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ADMINISTRATIVE AGENCY OVERSIGHT OF NOTARIAL PRACTICE

JOHN T. HENDERSON* AND PETER D. KOVACH**

INTRODUCTION

As the title suggests, the purpose of this article is to provide an overview of the different statutory provisions adopted by various commissioning jurisdictions which regulate the conduct and provide for the disciplining of notaries public. By necessity, the article will focus on the experience in Pennsylvania given the writers' familiarity and expertise in the commissioning process and in prosecuting notaries public for malfeasance in that jurisdiction.

The different commissioning jurisdictions have enacted a myriad of statutory provisions to help ensure that notaries public perform their official duties in a legal and professional manner.

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1. In this article, “commissioning jurisdictions” is defined as the 50 states and the District of Columbia.

The need for commissioning jurisdictions to have in place some type of authority which grants them the ability to monitor and oversee the commissioning and disciplining of notaries public is readily apparent given the fact that notaries public are generally considered public officials and perform duties which are essential and required with respect to numerous transactions. It is also needed because of the financial loss which can be incurred when customers rely upon a notary public whose performance is negligent. Such oversight is also warranted given the approximately 4.3 million notaries public in the United States. Within the commissioning jurisdictions, fourteen have more than 100,000 notaries public each.


7. States with more than 100,000 notaries include Florida, 346,548; Texas, 327,000; New York, 241,980; South Carolina, 205,718; Illinois, 182,699; New Jersey, 178,000; Ohio, 172,000; Georgia, 172,000; North Carolina, 170,000;
missioning jurisdictions have reported that the number of notaries public being commissioned is increasing. 8

I. THE COMMISSIONING PROCESS

The process of monitoring notaries public by the commissioning jurisdictions typically begins with the filing of the first application to be commissioned as a notary public. All commissioning jurisdictions have established eligibility requirements to be granted a notary commission. By statutorily requiring that the applicant for a notary commission meet certain requirements, the commissioning jurisdictions seek to insure that the applicants will be able to perform their duties at minimum acceptable level.

The most common eligibility requirement among the jurisdictions is a minimum age requirement. In all but two jurisdictions, the minimum age is 18. 9 Additional specified eligibility requirements common among the jurisdictions are the requirement of a good moral character 10 / lack of acts of moral turpitude, 11 or a dis-

Michigan, 160,000; Massachusetts, 144,000; California, 130,000; Virginia, 126,000; and Tennessee, 102,000. 1997 National Notary Association Survey of Notary Officials. This contrasts with only twelve states having had more than 100,000 notaries each in 1996. These were Florida, 400,000; Texas, 326,000; New York, 240,000; South Carolina, 200,000; Illinois, 180,000; New Jersey, 178,000; Georgia, 172,000; Michigan, 160,000; North Carolina, 160,000; Virginia, 126,000; Tennessee, 125,000; and California, 122,000. States With Notary Populations of 100,000 or More, NOTARY BULL., June 1996, at 1, 14 [hereinafter States].

8. See States, supra note 7, at 35 (detailing a 37% increase in the number of notaries public in South Carolina, from 150,000 in 1992 to 205,718 in 1997; an 8% increase in the number of notaries public in Georgia, from 160,000 in 1992 to 172,000 in 1997; a 21% increase in the number of notaries public in North Carolina from 140,000 in 1992 to 170,000 in 1997; a 41% increase in the number of notaries public in Maryland from 66,000 in 1992 to 93,000 in 1997; a 26% increase in the number of notaries public in Virginia from 100,000 in 1992 to 126,000 in 1997; a 22% increase in the number of notaries public in Arizona from 70,000 in 1992 to 85,000 in 1997). See also Notary Population is on the Rise Throughout Country, NOTARY BULL., Apr. 1995, at 1, 13. Compare Drop in Notary Ranks Disturbing, NOTARY BULL., Oct. 1994, at 1 (reflecting concern that the number of notaries public commissioned in California had dropped from a high of more than 160,000 in 1991 to under 135,000 in October 1994).

9. In all of the commissioning jurisdictions, except for Alaska and Nebraska, the minimum age to be commissioned as a notary public is 18. See, e.g., supra note 2 (identifying the statutes regulating Notaries Public in the fifty states and the District of Columbia). In both Alaska and Nebraska the minimum age is 19. ALASKA STAT. § 44.50.020 (Michie 1997); NEB. REV. STAT. § 64-101(6) (1997).


11. California, Connecticut, Minnesota, Nevada, North Carolina, Texas contain such additional specified eligibility requirement. See id.
qualifying criminal record, and passing a test to demonstrate knowledge of the duties of a notary public.

In an effort to eliminate applicants from being commissioned who may be predisposed toward misconduct in using a notary commission, many statutes, such as Pennsylvania's, require that the applicant satisfy the commissioning authority that the applicant is of "good moral character." The fact that the term "good moral character" is not defined specifically has led to concerns that an applicant for a notary commission, and by extension a current notary public, is unable to specifically acquire knowledge as to what conduct is expressly prohibited which would prevent the applicant from successfully applying for a notary commission or result in an existing commission holder having a commission revoked.

Although the term "good moral character" is not defined by statute in Pennsylvania, court decisions have made the term constitutionally certain in terms of applicants or commission holders lacking "moral turpitude." Good moral character is defined, in part, as including an absence of proven conduct or acts which have been historically considered as manifestation of "moral turpitude." The Pennsylvania courts have traditionally defined moral turpitude as "anything done knowingly contrary to justice, honesty or good morals." From these decisions, it is clear that the two phrases, good moral character and moral turpitude, are often used together or to define each other. Accordingly, through judicial interpretation, custom, and usage the term good moral character is not unconstitutionally vague and can be utilized by the commissioning jurisdictions to screen applicants in the commissioning process.

In Pennsylvania, crimes which indicate moral turpitude

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13. Alaska, California, Connecticut, District of Columbia, Hawaii, Louisiana (for non-attorneys), Maine, New York (for non-attorneys), North Carolina, Oregon, South Dakota, Wyoming (test not mandatory but is encouraged) contain such additional specified eligibility requirement. See id.
14. See Section 5 of the Notary Public Act of 1953, Act of Aug. 21, 1953 P.L. 1323 § 151. The Model Notary Act of September 1, 1984, Section 2-101(c) provides that the commissioning official may deny a notary commission where the applicant has been convicted of a crime involving dishonesty or moral turpitude. MODEL NOTARY ACT 2-101(c) (1984).
18. Gombach, 692 A.2d at 1131.
include burglary, larceny, and receiving stolen property,\textsuperscript{19} income tax evasion,\textsuperscript{20} and possession of a controlled substance with intent to deliver.\textsuperscript{21}

In order to further specify the type of criminal conduct applicants and notaries public may not have engaged in, ten commissioning jurisdictions specifically provide that the applicant may not have any felony convictions.\textsuperscript{22} Variations on this moral character and criminal record theme include a prohibition against the applicant having had any professional license revoked,\textsuperscript{23} and not having been convicted of committing "an offense involving dishonesty."\textsuperscript{24} Unfortunately, despite the apparent stringent requirements many commissioning jurisdictions have which would appear to disqualify an applicant with a criminal record from being commissioned as a notary public, many commissioning jurisdictions rely solely upon the applicant to supply the information regarding the criminal record and make no effort to verify this information.\textsuperscript{25} To date, only five jurisdictions require that all applicants include with the notary application a criminal record check conducted by an enforcement authority to verify the applicant's recollection regarding his criminal record.\textsuperscript{26} Several states permit local appointing authorities to require the submission of criminal record checks,\textsuperscript{27} and several others will perform criminal record checks on their own, either routinely, or randomly.\textsuperscript{28}

In order to insure the integrity of the responses to the inquiries in the application, twenty-eight jurisdictions require that all notary applications be notarized.\textsuperscript{29} Accordingly, if the applicant is

\begin{footnotes}
\footnote{20. Moretti, 277 A.2d at 519.}
\footnote{22. See supra note 2 and accompanying text for a discussion of Notary Public laws relating to Arizona, Colorado, Illinois, Kansas, Montana, Nebraska, New Mexico, Oregon, Texas, Virginia. \textit{See also} 18 PA. CON. STAT. ANN. § 9124 (West 1996) (relating to the use of records by licensing agencies and which also grants any department the authority to refuse to grant or renew a commission where the applicant has been convicted of any felony or convicted of a misdemeanor which relates to the profession for which the commission is sought).}
\footnote{23. KAN. STAT. ANN. § 53-118(a)(3) (1996).}
\footnote{24. N.J. STAT. ANN. § 52:7-20 (West 1997).}
\footnote{26. Massachusetts, Minnesota, Missouri, New Hampshire and New York. Several states including Alabama, Louisiana, and Tennessee appoint notaries at the local level; therefore, practices may vary by locality.}
\footnote{27. Alabama, Louisiana, Ohio and Tennessee.}
\footnote{28. Florida, South Dakota and Wisconsin.}
\end{footnotes}
less than truthful on the application for the notary commission, in these jurisdictions the applicant could be charged with perjury. Whereas Pennsylvania does not require that the application for a notary commission be notarized, all false statements on the application are deemed as adequate grounds for rejection and could subject the applicant to a charge relating to unsworn falsification to authorities.30 In a unique effort to insure the identity of the applicant, California requires that the fingerprints of the applicant also accompany the application.31

Closely related to the requirement that the applicant lack a criminal record which would disqualify the applicant from being commissioned a notary public is the requirement of some commissioning jurisdictions that the applicant may not have had a prior notary commission revoked.32

Yet another requirement set forth in the eligibility and application provisions of many of the statutes of the commissioning jurisdictions is the requirement that the notary public application be endorsed. This endorsement requirement is viewed as an additional indicator that the applicant will discharge his notarial duties appropriately. Of the fifty-one commissioning jurisdictions, twenty-nine require some form of endorsement.33 The qualifications of the endorser run the gamut and range from Florida’s requirement of one character witness to Nebraska’s requirement of twenty-five registered voters in the home county of the notary.

30. See 18 PA. CON. STAT. ANN. § 4904 (West 1997) (relating to unsworn falsification to authorities and which provides that a person commits a misdemeanor of the second degree if, with intent to mislead the commissioning authority in the commissioning process, makes a written false statement which the applicant does not believe to be true).
31. CAL. GOV’T CODE § 8201.1 (Deering 1997).
32. N.M. STAT. ANN. § 14-12-2 (Michie 1997); KAN. STAT. ANN. § 53-118 (1996). The Model Notary Act (relating to commissioning) provides that the commissioning official may deny an application where the applicant has had a notarial commission or professional license revoked, suspended or restricted within the commissioning jurisdiction or any other state. MODEL NOTARY ACT § 2-101(c) (1984).
33. The twenty-two commissioning jurisdictions which do not require an endorsement are Arizona, Arkansas, California, Colorado, Idaho, Illinois, Indiana, Iowa, Kansas, Minnesota, Mississippi, Montana, Nevada, New York, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Vermont, Wisconsin and Wyoming.
applicant. In Pennsylvania, the application is statutorily required to bear the endorsement of the senator of the district in which the applicant resides, or in the case of a vacancy in that senatorial district, the endorsement of the senator of an adjacent district. In Pennsylvania, the endorsement requirement is also tied to the good moral character requirement in that the commissioning authority also requires that the application set forth two references who can vouch for the applicant's good reputation for integrity, sobriety and truthfulness.

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

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

By far, the best indication as to whether the applicant is actually familiar with the duties and responsibilities of being a notary public is the requirement that applicants take and successfully complete an examination regarding the acts to be performed in exercising the notary public commission. Currently, thirteen commissioning jurisdictions require an applicant to take and suc-

34. FLA. STAT. ANN. § 117.01(2) (West 1996); NEB. REV. STAT. § 64-101(5) (1997).
35. Section 5 of the Notary Public Law (relating to application to become a notary public), 57 PA. CONS. STAT. ANN. § 151 (West 1997).
37. But see TENN. CODE ANN. § 8-16-302 (1997) (requiring notaries to sign all notarized documents "in ink by the notary's own hand").
38. See Quadriplegic Can't Retain Commission, NOTARY BULL., Apr. 1993, at 1, 9 (stating that a quadriplegic or any individual who is not physically capable to complete a notarial certificate is prohibited from obtaining a notary commission in Connecticut).
cessfully complete an examination. The importance of educating and testing notary applicants and notaries public is discussed at greater length in the article entitled Education and Testing of Notary Applicants set forth in this law review symposium issue.

While a discussion of all the requirements a successful applicant must meet in order to be eligible to be commissioned as a notary public is beyond the scope of this article, it should be noted that in discussing the requirements the United States Supreme Court has held that such requirements would be subject to strict judicial scrutiny. In applying this test, the Court concluded that the duties of a notary public are essentially clerical and ministerial. Accordingly, in order to justify any commission eligibility requirements, the commissioning jurisdiction must be able to demonstrate that the requirements further a compelling state interest by the least restrictive means available. There must be a connection between the requirement and the duties of a notary public which make it clear that an applicant unable to fulfill the commission eligibility requirement is commensurately incapable of fulfilling the role of a notary public. In light of the holding in Bernal v. Fainter, which held unconstitutional a Texas statutory requirement that notary public applicants be citizens of Texas and be registered to vote, it is unlikely that similar requirements in other commissioning jurisdiction statutes would be upheld.

This holding would also appear to call into question the minimum residency requirement in fifteen commissioning jurisdictions which range from one day to one year. It is interesting to note similar minimum residency requirements for the admission to practice law have been stricken by judicial decision.

40. See Bernal v. Fainter, 467 U.S. 214, 216 (1984) (holding that such requirements would be subject to strict scrutiny).
41. Id. at 225.
42. Id. at 227.
43. Id.
44. Id. The court also noted that the citizenship and registered to vote requirements could not be supported on the basis that they ensured a notary public's familiarity with state law in part because Texas failed to have a testing requirement. Id. at 218. See also Jii v. Rhodes, 577 F. Supp. 1128, 1131 (1983) (discussing notary requirements).
45. Alabama requires one day minimum residency; the minimum residency requirement in Arizona varies; thirty days minimum residency is required in Alaska, Colorado, Illinois, Kentucky, Missouri, Nevada, North Dakota, Ohio, Utah and West Virginia. A one month residency is required in Rhode Island; one year minimum residency is required in Pennsylvania. The Model Notary Act does not provide for minimum residency.
46. Supreme Court of New Hampshire v. Piper, 470 U.S. 274, 276-78
Finally, in order to provide the commissioning authority with flexibility in reviewing notary public commission applicants, Pennsylvania provides that the Secretary of the Commonwealth may reject any application for "good cause."\(^{47}\) The term can encompass many of the specific statutory provisions already discussed, i.e., an applicant's criminal record; the fact that an applicant had a prior notary commission suspended, revoked or restricted in any manner; where the applicant has failed to discharge the duties of a notary public faithfully or when the applicant is no longer able to physically perform notarial duties. Because "good cause" is also the standard for revoking the commission of a notary public, this term will be discussed in more detail in Part II (relating to Administrative Agency Disciplinary Options) of this article.

As is readily apparent from the brief survey of the different requirements set forth above, the different commissioning jurisdictions have provided for a variety of requirements to aid them in determining whether an applicant seeking to be commissioned as a notary public will discharge the duties of his office responsibly. To the extent however that most states do not require notary education or testing most notaries public are forced to rely upon themselves to learn how to properly exercise their commissions.\(^{48}\)

In the event, therefore, that the commissioning jurisdiction determines that it has commissioned an unqualified applicant or that the successful applicant has engaged in conduct which would warrant disciplinary action being taken against the notary commission of that individual, the commissioning jurisdiction retains the authority to discipline the notary public and limit the exercise of the notary commission. These disciplinary sanctions can include a reprimand, probation, the imposition of a fine, a suspension of the notary commission for a period of time or a revocation of the notary commission. The procedure for implementing these different disciplinary options is discussed further in Part II (relating to administrative agency disciplinary options) of this article.

II. ADMINISTRATIVE AGENCY DISCIPLINARY OPTIONS

After a notary public commission is issued, it is incumbent upon the commissioning authority to monitor the notary public's performance to ensure that the notary public discharges his duties

\(^{47}\) Goffo, supra note 5, at 1069 (discussing handbooks and other information provided to notaries). Many jurisdictions, however, do supply notaries public with handbooks and information over the Internet. See States Update Handbook for Their Notaries, NOTARY BULL., June 1997, at 13.
properly. Unfortunately, because of limited resources, the commissioning authorities are invariably unable to directly monitor a notary public's activities absent a complaint being filed against the notary public. Without some type of complaint being filed against the notary public, commissioning authorities generally do not interact again with the notary public until such time as the notary seeks to be recommissioned and again subjects himself to a determination as to whether the notary continues to meet the commissioning eligibility requirements. The one exception to this lack of direct monitoring is the continuing education and testing requirements placed upon notaries public in some jurisdictions. This topic is discussed at greater lengths in the article entitled Education and Testing of Notary Applicants set forth in the earlier part of this symposium issue.

The filing of a complaint against a notary public is commonly the first step in the disciplinary process. In Pennsylvania, while the complainant need not use a specific form, the Department of State does provide, as a courtesy to the complainant, a "notary public statement of complaint" form. The complainant is requested to describe the nature of the complaint in detail and attach copies of any pertinent notarized documents. Once a complaint is filed, the notary may be potentially disciplined either through administrative action (like Pennsylvania and California), through criminal prosecution (like Florida), or both. As the scope of this article is limited to administrative oversight, only disciplinary proceedings brought by administrative action will be discussed.

Upon receipt of a complaint, the administrative agency will typically assign the complaint a file number for tracking purposes and will acknowledge receipt of the complaint by letter. The Department then informs the notary public by letter of the nature of the complaint. In some states, by comparison, a copy of the complaint is actually forwarded to the notary with the request for a response to the allegations. In Pennsylvania, the notary public is instructed to reply to the allegations and to supply a copy of his or her notary register for a monthly period which includes the notarization which served as the basis for the filing of the complaint. Typically, the notary is provided thirty (30) days in which to respond. Obviously, the requirement that the notary supply a copy of his or her notarial register is only germane in those commissioning jurisdictions where the notary public is required to maintain a notarial register.

Upon receipt of the notary public's written response and reg-

49. See Marc A. Birenbaum, Enforcing the Law, NAT'L NOTARY MAG., Sept. 1997, at 11 (indicating that Florida forwards a copy of the actual complaint to the notary public and requests a sworn written response to the allegations).
ister (if required), the commissioning authority will review the
complaint, response and notary register to determine if there is
reason to believe that a violation has occurred. Some commission-
ing jurisdictions augment their information at this point by sup-
plying the notary's response to the complainant with the request
that the complainant reply and provide any further information
required. Should additional information still be required, some
commissioning jurisdictions, such as California and Pennsylvania,
utilize investigators to conduct an onsite interview with the notary
and to gather information directly from the notary who is the sub-
ject of the complaint.

When the requisite information has been gathered, the com-
misioning jurisdiction's legal counsel may be brought into the re-
view process in order to assist in determining whether grounds
exist for disciplining the notary public. In determining whether
disciplinary action is warranted in those instances where the no-
tary has failed to reply to the allegations and the request for in-
formation, the commissioning authority is invariably forced to pre-
sume that the allegations set forth in the complaint are true and
proceed on that basis.

Commissioning jurisdictions have generally seen an increase
in the number of complaints filed against notaries public. In
Pennsylvania for 1997, the last calendar year in which full year
statistics are available, there were 500 complaints filed. At the
time there were approximately 88,391 active notaries public.

This number reflects the general trend of an increasing number
of notary complaints being filed from year to year.

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50. *Id.*
51. *Id.* at 12.
52. Pennsylvania Department of State, Bureau of Commissions, Elections,
and Legislation records. *See also* John T. Henderson, Jr., *Accused Notaries are
Allowed their "Day in Court*, NOTARY BULL., Feb. 1997, at 5 (illustrating the
statistics for 1990 to 1995).
53. Pennsylvania Department of State, Bureau of Commissions, Elections,
and Legislation records.
54. *Id.* The State of Florida has reported a similar increase in notary
complaints:

<table>
<thead>
<tr>
<th>Year</th>
<th># of Complaints Filed</th>
</tr>
</thead>
<tbody>
<tr>
<td>1992</td>
<td>92</td>
</tr>
<tr>
<td>1993</td>
<td>100</td>
</tr>
<tr>
<td>1994</td>
<td>240</td>
</tr>
<tr>
<td>1995</td>
<td>449</td>
</tr>
</tbody>
</table>

The number of notary complaints filed in Pennsylvania by year:

<table>
<thead>
<tr>
<th>Year</th>
<th># of Complaints Filed</th>
</tr>
</thead>
<tbody>
<tr>
<td>1992</td>
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<tr>
<td>1993</td>
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<td>1994</td>
<td>149</td>
</tr>
<tr>
<td>1995</td>
<td>238</td>
</tr>
<tr>
<td>1996</td>
<td>320</td>
</tr>
</tbody>
</table>
In Pennsylvania, if the information gathered does not support a probable cause finding that the notary public has committed a violation, the complaint will be dismissed. Both the notary public and the complainant will receive letters indicating that the file will be closed without further action; however, the notary is warned that the Department of State reserves the right to reopen the matter in the future if additional pertinent information becomes available.

Should it be determined that there is probable cause to believe a violation has occurred, a second inquiry is made as to the seriousness of the possible violations. If a violation is not of a serious nature, several jurisdictions including Pennsylvania, Vermont, West Virginia and Florida, opt to issue an informal reprimand in which the notary public is informed of the preliminary findings of the investigation and is issued a warning that any further violations or negligence on the part of the notary public could result in more serious disciplinary sanctions.

In the event that the commissioning authority determines that more serious disciplinary action is appropriate the due process requirements of the Pennsylvania Constitution, and most other commissioning jurisdictions, require that any disciplinary administrative procedures provide the basic elements of procedural due process. These are adequate notice, opportunity to be heard and the chance to defend oneself before a fair and impartial tribunal having jurisdiction of the case.65

The notice requirement, which requires advising the notary public of the nature of the allegations which serve as the basis for any disciplinary action, commences in Pennsylvania through the filing of an Order to Show Cause. An Order to Show Cause is a legal document similar to a civil Complaint which compels the notary public to respond to the alleged violations and to "show cause" why the notary public's commission should not be revoked or suspended. It is required that the charges be set forth with required specificity in order to afford the notary public adequate notice of the charges against him.66 Without such notice the notary lacks a reasonable certainty of the substance of the accusations filed against him and would not be able to prepare an adequate de-

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55. Fiore v. Board. of Fin. and Revenue, 633 A.2d 1111 (Pa. 1993). See also Section 22 (relating to rejection of application; removal of the Notary Public Law of 1953); 57 PA. CONS. STAT. ANN. § 168 (West 1997) (providing that any action taken to revoke a notary commission is subject to the right of notice, hearing and adjudication and the right to appeal therefrom in accordance with the Administrative Agency Law, 2 PA. CONS. STAT. ANN. §§ 501-08, 701-04).

In bringing formal administrative charges, it is important that the prosecutorial and adjudicative functions be separate and distinct. Therefore, any legal counsel initially involved in the evaluation of the complaint cannot be involved in the adjudication of it. The leading case in Pennsylvania regarding the separation of the prosecutorial and adjudication functions is *Lyness v. State Board of Medical Examiners*. In *Lyness*, the Pennsylvania State Board of Medicine initiated a professional licensing disciplinary prosecution against Dr. Lyness based on an investigation concerning allegations of his sexual misconduct toward patients. The Board then subsequently acted as the ultimate fact finder in determining whether his physician's license should be suspended. Accordingly, the doctor was forced to face, as the “impartial” adjudicator of his case, the same body which had heard allegations and formed a judgment concerning probable cause to prosecute him. In finding that the prosecutorial and adjudicative functions exercised by the Board were unconstitutionally commingled, the Pennsylvania Supreme Court concluded that the doctor's right to due process had been violated. The court stated, “[w]hether or not any actual bias existed as a result of the [State Board of Medicine] acting as both prosecutor and judge is inconsequential; the potential for bias and the appearance of non-objectivity is sufficient to create a fatal defect under the Pennsylvania Constitution.”

Pursuant to the above, it is clear that in any administrative oversight scheme the procedures cannot result in a commingling of the prosecutorial and adjudicative functions.

In response to the Order to Show Cause, the notary public, also referred to as the Respondent in Pennsylvania, is required to file an Answer within the time specified (twenty days) after the date of service. Like the Order to Show Cause, the Answer must be specific; it must specifically admit or deny each of the allegations set forth in the Order to Show Cause and must support itself with facts and a concise reference to the law relied upon. Mere general denials of the allegations of the Order to Show Cause unsupported by specific facts can act as an admission of the allegations and be used as the basis for entry of a final order without a hearing.

57. Id.
59. Id.
60. Id.
61. Id. at 1210.
62. See 1 PA. CODE § 35.37 (1996) (relating to answers to orders to show cause).
63. Id.
A Respondent failing to file an Answer within the time allowed is deemed to be in default and the allegations set forth in the Order to Show Cause may be deemed to be admitted. An Adjudication and Order will then be issued based upon the deemed-to-be-admitted allegations in the Order to Show Cause.

If an Answer is timely filed, an administrative hearing will be scheduled by the Department of State, typically within thirty (30) to sixty (60) days after receipt of the Respondent's Answer. Once a hearing date has been set, there are three avenues a notary public may select to bring the disciplinary action to a conclusion: the notary may resign his or her commission, the notary may attempt to enter into a consent agreement with the Department of State regarding an acceptable disciplinary order, or the notary may proceed with a formal hearing and present his defenses and any mitigating factors.

In Pennsylvania, the Secretary of the Commonwealth's disciplinary authority is limited to suspending or revoking current notary commissions, or rejecting applications to be commissioned as a notary public. Therefore, if a notary wishes to avoid an administrative hearing and the disciplinary sanction that may result therefrom, a Pennsylvania notary may choose to resign his or her commission. In Pennsylvania, the number of notaries public who have resigned their commissions when faced with disciplinary action has ranged from a low of two (2) in 1991 to a high of nineteen (19) in 1995 and 1997. While the resignation of the notary's commission effectively ends the pending disciplinary action in Pennsylvania, a notation of the unresolved charges is made in the notary's permanent record with the Department. If the former notary public applies for a new commission, any unresolved charges will be reexamined and the Department may use the allegations as the basis to oppose the reappointment of the applicant. By contrast, California's notary law permits the California Secretary of State to enter an Order against a notary even after the notary's commission lapses or is resigned.

65. Zook, 683 A.2d at 715.
66. Number of Pennsylvania notaries public who resigned while disciplinary action was pending, by year:

<table>
<thead>
<tr>
<th>Year</th>
<th># of Resignations</th>
</tr>
</thead>
<tbody>
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<td>1996</td>
<td>13</td>
</tr>
<tr>
<td>1997</td>
<td>19</td>
</tr>
</tbody>
</table>

Pennsylvania Department of State, Bureau of Commissions, Elections and Legislation.
67. CAL GOV'T CODE § 8214.4 (Deering 1997).
Another method to avoid a disciplinary hearing is for the Department and the notary public to enter into a "Consent Agreement." With a Consent Agreement, the Department and the Respondent stipulate that certain allegations made by the Department are true. The parties then consent to the entry of an Order imposing an agreed upon disciplinary sanction. The terms and conditions of any agreement between the Department and the notary public are then submitted to the Secretary of the Commonwealth for approval. If the Secretary of the Commonwealth determines the agreed upon sanction is appropriate, he or she will issue an Order incorporating the findings and terms of discipline contained in the Consent Agreement. The number of notary complaints which end by way of Consent Agreement has also seen dramatic increases in the past seven (7) years in Pennsylvania.68

If the Secretary of the Commonwealth does not believe the proposed sanction adequately disciplines the notary or does not adequately protect the public, the Consent Agreement will be rejected and the Department and the notary will either resume negotiations or follow one of the other avenues of disposition. To accommodate the possibility that the Secretary of the Commonwealth will reject the Consent Agreement and because of concerns raised by Lyness,69 all proposed Consent Agreements entered into by the Department contain a provision that the Respondent notary agrees not to contest the Secretary's impartiality if the Consent Agreement is rejected and the matter proceeds to a hearing.

As a Consent Agreement is ultimately contractual in nature, the available terms of discipline are greater than those specified by statute.70 This often provides the Department of State and Secretary of the Commonwealth with greater flexibility in fashioning discipline to adequately suit the situation. Given the lack of a mandatory notary education requirement in Pennsylvania, a standard disciplinary term required by the Department of State is that

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68. Number of Pennsylvania notaries public who entered into Consent Agreements by year:

<table>
<thead>
<tr>
<th>Year</th>
<th># of Consent Agreements</th>
</tr>
</thead>
<tbody>
<tr>
<td>1991</td>
<td>2</td>
</tr>
<tr>
<td>1992</td>
<td>6</td>
</tr>
<tr>
<td>1993</td>
<td>9</td>
</tr>
<tr>
<td>1994</td>
<td>9</td>
</tr>
<tr>
<td>1995</td>
<td>19</td>
</tr>
<tr>
<td>1996</td>
<td>13</td>
</tr>
<tr>
<td>1997</td>
<td>41</td>
</tr>
</tbody>
</table>

Pennsylvania Department of State, Bureau of Commissions, Elections and Legislation.


the notary must successfully complete an approved notary public review course before a specified date (usually the last day of any Ordered suspension period). In this way, the Department of State and Secretary of the Commonwealth receive some assurance that the notary is aware of proper notary procedures before the notary resumes his or her duties.

In Pennsylvania, if the notary does not wish to resign his or her commission, and an agreement cannot be reached on disciplinary terms, the scheduled administrative hearing will be held. All notary disciplinary hearings in Pennsylvania are now conducted by an administrative hearing officer who presides at the hearing as the designee of the commissioning authority, the Secretary of the Commonwealth. The conduct of a formal notary hearing in Pennsylvania is similar to a standard civil bench trial. The parties are permitted to make opening statements, present their evidence and witnesses, cross examine and object to the opposing party’s evidence and witnesses, make closing remarks, and file briefs in support of their position. Witnesses who offer testimony at the hearing are placed under oath and a written transcript is prepared.

Since Pennsylvania notary disciplinary hearings are civil in nature, the constitutional right to an attorney does not apply. While the notary is not provided with an attorney by the state, the notary may elect to hire an attorney for representation at the hearing. One notable difference between an administrative hearing in Pennsylvania and a civil trial is that the formal rules of evidence are relaxed to permit the introduction of all relevant and material evidence.\textsuperscript{71}

After receiving evidence and testimony, and taking into account the parties closing statements, oral legal arguments, and legal briefs, the administrative hearing officer will issue a Proposed Adjudication and Order for the Secretary of the Commonwealth’s consideration. If, after reviewing the record and other legal filings, the Secretary agrees with the factual and legal holding of the Proposed Adjudication and Order, he or she will adopt the findings and the proposed order will become a Final Order. However, if the Secretary of the Commonwealth does not agree with the Proposed Adjudication and Order, he or she, as the official notary disciplinary authority, has the option of modifying the findings or order as needed and issuing a revised Final Order based upon the modifications.

If either the notary public or the Department of State does not agree with the holding of the Final Order, three avenues are open. The party may request reconsideration of the Order pursuant to 1 Pa. Code § 35.241, the party may appeal the Order to the Pennsyl-

\textsuperscript{71} 1 PA. CODE § 35.161 (1997).
vania Commonwealth Court (an intermediate appellate court with jurisdiction over state agency actions) pursuant to 42 Pa. Cons. Stat. § 1512(a)(1), or the party may pursue both avenues at the same time.

In Pennsylvania, a Petition for Reconsideration must be filed with the Secretary of the Commonwealth within fifteen (15) days of the date of the Final Order. If no action is taken on the Petition within thirty (30) days, the Petition will be deemed denied. No Answer to the Petition for Reconsideration may be filed unless the Secretary of the Commonwealth grants the Petition. At that time the non-opposing party may file an Answer to the Petition and the Secretary will review the Order taking into account the arguments contained in the Petition and Answer.

The filing of a Petition for Reconsideration in Pennsylvania does not act as a stay of the time to file an appeal with the Pennsylvania Commonwealth Court. Therefore, a disappointed party is permitted to concurrently request the Commonwealth court to review the Final Order at the same time he or she files a Petition for Reconsideration. The time within which to appeal a Final Order to the Commonwealth Court is thirty (30) days. As appealing a Final Order to the Commonwealth Court is often a more expensive and time-consuming process than filing a Petition for Reconsideration, historically few parties have chosen to pursue this avenue. In the past twenty (20) years, only three (3) reported opinions have been issued by the Commonwealth Court concerning notary decisions rendered by the Secretary of the Commonwealth.

If the Secretary of the Commonwealth grants the Petition for Reconsideration, any appeal filed with the Commonwealth Court is automatically rendered inoperative. The matter will be reconsidered by the Secretary of the Commonwealth and a determination will be made whether the previously issued Order should be modified. Once a final determination is made after any reconsideration, the parties are permitted to appeal/re-appeal the new Final Order to the Commonwealth Court.

III. COMMON CAUSES FOR ADMINISTRATIVE DISCIPLINARY ACTION

Despite age and educational requirements, background

72. 1 PA. CODE § 35.241(f) (1997); PA. RULES APP. PROC. No. 1701(b) (1997).
checks and character references, commissioning authorities are of-
ten required to take disciplinary action against notaries due to a
violation of the commissioning statute. While the cause of disci-
plinary action will necessarily change from state to state due to
differences in notary legislation, there are several common types of
violation; failure to require the personal appearance of the
signor(s) of a document, failing to properly identify the person who
appeared before the notary, charging fees in excess of those pre-
scribed by law, failing to maintain an accurate notary register, no-
tarizing documents in which the notary has a personal interest,
and the conviction of the notary for certain criminal offenses. The
possible ramifications of a criminal conviction on a notary has been
discussed above under "The Commissioning Process," and will not
be discussed further.

In Pennsylvania, one of the rules most often violated by nota-
ries is the failure to require the personal appearance of the
signor(s) of a document and/or the failure to properly identify the
person who appeared before the notary. While many jurisdictions
such as Texas specify by statute the need to require the personal
appearance of an affiant, other jurisdictions, such as Pennsyl-
"affiant,"

Pennsylvania also links the requirement that
a signor of a document personally appear before the notary public
to common law and the historical reasons for the office of notary
public. In Pennsylvania, the Commonwealth Court held that the
"such a practice [failing to require the personal appearance of a
document signor] is clearly unlawful, and should not be condoned,
for the evils of such an unlawful practice are readily apparent." The
Court went on to indicate that the failure to properly disci-
pline a notary who failed to require the personal appearance of a
signor was an abuse of discretion; the Court recommended the
revocation of the notary's commission, but only ordered the sus-
pension of the notary's commission for a minimum of one (1) year.

The charging of fees in excess of those permitted by law is an-
other statutory provision frequently violated. Commissioning ju-

77. Of 85 formal disciplinary actions taken by the Pennsylvania Depart-
ment of State in 1997, 28 were for failure to require personal appearance.
Pennsylvania Department of State, Bureau of Commissions, Elections and
Legislation.
78. TEX. GOV'T CODE ANN. § 406.009(c)(6) (West 1997).
79. 57 PA. CONS. STAT. ANN. § 162 (West 1997).
81. Id.
risdictions commonly set the maximum charge for notarial acts such as the taking of acknowledgments and affidavits, certification of documents and records, and the protestation of commercial instruments. The charging of fees in excess of those permitted by law often affects all of the notary's customers. In many jurisdictions, land and vehicle transfers are only fully effective after the transferring document has been notarized. Because of the need to have these types of documents notarized, members of the general public in rural areas often feel they have no choice but to pay the requested fee. The notary's overcharging can potentially impact hundreds of people who are forced to pay a higher fee than they should. Therefore, the charging of fees in excess of those permitted not only provides justification for administrative disciplinary action against a notary public, it may also constitute the criminal violation of extortion.

For those jurisdictions which require the maintenance of a notary register, the failure to maintain an accurate register may also be a violation of the applicable notary public law. By definition, a register is "a book of public facts," and is generally a compilation of specific types of information instead of copies of complete documents. Therefore, due in part to the definition of a register, and more specifically the common requirement that the register be turned over to a specified local official upon the notary's death, resignation, or removal from office, it has been held that the failure to maintain a register book of facts and relying, instead, on copies of notarized documents is a violation of the notary public law.

Given the types of information contained in a notary register, as well as the requirement that the register eventually be turned over to a public official, notary registers are considered public documents in Pennsylvania. The failure of a notary to provide copies from his or her notary register or to turn the register over to the proper authority (in Pennsylvania, the Recorder of Deeds Office) upon death, resignation, or removal may also constitute a violation of the statute and may be cause for a claim against the notary's bond.

82. CAL GOV'T CODE § 8214.1(h) (Deering 1997); MONT. CODE ANN. § 1-5-418 (1997); TENN. CODE ANN. § 8-21-1201 (1997); TEX. GOV'T CODE ANN. § 406.024 (West 1997). In Pennsylvania, Notary Public fees are fixed by the Secretary of State with approval of the Attorney General. 57 PA. CONS. STAT. ANN. § 167 (West 1997).
84. MONT. CODE ANN. § 1-5-419 (1997); 57 PA. CON. STAT. § 154 (1997); TEX. GOV'T CODE ANN. § 406.022 (West 1997).
86. 57 PA. CON. STAT. § 161(a) (1997).
87. Id. § 154.
88. Id.
Typically, the type of information which must be recorded in a notary register is specified by statute or regulation. In Pennsylvania, a notary register must contain the name of the parties to the instrument, the date of the instrument, the date of the notarization, the type of notary act performed, and the amount of notary fee charged for the service. The failure of a notary to record any of the required information is a violation of the Notary Public Law and provides the Secretary of the Commonwealth with good cause to take disciplinary action.

The reason administrative agencies discipline notaries for what may be considered "clerical" errors in the notary register is directly related to the reason for the maintenance of the register. If a notary dies or removes from the jurisdiction, the notary register is often the only collateral proof that a questioned notarization was performed in a regular manner. A full and proper entry in a chronological notary register will support the validity of any notarization brought into question, while the lack of an entry may permit a court to determine the notarization was performed irregularly and void its effect on the questioned document. Due to the potential harm an inaccurate notary register can cause the public, disciplinary action is often appropriate.

Given the importance of documents which require notarization, unscrupulous notaries may be tempted to falsely acknowledge a document for the notary's own benefit. Therefore, many jurisdictions have elected to statutorily forbid notaries from notarizing any document in which the notary has a direct or pecuniary interest in the subject matter of the document. Several states, including Georgia and Nebraska, have removed this prohibition for certain situations, such as if the notary is an officer of a bank or insurance company and is requested to perform a notarization for the bank or insurance company.

IV. CONCLUSION

There exists a great necessity for effective administrative oversight of notaries public. Notaries public are involved in most major financial transactions and provide the basis for authenticating signatures when distance or time may separate parties to a contract. One of the main reasons each jurisdiction in the United States has seen fit to create the office of notary public was so that when a person sees a notary seal and signature on a document, that person can accept the validity of the signatures on the docu-

89. Id. § 161(a).
90. Id. § 165(e). See also CAL GOV'T CODE § 8224.1 (Deering 1997); MONT. CODE ANN. § 1-5-416(2) (1997).
ment without further question. Unscrupulous and negligent notaries undermine the entire system of notaries public by destroying the perceived validity of notarial acts, thus creating questions instead of belaying them.

With the world perched on the edge of the twenty-first century, the occasion for global transactions heightens the need for notaries to be above reproach. Without an effective means of authenticating signatures, parties will be hesitant to enter into agreements with those they do not know and with whom they often have inadequate legal recourse. Only a strong office of notary public, along with its global counterparts, will permit business to continue to expand past local and national boundaries. Only by effectively screening and disciplining those who would otherwise undermine the office of notary public can the office of notary public continue to maintain its trusted place in the American and world societies.