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Karla J. Elliot

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# THE NOTARIAL SEAL - THE LAST VESTIGE OF NOTARIES PAST

KARLA J. ELLIOTT\*

All the townspeople gathered around the three men at the edge of the farm. The Seller, the Buyer, and the notary were at the center of the crowd. Seller, an older man with no children, gingerly placed the "X" that was his mark. Buyer, a young man with some education, then signed his name to the paper. The notary, having witnessed all that took place, moved forward, removed the inkhorn and pencase from the silken cord suspended from his girdle, and placed his mark upon the deed. Next, he raised the lit candle that had been placed next to him, and allowed a small amount of wax to drip upon the deed. Within that wax, he placed his seal. At that moment, Seller reached to the ground and lifted a handful of dirt, pebbles, and sticks, and ceremoniously handed them to Buyer. The crowd of townspeople cheered, for the men had completed their acts,<sup>1</sup> and Buyer was now the owner of the land upon which he stood.

Obviously, this story does not stem from recent history, but rather feudal England. The roles and the ceremony have evolved dramatically over time. No longer must parties engage in the symbolic livery of seisin<sup>1</sup> ceremony to sell and buy land. Today townspeople do not gather on the land, but rather the parties to the purchase gather in the office of a title company. The most symbolic exchange is not of dirt, pebbles, and sticks, but rather of keys and, perhaps, a garage door opener. No longer does a notary drip wax to affix his seal to a document. In fact, some states no longer require a notary to even use a seal of any form.<sup>2</sup>

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\* J.D. The John Marshall Law School, 1997; B.A. Purdue University, 1992. Attorney at Law, currently practicing in the field of employment litigation on behalf of management in Washington, D.C. Formerly notary public, State of Indiana.

1. Livery of seisin is defined as:

The appropriate ceremony, at common law, for transferring the corporal possession of land or tenements by a grantor to his grantee. It was livery *in deed* where the parties went together upon the land, and there a twig, clod, key or other symbol was delivered in the name of the whole.

BLACK'S LAW DICTIONARY 935 (6th ed. 1990) (emphasis in original).

2. Fourteen states currently do not require notaries to use any type of seal. Douglas M. Fischer, *The Seal: Symbol of Security*, NAT'L NOTARY MAG., Nov. 1995, at 12.

While it may appear an obvious and seemingly inevitable step in the evolution of the legal system to no longer require clumps of dirt to be traded in public ceremony to sell property, the abolition of the use of a notary seal on such documents is a symptom that such evolution has simply exceeded permissible limits. The notary seal has long held importance, symbolically and practically, as a deterrent to thievery and fraud. The recent trend of American states to move away from its use is detrimental to parties directly involved in transactions requiring notarial authentication and also to the position American notaries hold in international trade, and to the very existence of the office itself.

This brief article first outlines the history of the notarial seal throughout Europe and the United States. It then discusses the use and need for the seal today. Finally, this paper concludes that the seal must remain the identifiable symbol of a notarial act to help maintain the integrity of the office of notary public.

### I. TRACING THE HISTORICAL USE OF THE NOTARY SEAL

The historical use of notaries public traces back as far as ancient Rome,<sup>3</sup> where notaries were originally simple copiers and transcribers.<sup>4</sup> The first use of seals on documents prepared by notaries appears to trace back nearly as far. Ancient notaries, often termed *tabelliones*,<sup>5</sup> prepared and attested to the authenticity of transcribed documents.<sup>6</sup> The documents prepared by the *tabelliones* were afforded a higher degree of authenticity than those prepared solely by private individuals.<sup>7</sup> These documents, however, lacked the highest degree of authenticity that was attached only to an official record.<sup>8</sup> Thus, they were missing the probative force of instruments of official record issued by public authorities or from public archives.<sup>9</sup> The acts of *tabelliones* could only achieve this highest degree of authenticity by means of a judicial procedure known as *allegatio apud acta*.<sup>10</sup> The party wishing to rely on the document would produce it during the proceeding and have the other party accept or challenge the authenticity of the document.<sup>11</sup>

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3. Michael L. Closen & G. Grant Dixon III, *Notaries Public from the Time of the Roman Empire to the United States Today, and Tomorrow*, 68 N.D. L. REV. 874, 874 (1992); N.P. READY, BROOKE'S NOTARY 1 (11th ed. 1992).

4. READY, *supra* note 3, at 1.

5. *Id.* at 2. This title was first used in the fourth century and was derived from *tabellae*, thin tablets covered with wax on which letters and other documents were written. *Id.* The term was also used generally to describe documents written on paper or parchment. *Id.*

6. *Id.* at 2-3.

7. *Id.* at 3.

8. *Id.*

9. *Id.*

10. READY, *supra* note 3, at 3.

11. *Id.*

If accepted, the document then carried full probative and evidentiary value.<sup>12</sup>

It was not until the twelfth century that the characterization of the acts of notaries<sup>13</sup> began to change to the more prestigious forms that they hold in civil law countries today.<sup>14</sup> Notaries began demanding a higher degree of authenticity for notarized documents than previously afforded to these documents.<sup>15</sup> The Decretal "Meminimus" of Pope Alexander III around 1167 elevated notarized documents to a status equal in authenticity to official records.<sup>16</sup> Thus, a notarial document acquired the full probative value previously attached only to official records.<sup>17</sup>

Despite the widespread advances of notaries in the twelfth century, French law kept a notary's role bound to the court. In France, a notarial document was not deemed authentic until the seal of the court where the notary was registered was affixed to the document.<sup>18</sup> In the late seventeenth Century, however, Louis XIV severed the last tie that bound notaries to judicial authority.<sup>19</sup> He abolished the requirement of a court seal for authenticity and granted each notary a seal that the notary was to affix to notarized documents.<sup>20</sup> Eventually, notaries throughout Europe began using the seal and wax method for authenticating documents.<sup>21</sup>

The notarial office in England never held the same prestige as afforded the office in civil law countries following the Roman traditions. Unlike the requirements of the civil law system, the execution of contracts and judicial sentences did not depend upon written records in earliest English common law.<sup>22</sup> "Writing, if it was used, simply gave additional solemnity to a transaction for which the community was guarantor."<sup>23</sup>

Notarial authentication was not required by early English courts, even after written execution of contracts and land convey-

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12. *Id.*

13. By the twelfth century the terms "notaries" and "tabelliones" were synonymous. *Id.* at 6.

14. *Id.*

15. *Id.*

16. READY, *supra* note 3, at 6-7.

17. *Id.* at 7.

18. *Id.* at 8.

19. *Id.*

20. *Id.*

21. Closen & Dixon, *supra* note 3, at 875 (citing RAYMOND C. ROTHMAN, NOTARY PUBLIC PRACTICES AND GLOSSARY 1 (1978)). See also *Fund Comm'rs of Muskingum County v. Samuel Glass*, 17 Ohio 542, 543 (Ohio 1848) (requiring the use of a notarial seal in the United States to authenticate a notarial act).

22. READY, *supra* note 3, at 9-10 (citing C.R. CHENEY, NOTARIES PUBLIC IN ENGLAND IN THE THIRTEENTH AND FOURTEENTH CENTURIES 6 (1972)).

23. *Id.*

ances became typical.<sup>24</sup> The use of private seals to “authenticate” such documents became commonplace.<sup>25</sup> Before the twelfth century, the use of such seals was typically reserved for the king, princes, and bishops who used them on documents evidencing the conveyance of land.<sup>26</sup> Increasingly, however, the use extended far beyond the limited representatives of the crown.<sup>27</sup> Not surprisingly, a problem developed because the overuse of these private seals made it difficult to trust in the authenticity of a document or to identify forgery and fraud.<sup>28</sup> “By the end of the thirteenth century . . . even a villein [sic] could have a seal.”<sup>29</sup> In response, the courts developed the system of judicial decision for conveyances used throughout Europe.<sup>30</sup> The crown supported a reform of the church during which only representatives of the “Church of England” could have and use an “authentic seal.”<sup>31</sup>

Eventually, the papal monopoly of notarial acts gave way to the fourteenth century use of notaries as public scribes, letter-writers, and copyists identified most readily with the Scriveners Company of London.<sup>32</sup> The Scriveners also became the drawers of deeds, practicing conveyances throughout London and confirming the authenticity of their work by affixing their seal.<sup>33</sup> The monopoly afforded the Scriveners was terminated by statute in 1804,<sup>34</sup> restricting the right to perform conveyances to members of the legal profession.<sup>35</sup> From that regulation, notarial acts evolved to the more ministerial but important role that is prevalent today.

## II. THE NOTARY IN AMERICA - A DECLINING OFFICE

The use of the English notary traveled with the early colonists to the New World,<sup>36</sup> where the notarial office continues to evolve today. Unfortunately, the American notarial office is afforded very little respect today in comparison to its international counterparts.<sup>37</sup> Perhaps one reason for this downfall of the American of-

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24. *Id.* at 10.

25. *Id.*

26. *Id.*

27. *Id.*

28. READY, *supra* note 3, at 10 (citing C.R. CHENEY, NOTARIES PUBLIC IN ENGLAND IN THE THIRTEENTH AND FOURTEENTH CENTURIES 6 (1972)).

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* at 11.

33. *Id.* at 14. See generally H.C. GUTTERIDGE, THE ORIGIN AND HISTORICAL DEVELOPMENT OF THE PROFESSION OF NOTARIES PUBLIC IN ENGLAND (1926) (discussing the development of the notarial profession in England).

34. 44 Geo. III, c. 98, s. 4.

35. READY, *supra* note 3, at 17.

36. Closen & Dixon, *supra* note 3, at 876.

37. Michael L. Closen, *Why Notaries Get Little Respect*, NAT'L L.J., Oct. 9, 1995, at A23, A24.

fice is the sheer number of notaries in this country.<sup>38</sup> In 1995, there were an estimated 4.5 million notaries in the United States,<sup>39</sup> with the numbers growing everyday. Even the United States Supreme Court has recognized that "the significance of the position has necessarily been diluted by changes in the appointment process and by the wholesale proliferation of notaries."<sup>40</sup>

Symptomatic of the decline in the respectability of the American notary is the widespread apathy regarding its need and the decrease in formality required by law.<sup>41</sup> One easily identifiable consequence is the transformation of seal requirements.

The use of a seal by notaries in America has continued to evolve slowly with time. The seal and wax method adopted from England by the early colonists transformed to the familiar raised embosser.<sup>42</sup> The increased use of photocopying created problems identifying notarized originals from copies, thus bringing about the introduction of the even more familiar inked stamp.<sup>43</sup>

Increasingly, however, states are passing measures to eliminate the use of notarial seals - the last vestige of the highly respected notaries of the past. There are now fourteen states that do not require the use of a seal in any form:<sup>44</sup> Connecticut, Delaware, Iowa, Kentucky, Louisiana, Maine, Massachusetts, Michigan, New Jersey, New York, Rhode Island, South Carolina, Vermont and Virginia. Three states - Alabama, Maine<sup>45</sup> and Mississippi - and the District of Columbia authorize only the use of the raised embosser seal.<sup>46</sup> Florida, Nebraska, Oregon, Utah and West Virginia authorize only the use of the inked stamp.<sup>47</sup> Pennsylvania is the sole state to require the use of both the embosser and inked stamp seal.<sup>48</sup>

In the American system today, one of the most vital roles a notary plays is to assure the authenticity of executed documents. In doing so, the notary typically verifies the identity of the parties to the execution who confirm their signatures, affixes his or her own signature and other required information and places a seal on

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38. *Id.* at A23.

39. *Id.*

40. *Bernal v. Fainter*, 467 U.S. 216, 224 n.12 (1984).

41. Closen, *supra* note 37, at A23.

42. Michael L. Closen & R. Jason Richards, *Notaries Public - Lost in Cyberspace, or Key Business Professionals of the Future?* 15 J. MARSHALL J. COMPUTER & INFO. L. 703, 727 (1997) (citing Douglas M. Fischer, *The Seal: Symbol of Security*, NAT'L NOTARY MAG., Nov. 1995, at 10).

43. *Id.*

44. No state, however, prohibits the use of either or both varieties of seals.

45. Maine does not require the use of any seal. Fischer, *supra* note 2, at 12. If one is used, however, it must be of the embosser type. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

the document. In theory, once these formalities are followed, a properly "notarized" document can be used without question in judicial and other formal proceedings.<sup>49</sup>

Beyond the inherent respect afforded to the symbolism of a document "under seal," perhaps the most compelling reason for the continued use of a seal is simply its effectiveness against fraud and forgery.<sup>50</sup> The embosser seal provides maximum safeguards against forgery and fraud by providing an obvious, tactile means by which to verify an original document.<sup>51</sup> The ink stamp, although not providing quite the same level of formality as the embosser, often includes this same information in a form that is identifiable on photocopies.<sup>52</sup> The information gained from these seals can also be invaluable in verifying the credentials of the notary, by providing such information as the notary's name, state, county and commission number.<sup>53</sup>

It is unfortunate to see the trend toward the abolition of seal requirements on paper documents. As the propensity for fraud continues to rise, legislatures need to re-evaluate the need for this type of procedural safeguard. While there is certainly some necessity to have the ability to identify properly notarized documents in photocopies, the need for a means by which to identify an original document still exists. If the notarial office and the process it serves were afforded the proper respect and formality, the propensity for fraudulent documents and conveyances would greatly diminish. It would no longer be commonplace to ignore the notary's seal upon the page. Indeed, states should follow the lead of the Commonwealth of Pennsylvania, requiring both an ink stamp *and* an embosser. This requirement is the best method of providing readily identifiable markings on photocopies, as well as supplying a fraud-deterrent means to identify original documents.

For example, one of the easiest instances to imagine possible fraud is in the ownership of land. While it may be ethically cumbersome to imagine such a situation, a developer frustrated with his or her inability to annex a piece of property could falsify documents of the desired annexation and take them to the courthouse. If a notary's seal is not required, it conceivably would be terribly difficult for the developer to file the annexation without any challenge from the clerk. Furthermore, because of the relative ease

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49. See generally CLOSEN, ET AL., NOTARY LAW & PRACTICE, 10-14 (1997).

50. See Fischer, *supra* note 2, at 12.

51. *Id.*

52. The use of the ink stamp, while allowing recognition of a notarial seal in a photocopy, also reduces the guards against fraud that are inherent with the embosser seal. It is not difficult to photocopy a stamp and fraudulently use the copy, while the same fraud could not be perpetrated with the use of an embosser seal.

53. *Id.*

involved in becoming a notary, the developer could notarize the documents himself to complete the unscrupulous deal. Undoubtedly, a protracted court battle would result from the annexation, but the damage would already be done.

A return to the embossed seal certainly would not be a fail-safe measure to ensure against fraud, but it would provide an important tactile element to the seal, giving the authentication greater weight and recognizability.

One issue that is frequently argued in support of the abolition of notarial seals is the increasing use of electronic transactions and digital communications.<sup>54</sup> The rise in the use of computers in business and industry detracts from the need for paper and notarial authentication of that paper. It is highly unlikely, however, that we will ever achieve the "paperless" society that is often discussed.<sup>55</sup> Ultimately, the need for paper records of all types will remain.<sup>56</sup> Further, it is the paper records historically containing notarial seals that will survive because "[s]ome documents, like original, recorded deeds . . . , should not be destroyed even if digital backup files exist."<sup>57</sup>

Rather than relegate business to a society that allows for little advancement in the electronic field, some states have begun recognition of computer generated signatures and notarial seals.<sup>58</sup>

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54. See Closen & Richards, *supra* note 42, at 728 (providing a detailed and comprehensive discussion of the role of the notary in digital signature technology).

55. See, e.g., Paul Bernstein, *The Paperless Desktop - A Virtual Reality?*, TRIAL, Mar. 1997, at 54, 57.

56. See Closen & Richards, *supra* note 42, at 731 (citing Charles N. Faerber, *The Notary & EDI*, Paper Presented Before the Work Group on Notarization & Nonrepudiation of the ABA's Information Security Committee (Jan. 10, 1993)) Faerber stated:

[Another] reason I do not think you will ever see the traditional role of the Notary eliminated is because of the nature of paper. In contrast to modern electronic mechanisms, paper appears to be a flimsy, crude instrument for storing and transmitting information, but it has many advantages. Many of you know, for example, that there has been much talk of replacing court reporters with audio taping machines. This would certainly save a lot of money, but at what price? Have you ever tried to find a pertinent piece of spoken testimony on a lengthy tape? It is much easier to flip through the pages of a document. Did you know that in time that tape will turn into the equivalent of peanut butter - but we will still have the paper transcript? Paper is much underrated. In a place crash or an earthquake, for example, every electronic device, every computer disk drive may be obliterated. But what usually survives undamaged? Paper.

Charles N. Faerber, *The Notary & EDI*, Paper Presented Before the Work Group on Notarization & Nonrepudiation of the ABA's Information Security Committee, Jan. 10, 1993, at 4, 5.

57. Bernstein, *supra* note 55, at 56.

58. Closen & Richards, *supra* note 42, at 728 (citing Eric Mills Holmes, *Stature and Status of a Promise Under Seal as a Legal Formality*, 29



Utah, a leader in the recognition of electronic documents, recently licensed Digital Signature Trust as the first digital signature Certification Authority.<sup>59</sup> Certification Authorities function in the electronic world much like traditional notaries do with paper documents in that they are licensed to issue "electronic 'keys' that allow authentication of electronic signatures."<sup>60</sup> Essentially, these keys serve much the same purpose as the traditional notarial act, marked by a seal - they allow parties "to 'sign' electronic documents with the same confidence and validity of an actual ink signature."<sup>61</sup>

Thus, the evolution and advancement of technology and the legal system do not necessarily mean the demise of the office of notary or its seal. Rather, in the increasingly complex world in which we live, the tradition of the office and its function is more valuable today than it has ever been. It is imperative, therefore, that legislatures do not eliminate the requirement of the seal.

In order to cut down on attempted fraud, states should advocate a process to bolster the notary's credibility and the weight of his or her seal. A return to the unmistakable raised seal would give greater prestige to the job while making the seal easier to identify. Legislators should strengthen the ties to the past with an unwavering eye on the future. As a means of forging this strategy, when bills are signed into law, perhaps they should be sealed with hot wax and clay disk.

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WILLAMETTE L. REV. 617, 655 (1993)). See generally *First Company Licensed to Verify Digital Signatures*, NOTARY BULL., Feb. 1998, at 1, 4 [hereinafter *First Company*].

59. *First Company*, *supra* note 58, at 1.

60. *Id.* at 1, 4.

61. *Id.* at 4.