates rarely discuss other factors that could have contributed to the reductions in property fraud in Los Angeles County. Relationships between cause and effect are rarely simple. They are usually the result of complex interactive forces sometimes working together for a common goal, and often time not. For example, if there were measurable reductions in the incidence of real estate fraud during the three-year test period, it could have arisen out of better or more aggressive prosecution of fraud or because of heightened consumer awareness. A reduction in the incidence of fraud could have occurred because the County Recorder's Office was more prepared to identify potential problems, the real estate and mortgage brokerage industries were alerted to such transactions and notaries were more prudent in providing notarial services and journal-keeping.

92. *Id.* See also *Thumbprinting*, *supra* note 83, at 13 (discussing California's success with its pilot, anti-real estate fraud program); Gnoffo, *supra* note 48, at 1078 (discussing the identification standards and requirements of thumbprinting for the purpose of fraud deterrence).

93. *Thumbprinting*, *supra* note 83, at 13.

Unless careful collection of data was kept and competently analyzed, it cannot be assumed that most of these factors did not play a critical role in the success journal thumbprinting seems to claim for itself. If the claims of a successful three-year test are factually justified, then the test in its entirety is to be lauded because no single aspect of its three parts is documented to have outperformed the others.

VI. SHOULD A NOTARY REQUIRE A SIGNER'S THUMBPRINT IN THE NOTARY'S JOURNAL?

The old cliché, "necessity is the mother of invention," is also true in the reverse. Inventors often have to create a need for their inventions. With so much publicity accorded the new California thumbprinting laws, it is particularly timely to carefully consider the ramifications of such a practice. It seems as if the enthusiasm over thumbprinting is luring the traditional role of the notary towards new and possibly inappropriate directions.

Advocates of ink thumbprinting in notary journals make important and clear arguments by identifying a number of benefits the practice can produce. However, the practice of thumbprinting tends to negate the established and tested legal purpose of the notary. It suggests that notarial procedures prescribed by law and followed by millions of notaries nationally are inadequate. Moreover, such advocacy suggests a misunderstanding or underestimation of the statutory and common law principles that govern notarial services.

The core purpose of the notarial act is to authenticate signatures of persons appearing before the notary. The heart of that act is the notary's legal duty to take all reasonable steps to verify the signer's identity. The notary may do so through personal knowledge of the signer's identity or by reliance on the oath of a credible witness personally known to the notary. The notary, by common law and by statutory law in most states, may rely on certain forms of identification cards to verify the signer's identity. Once signer identity is confirmed, the prudent notary should obtain the document signer's signature in the notary journal, along with other key information.⁹⁴

It could be argued that journal thumbprinting should be discretionary, rather than mandatory. However, thumbprinting in the journal under any circumstances raises important questions. Advocates of thumbprinting assert that it will screen out imposters and forgers and thereby protect the notary and the public. The argument goes to the heart of the notary's duty to exercise reasonable care in verifying the signer's identity. If there is any doubt about the true identity of a signer, a reasonable and prudent no-

94. MODEL NOTARY ACT § 4-103 (Nat'l Notary Ass'n 1984).

tary should summarily withdraw and refrain from performing the notarization anyway. Requiring a notary to obtain the signer's ink thumbprint in addition to the signer's signature and all of the other vital information in a notary journal, is illogical and unreasonable. It is overkill.

Under centuries of well-established rules of evidence and procedures, a notary's personal knowledge of the identity of a document signer is irrefutable. As a form of evidence, the value of a signer's ink thumbprint in the notary's journal will be inferior to the evidentiary value of the notary's personal knowledge, or the personal knowledge of a credible witness, when it comes to documenting signer identification in the journal. Proper reliance on a signer's ID card is not superseded or enhanced by a thumbprint in the notary journal. The common law standard by which a notary's conduct is judged is the standard of reasonable care.⁹⁵ Mandating journal thumbprinting is inharmonious with this venerated historical standard.

Reportedly, the most vocal support group for mandatory journal thumbprinting is law enforcement.⁹⁶ This is due largely to the computerized, state-of-the-art Automated Fingerprint Identification Systems (AFIS) which can now match crime scene fingerprints in a matter of minutes with files of millions of such prints.⁹⁷ To law enforcement officials, the journal thumbprint constitutes invaluable evidence in solving and prosecuting fraud by forgery and imposter.⁹⁸

The benefits to law enforcement notwithstanding, thrusting the notary into a law enforcement role is inappropriate. The assumption that journal thumbprinting will eliminate problems with document fraud and signer identification is not justified. Advocates have not made their case. It appears to be advocacy based on fear of fraud and "what ifs". More than a century ago, Charles Dickens commented that Americans have a uniquely skeptical attitude about the direction in which society is headed.⁹⁹ Dickens wrote that in America the "one great blemish in the popular mind . . . and the prolific parent of an innumerable brood of evils, is Universal Distrust. Yet the American citizen plumes himself upon this spirit, even when he is sufficiently dispassionate to per-

95. See *Transamerica Title v. Gree*, 11 Cal. App. 3d 693, 694-95 (1970) (stating that the test for determining whether the notary is liable is if the notary establishes the identity of the signer with reasonable certainty). See also *Farm Bureau Fin. Co. v. Carney*, 605 P.2d 509, 515 (Idaho 1980) (citing reasonable care as the standard for notarial acts).

96. *A Journal Thumbprint*, *supra* note 84, at 11.

97. *Id.*

98. *Thumbprinting*, *supra* note 83, at 13.

99. See, David Whitman, *Believing the Goodnews*, U.S. NEWS & WORLD REP., DEC. 29, 1997, AT 45, 46.

ceive the ruin it works."¹⁰⁰

If there is in fact a growing problem with signature fraud slipping past American notaries, it is not notary law that has failed. The appropriate policy response is to better train notaries on correct notarial procedures. Compelling notaries to take a more aggressive stance against signature fraud by implementing questionable new procedures is not an appropriate response. If the notary performs the notarial act correctly, taking a signer's thumbprint in the notary journal cannot be considered a useful requirement.

VII. CYBERNOTARIES AND THE KEEPING OF A JOURNAL

The paperless, electronic notarial act is coming of age. The use of digital signatures on electronic documents by a "cybernotary" having authority in such transactions renders the traditional notary journal useless in that paperless context.¹⁰¹ No document signers personally appear before the notary, no signer identities can be verified by personal knowledge or satisfactory evidence.¹⁰² Yet, will digital notarizations need journalizing? To the same extent that the notary's protection against allegations of misconduct is provided by the meticulous keeping of a journal record of all notarial acts, the same can be asserted for the cybernotary. Such a record would indeed be electronic and permanent, documenting the cybernotary's conduct in every electronic transaction. The record would have to be secure, tamper-proof and available for public review to verify a notarial act or to resolve a disputed transaction. The journal record must show that every electronic notarial act is documented chronologically that the requisite procedures for correct and diligent cybernotarizations are followed.¹⁰³

VIII. THE MODEL NOTARY ACT AND THE NOTARY JOURNAL

The Model Notary Act¹⁰⁴ is a highly useful and venerated reference for developing state notary legislation. Its influence is seen in most of the fifty states. The Model Act has probably contributed more to the practice of journal record keeping than any other source. The recommended provisions concerning notary journals should be carefully and positively considered by every jurisdiction

100. *Id.*

101. Deborah L. Wilkerson, Comment, *Electronic Commerce Under the U.C.C. Section 2-201 Statute of Frauds: Are Electronic Messages Enforceable?*, 41 KAN. L. REV. 403, 403 (1993).

102. *Florida Recognizes Electronic Signatures as Legal and Binding*, SUN-SENTINEL, June 4, 1996, at 3D.

103. Michael L. Closen & R. Jason Richards, *Cyberbusiness Needs Supernotaries*, NAT'L L.J., August 25, 1997, at A19.

104. MODEL NOTARY ACT § 4-104(e) (Nat'l Notary Ass'n 1984).

in the country.

One particular provision of the model act merits revisitation. That is the provision concerning the disposition of the notary journal upon the termination of the notary's service by resignation, revocation of commission, non-renewal of appointment, or by the notary's death. The model act provides for submission of the journal by certified mail or other means to the office of the government official designated by the state's statute.¹⁰⁵ This provision should be removed from the model act as it works against the interest and protection of the public and the notary.

Section 4-104 should be amended to reflect the following:

1. Clarify the notary's duty to keep and safeguard the notary journal for life, even though the notary is no longer serving as a notary;

2. Make the journal available for public inspection, upon reasonable notice;

3. Safeguard by reasonable means the confidentiality of journal entries;

4. Hold the notary liable for damages suffered by any party denied access to reasonably inspect the journal after having properly identified himself before the notary, having specified which journal entry is requested, and having given reasonable notice in making the request;

5. Hold the notary harmless from liability for the loss, theft or destruction of the journal not proximately caused by the gross negligence of the notary; and

6. Grant to the notary a presumption in law that by having kept a journal which is now lost or destroyed, but not by the gross negligence of the notary, any notarial act performed during the time period the lost or destroyed journal was kept would have been recorded in the journal and therefore would have presumably been performed correctly.

Section 4-101 of Article IV should also be enhanced with a provision that, in effect, adopts the business records exception to the hearsay rule under the Federal Rules of Evidence: "The contents of the notary journal, if the minimum information required by statute is provided in the journal entry, shall be received into evidence as prime facie proof of the journal entries contained therein, that no further corroborating evidence of its veracity be required."¹⁰⁶ This provision would not only further protect the notary and the public from groundless assertions of wrongdoing, but would also enhance the value and stature of the notary journal and the notary who maintains it. Most importantly, it would expedite the resolution of many disputes without tying up the courts.

105. *Id.*

106. FED. R. EVID. 803(6).

CONCLUSION

Notary journals have been in use for centuries, but are only recently making a comeback. A number of states require their use and the notary's awareness of their benefits is increasingly taking hold. A properly designed and maintained notary journal can direct a notary in correct notarial practices, virtually assuring error-free service every time a notarization is performed. It is indeed the notary's most important notarial tool.

An important reason the notary journal has no peer in comparability of protection to the notary and the public is because it is the least intrusive solution, for the greatest good, for the greatest number of people. If in fact American society is experiencing a continued upswing in document fraud and forgery, the increased usage of the venerated notary journal is the ideal solution for solving the problem. The notary journal has a clear and permanent place in American jurisprudence. The real challenge today is to encourage every notary and every employer of notaries to require the proper and diligent keeping of the notary journal. Furthermore, the public served by the notary should come to expect that a signature in the notary's journal is required, to provide identification and to assist the notary to complete an accurate recordation of the notarial act in a matter of a few quick moments.

The properly maintained notary journal is indeed the notary's most valued tool of the trade. William Aspinwall of Massachusetts Bay Colony in 1652 had it right.