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To Notarize, or Not to Notarize ... Is Not a Question of Judging Competence or Willingness of Document Signers, 31 J. Marshall L. Rev. 1013 (1998)

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COMMENTS

TO NOTARIZE, OR NOT TO NOTARIZE . . .
IS NOT A QUESTION OF JUDGING
COMPETENCE OR WILLINGNESS OF
DOCUMENT SIGNERS

KLINT L. BRUNO*

"Without full knowledge of his powers, obligations and limitations, a notary public may be a positive danger to the community in which he is licensed to act." Chief Judge Charles S. Desmond (1963)¹

INTRODUCTION

The following facts are true: 85 year old Ida Gorodetsky suffered a stroke, was partially paralyzed and admitted to a hospital. Her condition was described as impaired of hearing, confused, drowsy, occasionally unresponsive, semi-comatose, uncooperative and at times she was restrained for her own safety. While hospitalized, an agent of a nursing home visited Ida. Ida agreed to sign a life care contract with the nursing home that included a provision gifting to the home any and all of her estate remaining at the time of her death.² *If you were a notary and were asked to notarize Ida's signature on that contract, would you?*

Notaries are frequently confronted with difficult and sensitive documents and circumstances and required to decide whether they will notarize such transactions.³ Should a notary be required to

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1. C.J. CHARLES S. DESMOND, SKINNER'S NOTARY MANUAL, foreword (3d ed. 1963).

2. *Gordon v. Bialystoker Ctr. and Bikur Cholim, Inc.*, 385 N.E.2d 285, 286 (N.Y. 1978). The facts contained in the hypothetical are based on the facts of this case, even though no notary was actually called to notarize the bedside transaction in the actual case. *Id.* Throughout this Comment, similar cases are cited and a notary is placed in a similar hypothetical situation. All of the facts contained in these hypothetical situations are based on the facts of actual cases. In the conclusion of the paper, the hypothetical questions posed throughout are answered.

3. Marc A. Birenbaum, *Protecting Your Invaluable Journal*, NAT'L NOTARY MAG., Nov. 1997, at 12. The author specifically states that a notary's testimony could become critical when a signature was notarized under undue

judge such difficult issues as a document signer's competence or willingness? There is a great deal of uncertainty and disagreement on this most fundamental issue.⁴

On one hand, many individuals believe that notaries do, in fact, have a duty to judge the willingness or competence of document signers.⁵ Accordingly, a recent survey of notaries revealed that most of those questioned concluded notaries have an affirmative duty to determine the competency and willingness of document signers appearing before them.⁶ Among the group of notaries surveyed, about 65% held the view that notaries bear the responsibility to assess the competency of document signers, and 75% concluded that notaries should determine a signer's willingness.⁷ Further, the National Notary Association's semi-final draft of the Notary Public Code of Professional Responsibility states, "The Notary shall require the presence of each signer, oath-taker and witness, and carefully screen each for identity, willingness and competence."⁸ In addition, the President of the National Notary Association has been quoted as saying that notaries must "verify the identity, willingness, and general competence of each document signer."⁹

influence or made by someone who is incompetent. *Id.*

4. See *infra* notes 13-27 and accompanying text for a discussion of the differing opinions regarding whether notaries should undertake to judge competence or willingness of document signers.

5. See *Poole v. Hyatt*, 689 A.2d 82, 90 (Md. 1997) (stating clearly that a notary is under an obligation to judge both the competence and willingness of those signers appearing before the notary). See also NOTARY PUB. CODE OF PROFESSIONAL RESPONSIBILITY, 2 (Semi-final draft Mar. 1, 1998) (declaring notaries have a duty to make general observations of document signers and determine from those observations whether the signers are competent and willing to enter into the agreement that they want notarized).

6. Survey conducted by Michael L. Closen at the National Notary Association Annual Conference, Atlantic City, New Jersey, Aug. 20, 1997 [hereinafter Survey]. The survey posed the questions: "Does a notary have a duty to judge the competence of document signers?" and "Does a notary have a duty to judge the voluntariness of document signers?". Of those responding to the survey, 50% responded that notaries do have an affirmative duty to judge competence of document signers appearing before them. *Id.* Conversely, 48% responded that notaries did not have such an affirmative duty. *Id.* The results of the survey do not equal 100% because some of those surveyed did not respond or did not have an opinion on a particular question. *Id.*

7. *Id.*

8. See NOTARY PUB. CODE OF PROFESSIONAL RESPONSIBILITY, *supra* note 5, at 2 (noting specifically that a notary has an obligation to judge the competence and willingness of document signers).

9. Milton G. Valera, *America's Notaries: Ever Faithful and True*, WALL ST. J., July 26, 1993, at 3. The president of the National Notary Association expressed his disappointment in an article previously published. *Id.* In his response, he declared that notaries are under a duty to "serve as impartial witnesses, . . . [and] verify the identity, willingness and general competence of each document signer." *Id.* See also *It's a Proud Calling, But the Notary's Lot Is Full of Indignities*, WALL ST. J., June 15, 1993, at 1 (noting the general di-

Additional support for the position that notaries should judge competence and willingness can be found in the recent decision of Maryland's highest court which ruled that notaries must judge willingness and competence of document signers.¹⁰ The court held that a signatory appearing before a notary must "be alert and under no apparent duress or undue emotional or intoxicating influence."¹¹ The court also held that the circumstances surrounding the notarization must indicate that the signatory understands the nature of the instrument.¹² These examples constitute a representative sampling of the array of support for the conclusion that notaries must judge competence and willingness of signers appearing before those notaries.

On the other hand, a diligent search of other sources reveals an almost complete absence of authority for the proposition that notaries are to evaluate competency or willingness.¹³ For example, in spite of the Maryland Court of Appeals holding, a thorough search of the Maryland Notary Statute discloses that the statute imposes no such duty.¹⁴ A careful reading of the statute clearly shows that the drafters did not even mention willingness or competence of document signers or any comparable terms.¹⁵ Only one state has enacted a statute that expressly directs notaries to judge competence and willingness of document signers.¹⁶ Further, in the survey previously mentioned, lawyers overwhelmingly concluded that notaries do not determine competency.¹⁷ Approximately 67% of attorneys responded in the negative, while only about 30% opined that notaries do judge competence.¹⁸

lution of the notary profession due to the vast number of notaries and the ease with which people can become notaries).

10. *Poole*, 689 A.2d at 89-90. This landmark decision declares for the first time that notaries have a duty to judge both the competence and willingness of document signers. *Id.* at 90.

11. *Id.* The court held that when the overall circumstances surrounding the signer's actions indicate that he understood the nature of the document and is appearing and signing voluntarily, the signer is presumed to have understood the subject matter of the document and have signed it willingly. *Id.*

12. *Id.*

13. Interview with Michael L. Closen, Professor of Law at The John Marshall Law School in Chicago, Ill. (Oct. 15, 1997).

14. MD. ANN. CODE art. 68, §§ 1-13 (1995 & Supp. 1996).

15. *See generally* MD. ANN. CODE art. 68, § 1-13 (1995 & Supp. 1996) (showing that no duty to judge competence or willingness is enumerated in the notary statute).

16. GA. CODE ANN. § 45-17-1 to -34 (Harrison 1990 & Supp. 1996).

17. Survey of attorneys randomly selected from various parts of the country by the author during Sept. and Oct. 1997. The survey showed that 30% of attorneys believe that notaries have a duty to judge competence and willingness, while 67% believe they do not. *Id.* Additionally, 48% of the attorneys surveyed believed that notaries must determine willingness of signers, with 45% contending otherwise. *Id.*

18. *Id.*

The most persuasive evidence of confusion and disagreement about the issue of the role of the notary arises from the almost evenly divided opinions of some groups polled.¹⁹ Among law students, approximately 49% favored the view that a notary must judge competence of document signers, while about 51% concluded otherwise.²⁰ On the issue of judging the willingness of signers, roughly 52% of law students thought notaries should do so, but 48% believed that notaries should not.²¹ Similarly, some 48% of lawyers held the opinion that notaries should determine voluntariness of document signers, while some 45% took the opposite position.²²

Thus, a sharp conflict exists regarding whether a notary is legally required to judge a signer's willingness or competence.²³ According to Chief Judge Desmond, quoted above, this type of uncertainty with regard to a notary's actual power and authority could be dangerous to the community that the notary is supposed to serve.²⁴ The notary does the community a disservice if the notary is not certain of the exact duties and responsibilities of the office.²⁵ Indeed, a notary may mislead the general public by leaving people with false or inflated views of the reliability of notarized documents.²⁶ As evidenced by the survey results announced above, different groups of people, including notaries themselves, maintain vastly different opinions of the actual functions of notaries.²⁷ Con-

19. Survey of law students at The John Marshall Law School conducted during Sept. and Oct. 1997. The results of this survey show that 49% of law students believe that notaries have an affirmative duty to judge competence of document signers, while 51% believe to the contrary. *Id.* Additionally, this student survey reveals that 52% of law students believe that notaries should judge voluntariness of document signers, with 48% thinking otherwise. *Id.*

20. *Id.*

21. *Id.*

22. See Survey, *supra* note 17 (stating the percentage of lawyers who indicated whether notaries should determine willingness and competence of document signers).

23. Compare *Poole v. Hyatt*, 689 A.2d 82, 89 (Md. 1997) (stating that an affirmative duty exists for notaries to judge competence and willingness of document signers appearing before the notaries), with MD. ANN. CODE art. 68, § 1-13 (1995 & Supp. 1996) (delineating no duty for notaries to judge either willingness or competence).

24. See DESMOND, *supra* note 1, at 1.

25. See *id.* (stating specifically that notaries do not do the community any service if the notaries do not know their exact duties).

26. See *supra* notes 9-12 and accompanying text for a discussion of the varying opinions regarding whether notaries should be judging competence and willingness of document signers.

27. Gillian Shaw Vansun, *Strata Council Should Get Insurance*, VANCOUVER SUN, Oct. 21, 1995, at C8. The article stated that a person must be mentally competent in order to execute a power of attorney. *Id.* In order for someone to prove mental competence, the person must adequately portray competency to a doctor, lawyer or notary. *Id.* The article does not state any criteria used to determine competency. *Id.* See also *Don't Notarize If Signer*

sequently, because of uncertainty about the tasks that they are to perform, effective education and training of notaries is rendered virtually impossible. In order to promote uniformity of notary practice and reliability of notarized documents, the question of whether notaries are required to determine willingness or competence of document signers must be resolved.

This Comment reviews whether the notary public has an affirmative duty to determine willingness or competence of document signers. Part I begins by discussing the relevant history and background of notaries and the role they play in notarizing documents. Secondly, Part II analyzes the state statutes governing notary law to determine whether any provisions expressly or impliedly require a notary to judge willingness or competence. This Comment next examines case law to identify whether the common law imposes any such duties on notaries. Thereafter, this Comment evaluates other possible sources of authority which could confer upon notaries the duty to judge competence or willingness of signers. Additionally, this Comment considers whether, as a policy matter, such duties should be assigned to notaries. Finally, this Comment proposes amendments to the Model Notary Act as well as the Codes of Ethics of the National Notary Association and the American Society of Notaries.²⁸

I. HISTORY OF NOTARY LAW

The following facts are true: 75 year old George Shea had a long history of alcoholism, arteriosclerosis, cirrhosis of the liver, and arthritis of the spine and hip. These conditions altered George's normal functioning both physically and mentally. When George began experiencing extreme financial difficulties, he agreed to sell some of his real property to his long-time physician at a fraction of its market value. The physician had appropriate

Is Not Competent, NOTARY BULL., Apr. 1995, at 11 (directing notaries not to notarize documents for those people that the notaries believe incompetent). The article also directs the notary to "be sure every signer acts with full understanding and freedom of will." *Id.* In order to determine whether the signer understands the document, the article instructs notaries to draw the signers into a simple conversation. *Id.* This article advised notaries to question the signer out of the presence of relatives to determine whether the signer is being coerced. *Id.*

28. See *infra* notes 193-199 and accompanying text for a discussion of the proposed amendments. It also should be noted that this comment focuses on the notary's duties, or lack thereof, pertaining to document signers and does not consider any other notary functions. Additionally, notaries may perform a variety of duties other than attesting to the validity of a signature. For example, some of these duties may include demanding payment of foreign and inland bills of exchange. CAL. GOV'T CODE § 8205 (West 1992). Notaries may also memorialize other official actions such as marriages. FLA. STAT. ANN. § 117.04 (West 1982 & Supp. 1992). This Comment does not address any of these issues in any detail.

provisions drawn and wished to execute the contract for George's land.²⁹ *If you were a notary and were asked to notarize George's signature on that contract, would you do so?*

Section A of this Part discusses the number of notaries nationwide and the lack of educational and testing requirements for becoming a notary. Section B outlines what purpose a notary is to serve.

A. Number of Notaries and Educational Requirements

Fourteen of the fifty states are home to more than 100,000 notaries each.³⁰ In total, there are more than 4 million notaries in the United States today.³¹ These statistics reflect the relative ease with which one can become a notary. To become a notary, one must merely apply to the appropriate governmental agency,³² pay a small fee,³³ reside in the particular state,³⁴ and await one's commission.

Generally, to have the notary commission granted, individuals must be of "legal age, citizens of the state, and persons of good moral character."³⁵ However, beyond these basic criteria, very few states provide for any education or mandatory training of prospective notaries.³⁶ Even in the few states which require some train-

29. *Hodge v. Shea*, 168 S.E.2d 82, 84 (S.C. 1969). The facts in this hypothetical are the actual facts from this case although in the case no notary was actually called to notarize the transaction. *Id.*

30. *States with Notary Populations of 100,000 or More*, NOTARY BULL., June 1996, at 1. States with more than 100,000 notaries include Florida, Texas, New York, South Carolina, Illinois, Massachusetts, California, Ohio, Georgia, North Carolina, Michigan, Virginia, Tennessee, and New Jersey. *Id.*

31. Michael L. Closen, *Why Notaries Get Little Respect*, NAT'L L.J., Oct. 9, 1995, at A24. According to this piece, the number of notaries in this country is probably too high. *Id.*

32. *See, e.g.*, ALA. CODE § 36-20-30 (1991); ARIZ. REV. STAT. ANN. § 41-311 (1992); CAL. GOV'T CODE § 8200 (West 1992); N.Y. EXEC. LAW § 130 (McKinney 1982 & Supp. 1992) (noting the proper governmental agency with which to file an application to become a notary).

33. EDWARD MILLS JOHN, JOHN'S AMERICAN NOTARY AND COMMISSIONER OF DEEDS MANUAL 7 (6th ed. 1951). This manual states that the fee paid when trying to obtain the notary commission is usually to meet the bonding requirements of the state. *Id.*

34. *See, e.g.*, MICH. COMP. LAWS ANN. § 5.1041 (West 1991) (proclaiming that a notary must be a resident of the county and a citizen of the state where he or she desires appointment).

35. *See* JOHN, *supra* note 33, at 7-8 (outlining the general criteria that need must be satisfied in order for one to become a notary in most of the fifty United States).

36. *E.g.*, ALA. CODE §§ 36-20-1 to -32 (1991); ALASKA STAT. §§ 44.50.010-.190 (Michie 1996); ARIZ. REV. STAT. ANN. §§ 41-311 to -317 (West 1992 & Supp. 1995); ARK. CODE ANN. §§ 21-14-101 to -205 (Michie 1996 & Supp. 1996); CAL. GOV'T CODE §§ 8200-8230 (West 1992 & Supp. 1997); COLO. REV. STAT. ANN. §§ 12-55-101 to -123, 12-55-201 to -211 (West 1996); CONN. GEN. STAT. ANN. §§ 3-91 to -95a, 7-33a (West 1988 & Supp. 1996); DEL. CODE ANN.

ing, the course is usually quite rudimentary.³⁷ Of the states that require some training, none offers effective guidance that would aid notaries in determining whether a signer appearing before the notary was competent and willing to sign.³⁸ Hence, a notary is likely to be a lay person who has met the minimal statutory requirements of the office and paid a nominal licensing fee without any prior training or experience to judge competence or willingness of document signers.³⁹ Further, even the states that require some education or training prior to granting a notary's commission

tit. 29, §§ 4301-4401 (1991 & Supp. 1996); D.C. CODE ANN. §§ 1-180 to -817 (1992); FLA. STAT. ANN. §§ 117.01-108 (West 1996 & Supp. 1997); GA. CODE ANN. §§ 45-17-1 to -34 (Harrison 1990 & Supp. 1996); HAW. REV. STAT. ANN. §§ 456-6 to -18 (Michie 1995 & Supp. 1995); IDAHO CODE §§ 51-1-1 to -123 (1994); 5 ILCS 312/1-101 to 8-104 (West 1993 & Supp. 1996); IND. CODE ANN. §§ 33-16-1-1 to -8-5 (Michie 1992 & Supp. 1996); IOWA CODE ANN. § 586.1 (West 1992); KAN. STAT. ANN. §§ 53-101 to -401 (1983); KY. REV. STAT. ANN. §§ 423.010-.990 (Michie 1992 & Supp. 1996); LA. REV. STAT. ANN. §§ 35:1-.555 (West 1985 & Supp. 1997); ME. REV. STAT. ANN. tit. 4, §§ 951-958 (West 1989 & Supp. 1996); MD. ANN. CODE art. 68, §§ 1-13 (1995 & Supp. 1996); MASS. GEN. LAWS ANN. ch. 222, §§ 1-11 (West 1993 & Supp. 1996); MICH. COMP. LAWS ANN. §§ 5.1041-.1072 (West 1993 & Supp. 1996); MINN. STAT. ANN. §§ 359-01 to -12 (West 1991 & Supp. 1997); MISS. CODE ANN. §§ 25-33-1 to -23 (1991 & Supp. 1996); MO. ANN. STAT. §§ 486-100 to -595 (West 1995 & Supp. 1997); MONT. CODE ANN. §§ 1-5-201 to -611 (1995); NEB. REV. STAT. §§ 64-101 to -215 (1990); NEV. REV. STAT. ANN. §§ 240.001-.330 (Michie 1996); N.H. REV. STAT. ANN. §§ 455:1-.15 (1992 & Supp. 1995); N.J. STAT. ANN. §§ 52:7-10 to -21 (West 1986 & Supp. 1996); N.M. STAT. ANN. §§ 14-21-1 to -20 (Michie 1995); N.Y. EXEC. LAW §§ 6-130 to -138 (McKinney 1993 & Supp. 1997); N.C. GEN. STAT. §§ 10A-1 to -16 (1991); N.D. CENT. CODE §§ 44-06-01 to -14 (1993 & Supp. 1995); OHIO REV. CODE ANN. §§ 147.01-14 (Banks-Baldwin 1994 & Supp. 1996); OKLA. STAT. ANN. tit. 49, §§ 1-121 (West 1988 & Supp. 1997); OR. REV. STAT. §§ 194.005-.990 (1991); 57 PA. CONS. STAT. ANN. §§ 31-169 (West 1996); R.I. GEN. LAWS §§ 42-30-1 to -15 (1993 & Supp. 1996); S.C. CODE ANN. §§ 26-1-10 to -120 (Law Co-op. 1991 & Supp. 1996); S.D. CODIFIED LAWS ANN. §§ 18-1-1 to -14 (Michie 1995); TENN. CODE ANN. §§ 8-16-101 to -309 (1994); TEX. GOV'T CODE ANN. §§ 406.001-.024 (West 1990); UTAH CODE ANN. §§ 46-1-1 to -19 (1993 & Supp. 1996); VT. STAT. ANN. tit. 24, §§ 441-446 (1992); VA. CODE ANN. §§ 47.1-1-33 (Michie 1996 & Supp. 1996); WASH. REV. CODE ANN. §§ 42.44.010-.903 (West 1991 & Supp. 1997); W. VA. CODE §§ 29-4-1 to -16 (1992 & Supp. 1996); WIS. STAT. ANN. §§ 137.01 (West 1989 & Supp. 1996); WYO. STAT. §§ 32-1-101 to -113 (Michie 1996).

37. Only six of the fifty states have statutory provisions that require any sort of training or testing prior to receiving the notary commission. CAL. GOV'T CODE § 8201 (West 1992 & Supp. 1996); CONN. GEN. STAT. ANN. § 946 (West 1988 & Supp. 1996); LA. REV. STAT. ANN. § 35:191 (West 1995 & Supp. 1996); N.Y. EXEC. LAW § 6-130 (McKinney 1993 & Supp. 1996); N.C. GEN. STAT. § 10A-4 (1991); 57 PA. CONS. STAT. ANN. § 151 (West 1996).

38. See generally N.Y. EXEC. LAW §§ 6-130 to -139 (McKinney 1993 & Supp. 1996) (failing to mention the words competence or willingness or any similar language that could be used in screening document signers).

39. *Comparison of State Notary Provisions*, NAT'L NOTARY MAG., May 1996, at 32. The article notes that every state charges a commissioning fee ranging from \$3 to \$72. *Id.* The average commissioning fee is \$26.91. *Id.*

have no requirement for continuing education.⁴⁰ Similarly, no state requires any type of retraining for notaries wishing to renew their commissions.⁴¹ Few states require notaries to submit to any kind of examination on notary ethics, law, or practice, and no state imposes a testing requirement for renewal of a notary commission. The relative ease of obtaining and keeping a notary commission has led to exponential growth in the number of notaries commissioned each year.⁴² The United States Supreme Court has acknowledged this by observing that "the significance of the position has necessarily been diluted by changes in the appointment process and by the wholesale proliferation of notaries."⁴³

B. The Notary's Duties

In the United States today, every state and territory recognizes that a notary is vested with certain powers and authority.⁴⁴ The office of notary is a creation of statute, and the notary's conduct, powers and duties are granted almost exclusively by statute.⁴⁵ General oversight of notary conduct and regulation of the notary is performed by the state's notary licensing agency.⁴⁶ Thus, the notary is not considered an officer of the court⁴⁷ because the court has almost no control over the notary's commission.⁴⁸ Pre-

40. See generally LA. REV. STAT. ANN. §§ 35:1-555 (West 1985 & Supp. 1996) (failing to mandate any type of continuing educational requirements after notaries receive their commissions).

41. See, e.g., CAL. GOV'T CODE §§ 8200-8230 (West 1992 & Supp. 1996) (omitting any requirement for retraining or re-testing of notaries after their commission has expired).

42. *Bernal v. Fainter*, 467 U.S. 216, 234 (1984). The United States Supreme Court highlighted the fact that because of the modern statutory changes, the number of notaries licensed has had a detrimental effect on the significance and importance of notaries. *Id.*

43. *Id.*

44. See, e.g., ALA. CODE §§ 36-20-1 to -32 (1991) (detailing the statutory provisions governing notaries in Alabama).

45. Interview, *supra* note 17.

46. See, e.g., ALASKA STAT. §§ 44.50.010-.090 (Michie 1989) (explaining the provisions that govern notary conduct in Alaska).

47. See *Bevan v. Krieger*, 289 U.S. 459, 462 (1933) (explaining that a notary public may hold a witness in contempt of court by virtue of his position as an officer of the court). This is the only case that gives notaries the ability to hold a witness in contempt of court. *Id.*

48. See *Patterson v. Dept. of State*, 312 N.Y.S.2d 300, 303 (N.Y. App. Div. 1970) (noting that the Secretary of State is responsible for disciplinary action taken against a notary). See also Michael L. Closen & G. Grant Dixon III, *Notaries Public From the Time of the Roman Empire to the United States Today, and Tomorrow*, 68 N.D. L. REV. 873, 882 (1992) (noting that notaries need to be distinguished from court reporters, although court reporters are almost always notaries). In a situation where a notary holds an individual in contempt in a court proceeding, although the notary is a court reporter, the notary is also acting in the capacity of notary and applying the powers which have been granted by the court. *Id.*

dominantly, the agency in charge of overseeing notarial conduct merely enforces the statutory guidelines provided by the legislature.⁴⁹

It is said that the office of the notary is "indispensable to modern business."⁵⁰ One of the functions of the notary that makes the notary indispensable to modern business is verification of the identity of document signers.⁵¹ When a notary attests to a signature on a document by notarizing the document, a third party can reasonably rely on the notarized signature.⁵² By verifying the signature on a document, the notary assures the third party that the person who signed the document was who he or she claimed to be.⁵³ In today's global environment where an inordinate amount of business is transacted from considerable distances, it is easy to see how a notary can play a vital role in verifying signatures contained within documents.⁵⁴ The notarization both verifies the signature on the document and identifies the signer.⁵⁵

49. See, e.g., N.J. STAT. ANN. §§ 52:7-11 (West 1986 & Supp. 1996) (explaining that the Secretary of State, acting on behalf of the governor, is the appropriate authority governing notaries in the state).

50. RICHARD B. HUMPHREY, AM. NOTARY MANUAL 9 (4th ed. 1948). This source highlights the fact that a notary's services are essential to business transactions. *Id.* If the office of the notary was eliminated, some type of authenticating authority would need to be created in order for business to be transacted. *Id.*

51. See Closen & Dixon, *supra* note 48, at 883-84. Ordinarily, a person appears before a notary with a document that he or she needs signed in the presence of a notary. *Id.* The notary identifies the person as who the signer claims to be, either by personal knowledge or by certain forms of identification as provided by statute. *Id.* The person then signs the document in the notary's presence. *Id.* Finally, the notary attaches his or her notarial seal or stamp to the document. *Id.* In addition to the seal or stamp, the notary is also required to sign and date the document so as to formally witness the signer's act. *Id.*

52. See MONT. CODE ANN. § 1-5-417 (1995) (eliminating some of the parties for whom a notary may act to preserve the integrity of the notarization).

53. HUMPHREY, *supra* note 50, at 10. Although the notary performs many functions, none of these functions becomes effective until the notary affixes his official seal or certificate. *Id.*

54. Closen & Dixon, *supra* note 48, at 884-85. Although the actual signing of a document was not witnessed by one of the parties, the notary can verify that the particular party did in fact sign the document. *Id.* at 884. For example, if a party to a contract was a substantial distance from another party to the contract, each party could have its signature notarized on the contract. This notarization would provide all parties to the contract with some reassurance that they could rely on that particular instrument and proceed with their plans to perform under the contract. See also HUMPHREY, *supra* note 50, at 11 (declaring that "[t]he purpose of authentication is to render the instrument available as evidence of its own contents, without further proof of its execution, or to entitle it to public record"). In order to accomplish this goal, the notary identifies the person who signed the instrument and verifies that the signature is that of the person who signed. *Id.*

55. HUMPHREY, *supra* note 50, at 7.

Even absent the parties being separated by a great distance, a notary serves to authenticate signatures on documents and enables third parties to comfortably rely on the fact that the signer was identified by a party with no interest in the transaction.⁵⁶ The notary is an agent of the public at large and does not represent any particular party in a specific transaction.⁵⁷

A notary's duties are clerical or ministerial by nature,⁵⁸ and few notaries function in that capacity as their principal occupations.⁵⁹ Their ministerial and occasional notarial role does not equip them to judge competence or willingness.⁶⁰

Notaries are "fiduciar[ies] of the public" who should perform their duties "with competence, diligence and integrity."⁶¹ In order to perform the duties of the office of the notary with the characteristics outlined above, notaries need direction to dictate what they should and should not do.⁶² Because the notary did not exist at the common law,⁶³ the notary is primarily guided by the various statutes that establish the office and govern notarial conduct.⁶⁴ These

56. *Id.* *The American Notary Manual* gives the commonly accepted definition of a notary as follows: "The notary public is a public officer whose duty it is to attest the genuineness of any deeds or writings in order to render them available as evidence of the facts therein stated." *Id.* The notary is an agent or trustee of the public and is considered a public officer whose sole purpose is serving the common good. *Id.*

57. *Id.*

58. *Id.* at 8. The notary has little or no discretion in the performance of his official duties. *Id.*

59. *Id.* at 14-16. Most notaries are clerks, bank tellers, secretaries, insurance agents, and so forth. *Id.* Few notaries serve in that capacity as their sole occupation. *Id.* Nearly all states expressly provide that notaries may hold other official public offices while retaining their status as notaries. *Id.*

60. *Id.* *The American Notary Manual* specifically states that most, if not all, notaries function as notaries as a sidelight to another profession or occupation. *Id.*

61. HUMPHREY, *supra* note 50, at 7. Ideally, the notary would live up to the expectations of the office which he or she holds. *Id.* In reality, however, the notary usually does not achieve these expectations due to a lack of the previously mentioned traits. *Id.*

62. *See* Interview, *supra* note 17. Professor Closen teaches a course that deals with notary law. *Id.* Professor Closen noted that notaries have a number of authorities that contradict each other in outlining a notary's general duties. *Id.* However, he stressed that, when in doubt, the ultimate authority governing a notary's conduct should be the statutes that create the notary's office. *Id.*

63. *Kirksey v. Bates*, 7 Porter 529, 530. This case states that if a statute creates an office that was known to the common law, then that statute just codifies and gives legal recognition to that office. *Id.* *See also* *Crain v. United States*, 25 Ct. Cl. 204, 230 (1890) (noting that if the duties of an office are not clearly enumerated by a statute, other sources must be considered to locate the exact powers and authorities of a given office).

64. *See generally* TENN. CODE ANN. §§ 8-16-101 -309 (1993 & Supp. 1996) (outlining in general terms the duties and obligations of the office of notary public).

statutes govern notaries' actions by outlining the notary's duties and regulating their conduct; thus, notaries must abide strictly by those statutes.⁶⁵

In order to achieve order in commerce, government, and elsewhere, courts have created the standard of care or "uniform standard of behavior."⁶⁶ This standard is meant to provide guidelines for individuals to follow and for judging the conduct of people.⁶⁷ The standard created by the courts to apply to a given situation is the standard of the "reasonable and prudent person" under like circumstances.⁶⁸ The reasonable and prudent person standard is employed in virtually every situation.⁶⁹

The standard of care for a notary is that of a reasonably prudent notary in a similar situation.⁷⁰ The substance of the standard of conduct is derived from the various statutes that create the office of the notary.⁷¹ These statutes serve as a notary's standard of

65. See *id.* (giving one example how a notary statute delineates the powers and authorities of the office).

66. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 32, at 173 (5th ed. 1984). Because of the number of possible situations, a concrete standard is not practicable. *Id.*

67. *Id.* at 174. The best possible solution for the difficulty in obtaining a standard of care is to devise some type of formula. *Id.* Due to the many different variables which can enter the equation, this formula must be flexible enough to accommodate a number of different circumstances. *Id.* The formula, however, must also be rigid enough to provide some sort of guidance as to what the standard really is or should be. *Id.* The standard must also be objective and not subject to judgments. *Id.*

68. See *Vaughan v. Menlove*, 132 Eng. Rep. 490, 492 (1837) (noting for the first time that a standard of care in an action for negligence is that of the idealized "man of ordinary prudence"). See also KEETON ET AL., *supra* note 66, at 173 (declaring that this idealized person has never existed, and the courts are charged with the very difficult duty of applying the standard of care of this fictitious person). The model person is "[a] model of all proper qualities, with only those human shortcomings and weaknesses which the community will tolerate on the occasion . . ." *Id.*

69. See KEETON ET AL., *supra* note 66, at 175 (noting that although a person may be mentally deranged and incompetent, the person will still be held to the standard of care of an ordinary reasonably prudent person). Public policy dictates that the rule should be applied in this way. *Id.* There is a great deal of difficulty in determining whether a person is mentally competent in criminal cases where guilt depends on the defendant's ability to understand the charges against him. *Id.* Because of this difficulty, courts have been opposed to allowing this mental capacity doctrine to enter into the civil arena. *Id.* One major problem that would result from this would be the difficulty in determining whether someone was capable of making a decision or whether that person's decision was merely poor judgment. *Id.*

70. See *Naquin v. Robert*, 559 So.2d 18, 20 (La. Ct. App. 1990) (declaring the standard for a notary to be that of a reasonably prudent notary in the same community).

71. See, e.g., KY. REV. STAT. ANN. §§ 423.010-.990 (Michie 1992) (listing the duties, powers, obligations, and responsibilities of the office of notary public).

minimum conduct.⁷² For example, if a notary acts negligently in identifying a document signer, then the notary will have breached the duty of reasonable care to any third person who relied upon the notarization of an impostor's signature.⁷³ The standard to which the notary is held in such an instance is delineated in the guidelines that the legislature established to identify document signers.⁷⁴ Therefore, if a plaintiff shows that a notary has not maintained this standard,⁷⁵ then a notary is liable to the plaintiff for all injuries proximately caused by that breach of care.⁷⁶

In order for a notary to honor the standard of reasonable care, the notary is entitled to know the responsibilities of the office. Does the function of the notary involve a determination of the competence and willingness of document signers? With only two or three exceptions, the states have not established that a determination of competence and willingness falls within the duties of notaries.⁷⁷ Therefore, notaries must follow the law that governs their office, and most notaries are not to judge the competence or willingness of document signers.

II. ANALYSIS

The following facts are true: Carolyn Ann Williamson suffers from early organic brain syndrome which is a form of permanent mental weakness. She also has a long history of alcoholism which has caused emotional problems. The Matthews learned that Carolyn Ann desired to sell her home because the mortgagee was threatening to foreclose on the property. The parties reached an agreement to sell the property for \$1800, although it was appraised at \$16,500 and Carolyn Ann had \$10,000 in equity in it.⁷⁸

72. See, e.g., N.H. REV. STAT. ANN. §§ 455:1-15 (1992 & Supp. 1995) (enumerating the steps that a notary should take to perform the duties of the office with the requisite degree of care).

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

74. See *id.* (holding an employer liable for the notarial misconduct of an employee). See also Karla Elliott, *Notary's Misconduct is the Employer's Liability, Too!*, NAT'L NOTARY MAG., May-June 1996, at 6 (exposing the fact that an employer can be held directly liable for the notaries' misconduct).

75. See 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, 725 (1997) (noting that the burden of proof for showing a notary's misconduct rests with the plaintiff).

76. See *id.* at 725-26 (noting that a notary is almost always liable for "negligent, reckless or willful conduct").

77. See *infra* notes 79-98 and accompanying text for a discussion on the merits of whether notaries should be making judgments on the competence or willingness of signers.

78. *Williamson v. Matthews*, 379 So.2d 1245, 1246-48 (Ala. 1980). The facts in the hypothetical are the actual facts of this case, except for the fact that no notary was called upon to notarize Ms. Williamson's signature in the

If you were a notary and asked to notarize Carolyn Ann's signature on this contract, would you do so?

Section A of Part II discusses the difficulty in defining whether someone is competent or willing. Section B analyzes state notary law statutes searching for a provision that conveys upon notaries the duty to judge competence or willingness. Section C examines case law to determine whether courts impose such a duty on notaries. Section D evaluates other possible sources of authority that might delineate such a duty for notaries.

A. Notaries' Difficulty Defining Competence and Willingness

Since some groups readily believe that a notary should make determinations as to a document signer's competence and willingness,⁷⁹ the terms themselves should first be defined. A search of common sources such as Webster's New Riverside University Dictionary⁸⁰ and Black's Law Dictionary⁸¹ for an adequate definition of willingness⁸² or competence quickly proves futile. At best, the definitions given by these two basic sources merely beg the questions: (1) What is competence and (2) What is willingness.⁸³ Neither definition provides any real guidance or effective criteria upon which to base a determination of competence or willingness.⁸⁴ Likewise, a search of more scholarly sources provides little help in outlining objective criteria which could be used for determining general competence or willingness.⁸⁵ Even leading psychological

actual case. *Id.*

79. See Survey, *supra* note 6 and accompanying text for the results of a survey of a group of notaries who believe that they must determine competence and willingness of the document signers appearing before them.

80. WEBSTER'S NEW RIVERSIDE UNIVERSITY DICTIONARY 290 (Riverside Pub. Co. 1984). Competence is defined as "properly qualified, adequate for the stipulated purpose, legally fit." *Id.*

81. BLACK'S LAW DICTIONARY 195 (6th ed. 1990). Competent is defined as "duly qualified; answering all requirements; having sufficient capacity, ability or authority; possessing the requisite physical, mental or legal qualifications; able; adequate; suitable; sufficient; capable; legally fit." *Id.*

82. *Id.* at 1103. Willful is defined as "proceeding from a conscious motion of the will; voluntary; knowingly; deliberate. Intending the result which actually comes to pass; designed; intentional; purposeful; not accidental or involuntary." *Id.*

83. *Id.*

84. *Id.*

85. See, e.g., SPENCER A. RATHUS, ESSENTIALS OF PSYCHOLOGY 397 (3d. ed. 1984) (defining competence as "knowledge of rules that guide conduct, concepts about ourselves and other people, and skills"); ANITA E. WOOLFOLK, EDUCATIONAL PSYCHOLOGY 268 (4th ed. 1990) (defining linguistic comprehension as "understanding the meaning of sentences"); BENJAMIN B. WOLMAN, INTERNATIONAL ENCYCLOPEDIA OF PSYCHIATRY, PSYCHOLOGY, PSYCHOANALYSIS, & NEUROLOGY 288 (1984) (outlining some general factors used in determining social competence). Some of those factors include: 1) common general hygiene standards; 2) realistic views of one's self; 3) active pursuit of social groups; 4) morality; 5) attention span; 6) critical thinking; 7)

researchers differ in defining competence and willingness.⁸⁶ Thus, it seems unlikely that notaries can judge either or both of these concepts where the definitions are replete with subjective terms.⁸⁷

Further complicating the already difficult determination of competence is the fact that the legal standard of competence varies depending on the type of transaction involved.⁸⁸ Courts require individuals who desire to enter into any legal transactions to possess a certain minimum degree of mental functioning.⁸⁹ For example, one of the lowest standards for legal capacity is the legal standard used to judge whether one can make a will.⁹⁰ This test merely requires that a party making a will be "of sound mind and memory" when executing the document.⁹¹

One of the most commonly used tests is that used to determine contractual capacity.⁹² The test is whether a party can appreciate the consequences of his or her commercial or financial act and sufficiently protect his or her own interests.⁹³ These standards for determining competence also have an effect on the determination of willingness. If one is considered incompetent to enter into an agreement, it is unlikely that the individual could enter such an agreement willingly, and vice versa.⁹⁴ Thus, the definitions of willingness and competence are inextricably tied and are neither easily nor uniformly defined or understood.⁹⁵

In addition to the difficulty of defining willingness and competence, a notary often has but a few minutes to observe the document signer.⁹⁶ Also, in most instances, notaries do not have the luxury of having any background information about the signer.⁹⁷ Medical professionals, lawyers, and judges sometimes debate the very issue of a person's competence or willingness for months and

problem solving skills; and 8) general knowledge. *Id.*

86. WILLIAM CARROLL, ILL. MENTAL HEALTH PROF. LAW HANDBOOK, *Mental Capacity To Perform Legal Acts* 87, 88-89 (1993).

87. *Id.*

88. *See id.* (discussing the varying standards of legal competence required to execute different instruments).

89. *Id.*

90. *See In Re Estate of Anthony J. Sutura*, 557 N.E.2d 371, 376 (Ill. 1976) (declaring the requisite mental state for entering into a will to be a standard "of sound mind and memory").

91. *Id.*

92. CARROLL, *supra* note 86, at 88. Professor Carroll claims that the test for determining contractual capacity is the most frequently used. *Id.*

93. *See People v. Kinion*, 435 N.E.2d 533, 536 (Ill. App. Ct. 1982) (providing the standard for determining contractual capacity).

94. *See, e.g., Barth v. Gregory*, 398 N.E.2d 849, 858 (Ill. App. Ct. 1979) (stating the general test used in determining whether one is legally capable of conveying property).

95. *Id.*

96. *See Interview, supra* note 17.

97. *Id.*

sometimes years.⁹⁸ Thus, the proposition that a notary could make a competency or willingness determination within a matter of a few minutes is unlikely.

B. Statutory Sources of Authority

The notary is a governmentally-controlled official whose office is created by statute.⁹⁹ Every state in the United States has a notary statute.¹⁰⁰ Those statutes outline the responsibilities and duties of notaries and govern the general conduct of notaries within each respective state.¹⁰¹ A detailed reading of the various state notary statutes reveals that only the Georgia statute specifically addresses a notary's duty to judge competence and willingness.¹⁰² The relevant portion of the statute clearly proclaims that notaries must judge both competence and willingness of signers.¹⁰³

The relevant portion of the Georgia statute reads as follows: "No notary shall be obligated to perform a notarial act if he feels such act is: . . . [f]or a person who is being coerced, [or] [f]or a person whose demeanor causes compelling doubts about whether the person knows the consequences of the transaction requiring the notarial act . . ." ¹⁰⁴ However, the Georgia statute fails to outline any criteria, either objective or subjective, on which the notary can rely in making either of these determinations.¹⁰⁵ Interestingly, the Georgia notary statute does include a section that concedes what typically reflects reality, the "notary [does not have] knowledge of the contents of the document so signed . . ." ¹⁰⁶ As noted above, the

98. See CARROLL, *supra* note 86, at 88 (introducing the case law which determines the varying standards of legal capacity).

99. See generally MINN. STAT. ANN. §§ 359.01-12 (West 1991 & Supp. 1996) (outlining in detail the duties of a notary in that state).

100. See *supra* note 36 for a list of every state notary statute.

101. *Id.*

102. GA. CODE ANN. §§ 45-17-1 to -34 (Harrison 1990 & Supp. 1996). This statute specifically states that notaries in Georgia are required to judge both competence and willingness of document signers. *Id.* The Georgia Notary Statute states as follows:

No notary shall be obligated to perform a notarial act if he feels such act is: (1) For a transaction which the notary knows or suspects is illegal, false, or deceptive; (2) For a person who is being coerced; (3) For a person whose demeanor causes compelling doubts about whether the person knows the consequences of the transaction requiring the notarial act

Id.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* § 45-17-8. This portion of the Georgia notary statute states specifically that the notary has no knowledge of the contents of the document that he or she is notarizing. *Id.* Interestingly, this language indicates that the notary will not read the document which he is notarizing. *Id.* The notary apparently must merely rely on the document signers word when the signer tells

standard of competence can change for different types of instruments.¹⁰⁷ Thus, a Georgia notary not only has to deal with the challenge of determining competence and willingness, but also must make that determination without knowing the document's substance.¹⁰⁸ If the notary does not know the contents of a document, it is unlikely that the notary could determine the level of mental capacity needed to enter into such a document.¹⁰⁹ Curiously, the Georgia law does not direct a notary not to notarize, but provides only that the notary has no obligation to perform a notarization if the signer's competence or willingness is in doubt.¹¹⁰

In the state of Washington, notaries are sometimes statutorily required to judge the competence of document signers, though not their willingness.¹¹¹ Although not specifically stated, it is implied

the notary what he or she needs notarized. *Id.* The relevant portion of the statute reads as follows:

The signature of a notary public documenting a notarial act shall not be evidence to show that such notary public had knowledge of the contents of the document so signed, other than those specific contents which constituted the signature, execution, acknowledgment, oath, affirmation, affidavit, verification, or other act which the signature of that notary public documents, nor is a certification by a notary public that a document is a certified or true copy of an original document evidence to show that such notary public had knowledge of the contents of the document so certified.

Id.

107. CARROLL, *supra* note 87, at 88.

108. GA. CODE ANN. § 45-17-8 (Harrison 1990 & Supp. 1996).

109. *Id.* The notary has no knowledge of the contents of the document that he or she is notarizing. *Id.* Therefore, the notary probably does not know what standard of competence the signer must have in order for the signer to enter into such a transaction. *Id.* The notary will have to rely solely on the document signer's word in determining whether the document to be notarized is what the signer claims it is. *Id.*

110. *Id.* The Georgia notary statute has the effect of confusing what reliance should be placed on notarized documents. The statute states that notaries are not required to perform a notarization, if the notary does not believe that the signer is competent or appearing willingly. *Id.* This portion of the statute does not direct notaries not to notarize documents for signers that the notaries believe are incompetent or unwilling. *Id.* Notwithstanding the evaluation of competence and willingness, this portion of the statute does not promote uniformity of notary practice. As a result, third parties who rely on notarizations cannot be sure of what value they should place on a notarization.

111. WASH. REV. CODE ANN. § 42.44.080 (West 1991). The relevant portion of the Washington statute reads as follows:

In taking an acknowledgment authorized by RCW 64.08.100 from a person physically unable to sign his or her name or make a mark, a notary public shall, in addition to other requirements for taking an acknowledgment, determine and certify from personal knowledge or satisfactory evidence that the person appearing before the notary public is physically unable to sign his or her name or make a mark and is otherwise competent. The notary public shall include in the acknowledgment a statement that the signature in the acknowledgment was obtained un-

that notaries must also make a determination about whether the signer is willing in some limited circumstances.¹¹² The Washington statute does not uniformly provide that notaries shall judge competence of document signers,¹¹³ for the statute only requires notaries to make a competency judgment about those who are physically unable to sign for themselves.¹¹⁴ Specifically, the statute recites as follows: "a notary public shall . . . determine and certify . . . that the person appearing before the notary public is physically unable to sign his or her name or make a mark and is otherwise competent."¹¹⁵ Although this statute separately provides the notary with some instruction in making the determination that the signer is physically incapable of signing, the statute does not give any direction for the notary to determine competence.¹¹⁶ Further, the statute requires that the notary certify the disability of the signer either from personal knowledge or satisfactory evidence.¹¹⁷ Despite the requirement that the notary use personal knowledge or satisfactory evidence to determine the disability, the statute provides no guidance on the evidence required to make the evaluation of competency.¹¹⁸ The fact that the statute requires notaries to judge the competency of only those unable to make a mark leaves the impression that the drafters considered people with disabilities as generally in need of such an evaluation.¹¹⁹ Un-

der the authority of RCW 64.08.100.

Id.

112. See *supra* notes 79-98 and accompanying text for a discussion of the relationship between competence and willingness.

113. WASH. REV. CODE ANN. § 42.44.080 (West 1991).

114. *Id.*

115. *Id.* The Washington statute declares that notaries are to judge only the competency of signers appearing before them who are physically unable to sign their names or make a mark. *Id.* The statute specifically states that the notary must not notarize the request if the signer is physically incapable of signing, but the signer is otherwise competent. *Id.*

116. *Id.*

117. *Id.* This provision of the statute allows notaries to make observations of signers appearing before the notaries and make the determination whether or not the signer is physically disabled. *Id.* The provision allowing the notary to use satisfactory evidence would allow the notary to use some type of medical evidence or any state adjudication of disability to make the determination. *Id.*

118. *Id.* The statute goes into some detail in outlining what evidence a notary can and should rely upon in determining whether a signer is disabled or otherwise unable to make a mark. *Id.* However, these observations should be relatively obvious and simple for the notary. *Id.* The drafters of the statute did not choose to provide notaries with any evidence on how to make the determination of competence for the disabled. *Id.*

119. WASH. REV. CODE ANN. § 42.44.080 (West 1991). The fact that the drafters singled out only the disabled for the competency determination leads one to believe that the drafters thought people with disabilities the only group worthy of such an evaluation. The evaluation fosters the prejudice that people who have a minor physical impairment also have some mental problem

fortunately, such a requirement has a discriminatory effect and reinforces stereotypes about people with disabilities.¹²⁰

Having noted the only two exceptions, the other forty-eight states, the District of Columbia, and the United States territories have no statutory provisions charging notaries with the obligation of judging competence or willingness of document signers.¹²¹ The Model Notary Act and the Uniform Law on Notarial Acts do not direct notaries to evaluate the competence or willingness of signers.¹²² Correspondingly, no statute, including the statutes of Georgia and Washington, defines or gives criteria for evaluating either competence or willingness in its state notary statute.¹²³ Some states do, however, have notary statutes prohibiting a notary from signing for someone known to have been adjudicated incompetent by a court.¹²⁴ These states require notaries to rely on the judgment of the court and do not force the notary into the difficult position of making that determination.¹²⁵

It is clear that state legislatures expressed no intention in the language of the notary laws to direct notaries to determine competency or willingness of document signers except in Georgia and for disabled signers in Washington.¹²⁶ It appears equally clear that legislatures did not impliedly suggest that notaries should undertake to judge competence or willingness of signers.¹²⁷ Instead, the legislatures seem to have been concerned about identification of document signers by notaries and about notary misconduct.¹²⁸

Finally, many states have statutory provisions which provide for the types of identification a notary may accept in verifying the identity of the signer.¹²⁹ Many of the identification portions of

that is worthy of evaluation as well.

120. *Id.*

121. See *supra* note 36 for a list of the state notary law statutes.

122. MODEL NOTARY ACT §§ 1-101 to 8-103 (1984); UNIF. LAW ON NOTARIAL ACTS §§ 1-13 (1983).

123. MODEL NOTARY ACT §§ 1-101 to 8-103 (1984); UNIF. LAW ON NOTARIAL ACTS §§ 1-13 (1983).

124. CONN. GEN. STAT. ANN. § 3-94f (West 1988 & Supp. 1996); FLA. STAT. ANN. §§ 117.107, 117.05(b), 117.05(c) (West 1996); GA. CODE ANN. § 45-17-8 (Harrison 1990 & Supp. 1996); HAW. REV. STAT. § 456-19 (1995); 5 ILCS 312/6-104 (West 1993 & Supp. 1996); IND. CODE ANN. § 33-16-2-4 (Michie 1992 & Supp. 1996); N.C. GEN. STAT. § 10A-3 (Michie 1991); WASH. REV. CODE ANN. § 42.44.080(2) (West 1991).

125. See, e.g., N.C. GEN. STAT. § 10A-3 (1991) (stating that a notary can rely upon the judgment of the court and should not notarize a document for someone who has been adjudicated incompetent).

126. GA. CODE ANN. § 45-17-8 (Harrison 1990 & Supp. 1996); WASH. REV. CODE ANN. § 42.44.080 (West 1991).

127. GA. CODE ANN. § 45-17-8 (Harrison 1990 & Supp. 1996).

128. See Vincent Gnoffo, *Notary Law and Practice for the 21st Century: Suggested Modifications for the Model Notary Act*, 30 J. MARSHALL L. REV. 1063, 1070 (1997) (discussing the potential for notarial misconduct).

129. ARK. CODE ANN. § 21-14-111 (Michie 1996); CAL. GOV'T CODE § 8230

these statutes go into substantial detail in explaining what types of identifications a notary may accept.¹³⁰

Many enacted provisions restrict, in some way, the parties for whom notaries may notarize.¹³¹ For example, some of these states prohibit notaries from performing notarial acts for people with whom the notary has some type of relationship.¹³² Other states are concerned that the notary not have some kind of financial interest in the transaction that is notarized.¹³³

Thus, common threads running through the various legislation restricting notarizations seem to focus on identifying signers and deterring misconduct.¹³⁴ Many legislatures have gone into considerable detail in attempting to close loopholes and preserve

(West 1992 & Supp. 1996); COLO. REV. STAT. §§ 12-55-205, 12-55-207 (1996); DEL. CODE ANN. tit. 29, § 4322 (1991 & Supp. 1994); FLA. STAT. ANN. § 117.05(5) (West 1996); IDAHO CODE §§ 51-111 to -112 (1994); KAN. STAT. ANN. §§ 53-107, 53-303 (1983); KY. REV. STAT. ANN. § 423.130 (Michie 1992); MONT. CODE ANN. §§ 1-5-303, 1-5-603 (1995); NEB. REV. STAT. § 64-203 (1990); NEV. REV. STAT. ANN. § 240.163(7) (Michie 1996); N.M. STAT. ANN. § 14-12-18 (Michie 1995); N.C. GEN. STAT. §§ 10A-6 to -8 (1991); OKLA. STAT. ANN. tit. 49 § 113A (West 1988 & Supp. 1996); OR. REV. STAT. § 194.515 (1991); TEX. GOV'T CODE ANN. § 406.014 (West 1990); VA. CODE ANN. § 47.1-14 (Michie 1996); WASH. REV. CODE ANN. § 42.44.080(1) (West 1991).

130. See, e.g., 5 ILCS 312/6-102 (detailing the type of identification that a notary may accept in identifying a document signer).

131. ARIZ. REV. STAT. ANN. § 43-317 (West 1992 & Supp. 1995); ARK. CODE ANN. § 21-14-109 (Michie 1996); CAL. GOV'T CODE §§ 8224-8225 (West 1992 & Supp. 1996); COLO. REV. STAT. § 12-55-110 (1996); CONN. GEN. STAT. ANN. 3-94 (West 1988 & Supp. 1996); D.C. CODE ANN. 1-1801 (1992); FLA. STAT. ANN. § 117.05(1)(e), (6)(e) (West 1996); GA. CODE ANN. §§ 45-17-8(c), -12 (Harrison 1990 & Supp. 1996); HAW. REV. STAT. § 456-14 (1995); IDAHO CODE § 51-108 (1994); 5 ILCS § 6-104 (West 1993 & Supp. 1996); IND. CODE ANN. § 33-16-22 (Michie 1992 & Supp. 1996); KAN. STAT. ANN. § 53-109 (1983); LA. REV. STAT. ANN. § 5 (West 1985 & Supp. 1996); ME. REV. STAT. ANN. tit. 4, § 954(A) (West 1989 & Supp. 1995); MD. ANN. CODE § 10 (1995 & Supp. 1996); MICH. STAT. ANN. § 5-1071 (Law. Co-op. 1993 & Supp. 1996); MO. ANN. STAT. § 486.255, .340(2) (West 1987 & Supp. 1996); MONT. CODE ANN. § 1-5-417 (1995); NEB. REV. STAT. § 64-211 (1990); NEV. REV. STAT. ANN. § 240.065 (Michie 1996); N.H. REV. STAT. ANN. § 455:1 (1992 & Supp. 1995); N.M. STAT. ANN. § 14-12-20 (Michie 1995); N.Y. EXEC. LAW § 138 (McKinney 1993 & Supp. 1996); N.D. CENT. CODE § 44-06-13.1 (1993 & Supp. 1995); OHIO REV. CODE ANN. § 147.53 (Banks-Baldwin 1994 & Supp. 1996); OR. REV. STAT. § 194.100 (1991); S.C. CODE ANN. § R6-1-120 (Law. Co-op. 1991); UTAH CODE ANN. § 46-1-8 (1993 & Supp. 1996); VA. CODE ANN. § 47.1-30 (Michie 1996); W.VA. CODE § 29-4-7 (1992 & Supp. 1996); WYO. STAT. ANN. § 32-1-113 (Michie 1996).

132. OR. REV. STAT. § 194.100 (1991). This statute prohibits a notary from notarizing transactions for parties with whom the notary has a business relationship. *Id.*

133. KAN. STAT. ANN. § 53-109 (1983). This statute prohibits a notary from notarizing transactions where the notary has a financial interest in the transaction. *Id.*

134. *Id.*

the value of notarized documents.¹³⁵ Therefore, it seems highly unlikely that these same legislatures drafted statutes that leave to implication whether a notary has a duty to judge the competence or willingness of document signers.¹³⁶

Ironically, at a time when notary statutes are becoming more extensive, none of the state notary statutes mention, much less explain, competence or willingness or how either standard should be determined.¹³⁷ If the drafters of the statutes intended for notaries to judge either concept, those legislatures would have included such provisions in the statutes.¹³⁸ This is especially true in light of the tremendous amount of attention paid by some statutes to the relatively simple task of identifying someone.¹³⁹

In sum, notaries are governed by statutes. The statutes that establish the notaries' duties, with two exceptions, do not reference any duty for notaries to judge competence or willingness.¹⁴⁰ Therefore, because the statutes that ultimately outline a notary's functions do not expressly or impliedly establish the duty of notaries to determine competence or willingness, notaries should not undertake to make such determinations.

C. Common Law Sources of Authority

Another possible source that could establish the legal duty of a notary to make a determination of a document signer's competence or willingness is the common law.¹⁴¹ The courts have the authority and responsibility of interpreting the statutes pro-pounded by state legislatures and deciding other questions on the basis of general law and equity.¹⁴² Through the years, various courts around the country have written opinions, some supporting, but most undermining the proposition that notaries must judge competence and willingness of document signers.¹⁴³ However, none

135. See OR. REV. STAT. § 194.100 (1991) (discussing the legislative provisions that restrict parties for whom a notary can perform official acts).

136. See KAN. STAT. ANN. § 53-109 (1983) (noting the specific language that appears in the statute aimed at preventing a notary from having a personal interest in a notarized document).

137. See, e.g., IDAHO CODE § 51-111 (1994) (outlining the notary's duty to identify the document signer).

138. See GA. CODE ANN. § 45-17-8 (Harrison 1990 & Supp. 1996) (stating that notaries must judge both the competence and willingness of document signers appearing before them).

139. See TEX. GOV'T CODE ANN. § 406.014 (West 1990) (detailing the types of identification that a notary may accept in verifying a document signer).

140. See *supra* note 36 for a list of the state notary law statutes.

141. See, e.g., *Poole v. Hyatt*, 689 A.2d 82, 89 (Md. 1997) (holding that notaries have an affirmative duty to judge both the competence and willingness of signers appearing before them).

142. *Id.*

143. See *Richard v. Smith*, 361 S.W.2d 741, 743 (Ark. 1962) (commending the notary for stating that if the notary had thought the signer to be incompe-

of these decisions are as clear in holding that a notary has such a duty as the recent decision of the Maryland Court of Appeals in *Poole v. Hyatt*.¹⁴⁴ In this case, the court wrote as follows:

We hold that . . . when a signatory (1) appears personally before a notary for the purpose of having the notary witness and attest to his signature, (2) the signatory appears to be alert and is under no apparent duress or undue emotional influence, (3) it is clear from the overall circumstances that the signatory understands the nature of the instrument he or she is about to sign, and (4) he or she signs the instrument in the presence of the notary with the apparent intent of making the instrument effective, the signatory is effectively acknowledging to the notary that the instrument is being signed voluntarily and for the purpose contained therein.¹⁴⁵

The *Poole* court relied on decisions from other states in reaching its conclusion.¹⁴⁶ However, none of those cases specifically considered a notary's duty to judge competence and willingness in their reasoning. The court cites the case of *McQuatt v. McQuatt*¹⁴⁷ as reason for its holding.¹⁴⁸ In *McQuatt*, a property conveyance was challenged on the basis that the grantor was incompetent and under undue influence.¹⁴⁹ When the grantor was asked by the no-

tent, then the notary would not have notarized the document for the signer); *Barouquet v. Barriou*, 148 So.2d 836, 839 (La. Ct. App. 1963) (placing a great deal of weight on the notary's testimony at a trial which challenged the validity of a notarized transaction); *Rayborn v. McGill*, 159 So.2d 807, 808 (Miss. 1964) (relying on the notary's observations about a person's general competence to enter into a transaction); *Schalla v. Roberts*, 86 N.W.2d 5, 10 (Wis. 1957) (noting that the notary's official signature is presumptive evidence of the facts contained within the document bearing that signature).

144. 689 A.2d 82 (Md. 1997).

145. *Id.* at 90. The facts from which the dispute in this case arose are somewhat convoluted. *Id.* at 82-83. Ethyl Poole and her now deceased husband, N. Purdam, had built a home on some property which they owned. *Id.* at 82. Some years later, they built a home for their son, Bernard. *Id.* When N. Purdam died, Ethyl conveyed the property on which both homes were built to herself and her son Bernard as "joint tenants with the right of survivorship." *Id.* at 83. When Bernard's health began to fail, his wife, Glenda, decided to hire an attorney to prepare a durable power of attorney and a will. *Id.* The attorney also notarized both documents. *Id.* In this will, Bernard left his entire estate to Glenda. *Id.* The power of attorney gave Glenda broad power to manage Bernard's personal property. *Id.* A few months later, Glenda, acting as Bernard's attorney in fact, conveyed Bernard's interest in the property which he had held with Ethyl to Glenda as tenants by the entireties. *Id.* Three days later, Bernard died. *Id.*

146. *Id.* at 87-90.

147. 69 N.E.2d 806 (Mass. 1946).

148. *Poole*, 689 A.2d at 89.

149. *McQuatt v. McQuatt*, 69 N.E.2d 806, 808 (Mass. 1946). The children of the grantor sued to set aside a deed claiming that the grantor was not competent to deed property and that the deed was coerced by the grantee. *Id.* The deed was executed just hours before the grantor died. *Id.* The attorney who prepared the deed had discussed the contents of the deed with the grantor on a prior occasion, but the attorney was not present when the deed was signed.

tary if he was aware of what he was about to do, the grantor replied, "Yes" and signed the conveyance.¹⁵⁰ The court, however, invalidated the conveyance because the grantor did not make a formal statement that the conveyance was undertaken of his free will.¹⁵¹

The *Poole* court also cited the case of *Waitt Bros. Land, Inc. v. Montange*¹⁵² for the proposition that one appearing before a notary is presumably doing so on his or her own free will.¹⁵³ The *Waitt Bros.* court declined to follow the form over substance doctrine and held that this voluntary appearance constituted an admission by conduct and was evidence of a proper execution of a document.¹⁵⁴ The *Poole* court further relied on *Lawson v. Lawson*¹⁵⁵ in which the parties appeared before a notary and signed the agreement in his presence.¹⁵⁶ The notary did not inquire whether the parties were appearing voluntarily, but the *Lawson* court upheld the transaction.¹⁵⁷ The *Lawson* court also reasoned that the signer's actions were valid based on the appearance before the notary, even though the signer did not specifically state the act was voluntary.¹⁵⁸

None of the cases the *Poole* court notes in support of imposing a duty to judge competence and willingness of signers, however, even mention any type of duty on the notary to determine either competence or willingness.¹⁵⁹ In fact, some of the cases cited in

Id. The grantor signed the deed in the presence of the grantee and the notary who then notarized the grantor's signature. *Id.* at 809.

150. *Id.* at 809.

151. *Id.* at 810. The court voided the deed because the grantor had not made an acknowledgment that he was executing the deed freely and voluntarily. *Id.* The court relied on the fact that the grantor said absolutely nothing before, during, or after the notarization which indicated that the act was performed of his own free will. *Id.*

152. 257 N.W.2d 516 (Iowa 1977).

153. *Poole*, 689 A.2d at 89. In *Montange* a notary went to an elderly couple's home with a contract to sell their land. *Waitt Bros.*, 257 N.W.2d at 518. The wife signed both her and her husband's name, and the notary notarized the document. *Id.* The couple challenged the suit for specific performance to sell their property because the husband did not make a formal statement allowing his wife to sign his name before the notary. *Id.*

154. *Id.* at 519. The court noted that the signer's appearance before the notary constituted an admission by silence when the husband did not then object to his wife signing his signature. *Id.* The conduct before the notary can constitute an admission by silence because the signers are voluntarily appearing for the purpose of having something notarized. *Id.*

155. 362 S.E.2d 269 (N.C. 1987).

156. *Poole*, 689 A.2d at 89.

157. *Lawson*, 362 S.E.2d at 270.

158. *Id.* The act of appearing before the notary and signing in his presence is sufficient to satisfy the statutory requirement that the signer acknowledge the execution of whatever document he is having notarized. *Id.* at 272.

159. *Waitt Bros. Land, Inc. v. Montange*, 257 N.W.2d 516 (Iowa 1977); *Trowbridge v. Bisson*, 44 N.W.2d 810 (Neb. 1950); *Picetti v. Orcio*, 67 P.2d 315 (Nev. 1937); *Lawson v. Lawson*, 362 S.E.2d 269 (N.C. 1987); *McQuatt v.*

Poole inferentially undermine this holding.¹⁶⁰ The cases assume that those signers appearing before a notary are doing so voluntarily, and thus, the challenged notarial acts are valid.¹⁶¹ By making such assumptions, however, the courts have sanctioned notarization of documents for anyone who stumbles in, or who is intoxicated and appears before a notary and signs a document.¹⁶² Thus, notaries may authenticate signatures for anyone who complies with the statutory provisions on identification and personally signs the document.¹⁶³ Conversely, *Poole* holds that a notary must judge whether a signer is under "apparent duress or undue emotional or intoxicating influence."¹⁶⁴ Thus, the line of cases on which the *Poole* court relies in support of its holding actually contradicts it.¹⁶⁵

Cases from other jurisdictions occasionally deal with the issue of notaries' perceptions of signers.¹⁶⁶ These cases, while not imposing a clear duty to judge competence or willingness, suggest that a notary has such a legal duty.¹⁶⁷ For example, in *Richard v. Smith*,¹⁶⁸ the notary who notarized the transaction in question stated she would not have notarized had she thought the signer to be incompetent.¹⁶⁹ The court sanctioned the notary's conduct as commendable, referring specifically to her statement regarding notarization for an incompetent signer.¹⁷⁰ Conversely, at least one

McQuatt, 69 N.E.2d 806 (Mass. 1946); *Wayne Bldg. & Loan Co. v. Hoover*, 231 N.E.2d 873 (Ohio 1967).

160. See *supra* note 36 for a list of the state notary law statutes and the required steps prior to a notarization.

161. *Poole*, 689 A.2d at 89 (Md. 1997).

162. *Cf. id.*

163. *Cf. id.*

164. *Id.* at 86-89. The *Poole* court does not provide any criteria on which the notary should base the decision of judging competence or willingness other than using general observations. *Id.* at 89-90.

165. *Id.* at 87.

166. See generally *Richard v. Smith*, 361 S.W.2d 741, 743 (Ark. 1962) (commending a notary for stating that the notary would not have gone forward with the notarization if the notary had thought the signer incompetent).

167. *Id.* The court did not clearly set out a legal duty for notaries to make judgments of competence or willingness. *Id.*

168. 361 S.W.2d 741 (Ark. 1962).

169. *Id.* at 743.

170. *Id.* The plaintiff was challenging a land conveyance and sought to void the deed. *Id.* at 742-43. Shortly after the conveyance, the grantor contended that he was not competent to enter into such transactions at the time of the conveyance. *Id.* In fact, the grantor's doctor testified that the grantor was unable to transact business on the date of the deed because the grantor could not appreciate the value of anything at that time. *Id.* The court also considered the testimony of the clerk who recorded the deed and served as the notary public. *Id.* The notary testified that the appellant acted similarly to the way most people act; therefore, he was competent at the time of the conveyance. *Id.* The court chose to follow the notary's judgment and upheld the conveyance. *Id.* The court held the grantor possessed sufficient mental ca-

court has held that “[a] notary’s function is simply to certify the validity of the signature; the notary does not attest to the validity of the statements made in the document itself.”¹⁷¹

Other courts have undermined the authority of notaries by invalidating transactions where the notary and other witnesses had differing views on a signer’s competence, willingness, or both.¹⁷² For example, in *Gifford v. Goesling*¹⁷³ the court considered whether a grantor had the appropriate mental capacity at the time of making a conveyance.¹⁷⁴ After weighing the testimony of the notary, whom the court described as a “lay witness” against two of the grantor’s physicians, the court relied upon the physicians’ testimony.¹⁷⁵ In fact, the notary even admitted she was not qualified to determine the grantor’s competency.¹⁷⁶ The court relied on the doctors’ testimony and nullified the conveyance.¹⁷⁷ Similarly, in

capacity to convey the land because he could “retain in his memory without prompting the extent and condition of his property and to comprehend how he is disposing of it and to whom and upon what consideration” *Id.*

171. *Butler v. Encyclopedia Britannica, Inc.*, 41 F.3d 285, 293-94 (7th Cir. 1994). The notary does not attest to any of the facts contained within the document, but merely verifies that the signer is who he or she purports to be. *Id.*

172. *See, e.g.*, *Clark v. Hackett*, 674 So.2d 1306, 1309 (Ala. Civ. App. 1995) (proclaiming a notary’s observations regarding a document signer’s capacity to be merely opinion); *Daley v. Boroughs*, 835 S.W.2d 858, 864-65 (Ark. 1992) (giving no deference to the notary’s testimony where the evidence regarding the signer’s capacity was contradictory); *Anderson v. Anderson*, 237 P.2d 24, 25 (Cal. Dist. Ct. App. 1951) (relying on the testimony of a physician rather than the notary who notarized the transaction); *Hughes v. Grandy*, 177 P.2d 939, 943-44 (Cal. Dist. Ct. App. 1947) (relying on the testimony of lay people instead of the testimony of the notary public who notarized the conveyance); *Pearson v. Schubach*, 763 P.2d 834, 836 & n.2 (Wash. Ct. App. 1988) (noting that the language which appears on a notary’s acknowledgment declaring that acknowledgment to be a free and voluntary act is only prima facie evidence of the act being free and voluntary); *Young v. Young*, 82 S.E.2d 54, 57-58 (W.Va. 1954) (refusing to allow the notarized transfer of land to be upheld on the grounds that the grantor was not competent).

173. 951 S.W.2d (Mo. Ct. App. 1997).

174. *Id.* at 645.

175. *Id.* D.A. signed a power of attorney that enabled Mary to transact business for him and also executed a quit-claim deed for his property. *Id.* at 643. Both of these instruments were signed in the presence of the notary and Mary. *Id.* D.A.’s son challenged the grant of land claiming that D.A. was not competent to enter into such transactions because of medical infirmities. *Id.* Two of D.A.’s doctors testified that D.A. was not mentally competent to execute the deeds. *Id.* at 644. However, neither of the doctors were present at the time of the transaction. *Id.* The court chose to rely on the testimony of the doctors in place of the notary, and the court voided the conveyance of the land. *Id.* at 645.

176. *Id.* The court noted that the notary’s acknowledgment on the deeds indicated that the conveyance was the grantor’s free act. *Id.* The court noted that this language on the acknowledgment was prima facie evidence that the conveyance was the grantor’s free act. *Id.*

177. *Id.* The court highlighted the fact that the notary spent very little time

Anderson v. Anderson,¹⁷⁸ a court considered the testimony of the notary who claimed that the grantor of property was mentally competent.¹⁷⁹ The court, however, chose to rely on the testimony of the grantor's physician in affirming the nullification of the grant.¹⁸⁰ Likewise, in *Hughes v. Grandy*,¹⁸¹ a notarized real estate conveyance was challenged.¹⁸² The court balanced the notary's testimony with the testimony given by friends and relatives of the grantor in considering whether the grantor was mentally competent at the time of the conveyance.¹⁸³ The notary testified that he was with the grantor for about 15 to 25 minutes and that she appeared competent.¹⁸⁴ The court, however, upheld the trial court's decision and held the grantor to be incompetent at the time of the conveyance.¹⁸⁵

with the grantor before the notarization. *Id.* The court also noted that the notary's signature did not in any way indicate that the grantor was competent to execute the deeds. *Id.*

178. 237 P.2d 24 (Cal. Dist. Ct. App. 1951).

179. *Id.* at 25. The plaintiff challenged the validity of a deed executed from decedent to the defendant. *Id.* at 24. The plaintiff alleged that the decedent was not mentally competent at the time of the grant, and the grant should be voided. *Id.* The plaintiff presented evidence at trial which indicated that the decedent had some difficulty with the English language. *Id.* The plaintiff also presented evidence showing that the decedent confused the identity of his children and was extremely irrational. *Id.* The evidence at trial also showed that the decedent was "disoriented, complained of dizziness and pain, and was unable to remember various things." *Id.* at 25.

180. *Id.* The court weighed the testimony of family members who observed the decedent's conduct and his physician against the testimony of the notary who notarized the deed. *Id.* The notary, who was also an attorney, stated that the decedent appeared to be mentally competent. *Id.* However, the decedent's physician declared that the decedent was of unsound mind and not competent to enter into such transactions. *Id.* The court relied on the physician and family members' testimony and voided the deed. *Id.*

181. 177 P.2d 939 (Cal. Dist. Ct. App. 1947).

182. *Id.* at 943. The decedent transferred property to the defendant and had the transfer notarized. *Id.* The plaintiff challenged this transfer alleging that the decedent was not mentally competent to enter into such transactions. *Id.* at 941.

183. *Id.* at 943. Several friends, neighbors, and acquaintances of the decedent testified for the plaintiff. *Id.* The defendant relied heavily on the testimony of the notary who notarized the transaction. *Id.* The notary testified that the decedent was "in first class mind, sound mind, and good memory." *Id.* at 944. The notary also testified that the decedent was under no undue influence at the time of the conveyance. *Id.* Another witness for the plaintiff who had known the decedent for over a decade testified that the decedent was of sound mind on the day of the grant. *Id.* at 943. Finally, two more witnesses for the plaintiff testified that they noticed absolutely no difference in the decedent's conduct. *Id.*

184. *Id.* at 945. The court noted the very brief amount of time that the notary had to judge the decedent's actions. *Id.*

185. *Id.* at 943-44. Although the testimony was almost evenly divided, with the notary believing the decedent competent, the court chose to void the conveyance. *Id.* at 944. The court placed no special emphasis or significance on the notary's testimony. *Id.* Instead, the court relied on the testimony of peo-

Further, in *Pearson v. Schubach*,¹⁸⁶ the court noted that although a notary's acknowledgment proclaimed the notarized document a "free and voluntary" act, the language was only prima facie evidence of the willingness of the signer.¹⁸⁷ The court specifically stated that this language merely establishes a rebuttable presumption.¹⁸⁸ The court did not rely on the notary's observations to establish whether the act was actually free and voluntary.¹⁸⁹

In all of the aforementioned cases, the notary's signature on a document is one of many factors considered by courts in determining a signer's competence or willingness. At best, the notary's observations are given relatively little weight in making such determinations, presumably because the notary was actually in the presence of the signer at the moment when his or her willingness or competence was to be judged. Courts often consider a number of other factors as well, and often take the opposite position of the notary.¹⁹⁰ Thus, it does not appear that most courts require notaries to judge competence or willingness because the courts are quick to counter a notary's assertions.

D. Other Sources of Authority

A variety of other sources exist from which a notary could seek guidance in interpreting the statutes that govern notary conduct.¹⁹¹ Included among the sources designed to aid notaries in

ple who had known the decedent for numbers of years. *Id.* See *Clark v. Hackett*, 674 S.2d 1306, 1308 (Ala. Civ. App. 1995). Plaintiff had conveyed some property to the defendant and sought to void the deed based on mistake or fraud. *Id.* The plaintiff testified that he had no recollection of the conveyance and that he lacked the proper capacity to convey the property. *Id.* When the notary who notarized the transaction was called to the hospital, he spoke with several members of the hospital staff who assured him that the grantor was mentally alert. *Id.* The court placed little weight on the notary's testimony. *Id.* at 1309. The court also noted that by no means is a notary's opinion regarding a grantor's competency necessarily conclusive on that matter. *Id.* The court held that the notary's statements regarding the grantor's competency were merely contradictions and would not rely on the notary's observations. *Id.* The court refused to uphold the trial court's grant of summary judgment for the defendant based on the notary's assertions. *Id.* The court declared that a question of material fact existed regarding the plaintiff's mental capacity. Therefore, the court would not rely on the notary's judgment. *Id.*

186. 763 P.2d 834 (Wash. Ct. App. 1988).

187. *Id.* at 836. The language in the notary's acknowledgment declared the act which he was notarizing to be both "free and voluntary." *Id.* The court noted that the notary was not using those terms based on the notary statute. *Id.* Thus, the relevance of the language contained in the acknowledgment created only a rebuttable presumption of truth. *Id.*

188. *Id.*

189. *Id.*

190. See, e.g., *Young v. Young*, 82 S.E.2d 54, 61 (W.Va. 1954) (declaring that contradictory testimony of a notary was not reliable).

191. See Interview, *supra* note 17. Professor Closen noted that many nota-

their duties are handbooks that are printed by the state agencies that govern the notaries' commissions and publications by the National Notary Association (NNA) and the American Society of Notaries.¹⁹²

Currently, the Model Notary Act contains no provisions explaining whether a notary should judge competence or willingness of signers appearing before them.¹⁹³ This absence creates some confusion regarding exactly how a notary should screen document signers. However, the NNA has further confused the issue by declaring in its Code of Professional Responsibility that the notary is under a duty to judge both competence and willingness of document signers.¹⁹⁴ Thus, the NNA contradicted itself by promulgating a Model Notary Act that is silent as to a notary's obligation of judging competence and willingness,¹⁹⁵ and a Code of Professional Responsibility that specifically charges a notary with such a duty.¹⁹⁶ One would presume that the language of the Model Notary Act would control a notary's conduct with the Code of Professional Responsibility used merely as support for the model statute.¹⁹⁷ This presumption is valid since statutes ultimately govern a notary's conduct,¹⁹⁸ with other materials such as handbooks merely serving to clarify uncertainties and provide notaries with guidance.¹⁹⁹ Hence, in the NNA's idealized world, the notary's duties are not only unclear, but also contradictory.

ries belong to organizations such as the National Society of Notaries or the American Society of Notaries. *Id.*

192. *Id.* Some states do not print handbooks. *Id.* However, many of those states advise new notaries that they should join either the National Notary Association or the American Society of Notaries. *Id.*

193. MODEL NOTARY ACT (1984); UNIF. LAW ON NOTARIAL ACTS §§ 1-13 (1983).

194. See NOTARY PUB. CODE OF PROFESSIONAL RESPONSIBILITY, *supra* note 5, at 10. This authority provides two illustrations specifically aimed at a notary's duty to judge competence and willingness. *Id.* In one example, this authority proclaims that the notary should not notarize a document because the signer was not in touch with reality. *Id.*

195. MODEL NOTARY ACT (1984).

196. See NOTARY PUB. CODE OF PROFESSIONAL RESPONSIBILITY, *supra* note 5, at 10.

197. *Id.* See also CODE OF PROFESSIONAL RESPONSIBILITY OF THE AM. SOC'Y OF NOTARIES 1 (1980) (stating that a notary must be sure that the party that is having a document notarized understands the contents of that document).

198. See Interview, *supra* note 17.

199. ALASKA NOTARY PUB. HANDBOOK 15 (1997). This handbook specifically states that notaries should not notarize when they feel the signer appearing before them is incompetent and unwilling. *Id.* The handbook states that the signer should "be able to communicate with [the notary] in some fashion and to indicate a basic understanding of the document." *Id.* The handbook also directs the notary to exercise common sense in determining whether a signer is competent. *Id.*

III. PROPOSED CLARIFICATIONS

The following facts are true: For 15 years, Bobby Joe Clardy suffered from a recurrent manic depressive illness that was described as episodic. In order to control the condition, Bobby Joe took lithium. One day, after discussing the required down payment with a dealer, Bobby Joe decided that he wanted to purchase a new truck. Two days later, Bobby Joe's wife phoned the dealer and said that Bobby Joe was incompetent and should not be conducting business. Not heeding this advice, the dealer decided to proceed with the sale.²⁰⁰ *If you were a notary and asked to notarize this transaction, would you do so?*

This Part proposes additions and changes to the National Notary Association's Model Notary Act and its Code of Professional Responsibility, and the American Society of Notaries Code of Professional Responsibility. The proposed statutory changes are set out below in capitalized print.²⁰¹ Further, like the committee comments accompanying many statutes, the proposed changes are explained in the text accompanying those changes.²⁰² The explanation reveals the policy reasons that make the additions and changes necessary.

ANY DOCUMENT BEARING A NOTARIZATION SHALL INDICATE ONLY THAT THE NOTARY IDENTIFIED THE DOCUMENT SIGNER THROUGH PERSONAL KNOWLEDGE OR SATISFACTORY EVIDENCE. A NOTARIZATION DOES NOT AND SHALL NOT REPRESENT THAT THE NOTARY MADE ANY DETERMINATION OF EITHER THE COMPETENCE OR WILLINGNESS OF THE SIGNER APPEARING BEFORE THE NOTARY.

The preceding language should be adopted and incorporated into the NNA's Model Notary Act. Additionally, the proposed language should be substituted for the current provision in the NNA's Code of Professional Responsibility stating that notaries should judge competence and willingness of document signers. The proposed language seeks to clearly define what is considered by a notary prior to performing a notarization. The concise language of the proposal relieves notaries of any possible uncertainty regarding their notarial duties by unequivocally stating that notaries are not required to judge competence or willingness of document signers. Once adopted, the proposed language clarifies any previous uncertainty regarding a notary's duties and explains that signers appearing before notaries are screened solely for identity. Additionally, the proposal will help to promote uniformity in notary practice by specifically delineating exactly how notaries are to

200. *Shoals Ford, Inc. v. Clardy*, 588 So.2d 879, 880-81 (Ala. 1991). The facts contained in the hypothetical are based on the actual facts of this case, even though no notary was called upon to notarize the transaction. *Id.*

201. *Gnoffo*, *supra* note 128, at 1091.

202. *Id.*

screen document signers.²⁰³

Similarly, the American Society of Notaries also propounds a Model Code of Professional Responsibility.²⁰⁴ In this, the American Society of Notaries does not contend that notaries are charged with the duty of judging either competence or willingness of document signers.²⁰⁵ However, as mentioned above,²⁰⁶ in omitting a statement which specifically proclaims that a notary screens a document signer for identification and nothing more, the American Society of Notaries has also contributed to the uncertainty surrounding notarizations.²⁰⁷ By adopting the language proposed above, the American Society of Notaries could explicate the duties encompassing the office of the notary. Again, adoption of the proposal would effectively promote constancy in notary practice and the reliance placed upon notarized documents.

IV. CONCLUSION

The following facts are true: Esther Neprozatis is an 81 year old widow who lives alone with no close friends or relatives. During mid-January in Chicago, Esther called J&B Heating to inspect the heater in her home. After informing Esther that she would need a great deal of work done, including a new air conditioner, a representative of J&B drove her to two different banks so that she could make withdrawals to pay for repairs. All total, Esther paid J&B over \$25,000 for its services that were appraised at a fraction of that value.²⁰⁸ *If you were a notary and Esther asked you to notarize this service contract, would you do so?*

The five situations posed at the beginning of each section,²⁰⁹ represent some of the difficult situations with which notaries may be confronted. It should be noted that the courts which reviewed those five situations invalidated all five transactions.²¹⁰ However,

203. *Id.*

204. CODE OF PROFESSIONAL RESPONSIBILITY OF THE AM. SOC'Y OF NOTARIES (May 4, 1980).

205. *Id.*

206. *Id.*

207. *Id.*

208. *In Re Estate of Neprozatis*, 378 N.E.2d 1345, 1346-47 (Ill. App. Ct. 1978). The facts contained in the hypothetical are based on the actual facts of this case, even though no notary was called upon to notarize the transaction.

Id.

209. Notaries should notarize in all of the situations presented, because notaries have no duty to judge competence or willingness of document signers.

210. See *Shoals Ford, Inc. v. Clardy*, 588 So.2d 879, 885 (Ala. 1991) (voiding a contract between two parties and levying punitive damages against one party because of its pursuit of the contract after repeated warnings from people associated with the purchaser); *Williamson v. Matthews*, 379 So.2d 1245, 1248 (Ala. 1980) (canceling a real estate transaction because one of the parties was not capable of contracting due in part to diminished capacity); *Neprozatis*, 378 N.E.2d at 1350-51 (rescinding a contract between an elderly widow and a

if the notaries were actually asked to notarize those five documents, the notaries should have done so—except in Georgia, Maryland, and possibly in Washington.

Although notaries were not actually asked to notarize any documents in the five illustrations, notaries are often confronted with such difficult circumstances. For example, 90 year old Adeline Fuoco transferred a parcel of land to her son and had a notary attest to her signature on the transaction.²¹¹ After Adeline's death, the administrator of her estate challenged the transfer alleging that Adeline was incompetent at the time of the execution of the transfer.²¹² Similarly, a notary was presented with a difficult situation where William Fisher wanted to amend his will and leave everything to Joyce Ann Fortson.²¹³ Joyce Ann had been one of William's primary caregivers when he was diagnosed with terminal cancer a few weeks earlier.²¹⁴ William and Joyce Ann were

heating company based on the fraud of the heating company and the exorbitant profits that it made at the widow's expense); *Gordon v. Bialstoker Ctr. and Bikur Cholim, Inc.*, 385 N.E.2d 285, 287 (N.Y. 1978) (holding that the defendant did not meet its burden of proving that the gift was freely and voluntarily made because of the existing relationship between the parties); *Hodge v. Shea*, 168 S.E.2d 82, 83 (S.C. 1969) (invalidating a contract between the parties based on the weakened condition of the granting party and the special doctor and patient relationship that existed between the two parties).

211. *Howe v. Johnston*, 660 N.E.2d 380, 381 (Mass. App. Ct. 1996). The decedent had transferred a parcel of real estate to her son three years before her death at the age of 93. *Id.* The decedent was legally blind at the time of the alleged conveyance. *Id.* The judge found that her judgment was impaired and that her mental condition was weak at the time of the signing. *Id.* at 382. A notary notarized the signature outside of the decedent's hospital room without knowing whether or not she had actually signed the deed. *Id.* at 381.

212. *Id.* This case is different than many of the others mentioned in this comment because the notary did not properly attest to the decedent's signature. *Id.* Instead of actually witnessing the decedent sign the deed and properly identifying her, the notary waited in the hall outside of the hospital room. *Id.* This notarization was improper because the notary did not properly attest to the decedent's signature. *Id.* Although the surrounding circumstances shock the conscience, those circumstances alone would not have constituted an improper notarization had the notary properly identified the decedent and had her sign in his presence. *Id.*

213. *Arnelle v. Fisher*, 647 So.2d 1047, 1048 (Fla. Dist. Ct. App. 1994). The decedent was diagnosed with terminal cancer while a patient at a local hospital. *Id.* During his stay at the hospital, the decedent developed a relationship with one of his nurses. *Id.* In the weeks following his discharge, the decedent and the nurse often visited each other at home. *Id.* After a very brief courtship, the two moved in together. *Id.* The couple decided to get married and had a notary perform the wedding ceremony. *Id.*

214. *Id.* The decedent contacted a notary who performed his wedding ceremony and later executed his will. *Id.* The will was executed one month after the wedding ceremony and nine days before the decedent's death. *Id.* Friends of the wife of the decedent witnessed the execution of the will. *Id.* The will named the children of the wife of the decedent as beneficiaries to the decedent's estate, even though the decedent had only met the children on one occasion. *Id.*

married shortly after his release from the hospital and remained married for exactly 41 days before his death.²¹⁵ The administrator of his estate challenged the will based on undue influence.²¹⁶

Both of the preceding examples along with the illustrations at the start of each section demonstrate how notaries are frequently confronted with difficult and sensitive situations. As Chief Judge Desmond warned, "[w]ithout full knowledge of his powers, obligations and limitations, a notary public may be a positive danger to the community in which he is licensed to act."²¹⁷ Notaries must know the limitations of their powers and duties in order to properly serve the public. Thus, notaries should not make determinations such as competence or willingness of document signers.

215. *Id.* Upon the decedent's death, the decedent's cousin filed a petition for an annulment of the marriage, revocation of the will, determination of the beneficiaries, an accounting, and the appointment of a new representative. *Id.* The decedent's cousin contended that the decedent's wife had exerted undue influence over the decedent and had persuaded him to enter into both the marriage and the subsequent will. *Id.*

216. *Id.* The court found that the marriage contract was merely voidable if it was obtained through the undue influence of one of the parties. *Id.* at 1049. The court also found that the decedent was of sufficient mental capacity to enter into both the marriage contract and the will. *Id.*

217. Desmond, *supra* note 1, at 1.

