NORTH DAKOTA LAW REVIEW

NOTARIES PUBLIC FROM THE TIME OF THE ROMAN EMPIRE TO THE UNITED STATES TODAY, AND TOMORROW

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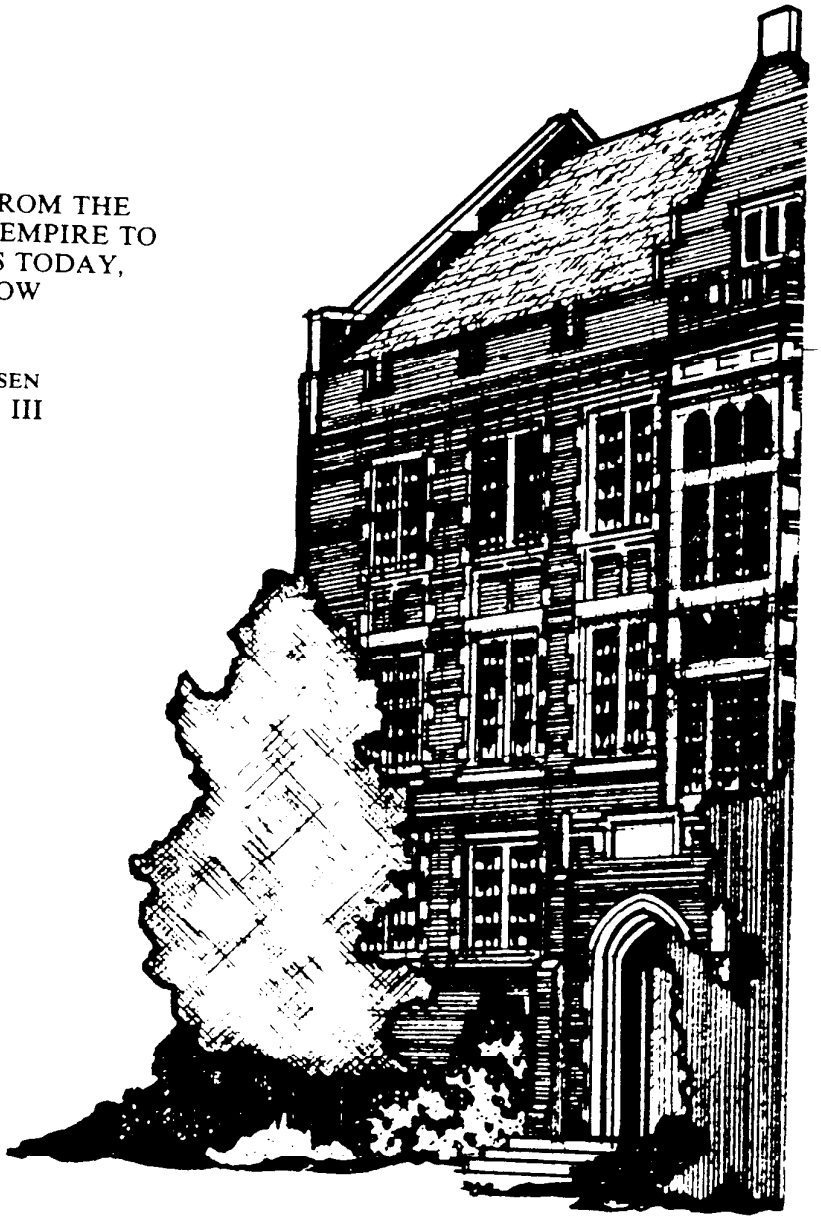

Volume 68 *1992* *Number 4*

NOTARIES PUBLIC FROM THE TIME OF THE ROMAN EMPIRE TO THE UNITED STATES TODAY, AND TOMORROW

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I. INTRODUCTION

A notary public[1] is a public official[2] with unusual powers for a non-judicial officer.[3] Notaries public are considered to be persons of high moral character and, as such, are entrusted with powers usually reserved for a court, such as the authority to administer oaths.[4] However, a notary's power to administer oaths is only a

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The authors would like to acknowledge the outstanding research and assistance provided by Anthony Perniciaro and John Furnari.

1. Throughout this paper the terms "notary public" and "notary" shall be used interchangeably as in some state statutes. See ILL. ANN. STAT. ch. 102, ¶ 201-104 (Smith-Hurd 1987).

2. Most scholars agree that a notary public is a public official. Smith v. Gale, 144 U.S. 509 (1892); Pierce v. Indseth, 106 U.S. 546 (1882); Britton v. Niccolls, 104 U.S. 757 (1881); McGee v. Eubanks, 335 S.E.2d 178 (N.C. Ct. App. 1985); Jii v. Rhodes, 577 F. Supp. 1128 (S.D. Ohio 1983); People v. Olensky, 397 N.Y.S.2d 565 (Sup. Ct. 1977); Krueger v. Miller, 489 F. Supp 321 (E.D. Tenn. 1977); George v. Financial Corp. of Louisiana, 414 F. Supp. 33 (E.D. La. 1976); Meyers v. Meyers, 503 P.2d 59 (Wash. 1972); Patterson v. Department of State, 312 N.Y.S.2d 300 (App. Div. 1970); Transamerica Ins. Co. v. Valley Nat'l Bank, 462 P.2d 814 (Ariz. Ct. App. 1969); Succession of Michel, 225 So. 2d 480 (La. Ct. App. 1969); State *ex rel.* Smith v. Johnson, 231 N.E.2d 81 (Ohio Ct. App. 1967); Commercial Union Ins. Co. of New York v. Burt Thomas-Aitken Const. Co., 230 A.2d 498 (N.J. 1967); Immerman v. Ostertag, 199 A.2d 869 (N.J. Super. Ct. Law Div. 1964); Wright v. Bedford, 182 N.Y.S.2d 660 (Sup. Ct. 1958); Boster v. First Nat'l Bank, 5 F. Supp. 15 (E.D. Mich. 1933); RICHARD B. HUMPHREY, THE AMERICAN NOTARY MANUAL 7 (4th ed. 1948) [hereinafter AMERICAN NOTARY]; 66 C.J.S. *Notaries* § 1(a) (Supp. 1990); 58 AM. JUR. 2D *Notaries Public* § 2 (1989).

Notaries are, according to other statutes and decisions, quasi-judicial officers. 58 AM. JUR. 2D *Notaries Public* § 2, at 524 n.16 (and cases cited therein). However, their actions are not binding upon the state. Kaufman v. McCrory Stores, 613 F. Supp. 1179 (M.D. Pa. 1985).

3. Although most of their duties are clerical or ministerial in nature, they may do things that are usually reserved for court officials, such as giving oaths. *See supra* note 2; *see also* 58 AM. JUR. 2D *Notaries Public* §§ 1, 30 (1989).

4. *See* United States v. Morehead, 243 U.S. 607 (1917) (notaries authorized to administer oath); Thomas v. Loney, 134 U.S. 372, 374 (1890) (suggesting that a lie before a notary in a deposition is perjury); United States v. Curtis, 107 U.S. 671 (1883) (holding that there was no common law authority for notaries to administer oaths); *In re* Estate of Martinez, 664 P.2d 1007 (N.M. Ct. App. 1983) ("notary public" is one who is authorized by the state or federal government to administer oaths, and to attest to authenticity of signatures); Crockford v. Zecher, 347 N.Y.S.2d 105 (Sup. Ct. 1973) (notary public is a public officer and is authorized by law to administer oaths); Owsley v. Commonwealth, 428 S.W.2d 199 (Ky. 1968) (notary public is authorized to administer oath to an affidavit). *See* Gormley

small part of his or her official function.[5] A notary is also relied upon in business and law to minimize fraud in signed documents.[6] Indeed, this responsibility is a very important one, for without it, a signature on an important document might not be worth the paper upon which it is written.[7] The potential for fraud would otherwise grind the business and legal worlds to a halt.

This article will discuss the evolution of notaries public into their present form. It will begin with a brief historical review of the development of the office including how the present powers were derived. Focus will then shift to an explanation of the requisites to become a notary and the powers most states entrust to them today. The standards for judging the propriety of a notary's performance are examined in the next portion of the article. The consequences of notarial misconduct, including legal liability, are also examined. The article will conclude by predicting future developments regarding notarial activities and liabilities.

II. A BRIEF HISTORY OF NOTARIES PUBLIC

The origin of notaries can be traced back to ancient Rome.[8]

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v. Bunyan, 138 U.S. 623 (1891) (holding that a notary public is an officer authorized by law to take depositions). *See generally* 10 U.S.C. § 936 (1988) (noting persons in armed forces who have authority to act as notaries); 10 U.S.C. § 1044a(b) (1988) (listing persons who have authority to act as notaries). Notaries must execute their duties with "honesty, integrity, diligence, and skill." Bernd v. Fong Eu, 161 Cal. Rptr. 58, 61 (Ct. App. 1979).

One of the principal reasons the notary was originally needed was to facilitate commerce. 66 C.J.S. *Notaries* § 1 (1950). Little credence could be put into a document if it did not contain the notary's signature. *Id.*

5. For a complete explanation of the powers of a notary, see *infra* notes 56-82 and accompanying text. In brief, those powers include the ability to administer oaths and attest to the validity of signatures as a bonded witness. *See also* AMERICAN NOTARY, *supra* note 2, at 11-12.

6. The simple fact is that fraud is inherent in these systems. A notary helps to minimize that fraud. Thus, Humphrey states:

> Then men learned to write, and it was found that cold letters remain after the fragile structures of memory failed. So transfers began to be made in writing. But it would inevitably happen that A or B or C would sign a paper and thereafter say he did not sign it; and that D or E or F would learn to forge another's name. So that, notwithstanding it had been at first thought that a written transfer would forever settle all disputes, it was found that a writing was only helpful, not always conclusive. So someone hit upon the idea of having the signature witnessed. From this it was but another step to having as such witness an officer under bond. The notary is that officer, that witness, and his authentication certificate means that he guarantees upon his oath as an officer, and subject to suit upon his bond, that the paper authenticated is indeed the very paper it purports to be, insofar as the signer and the signature are concerned.

AMERICAN NOTARY, *supra* note 2, at 11-12.

7. Courts will not accept certain documents without proper notarization because they tend to be unreliable. *See, e.g.*, Williams v. Conroe Indep. School Dist., 809 S.W.2d 954, 958 (Tex. Ct. App. 1991) (affidavit tender refused without notary signature).

8. Kumpe v. Gee, 187 S.W.2d 932, 934 (Tex. Ct. App. 1945). Generally, these powers

Writing was not widespread in that region during those times.[9] As a result, trusted souls were needed to write out important documents such as contracts and wills and retain them, all for a small fee.[10] Such an individual was imparted with the public trust in office, and called a *notarius*.[11]

Because most lay persons were unable to write, signatures as they are commonly known today were all but impossible. Therefore, many people, often those of some wealth, used a metal or clay disk which was engraved with the family coat of arms.[12] After hot wax was dripped on a page, the crest was impressed upon the wax and served as a signature for that individual.[13] A document formalized in this fashion, when prepared by a *notarius*, was given a high regard for authenticity in Rome.[14]

As the Roman Empire grew, the need for the *notarius* increased as well. This demand was a direct result of more extensive literacy and increased document reproduction capabilities. Eventually, notaries adopted the disk and hot wax method of attesting a document,[15] most closely resembling a trademark of a validly attested document. Notaries then began to spread out into the provinces of the Empire including what are now England, France, and Spain.[16] By the year 805 A.D., the acts of notaries had become so vital that Charlemagne ordered that each bishop, abbot, and count have a notary.[17] Land grants were even drawn

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were limited to its origin in the law merchant. *Id.*; 58 AM. JUR. 2D *Notaries Public* § 1 (1989).

9. RAYMOND C. ROTHMAN, NOTARY PUBLIC PRACTICES AND GLOSSARY 1 (1978) [hereinafter NOTARY GLOSSARY].

10. *See* WILSON GILMER, JR., ANDERSON'S MANUAL FOR NOTARIES PUBLIC § 1.2 (5th ed. 1976) [hereinafter NOTARY MANUAL]. As late as the early 1900s, notaries retained the power to make valid copies and retain them as a safe-keeper. Drumm-Flato Comm'n Co. v. Edmisson, 208 U.S. 534, 538 (1908).

11. NOTARY GLOSSARY, *supra* note 9, at 1. AMERICAN NOTARY, *supra* note 2, at 8. Humphrey states that notaries had been recognized in England as public officials as early as the 1600s. For cases discussing the public official status of a notary, see *supra* note 2.

12. NOTARY GLOSSARY, *supra* note 9, at 1.

13. *Id.*

14. NOTARY MANUAL, *supra* note 10, § 1.2. To "authenticate" means to ensure the validity of a signature by the notary attesting to the validity of it. *Id.* at 10.

15. NOTARY GLOSSARY, *supra* note 9, at 1. As documents grew longer, a ribbon was passed through two holes in the document and the seal on hot wax joined the two ends. *Id.* Thus, the document was guaranteed to be in its same form as when signed if the seal was not broken. *Id.* This was the most likely origin of the seal that most states require notaries to possess today. *See* The Fund Comm'rs of Muskingum County v. Samuel Glass, 1848 WL 136 (Ohio Dec. 1848) (discussing the use of a seal); Pierce v. Indseth, 106 U.S. 546 (1883) (briefly discussing use of seal); A & L Trading Co. v. Herald Square Bakers & Caterers, Inc., 242 N.Y.S.2d 799 (Sup. Ct. 1963) (discussing the seal's role in ascertaining the authenticity of a document); *see also* New v. Corrough, 370 S.W.2d 323 (Mo. 1963) (failure to specify expiration date of seal and commission did not render notary's actions invalid).

16. NOTARY MANUAL, *supra* note 10, § 1.2.

17. AMERICAN NOTARY, *supra* note 2, at 8.

and witnessed by notaries.[18] This common law history formed the basis of notary law in England.

In the New World, colonists had little need for the services of a notary. At first, there were so few transactions that they often were performed in the presence of the court and on a court record.[19] Those notaries who were needed were appointed or elected in the same manner as judges.[20] What eventually spurred the development of the notary public was trade with Europe.[21] Trading partners needed reliable bills of exchange witnessed by a knowledgeable and responsible person with no interest in the deal being struck.[22] The notary filled this void.[23]

In early colonial times, election or appointment continued to be the method of becoming a notary public. Indeed, some of the very first notaries were appointed by the President of the United States.[24] However, this procedure quickly became too cumbersome. The legislatures of the states eventually took control by passing statutes regulating the appointment and supervision of notaries, which was usually delegated to the secretary of state.[25]

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18. NOTARY MANUAL, *supra* note 10, § 1.2.

19. NOTARY GLOSSARY, *supra* note 9, at 2.

20. *Id.* At these early stages, women were prohibited from being notaries. *In re* Appointment of Women to Be Notaries Public, 23 N.E. 850, 853 (Mass. 1890). *See, e.g.*, 66 C.J.S. *Notaries* § 1 (1950); 58 AM. JUR. 2D *Notaries Public* § 1 (1989).

21. NOTARY GLOSSARY, *supra* note 9, at 3. It is often stated that the law merchant is the basis for all notaries. *See, e.g.*, 66 C.J.S. *Notaries* § 1 (1950); 58 AM. JUR. 2D *Notaries Public* § 1 (1989). The Supreme Court recognized the need to honor the validity of notarized documents from other countries very early in its history. Pierce v. Indseth, 106 U.S. 546, 549 (1883). Nonetheless, the document must comport with the requirements of local law. *Id.* at 550.

22. NOTARY GLOSSARY, *supra* note 9, at 3; *In re* Douglas' Will, 83 N.Y.S.2d 641 (Sup. Ct. 1948).

23. NOTARY GLOSSARY, *supra* note 9, at 3.

24. *See Id.* at ii.

25. On the state level, all fifty states have some form of unified set of laws regulating notaries. ALA. CODE §§ 36-20-1 to -11 (1991); ALASKA STAT. §§ 44.50.010 - .190 (1989); ARIZ. REV. STAT. ANN. §§ 41-311 to -317 (1992); ARK. CODE ANN. §§ 21-14-101 to -111 (Michie 1987 & Supp. 1991); CAL. GOV'T CODE §§ 8200 - 8230 (West 1992); COLO. REV. STAT. §§ 12-55-101 to -123 and 12-55-201 to -211 (1991); CONN. GEN. STAT. ANN. §§ 3-91 to -99a and 7-33a (West 1988 & Supp. 1992); DEL. CODE ANN. tit. 29, §§ 4301 - 4328 (1991); D.C. CODE ANN. §§ 1-801 to -817 (1990); FLA. STAT ANN. §§ 117.01 to .10 (West 1982 & Supp. 1992); GA. CODE ANN. §§ 45-17-1 to -34 (Harrison 1991); HAW. REV. STAT. §§ 456-1 to -18 (1985 & Supp. 1992); IDAHO CODE §§ 51-101 to -123 (1988 & Supp. 1992); ILL. ANN. STAT. ch. 102, ¶¶ 201-101 to 203-106 (Smith-Hurd 1987 & Supp. 1992); IND. CODE ANN. §§ 33-16-1-1 to 16-2-9 (Burns 1992); IOWA CODE ANN. § 586.1 (West 1992); KAN. STAT. ANN. §§ 53-101 to -401 (1983); KY. REV. STAT. ANN. §§ 423.010 - .990 (Michie/Bobbs-Merrill 1992); LA. REV. STAT. ANN. §§ 35:1 - :17 (West 1985 & Supp. 1992); ME. REV. STAT. ANN. tit. 4, §§ 951 - 958 (West 1989 & Supp. 1991); MD. ANN. CODE art. 68, §§ 1-13 (1988 & Supp. 1991); MASS. GEN. LAWS ANN. ch. 222, §§ 1-11 (West 1991); MICH. COMP. LAWS ANN. §§ 55-101 to -107 (West 1991); MINN. STAT. ANN. §§ 359-01 to -12 (West 1991); MISS. CODE ANN. §§ 25-33-1 to -23 (1991); MO. ANN. STAT. §§ 486-200 to -405 (Vernon 1987 & Supp. 1992); MONT. CODE ANN. §§ 1-5-401 to -420 (1991); NEB. REV. STAT. §§ 64-101 to -215 (1990); NEV. REV. STAT. ANN. §§ 240.010 - .160 (Michie 1986 & Supp. 1991); N.H. REV. STAT. ANN. §§ 455:1 to :14 (1991); N.J. STAT. ANN. §§ 52:7-10 to -21 (West 1986 & Supp.

Ultimately in 1983, the Commissioners on Uniform State Laws approved a uniform law which served as the basis for many of the current statutes.[26] This uniform law is a good one and many states can improve their current law by copying it. It covers all the important points from definitions,[27] to the requisites for proper attestation.[28] Two additional particulars concerning the model law are worthy of note. First, the comments following each section are very useful. They provide significant insight into how the drafters intended each section to be construed; something of considerable use to courts when interpreting a statute. Second, the model law mandates the legal effect to be given to notarial acts performed under state law (and other state's laws), federal statutes,[29] and international laws.[30] Section six, along with the rest of the model law, makes it an especially effective model for st es to follow.

Over the course of history, notaries' powers have changed substantially. In Rome, notaries often served not only as scriveners, but also as legal advisors in the preparation of the documents.[31] But as the number of lawyers grew and literacy became more widespread, the powers of the notary were gradually limited. Eventually, notarial functions became primarily ministerial rather than judicial.[32] Of course, that did not mean that notarial services were not required, but rather that notarial authority had

1992); N.M. STAT. ANN. §§ 14-12-1 to -20 (Michie 1988); N.Y. EXEC. LAW §§ 6-130 to -139 (McKinney 1982 & Supp. 1992); N.C. GEN. STAT. §§ 10A-1 to -16 (1991); N.D. CENT. CODE §§ 44-06-01 to -14 (1978 & Supp. 1991); OHIO REV. CODE ANN. §§ 147.01 - .14 (Anderson 1990); OKLA. STAT. ANN. tit. 49, §§ 1-10 (West 1988 & Supp. 1992); OR. REV. STAT. §§ 194-005 to -990 (1991); 57 PA. CONS. STAT. ANN. §§ 1 to -169 (1964 & Supp. 1992); R.I. GEN. LAWS §§ 42-30-1 to -14 (1988 & Supp. 1991); S.C. CODE ANN. §§ 26-1-10 to 26-3-90 (Law. Co-op. 1991); S.D. CODIFIED LAWS ANN. §§ 18-1-1 to -14 (1987 & Supp. 1991); TENN. CODE ANN. §§ 8-16-101 to 309 (1988 & Supp. 1991); TEX. GOV'T CODE ANN. §§ 406.001-.024 (1990); UTAH CODE ANN. § 46-1-1 to -17 (1988); VT. STAT. ANN. tit. 24, §§ 441-446 (1975 & Supp. 1991); VA. CODE ANN. §§ 47.1-1 to -33 (Michie 1989); WASH. REV. CODE ANN. §§ 42.44.010 - .903 (West 1991); W.VA. CODE §§ 29-4-1 to -16 (1986); WIS. STAT. ANN. §§ 137.01 (West 1989); WYO. STAT. §§ 32-1-101 to -113 (1977 & Supp. 1992).

Contrariwise on the federal level, the United States does not have a unified set of laws regulating notaries. Rather, Congress has promulgated a diverse set of laws. For example, if one is required to get a notary public appointment as a result of her employment with the federal government, the United States pays for her to get the commission. 5 U.S.C. § 5945 (1988).

26. *See* UNIFORM LAW ON NOTARIAL ACTS, 14 U.L.A. 125 (1990) [hereinafter UNIFORM LAW].

27. *Id.* § 1.

28. *Id.* § 7. Interestingly enough, a seal is not required for valid notarization. *Id.*

29. *Id.* § 5. This includes notaries for the armed forces. *Id.* § 5(2).

30. *Id.* § 6. The comments provide guidance especially useful here because they reference the only international notarial act, the October 5, 1961, Hague Convention. *Id.* Indeed, the notary is recognized by the law of nations. 66 C.J.S. *Notaries* § 1(b) (1950).

31. NOTARY GLOSSARY, *supra* note 9.

32. *Id.* at 2-3; Sicard v. Sicard, 426 So. 2d 299 (La. Ct. App. 1983).

changed from purveyor of legal counsel to delegate of the court. That is primarily where those powers remain today.[33]

III. QUALIFICATIONS FOR OFFICE

Throughout the years, states have imposed many different qualifications on the person seeking a notary office. However, due to constitutional limitations, some of these are impermissible.[34] What is left today is a mixture of requirements in many states.

To become a notary, one must first apply to the appropriate government body. Before the turn of the century, this governmental agency was the office of the governor of the state or the President of the United States. More recently, the appropriate governmental body is the office of the secretary of state of the particular state or the federal Department of State,[35] although this is not always true.[36] The application usually requires the applicant to take an oath of office[37] and to obtain a bond.[38] The applicant then sends in the completed application and awaits response to that application.

There are several other requirements that most states include in their application procedures. First, the applicant must be at least 18 years old.[39] Second, the applicant may be required to be

33. Of course, powers vary from state to state. For examples, see *infra* section IV.

34. For a discussion of some constitutional limitations, see *infra* notes 42-52 and accompanying text.

35. *See, e.g.*, ALA. CODE § 36-20-30 (1991); ARIZ. REV. STAT. ANN. § 41-311 (1992); ARK. CODE ANN. § 21-14-101 (Michie 1987 & Supp. 1991); CAL. GOV'T CODE § 8200 (West 1992); COLO. REV. STAT. § 12-55-104 (1991); IOWA CODE ANN. § 77A.3 (West 1992); KAN. STAT. ANN. § 53-102 (1983); KY. REV. STAT. ANN. § 423.010 (1992); N.J. STAT. ANN. § 52:7-11 (West 1986 & Supp. 1992); N.Y. EXEC. LAW § 130 (McKinney 1982 & Supp. 1992).

36. Indiana, Louisiana, Ohio, South Carolina, and Tennessee, for example, place responsibility for issuing commissions of notaries in the hands of the governor of the state. IND. CODE ANN. § 33-16-2-1 (Burns 1992); LA. REV. STAT. ANN. § 35:1 (West 1985 & Supp. 1992) (governor issues commission on the advice and consent of the senate); OHIO REV. CODE ANN. § 147.01 (Anderson 1990 & Supp. 1991); S.C. CODE ANN. § 26-1-10 (Law. Co op 1991); TENN. CODE ANN. § 8-16-102 (1988).

37. For a discussion of the oath of office, see *infra* notes 47-52 and surrounding text.

38. For examples of bond amounts, see ALA. CODE § 36-20-3 (1991) ($10,000); ALASKA STAT. § 44.50.120 (1989) ($1,000); CAL. GOV'T CODE § 8212 (West 1992) ($10,000); FLA. STAT. ANN. § 117.01(4) (West 1982 & Supp. 1992) ($1,000); ILL. ANN. STAT. ch. 102, ¶ 202-105 (Smith-Hurd 1987) ($5,000); IND. CODE ANN. § 33-16-2-1(c) (Burns 1992) ($5,000); TENN. CODE ANN. § 8-16-104 (1988 & Supp. 1991) ($5,000); TEX. GOV'T CODE ANN. § 406.010 (West 1990) ($2,500); UTAH CODE ANN. § 46-1-4 (1988) ($5,000); V.I. CODE ANN. tit. 3, § 773(b) (Supp. 1991) ($5,000); WYO. STAT. § 32-1-104 (1977 & Supp. 1992) ($500).

39. ARK. CODE ANN. § 21-14-101(B) (Michie 1987); CAL. GOV'T CODE § 8201(b) (West 1992); FLA. STAT. ANN. § 117.01(1) (West 1982 & Supp. 1992); GA. CODE ANN. § 45-17-2.1(2) (Harrison 1990); HAW. REV. STAT. § 456-2 (1985); ILL. ANN. STAT. ch. 102, ¶ 202-102(f) (Smith-Hurd 1987); IDAHO CODE § 51-104(1) (1988); IND. CODE ANN. § 33-16-2-1(1) (Burns 1992); KY. REV. STAT. ANN. § 423.010 (1992); LA. REV. STAT. ANN. § 35:191(A) (West 1985); MICH. COMP. LAWS ANN. § 55.107 (West 1991); MINN. STAT. ANN. § 359.01 (West 1991); MO. ANN. STAT. § 486.220 (Vernon 1987); NEV. REV. STAT. § 240.015(2) (Michie 1986); N.J. STAT. ANN. § 52: 7-12 (West 1986); N.M. STAT. ANN. § 14-12-2(B) (Michie 1988);

able to read and write the English language.[40] Both of these qualifications seem to be valid and have encountered little, if any, challenge. No doubt the exercise of the important powers possessed by notaries should certainly be limited to adult persons. However, the English literacy requirement might properly be subject to modification. With the diversity of languages in the United States, many commercial and legal transactions are conducted in languages other than English. The real concern should be that the notary be literate in the language of the document to be notarized or at least in the language of the individual to whom the oath is administered (unless, of course, an interpreter is available to act as an intermediary).[41]

Other requirements have not been so easily accepted. For example, most states at one time required that the applicant be a citizen of the United States and/or a resident of the state where the notary commission was sought. Texas had one such requirement. In the 1984 case of *Bernal v. Fainter*,[42] a Mexican native but long-time resident alien, applied to become a notary in the State of Texas.[43] He was denied a commission solely because he was not a United States citizen.[44] The United States Supreme Court, reversing the court of appeals,[45] held that such a requirement was an unconstitutional restriction under the Equal Protection Clause of the Fourteenth Amendment.[46]

The oath of office requirement has also met with some resist-

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OHIO REV. CODE ANN. § 147.01 (Anderson 1990); OKLA. STAT. ANN. tit. 49, § 1 (West 1988); PA. STAT. ANN. § 149 (Supp. 1992); TEX. GOV'T CODE § 406.004 (West 1990); UTAH CODE ANN. § 46(a)-1-3 (1988); WASH. REV. CODE ANN. § 42.44.020(a) (West 1991).

40. ARK. CODE. ANN. § 21-14-101(D) (Michie 1987); COLO. REV. STAT. § 12-55-104(b) (1991); GA. CODE ANN. § 45-17-2(4) (Harrison 1990); ILL. ANN. STAT. ch. 102, ¶ 202-102(g) (Smith-Hurd 1987); R.I. GEN LAWS. § 42-30-5 (1988).

41. California has recognized the basic problem that many people simply cannot understand the English language and have taken a positive step in this regard. There, notaries are permitted to advertise in any language they choose. CAL. GOV'T CODE § 8219.5 (West 1992). However, they are required to post a notice in English, that notifies the person of certain things. *Id.*

42. 467 U.S. 216 (1984).

43. Bernal v. Fainter, 467 U.S. 216, 218 (1984).

44. *Id.* There seems to be a hint in the Supreme Court's opinion that the Court believed that one of the reasons the Texas Secretary of State denied the commission was the proposed use of the commission—to aid migrant farm workers file claims. *Id.*

45. The court of appeals reversed the district court's memorandum opinion in Vargas v. Strake, 710 F.2d 190 (5th Cir. 1983), and the Supreme Court reversed the appellate court. The Supreme Court used a strict scrutiny test since the constitutional question was one of alienage. *Bernal*, 467 U.S. at 219-27. Since there was no relation "to the achievement of any valid state interest;" the statute was declared unconstitutional. *Id.* at 219. Justice Rehnquist dissented, citing his dissent in Sugarman v. Dougall, 413 U.S. 634, 649 (1973). *Id.* at 228 (Rehnquist, J., dissenting). In *Sugarman*, Justice Rehnquist argued that aliens should not be a suspect class, and therefore the statute differentiating citizens and aliens should be upheld. *Sugarman*, 413 U.S. at 649 (Rehnquist, J., dissenting).

46. *Bernal*, 467 U.S. at 227-28.

ance in the courts. Some oaths of office required, and still require, that the applicant acknowledge a belief in God.[47] The Maryland oath contained such a reference.[48] A Maryland man, who was also an atheist, objected to the oath and sued when he was denied his notary commission. In 1960, the Maryland Court of Appeals in *Torcaso v. Watkins*,[49] held that belief in God was a permissible constitutional requirement of the oath of office.[50] However, the United States Supreme Court disagreed in *Torcaso v. Watkins*.[51] Justice Black held for the court that an oath requiring a belief in God was repugnant to both the Maryland Constitution and the United States Constitution.[52]

Yet many states still have this "belief in God" requirement. This is unfortunate because it subjects these laws to needless constitutional attack. Moreover, the oaths could simply be modified to allow the prospective notary to solemnly swear he or she will uphold his or her duties of office responsibly *or* swear by God. This simple change would rectify the problem entirely.

Another typical requirement is that the applicant must have no felony convictions within a certain number of years prior to application. This type of provision has apparently gone unchallenged. The purpose of this condition of office is undoubtedly to prevent a person with a history of dishonesty from obtaining the position of notary.[53] If that is the purpose, exclusion simply of felons is an ineffective means to that end because the exclusion is both overinclusive and underinclusive. Not all crimes involving dishonesty are felonies. Offenses such as check fraud and petty thefts are classified as misdemeanors. Yet, these offenses reflect

47. For example, Georgia requires each notary to take the following oath:

> I, [name], do solemnly swear or affirm that I will well and truly perform the duties of a notary public to the best of my ability; and I further swear or affirm that I am not the holder of any public money belonging to the state and unaccounted for, *so help me God*.

GA. CODE ANN. § 45-17-3 (Harrison 1991) (emphasis added). Tennessee has a similar oath. TENN. CODE ANN. § 8-16-204 (1988).

48. MD. ANN. CODE art. 68, §§ 1-10; art. 70, § 7 (1957).

49. 162 A.2d 438 (Md. 1960), *rev'd*, 367 U.S. 488 (1961).

50. Torcaso v. Watkins, 162 A.2d 438, 442-43 (Md. 1960), *rev'd*, 367 U.S. 488 (1961). In a similar case, an oath requiring a statement that the affiant is not a member of a group advocating the overthrow of a government was held constitutional. Wirin v. Ostly, 13 Cal. Rptr. 31 (Dist. Ct. App. 1961).

51. 367 U.S. 488 (1961).

52. Torcaso v. Watkins, 367 U.S. 488, 495 (1961).

53. *See, e.g.*, CAL. GOV'T CODE § 8214.1 (West 1992); COLO. REV. STAT. § 12-55-104, -107 (1991); CONN. GEN. STAT. ANN. § 3-94(b) (West Supp. 1992); ILL. ANN. STAT. ch. 102, ¶ 202-102 (Smith-Hurd Supp. 1992); KAN. STAT. ANN. § 53-118 (1983); LA. REV. STAT. ANN. § 35:191 (1985); MO. ANN. STAT. § 486.385 (Vernon 1987); N.M. STAT. ANN. § 14-12-2 (Michie 1988); OR. REV. STAT. § 194.022 (1991).

directly upon the integrity of an individual. On the other hand, many felonies such as manslaughter and aggravated battery have little to do with the veracity of an individual. These inconsistencies leave the provisions regarding exclusion of felons open to substantial doubt, and susceptible to constitutional attack. In these cases, and unless some protected class is involved, the law requires only that there be a rational relationship between the statute and the government purpose for passing the statute.[54] Nonetheless, such an immensely overinclusive and underinclusive provision might be struck on a rational relationship basis. This situation is especially unfortunate since the statute could easily be amended to rectify the problem by simply enumerating those crimes which affect a person's ability to become or remain a notary.[55]

IV. AUTHORITY OF NOTARIES

Once a notary's commission is approved, he or she is vested with a number of powers and duties. These vary depending on the state in which the notary holds the commission. Nearly all states recognize certain powers and responsibilities, however. A notary is an officer of the court, somewhat like an attorney.[56] Yet, unlike an attorney, the court has very little control over the notary's commission because the notary is usually regulated (and disciplined) by the secretary of state or some other agency of a non-judicial branch.[57] The duties of the notary are ministerial rather than judicial.[58] As a result, the fees a notary may charge for his or her services are often tightly regulated and nominal.[59] For

54. *See* Frontiero v. Richardson, 411 U.S. 677 (1973). "Under 'traditional' equal protection analysis, a legislative classification must be sustained unless it is 'patently arbitrary' and bears no rational relationship to a legitimate governmental interest." *Id.* at 683.

55. New York has one such law which enumerates the crimes which cannot be committed by an applicant. N.Y. EXEC. LAW § 6-130 (McKinney 1982).

56. 58 AM. JUR. 2D § 3 *Notaries Public* (1989) (citing People v. Rathbone, 40 N.E. 395 (1895) (discussing whether notary is public officer as defined in state constitution)).

57. *See* Zelik v. Secretary of State, 562 N.Y.S.2d 101 (App. Div. 1990) (secretary suspending notary's commission for dishonesty); Yankopoulos v. State, 478 N.Y.S.2d 633, 634 (App. Div. 1984) (question of law as to whether notary was practicing law raised a serious question of whether Secretary of State, Department Disciplinary Committee or Attorney General is to make a determination); Patterson v. Department of State, 312 N.Y.S.2d 300, 303 (App. Div. 1970) (notary answers to Secretary of State for misconduct); Klein v. Department of State, 237 N.Y.S.2d 1, 2 (App. Div. 1963) (Department of State is to determine credibility of witness in hearing to determine whether to revoke notary public's license).

58. *See* Sicard v. Sicard, 426 So. 2d 299, 301 (La. Ct. App. 1983) (notary appointed to effect a partition must act fairly and impartially, but is not an administrator of the estate).

59. CAL. GOV'T CODE § 8211 (West 1992) ($5 per act); CONN. GEN. STAT. ANN. § 3-95 (West Supp. 1992) ($2 per act and $.25 per mile of travel); GA. CODE ANN. § 45-17-11 (Harrison 1991) ($4 per act); IDAHO CODE § 51-110(1) (1988) ($2 per act); ILL. REV. STAT

example, Illinois notaries may charge not more than one dollar for each notarial act.[60] In Arkansas, a notary may charge up to five dollars for each act.[61] In sum, the notary is a quasi-judicial and nominally-paid officer acting on behalf of the court but controlled by the legislative and executive branches.

Generally speaking, all notaries have the power to administer oaths to people in the same manner as courts.[62] This power is beyond that of laypersons and applies in a variety of settings including depositions[63] and attestation of signatures.[64] Violation of this oath by the affiant constitutes perjury and is punishable like any other perjurious act by a court.[65]

A distinction between notaries public and court reporters needs to be drawn. A notary public is one who, after applying for and being found to meet the requisites of the office, is designated as a notary. A court reporter is one who transcribes the conversations between parties at a deposition or court proceeding. Although both titles are invariably held by the same person, the distinction in roles is an important one. The notary is a public official with the powers vested in him or her by the licensing authority and the court. The court reporter is a private individual who is paid a wage for transcription, and thus, his or her motives are not necessarily virtuous. If and when the deponent is sanctioned while in a deposition, it is only because the notary had the power to do so, not the court reporter.

The United States Supreme Court has even held that the notary has the power to hold an affiant in contempt, as a court

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ANN. ch. 102, ¶ 203-104 (Smith-Hurd 1987) ($1 per act); N.Y. EXEC. LAW § 136(1) (McKinney Supp. 1992) ($2 per act).

60. ILL. REV. STAT. ANN. ch. 102, ¶ 203-104 (Smith-Hurd 1987).

61. ARK. CODE ANN. § 21-6-309 (1987 & Supp. 1991).

62. *See supra* note 4 (citing cases stating notaries may administer oaths).

63. Bevan v. Krieger, 289 U.S. 459, 464 (1933) (notary may take deposition); Gormley v. Bunyan, 138 U.S. 623, 632 (1891) (notary may take deposition); Nord v. Mcmillan, 215 N.E.2d 919, 923 (Ohio C.P. Clermont County 1966) (notary should have discretion to permit party not to answer questions on deposition that are not relevant to case); Clifford v. Allman, 24 P. 292, 292 (Cal. 1890) (discussing the power to take depositions).

64. *In re* Estate of Martinez, 664 P.2d 1007, 1013 (N.M. Ct. App. 1983) (notary public is one who is authorized to attest to authenticity of signatures); Ardis v. State, 380 So. 2d 301, 304 (Ala. Crim. App. 1979) (notaries must ascertain identity of person whose signature they attest); *In re* Douglas' Will, 83 N.Y.S.2d 641, 649-50 (Sur. Ct. 1948) (notary certifying to the subscript before him of an instrument acts incidentally as a witness); United States v. Mosby, 133 U.S. 273 (1890) (consul to embassy may attach own seal as evidence of his own character); Hitz v. Jenks, 123 U.S. 297, 303-04 (1887) (signature attested and admitted despite extrinsic evidence); New Orleans Nat'l Banking Ass'n v. LeBreton, 120 U.S. 765 (1887) (a holder of duly authorized and attested note need not give notice to anyone except debtor in possession).

65. *In re* Thomas, 134 U.S. 372 (1890) (discussing early federal law which made lie under oath made before notary to be perjurious).

would do. The case of *Bevan v. Krieger*[66] involved a swindle of monies of an executor. The attorneys for the wife of the Ohio deceased sought to depose three people. Three witnesses were served with subpoenas. One deponent was required to bring papers with him and the others were to appear personally. One of the witnesses refused to answer questions in the deposition, which was conducted before a notary. The witness was eventually held in contempt by the notary and arrested.[67] The Court, speaking through Justice Roberts, held that a notary was competent to judge a valid exercise of a witness' privilege under Ohio law.[68] This was true in *Bevan* where the deponent "refused to answer [any further] questions or to produce the writings enumerated in his subpoena."[69] His complete refusal made the decision to hold him in contempt an easy one for the Court.[70] The power of an Ohio notary to hold a reluctant witness in contempt still exists today.[71]

One of the most important and frequently used powers of a notary public is the power to attest to signatures. Typically, the scenario is that (1) the person whose signature is to be notarized presents evidence sufficient to satisfy the notary that the person is who he or she claims to be,[72] (2) the person then signs his or her

66. 289 U.S. 459 (1933).
67. Bevan v. Krieger, 289 U.S. 459, 462 (1933).
68. *Id.* at 464.
69. *Id.* at 463.
70. *Id.* at 466.
71. Gall v. Saint Elizabeth Medical Ctr., 130 F.R.D. 85 (S.D. Ohio 1990) (Ohio notaries have authority to compel court attendance of witnesses at depositions and to punish them for refusing to testify); Gargan v. State, 805 P.2d 998, 1004 (Alaska Ct. App. 1991) (notarized statement was a sworn statement for purposes of perjury).
72. The person must appear personally and must provide sufficient evidence to prove he or she is who he or she claims to be, but if the signatory is personally known by the notary, no identification is needed. *See* City Consumer Serv., Inc. v. Metcalf, 775 P.2d 1065, 1068 (Ariz. 1989) (*en banc*) (notary negligent in executing certification of acknowledgement when notary did not know person and failed to ask for identification); Farm Bureau Fin. Co., Inc. v. Carney, 605 P.2d 509, 515 (Idaho 1980) (notary must request identification but is not liable if acting reasonably in believing false identification); Bernd v. Fong Eu, 161 Cal. Rptr. 58, 62 (Ct. App. 1979) (actionable negligence occurs where a notary fails to use diligence in ascertaining the identity of person whose acknowledgment is being certified); Ardis v. State, 380 So. 2d 301, 305 (Ala. Crim. App. 1979) (notary must ascertain identity of person whose signature they attest); Transamerica Title Ins. Co. v. Green, 89 Cal. Rptr. 915, 919 (Ct. App. 1970) (degree of acquaintance sufficient to authorize notary to certify that he possesses personal knowledge of such person); *In re* Scott, 464 P.2d 318, 318 (Or. 1970) (notarizing without appearance is reprimandable). *See also* Lewis v. Agricultural Ins. Co., 82 Cal. Rptr. 509, 513 (Ct. App. 1969) (notary who notarizes without appearance of witness can be reprimanded); Butler v. Olshan, 191 So. 2d 7, 16 (Ala. 1966) (notary must witness signatures to certify them); *In re* Estate of Bokey, 194 A.2d 194, 198 (Pa. 1963) (notary must know he is presented with signatory); Manufacturers Acceptance Corp. v. Vaughn, 305 S.W.2d 513, 522 (Tenn. Ct. App. 1956) (person introduced as signatory was sufficient proof); Lowe v. Wright, 292 S.W.2d 413, 420 (Tenn. Ct. App. 1956) (discussing the duty of a notary to exercise reasonable care to prevent imposition); State v. Heyes, 269 P.2d 577, 582 (Wash. 1954) (failure of notary to require presence of signer, and failure to require oath when

name to the subject document in the presence of the notary, and (3) the notary then formally witnesses the signature by affixing the notarial seal or stamp and by signing and dating the document.[73] This attestation by a notary is required on many court and state agency filings.[74] With this verification, other people can more readily rely on a document when they cannot personally observe the completion of the transaction (which occurs upon the signing of the document by the individual whose signature is notarized).[75]

Most statutes also allow a signature not endorsed in the presence of the notary to be acknowledged as the signatory's and then notarized.[76] This corollary to verification provides more leeway in the use of a notary's commission. A person may simply sign a document at some prior time when it is convenient and then, when a notary is present, acknowledge under oath that the signature on the document is his or her own.

In order to properly notarize a signature on a document, a notary should not simply verify the identity of the signatory and then sign his name. The law should demand that the notary's seal be affixed, if one is so required. Similarly, a notary should not merely affix his seal without signing and dating the document. All three steps (signing, dating, sealing) should be required in the

signer is present raises serious questions of whether solemn oath was actually administered or taken); UNIFORM LAW, *supra* note 26, § 2, Committee Comments.

73. *See In re* Estate of Martinez, 664 P.2d 1007 (N.M. Ct. App. 1983) (notary must affix his signature on document); Ardis v. State, 380 So. 2d 301 (Ala. Crim. App. 1979) (notary must ascertain identity of signers before signing himself); Vanderhoof v. Prudential Savings and Loan Ass'n, 120 Cal. Rptr. 207 (Ct. App. 1975) (notary's duty is to certify that acknowledgement was valid); Hitz v. Jenks, 123 U.S. 297, 303 (1887) (notary's attestation is conclusive proof); New Orleans Nat'l Banking Ass'n v. Le Breton, 120 U.S. 765 (1887) (acknowledged by notary); *In re* Douglas Will, 83 N.Y.S.2d 641 (Sur. Ct. 1948) (notary is a witness when attesting).

74. For example, many pleadings must be verified. All depositions must be notarized, most proofs of service, and interrogatory answers, also require a notary's attestation. Virtually all mortgages must be notarized as well as their accompanying notes. In fact, nearly every important contract requires notarization. *See* Porter v. Hoffman, 592 A.2d 482, 485 (Me. 1991) (adoption consent document requires notarization).

75. In its most basic form, the notary developed because of a lack of trust. For example, a person who is making a substantial investment in real estate wants to be sure that the person signing the document really was the underscored person. The notary serves as the middleman who is neutral and trusted by both sides. The convenience and reliability renders notaries a necessity today. *See also supra* n.6.

76. Black's defines acknowledgement as "to admit . . . as genuine." BLACK'S LAW DICTIONARY 21 (5th ed. 1979). Many states recognize the power of notaries to take acknowledgments. *See, e.g.*, CAL. GOV'T CODE § 8205 (a)(2) (West 1992) (duty to take acknowledgments); DEL. CODE ANN. tit. 29, § 4308 (1991) (power to take acknowledgments); FLA. STAT. ANN. § 117.04 (West 1982) (may acknowledge deeds); ILL. ANN. STAT. ch. 102, ¶ 206-102(a) (Smith-Hurd 1987) (discussing requirements for taking acknowledgments); IOWA CODE ANN. § 77A.2 (West 1992) (acknowledgment power); N.Y. EXEC. LAW § 6-135 (McKinney 1982) (can receive and certify acknowledgments); *see also* Porter v. Hoffman, 592 A.2d 482 (Me. 1991) (acknowledgment of signatures held sufficient to satisfy adoption statute).

usual case.[77] However, if litigation were to place into question the validity of a notarization due to technical error by the notary, a court could and indeed should permit substantial good faith compliance with the statute to validate the document.[78]

Some jurisdictions have tremendously expanded the powers of notaries. For example, in Louisiana, with its civil law tradition, notaries have much more expansive powers which seem to combine those of a court and a justice of the peace. They may "make inventories, appraisements, and partitions: . . . receive wills, . . . matrimonial contracts, . . . all contracts and instruments of writing; [and] . . . hold family meetings and meetings of creditors; . . . ."[79] California also allows its notaries more latitude than most states. They may "demand acceptance and payment of foreign and inland bills of exchange, or promissory notes, to protest them for nonacceptance and nonpayment" and other duties as authorized by the laws of any other state or country.[80] And yet the burdens on notaries increase in such states as well, sometimes requiring the notary to keep a journal of transactions conducted[81] and take exams to become a notary in that state.[82]

In addition, there are some limits on the typical notary. In most instances, the commission is issued in a particular county of the state.[83] In fact, ordinarily the last step in the bureaucratic procedure to become a fully commissioned notary is to register the commission in the home county. This step may also require payment of an additional registration fee. Until this process is com-

77. Fabe v. Floyd, 405 S.E.2d 265 (Ga. Ct. App. 1991) (otherwise valid notarization is invalid for lack of seal on document).

78. *Cf.* Gargan v. State, 805 P.2d 998 (Alaska Ct. App. 1991) (statement in front of notary held to be sworn statement even without proof of oath where signed above "sworn and subscribed" line and notarized).

79. LA. REV. STAT. ANN. § 35:2 (West 1985). Wills also must be read aloud by notaries in the presence of the testator. Succession of Harvey, 573 So. 2d 1304 (La. Ct. App. 1991).

80. CAL. GOV'T CODE § 8205 (West 1992). However, powers do not always cease there; in Florida a notary might solemnize marriages. FLA. STAT. ANN. § 117.04 (West 1982 & Supp. 1992). In fact, a notary has often been likened to a justice of the peace since they are both appointed yet ministerial positions. *Id.* at 8. *See also* MASS. GEN. L. ch. 222, § 1 (1991) (appointment in same manner as justice of the peace).

81. California notaries are burdened by a requirement that they keep a journal of all notarial acts. Bernd v. Fong Eu, 161 Cal. Rptr. 58 (Ct. App. 1979) (citing CAL. GOV'T CODE § 8206 (West 1992)). Other states have, or at one time have had, this requirement as well. Sapp v. Wilson, 91 B.R. 520 (Bankr. E.D. Mo. 1988) (failure of notary to retain record of action not actionable because no harm accrued as a result); Mortensen v. Pacific Indem. Co., 479 P.2d 288 (Colo. Ct. App. 1970) (citing COLO. REV. STAT. § 96-1-3 (1963)) (journal requirement, although failure to keep record did not result in bond forfeiture).

82. Several states have an exam requirement. *See, e.g.*, CAL. GOV'T CODE § 8201(e) (West 1992).

83. *See, e.g.*, LA. REV. STAT. ANN. § 35:1 (West 1985) (notaries appointed to specific parishes only).

plete, one is not truly a qualified notary.[84] The notary must also continue to reside in this county or region during the life of his or her commission but usually may execute documents throughout the state. The state's borders are the limit of the notary's power.[85]

Another question of some concern, especially to those who reside on the border of two or more states or who travel frequently, is whether a person may be a notary in more than one state. Because no state can require a person to be a citizen of the United States,[86] it might also seem comprehensible that no state could require the notary to be a resident of its state. States have sometimes adopted a prohibition against a notary being commissioned in more than one state.[87] The usual manner in which this limitation is accomplished, however, is by requiring that the notary be a resident in the state.[88] A second statute is sometimes

84. For a discussion of what methodology a court should employ when considering whether a person was a notary in law or fact, see the discussion concerning *de facto* notaries, *infra* notes 95-97 and surrounding text.

85. Garza v. Serrato, 699 S.W.2d 275 (Tex. Ct. App. 1985) (Texas notary cannot hold deposition in New Mexico); Shipley v. Stephenson County Electoral Bd., 474 N.E.2d 905 (Ill. Ct. App. 1985) (power to administer oaths in state as long as notary lives in county of appointment); Lewis v. City of Liberty, 600 S.W.2d 677 (Mo. Ct. App. 1980) (deposition sworn before notary public in adjoining county of adjoining state invalid because not within state); Commonwealth v. Frey, 392 A.2d 798 (Pa. Super. Ct. 1978) (within state); *but see* United Serv. Auto. Ass'n v. Ratterree, 512 S.W.2d 30, 32-33 (Tex. Ct. App. 1974) (notary's power to perform duties limited to that county of appointment, *not* other counties in state).

86. Courts have agreed that a United States citizenship requirement is not a constitutional limitation on the ability to be a notary. *See* Bernal v. Fainter, 467 U.S. 216 (1984); Jii v. Rhodes, 577 F. Supp. 1128 (S.D. Ohio 1983); Cheng v. State of Illinois, 438 F. Supp. 917 (N.D. Ill. 1977); Taggart v. Mandel, 391 F. Supp. 733 (D. Md. 1975); Opinion of the Justices, 554 A.2d 466 (N.H. 1989); Babcooke v. Duncan, 486 So. 2d 431 (Ala. 1986); Graham v. Ramani, 383 So. 2d 634 (Fla. 1980).

However, the vast majority of states require residency before a commission is granted. *See, e.g.*, LA. REV. STAT. ANN. § 35:191(A) (West 1985) (residency required); VT. STAT ANN. tit. 24, § 441(c) (Supp. 1991) (residency required); WIS. STAT. ANN. § 137.01(a) (West 1989) (residency required to be notary); WYO. STAT. § 32-1-101 (1977) (residency required); *but see* N.J. STAT. ANN. § 52:7-13 (West 1986) (residency not required but must live in contiguous state and maintain an office or be regularly employed in state); N.Y. EXEC. LAW § 130 (McKinney Supp. 1992) (residency not required but must live in contiguous state and maintain an office or be regularly employed in state).

87. *See, e.g.*, IOWA CODE ANN. § 77.17 (West 1990) (repealed).

88. All states have some sort of requirement that notary be a resident of the state, or reside in a contiguous state and do extensive business in the state. *See, e.g.*, ALASKA STAT. § 44.50.020 (1989) (residency required); CAL. GOV'T CODE § 8201(a) (West 1982) (residency required); CONN. GEN STAT. ANN. § 3-94b(b)(2) (West Supp. 1992) (residency required); D.C. CODE ANN. § 1-801(a) (1991) (residency required or sole place of business); FLA. STAT. ANN. § 117.01(1) (West 1982) (residency required); GA. CODE ANN. § 45-17-2.1 (a)(1) (Harrison 1991) (residency required or non-resident with regular employment in state); HAW. REV. STAT. § 456-2 (1985) (residency required); IND. CODE ANN. § 33-16-2-1 (a)(2) (Burns 1992) (residency required); IOWA CODE ANN. § 77A.3 (West 1992) (residency required or bordering state resident and business); KY. REV. STAT. ANN. § 423.010(1) (Michie/Bobbs-Merrill 1992) (residency required); LA. REV. STAT. ANN. § 35:191(A) (West 1985) (residency required); ME. REV. STAT. ANN. tit. 5, § 82 (West 1989) (residency required); MD. ANN. CODE art. 68, § 1(b) (1988) (residency required); MICH. COMP. LAWS ANN. § 55.107 (West 1991) (residency required); MINN. STAT. ANN. § 359.01(1), (2) (West

added that automatically revokes a commission in another state.[89]

The residency requirement, mandating that a prospective notary reside in the state for a certain period of time before being eligible for a commission, has never been challenged in the courts. It is difficult to predict how a court might rule on constitutional grounds on such a question. However, if the statute requires residency for only a short period of time and seems to be based on administrative convenience, it is much more likely to be upheld.[90] Similarly, the revocation of a commission upon movement from the state has not been challenged. It may be more subject to attack as an unconstitutional restraint on a place to live under an Equal Protection analysis. There may be a good analogy for this argument to the Equal Protection cases concerning the practice of law.[91]

A notary's commission does not last indefinitely. All states mandate that commissions expire after a certain number of years. This time varies from two to ten years with the average appearing to be about four years.[92] Renewal is usually just a matter of filling

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1991) (requiring that notary must be resident of state or be a resident of bordering state); N.M. STAT. ANN. § 14-12-2 (a) (Michie 1988) (residency required).

89. CAL. GOV'T CODE § 8203.4 (West 1982) (government employment in certain cases revoked); CONN. GEN. STAT. ANN. § 3-94c(a)(2) (West Supp. 1992); N.Y. EXEC. LAW § 130 (McKinney Supp. 1992) (failure to notify results in revocation).

Other states limit the notary's commission to the county in which it was issued and if the notary moves without proper notification, the commission is revoked. LA. REV. STAT. ANN. § 35:191(E) (West 1985); MINN. STAT. ANN. § 359.07(1) (West 1991); MO. ANN. STAT. § 486.315 (Vernon 1987); N.C. GEN. STAT. § 10A-13 (1991); PA. STAT. ANN. tit. 57, § 153 (1964); VA. CODE ANN. § 47.1-18 (Michie 1989); WYO. STAT. § 32-1-101(b) (1991).

90. Of course this assumes the statute is otherwise valid constitutionally. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 508 (1989) (citing Frontiero v. Richardson 422 U.S. 677 (1973) (plurality opinion)). If it is, it seems clear that the mere fact that a person is required to stay a period of time before the commission could vest, is a constitutionally legitimate requirement.

91. *See In re* Griffiths, 413 U.S. 717 (1973) (speaking to equal protection, the right to practice law, and resident aliens).

92. ALA. CODE § 36-20-30 (1991) (4 years); ALASKA STAT. § 44.50.030 (1989) (4 years); ARK. CODE ANN. § 21-14-101 (Michie Supp. 1991) (10 years); CAL. GOV'T CODE § 8204 (West 1982) (4 years); COLO. REV. STAT. § 12-55-103 (1991) (4 years); CONN. GEN. STAT. ANN. § 3-94c(a) (West Supp. 1992) (5 years); DEL. CODE ANN. tit. 29, § 4306 (1991) (2 years); GA. CODE ANN. § 45-17-5(a) (Harrison 1990) (4 years); HAW. REV. STAT. § 456-1 (1985) (4 years); IDAHO CODE § 51-103(2) (1988) (6 years); ILL. ANN STAT. ch. 102, ¶ 202-101 (Smith-Hurd 1987) (4 years); IND. CODE ANN. § 33-16-2-1(b) (Burns 1992) (4 years); IOWA CODE ANN. § 77A.4 (West 1992) (3 years); KAN. STAT. ANN. § 53-101 (1983) (4 years); KY. REV. STAT. ANN. § 423.010(1) (Michie/Bobbs-Merrill 1992) (4 years); ME. REV. STAT. ANN. tit. 5, § 82 (West 1989) (7 years); MD. ANN. CODE art. 68, § 1(d)(1) (1988) (4 years); MINN. STAT. ANN. § 359.02 (West 1991) (6 years); MISS. CODE ANN. § 25-33-1 (1991) (4 years); MO. ANN. STAT. § 486.215 (Vernon 1987) (4 years); MONT. CODE ANN. § 1-5-403 (1991) (3 years); NEV. REV. STAT. ANN. § 240.020 (Michie 1986) (4 years); N.J. STAT. ANN. § 52:7-11(a) (West 1986) (5 years); N.M. STAT. ANN. § 14-12-4 (Michie 1988) (4 years); N.Y. EXEC. LAW § 130 (McKinney 1982) (2 years); OHIO REV. CODE ANN. § 147.03 (Anderson 1990) (5 years); OR. REV. STAT. § 194.012 (1991) (4 years); PA. STAT. ANN. tit. 57, § 148 (1964 & Supp. 1992) (4 years); S.C. CODE ANN. § 26-1-10 (Law. Co-op. 1991) (10 years); TENN. CODE ANN. § 8-16-103 (1988) (4 years); TEX. GOV'T CODE ANN. § 406.002 (West 1990) (4 years); UTAH CODE

out the new forms, renewing the bond, paying the fee, and registering the commission again in the county of residence.[93]

But what results when, for example, a notary's commission is renewed but he or she fails to register his or her new commission and, in the interim, verifies the signatures on a document? Few courts would place form over substance and throw out the otherwise-valid agreement. The question becomes how to accomplish the intended purpose. This is especially problematic when the document that has been signed cannot be re-executed, such as a will postmortem. Such was the case in *Succession of Galway*.[94] There, a Louisiana appellate court used a little-known creature called the "*de facto* notary."[95] A *de facto* notary is one whose commission is invalid because of some technicality unbeknownst to the parties and the notary, yet valid in all other respects.[96] The *de facto* notary determination allowed the court to achieve a just result without having to subvert the statute in any significant manner. Other courts have used this same procedure.[97]

V. LIABILITY FOR MALFEASANCE

The standard for liability of a notary public is one common to tort law. The notary must act as a reasonably prudent notary would act in the same situation.[98] Thus, the notary cannot act neg-

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ANN. § 46-1-3(4) (1988) (4 years); VA. CODE ANN. § 47.1-21 (Michie 1989) (4 years); WASH. REV. CODE ANN. § 42.44.060 (West 1991) (4 years); W. VA. CODE § 29C-2-102 (1992) (10 years).

93. *See, e.g.*, CONN. GEN. STAT. ANN. § 3-94b (e) (West Supp. 1992) (fee of $5).

94. 483 So. 2d 662 (La. Ct. App. 1986).

95. Succession of Galway, 483 So. 2d 662, 665 (La. Ct. App. 1986).

96. *Id.*

97. *See In re* Initiative Petition No. 347 State Question No. 639, 813 P.2d 1019 (Okla. 1991) (clerical and technical errors by notary's jurat do not impeach affidavit, but lapsed notary's license does); State *ex rel.* Marquis v. United States Fidelity & Guar. Co. 424 S.W.2d 199 (Tenn. Ct. App. 1966) (failure to receive commission did not affect notarization when all else proper); Haynes v. State, 374 S.W.2d 394 (Tenn. 1964) (allowing notary to be considered *de facto* officer); Hood v. Cravens, 218 S.W.2d 71 (Tenn. Ct. App. 1948) (omission of signature on commission did not render it invalid).

98. Naquin v. Robert, 559 So. 2d 18 (La. Ct. App. 1990) (reasonably prudent notary in same community); Independence Leasing Corp. v. Aquino, 445 N.Y.S.2d 893 (Buffalo City Ct. 1981) (notarial liability is based in common law); Summers Bros., Inc. v. Brewer, 420 So. 2d 197 (La. Ct. App. 1982) (willful and wanton conduct subjects notary to liability); Garton v. Title Ins. and Trust Co., 165 Cal. Rptr. 449 (Ct. App. 1980) (taking false acknowledgment negligently or intentionally was misconduct); Werner v. Werner, 526 P.2d 370 (Wash. 1974) (must act reasonably); *In re* Killingsworth, 270 So. 2d 196 (La. Ct. App. 1973) (reasonable skill and diligence required); Transamerica Title Ins. Co. v. Green, 89 Cal. Rptr. 915 (Ct. App. 1970) (must perform job with diligence and skill); Commercial Union Ins. Co. v. Burt Thomas-Aitken Constr. Co., 253 A.2d 469 (N.J. 1969) (liable for negligence); Johnson v. State, 238 N.E.2d 651 (Ind. 1968) (reasonable person standard); Immerman v. Ostertag, 199 A.2d 869 (N.J. Super. Ct. Law Div. 1964) (perform job with diligence); Klein v. Department of State, 237 N.Y.S.2d 1 (App. Div. 1963) (fraud supports finding of improper conduct); Levy v. Western Casualty & Surety Co., 43 So. 2d 291 (La. Ct. App. 1949) (must act as reasonably prudent "business man").

ligently, recklessly, or willfully and escape liability.[99] The burden is on the plaintiff to show that the notary acted below his or her job's standard of performance.[100]

The statutory requirements of a particular state will inevitably set out what the notary's responsibilities are. The notary's responsibilities to the parties of a transaction are limited to that narrow range and once fulfilled, the notary, and thus his or her surety, is exonerated.[101]

For instance, the notary is generally only liable for actions committed as a notary (*i.e.* attesting signatures). By witnessing a signature, the notary is not attesting to the validity or legal effect of the document on which the signature appears.[102] Negligent legal advice on the part of a notary-lawyer does not result in an action for damages against the notary. Rather, the claim is properly heard as a legal malpractice action.[103] In fact, *Vanderhoof v. Prudential Savings and Loan Ass'n*[104] stands for the proposition that a notary need not speak up even if he or she knows the document is legally invalid.[105] This limit applies as long as the person is acting as a notary. For example, if an attorney acts as a notary to a transaction and nothing more, his or her knowledge as an attorney of the legal effect of the document is irrelevant. However, if the same attorney then volunteers that the document is invalid, he or she can be held liable for any inaccuracies in his or her assessment as an attorney (not to mention several potential ethical breaches if he or she subsequently modifies the agreement for the parties). But, if a notary-attorney counsels his client to falsely sign a document and then the attorney notarizes that signature, loss of the attorney-notary's notarial license and suspension of the law license

99. Marine Midland Bank v. Stanton, 556 N.Y.S.2d 815 (Sup. Ct. 1990) (notary liable if acts negligently, willfully or fraudulently).

100. *See* State *ex rel.* Koste v. Maryland Casualty Co. of Baltimore, 335 S.W.2d 510 (Mo. Ct. App. 1960). The statute of limitations for negligence should also apply to acts of notary misconduct unless a special limitation period applies. Kohout v. Adler, 327 S.W.2d 492 (Mo. Ct. App. 1959) (special statute of limitations for notarial misconduct).

101. Sitton v. American Ins. Co., 390 S.W.2d 34 (Tex. Ct. App. 1965) (notary's surety not liable when notary allowed alteration to deed *after* notarization completed because notarial responsibilities fulfilled); State *ex rel* Nelson v. Hammett, 203 S.W.2d 115 (Mo. Ct. App. 1947) (only liable for damages resulting from wrongful performance of official duties).

102. Dale v. Carriere, 537 So. 2d 346 (La. Ct. App. 1988) (form of will invalid, however, notary not liable for notarizing); *In re* LaSalle v. Clark, 503 So. 2d 694 (La. Ct. App 1987) (notary who prepared deed was not warranting good title).

103. Alternatively, if a nonlawyer/notary gives negligent legal advice, that claim is properly heard only as a claim for unauthorized practice of law, not notarial misconduct.

104. 120 Cal. Rptr. 207 (Ct. App. 1975).

105. Vanderhoof v. Prudential Savings & Loan Ass'n, 120 Cal. Rptr. 207, 209-10 (Ct. App. 1975).

is proper.[106] Of course, a notary may not escape liability when he or she attests his or her own signature or a document in which he or she has an "interest".[107]

A question that has escaped treatment in the courts is an explanation of what constitutes an interest in a document. One definition describes an interest as "a right, claim, title, or legal share in something. . . . The word 'interest' is used throughout the Restatement of Torts, Second, to denote the object of any human desire."[108] In matters concerning notaries public, the question becomes whether they, in the performance of their duties, may be put into positions in which they are subject to "objects of human desire."

Courts in making this determination do not, however, write on a clean slate. There are some analogous situations in a number of fields. For instance, judges often excuse themselves because they have some interest in the litigation pending before them. Perhaps more closely analogous to the notary situation, a beneficiary is sometimes disqualified from taking any part of an estate in which he was a witness to the will. These analogies provide established case law upon which judges can draw to aid in the determination of whether the notary had an interest in a document attested by the notary.

And yet, in one sense, every notary has some interest in a transaction in which she performs her services. The notary is entitled to her fee for performance of the attestation and therefore has an interest in every transaction—albeit a nominal one. The question for the courts is whether the interest of the notary at the time of the notarial act should be sufficient to disqualify the notary and to invalidate the attested signature(s).

Suppose, for instance, an attorney prepares a legal document for her client's signature. The attorney also happens to be a notary public, so she notarizes her client's signature. Should this be upheld? Arguably not. The attorney is hired as a professional to

106. *In re* West, 805 P.2d 351, 359 (Alaska 1991); *In re* Holmay, 464 N.W.2d 723, 724 (Minn. 1991).

107. Rorick v. Devon Syndicate, Ltd., 307 U.S. 299, 304 (1939) (attorney who acted as notary for petitioner, and was previously employed by company of which petitioner was president, was not an interested party); Loucks v. Carl Foster & Wards Used Cars, 334 F.2d 86 (6th Cir. 1964); Bank of Am. Nat'l Trust and Sav. Ass'n v. Dowdy, 9 Cal. Rptr. 779, 782 (Ct. App. 1960) (executing document in which notary had interest was misconduct); State v. Hammett, 203 S.W.2d 115, 119 (Mo. Ct. App. 1947) (cannot execute duties of notary when notary has an interest). *See also* Dementas v. Estate of Tallas, 764 P.2d 628, 629 (Utah Ct. App. 1988) (notary notarized document in which he was the author and signatory).

108. BLACK'S LAW DICTIONARY 812 (6th ed. 1991).

do legal work for the client, often for a substantial fee. By preparing the document, the attorney has a very real interest in seeing the transaction to fruition to ensure the collection of her legal fee. She no longer stands as an objective and independent witness, but as a proponent of her own interests. The total destruction of impartiality should also destroy the notary-attorney's ability to notarize her client's signature on her legal work.[109]

What result when one of the attorney's co-workers in the firm notarizes the client's signature? Arguably, the law partner or secretary's notarization need not be invalidated. In a very real sense, they both have an interest in the transaction—if for no other reason than continued prosperous growth of the business. Yet they lack the extensive involvement seen in the previous example. Their role is much more one of performing their duties with integrity and in accord with reasonably prudent notary standards.[110]

If the notary violates the reasonably prudent notary standard, the notary is personally liable[111] for all proximately caused injuries.[112] Thus, the usual elements for a cause of action sounding in negligence or breach of contract must be established for a plaintiff

109. This does not necessarily mean that the notary's acts should be thrown out and thus the signature declared invalid. Rather, the proper result is that the door is opened to *challenge* the notarial act. If the challenger can show that the notary did in fact commit fraud or acted below the reasonably prudent notary standard, that act is properly thrown out.

110. Any close-knit relationship between the notary and signatory might be grounds for disqualification of the notary. For example, immediate family members of the signatory should not be allowed to notarize their relative's signature.

111. Beneficial Mortgage Co. of Ind. v. Powers, 550 N.E.2d 793, 798-99 (Ind. Ct. App. 1980) (where negligent notary not proximate cause of plaintiff's loss so not liable); Garton v. Title Ins. and Trust Co., 165 Cal. Rptr. 449, 455 (Ct. App. 1980) (falsely executed deed of trust, notary liable for proximately caused damages); Oakland Bank of Sav. v. Murfey, 9 P. 843, 847 (1886) (notary liable for all proximately caused damages). Thus, to the extent the bond does not cover the loss, the notary is required to compensate the victim for the difference.

112. *See, e.g.*, Beneficial Mortgage Co. of Ind. v. Powers, 550 N.E.2d 793 (Ind. Ct. App. 1980) (despite negligent notarization, no cause of action when loss is not proximately caused by negligence); Kirk Corp. v. First Am. Title Co., 270 Cal. Rptr. 24 (Ct. App. 1990) (liability of notary predicated on promixately caused injury by negligent act); Tutelman v. Agricultural Ins. Co., 102 Cal. Rptr. 296 (Ct. App. 1972) (the fact that execution of false trust deed was a proximate cause was enough to establish notary liability, even though not sole proximate cause); Biakanja v. Irving, 320 P.2d 16 (Cal. 1958) (notary held liable for damages because of improperly attested will). *See also* Commonwealth Ins. Sys. Inc. v. Kersten, 115 Cal. Rptr. 653 (Ct. App. 1974) (notary public was held liable for all proximately caused injuries); Garton v. Title Ins. and Trust Co., 165 Cal. Rptr. 449 (Ct. App. 1980) (notary public can be held liable for all proximately caused injuries from negligently acknowledged deed). Nor is it a defense that the notary followed common practice, as it is the courts who determine proper conduct. City Consumer Serv., Inc. v. Metcalf, 775 P.2d 1065, 1069 (Ariz. 1989).

If a notary is found not to have faithfully performed all notarial acts, he or she forfeits his or her bond. *See, e.g.*, ILL. ANN. STAT. ch. 102, ¶ 202-105 (Smith-Hurd 1987). This includes being found negligent in performances of notarial duties. State Bd. of Equalization v. Naylor, 161 Cal. Rptr. 280, 282 (Ct. App. 1980).

to prevail. Under a malpractice theory, it must be shown that the notary owed a duty of care to the plaintiff, that the notary breached that duty, and that the plaintiff suffered damage as a proximate cause of the notary's misconduct. Under a breach of contract theory, it must be established that there was a material failure in the performance by the notary. The damaged party must have actually relied on the improperly notarized signature as a valid one to have a claim for damages for improper notarization of a document.[113] The damage is not limited to the parties in privity with the notary, but to all those who foreseeably and reasonably relied on the notary's acts, including third parties.[114] An employer who encourages or helps a notary commit a negligent act may also be subjected to liability.[115]

There is plenty of room for intentional misconduct by notaries as well.[116] Where notaries partake in such intentional acts, they can be held accountable for the appropriate tort consequences, including fraud. If a notary has conspired with other parties to a transaction, the notary can be held liable for conspiracy. The notary can also be held liable for conversion, or any intentional tort. Even criminal liability is a possible punishment for notarial misconduct.[117]

It is possible that a seemingly insignificant act could result in tremendous liability for the notary. For example, consider the very common attestation of a note and mortgage for a new home. Also assume that the notary witnesses both the buyer's and

113. Davis v. Adoption Auto, Inc., 731 F. Supp. 1475, 1478 (D. Kan. 1990) (absent reliance and proximately caused injury, no cause of action stated); Amodei v. New York State Chiropractic Ass'n, 553 N.Y.S.2d 713, 716 (App. Div. 1990) (no private cause of action for violation of notary law unless damage shown); Aladdin Oil Co. v. Marque, 157 So. 2d 368, 374 (La. Ct. App. 1963) (limit on liability is reliance damages); Stemmons v. Akins, 283 P.2d 797, 798 (Okla. 1955) (auto dealer's reliance was enough); Jordan v. O'Connor, 222 P.2d 322, 328 (Cal. Ct. App. 1950) (no reliance, therefore no cause of action for damages).

114. For an excellent discussion of third party reliance and effect of a notary's seal, see State of Alaska for the Use of Smith v. Tyonek Timber, Inc., 680 P.2d 1148 (Alaska 1984). *See also* United States Fidelity & Guar. Co. v. State, 53 So. 2d 11, 14 (Miss. 1951) (fraud by notary in sale of property reasonably foreseeable to harm third parties and thus notary was liable); State v. Wilson, 207 S.W.2d 785, 790 (Mo. Ct. App. 1948) (owner entitled to recover from notary for false certification of other signature); ***but see*** Means v. Clardy, 791 S.W.2d 433, 436 (Mo. Ct. App. 1990) (no liability if third party knew signature to be false).

115. Independence Leasing Corp. v. Aquino, 506 N.Y.S.2d 1003 (Erie County Ct. 1986). *See also* Iselin-Jefferson Fin. Co. v. United Cal. Bank, 125 Cal. Rptr. 20 (Ct. App. 1975) (notary's employer liable for notary's acts where agency is determined); Transamerica Ins. Co. v. Valley Nat'l Bank, 462 P.2d 814 (Ariz. Ct. App. 1969) (employer liable if notary was acting within scope of employment).

116. *See* Rakestraw v. Rodrigues, 500 P.2d 1401 (Cal. 1972) (where notary fraudulently notarized signature without knowing party or observing act of signing).

117. Noble v. State, 223 N.E.2d 755 (Ind. 1967); Citizens Nat'l Bank in Zanesville v. Denison, 133 N.E.2d 329 (Ohio 1956); *In re* Prentice, 132 N.E.2d 634 (Ohio Ct. App. 1953); United States Fidelity & Guar. Co. v. State, 53 So. 2d 11 (Miss. 1951).

builder's signatures, but the builder was not present at the time nor known to the notary. The builder gets a better offer from some other prospective purchaser and reneges on the deal for lack of proper attestation. If the holder succeeds in avoiding the sale to the plaintiff, the notary will be liable to the buyer-plaintiff for the loss of the home and real estate. The appropriate measure of damages in this case is the lost expectation of the buyer on the purchase of the residence or the lost profit on the house (the difference between the fair market value of the home and the contract price for it).[118] If one considers that much urban real estate is quite expensive, it is easy to see how notarial liability could climb to many thousands of dollars. Although this case seems unlikely, similar situations have arisen.[119]

The notarial bond will do little to protect the notary in such a situation. Usually, these bonds offer protection for fairly nominal sums by today's standards; bond requirements are most often $5000 or less.[120] The surety is only liable to this extent, and no more.[121] Thus, the notary is potentially stuck with large personal liability. On the other hand, there will certainly be times when the extent of liability is slight or nonexistent. That is, there will be occasions when the plaintiff will suffer no discernible harm, and there will be occasions when the extent of the plaintiff's injury will be so speculative as to be beyond the realm of satisfactory proof.

VI. FUTURE DEVELOPMENTS

In the future, the number of suits for notarial misconduct will no doubt increase. As larger financial deals fail because of the

118. *See generally* Deering Ice Cream Corp. v. Colombo, Inc., 598 A.2d 454 (Me. 1991); Wilson v. Kapetan, Inc., 595 A.2d 369 (Conn. App. Ct. 1991).

119. *See* Commonwealth v. Maryland Casualty Co., 97 A.2d 46 (Pa. 1953) (notary who falsely acknowledged personal appearance of signers held liable for surety bond in real estate transfer); Strother v. Shain, 78 N.E.2d 495 (Mass. 1948) (deed found invalid because notary falsely certified plaintiff's appearance); Commonwealth v. Doak, 42 A.2d 826 (Pa. 1945) (notary who falsely acknowledged signature was found liable for harm to real estate purchaser); Emeric v. Alvarado, 27 P. 356 (Cal. 1891) (seal of notary public of one county purporting to convey property in another county was not valid and thus deed was invalid and notary was found liable); Bernier v. Becker, 37 Ohio St. 72 (1881) (refusing to allow *de facto* notary past term in real estate case).

120. *See, e.g.*, ALASKA STAT. § 44.50.120 (1989) ($1000); ARK. CODE ANN. § 21-14-101 (Michie 1987) ($4000); CAL. GOV'T CODE § 8212 (West 1982) ($10,000); D.C. CODE § 1-803 (1991) ($2000); FLA. STAT. ANN. § 117.01(4) (West 1982) ($1,000); HAW. REV. STAT. § 456-5 (1985) ($1,000); ILL. ANN. STAT. ch. 102, ¶ 202-105 (Smith-Hurd 1987) ($5,000); IND. CODE ANN. § 33-16-2-1(c) (Burns 1992) ($5,000); MONT. CODE ANN. § 1-5-405 (1991) ($5,000); NEV. REV. STAT. ANN. § 240.150 (Michie 1986) ($2,000); N.M. STAT. ANN. § 14-12-3(B) (Michie 1988) ($500); OKLA. STAT. ANN. tit. 49, § 2 (West 1988) ($1,000); TENN. CODE ANN. § 8-16-104 (1988) ($5,000); UTAH CODE ANN. § 46-1-4 (1988) ($5,000); V.I. CODE ANN. tit. 3, § 773 (Supp. 1991) ($5,000); WYO. STAT. § 32-1-104 (1977) ($500).

121. *See supra* note 118.

improper use of a public trust by the notary, the public will inevitably look to hold the notary liable for his misconduct. Of course, the courts will attempt to thwart the efforts of crafty purchasers and their lawyers who try to avoid unprofitable deals on flimsy grounds. One manner in which courts might accomplish this under such circumstances, and indeed already have, is the *de facto* notary. If the technicalities have not been met, yet the spirit of the duties of the notary have been fulfilled,[122] little justice can be served by voiding an otherwise valid agreement based on that relatively minor detail.

As a result of concern about substantial potential notary liability, legislatures may become more thoroughly entangled in the regulation of notaries. One constructive manner in which they may become involved is by raising the often nominal bond requirements of a notary. As lawsuits become more prevalent, all can be benefitted by requiring the notary to hold a realistic bond to assure a more practical protection and recovery for successful plaintiffs.

Change can also be expected as technology advances. Today, all notarial acts must be accomplished in a face-to-face setting. With the advent of facsimile machines, cellular telephones, and television phones, it is possible that the traditional understanding of personal appearance may be expanded as we give way to this advancing technology.[123]

Some might suggest the elimination of the face-to-face requirement for the notarization of a signature and the substitution of the television phone and the facsimile machine. Although this idea has appeal in terms of convenience, the face-to-face requirement is more than a vestige of Roman history. A burden such as this requires the affiant to take the risk of appearing personally. It naturally makes the forger's job more difficult. The

122. The spirit behind the role of a notary public can be said to be nothing other than to avoid fraud. From the earliest days of the *notarius* to today, the notary public's principle role has been that of an independent and unbiased third party present to be certain that a fraud is not being accomplished. It seems to be a much greater injustice to allow one to escape well-founded liability based on a technical noncompliance by the notary when this purpose has been served in essentially every other respect.

123. One court struck down an attempt to notarize a home improvement agreement and liens by telephone. Charlton v. Richard Gill Co., 285 S.W.2d 801 (Tex. Civ. App. 1955).

With the presence of facsimile machines, could a person known to the notary call the notary, sign the document, immediately fax it to the notary, and while they are still on the line, have the notary validly attest to the signature? Most statutes don't require proof of identification if the affiant is personally known to the notary. If this is not enough, what of the development of television phones whereby the notary could "see" the signature in process and then receive it remotely? Perhaps an exception to the appearance rule could be crafted when the signatory is personally known to the notary.

forger need not only prepare his face for a camera, but also he must prepare for confrontation and offer direct proof of his identity.[124] This more rigorous requirement minimizes fraud. Thus, the face-to-face requirement, although it will no doubt be challenged, should remain a requirement.

Indeed, as technology advances, the need for notary services as they presently exist, may be eliminated in some instances. For example, a common practice today is to videotape the signing of a will to head-off challenges to the competency of the maker.[125] When the tape records the testator putting pen to paper, it effectively eradicates the need for the services of a notary for the purpose of assuring that the person signing is in fact the one who he or she claims to be. However, it would be very cumbersome to file each commercial document with the copy of a videotape attached to it when compared to the small space required for the signature, date, and seal of a notary. Additionally, it is not unheard of for unscrupulous people to alter videotape to accomplish sophisticated frauds and crimes. The notary's function should be preserved to help prevent this type of fraud.

The seal of the notary originally developed from the hot wax impression of the family coat of arms at the bottom of the page. Eventually, paper impressions and ink seals developed. Yet technology can and should change this part of a notary's duties as well. This simple ink stamp, in earlier days, was often difficult to duplicate. Today, that is simply not the case. The technology exists today to allow for the adoption of low cost holographic notary public seals. Perhaps other technologically advanced, difficult-to-duplicate seals would better effectuate the purpose of assuring the genuineness of a notarization. But certainly, the present method has become outrun by today's technology. No doubt though, the future of notaries presents substantial room for growth.

VII. CONCLUSION

The development of notaries public in the United States has paralleled that of notaries in the Roman Empire. At first there were a prized few. But as the Empire grew, so did the need for

124. One should not be so naive as to believe all notaries actually require stringent proof, if any at all. Nonetheless, the law requires as much and the notary can be held liable for noncompliance. The fact that not all people follow the law can hardly be seen as a grounds for not continuing its practice in the future. Substantial compliance, however, should be the minimum required. *In re* Hess, 407 S.E.2d 594 (N.C. Ct. App. 1991).

125. *In re* Estate of Peterson, 439 N.W.2d 516 (Neb. 1989); William R. Buckley, *Videotaped Wills: More Than a Testator's Curtain Call*, MICH. BAR J., Mar. 1988, at 266.

their services. In the United States, there were once few, now there are over four million.[126] Notaries have survived because they have adapted to change. In the future, their professional duties, responsibilities, and liabilities will no doubt change, but notaries will certainly remain a vital part of the legal and business communities.

126. Telephone Interview with Editing Department of National Notary Ass'n (Jan. 16, 1992) (speaking of recent NNA survey compiling data from all states).