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Article

FAMILY TIES THAT BIND, AND DISQUALIFY: TOWARD ELIMINATION OF FAMILY-BASED CONFLICTS OF INTEREST IN THE PROVISION OF NOTARIAL SERVICES

Michael L. Closen* and Trevor J. Orsinger**

I. INTRODUCTION

*"In dubiis non est agendum."*¹

Over 4.2 million United States notaries public perform tens of thousands of notarizations every day.² Day after day, notaries

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¹ Latin maxim that means "in dubious cases, you should not act." *Latin Maxims*, at <http://www/user.tninet.se/~df732s/show-off.html> (last updated Jan. 20, 1999).

² See CLOSEN ET AL., *infra* note 17, at 2 ("Hundreds of millions of documents are notarized in this country each year . . ."); Marc A. Birenbaum, *The 1997 NNA Notary Census*, NAT'L NOTARY, May 1997, at 30 (indicating that there were 4,290,634 United States notaries in 1997); Michael L. Closen & Trevor J. Orsinger, *Potential Identity Crisis*, CHI. DAILY L. BULL., Sept. 19, 2000, at 6 [hereinafter Closen & Orsinger I]. "Statutes require that many types of documents be notarized. Millions of business transactions are handled daily that involve processing, signing and filing of: loan applications, business licenses, credit applications, applications for college admissions and visas, service contracts, and real estate transactions." NEBRASKA NOTARY REFERENCE GUIDE (n.d.), at 2; see also Linda S. Adams, *Out and About with Mobile Notaries*, AM. NOTARY, 4th Qtr. 2000, at 18 (pointing out that "of the twenty or so documents . . . required for a mortgage closing . . . five or six . . . require notarization"); Michael L. Closen, *Why Notaries Get Little Respect*, NAT'L L.J., Oct. 9, 1995, at A23 (referring to the "preposterous overabundance" of United States notaries) [hereinafter Closen I]. Indeed, in this country, more and more documents seem to get added to the list of those to be notarized. See, e.g., NFL: *Notarize If You Want To Be A Star*, NOTARY BULL., April 2001, at 8 (reporting that the National Football League now requires "notarized

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authenticate signatures on a cornucopia of documents ranging from titles for automobiles to multi-million dollar loan instruments.³ It is the central function of the notary public to serve as an impartial witness to authenticate and date the signatures of parties to these transactions and, in many cases, to administer oral oaths or affirmations to the documents' signers.⁴ As attorney Peter Van Alstyne, one of this country's leading authorities on notarial law, ethics, and practice, has remarked: "Impartiality on the part of a notary is universally expected."⁵ He is

requests from college juniors to enter [the] player draft," thereby foregoing their college playing eligibility).

³ John C. Anderson & Michael L. Clozen, *Document Authentication in Electronic Commerce: The Misleading Notary Public Analog for the Digital Signature Certification Authority*, 17 J. MARSHALL J. COMPUTER & INFO. L. 833, 847 (1997) (commenting about "the enormous volume of commercial and governmental instruments required to be notarized") [hereinafter Anderson & Clozen I]. A notary is "a public official whose chief function in common-law countries is to authenticate contracts, deeds, and other documents . . ." 7 ENCYCLOPAEDIA BRITANNICA 416 (15th ed. 1979). "Many significant commercial documents must be notarized before the transaction can be completed, and many legal documents must be notarized before filing." CLOZEN ET AL., *infra* note 17, at ix (quoting Nevada Attorney General Frankie Sue Del Papa). "Documents which are notarized often deal with great sums of money and invaluable personal rights." *Id.* California notary Linda Kodis commented that "my typical [real estate] loan package contains 60 documents, of which I notarize signatures on two to six." David S. Trun, *Springing Forward with the Real Estate Market*, NAT'L NOTARY, May 2001, at 14.

Every day millions of documents are prepared, signed and submitted for processing and filing for countless transactions: real estate deeds, automobile titles, loan applications, buy/sell agreements, applications for visas or college admission, credit applications, business licenses, service contracts and thousands more. Billions of dollars are at stake in these transactions."

WYOMING NOTARIES PUBLIC HANDBOOK 1 (June 1999); see also *supra* note 2, and *infra* note 8.

⁴ Dating a certificate of notarization is a vital feature of the notarial process. Many notary statutes require the affixation of the present date at the time each certificate of notarization is filled out. See, e.g., N. D. CENT. CODE § 44-06-13.1(5) (1999 Supp.) (providing that "[a] notary public may not notarize a signature on a document if: . . . The date of the jurat or certificate of acknowledgment is not the actual date the document is to be notarized"). See generally Lisa K. Fisher, *Dates and Documents*, AM. NOTARY, 2d Qtr. 2000, at 1 (discussing the various dates on documents and certificates of notarization). The oath or affirmation administration function of the notary is also of importance for a number of reasons. See generally Michael L. Clozen, *The Lost Art of Administering Notarial Oaths*, AM. NOTARY, 2d Qtr. 2001, at 6 [hereinafter Clozen II]; *Administering Oaths, Affirmations and Jurats*, NAT'L NOTARY, March 1999, at 22.

⁵ VAN ALSTYNE, *infra* note 17, at 4. "Notaries should not notarize for any of their known family members of any and all degrees to avoid even the possible appearance of impropriety. . . . [A] court or arbitrator could find a notarization of a relative's signature invalid for violating the standard of impartiality and due care demanded of Notaries." Michael L. Clozen & Trevor J. Orsinger, *Is Blood Thicker Than . . . Professional Responsibility?*, NAT'L NOTARY, July 2001, at 26-27 [hereinafter Clozen & Orsinger II]; see also *infra* notes 196-206.

absolutely correct. But, the more important concern to be addressed in this Article is how closely that expectation has been achieved.

The notary's role in United States governmental and commercial transactions can genuinely be described as paramount and essential.⁶ The historic "affixation of a [notary] seal [has] impart[ed] an appropriate sense of officiality."⁷ The sheer volume of documents requiring notarizations of signatures is monumental. Consider, as just a few examples from place to place: candidates' petitions in public elections, real estate deeds for filing in recorders' offices, affidavits in arbitrations and litigations, wills and powers of attorney in estate planning, disclosure statements in firearm owner identification procedures, and applications to sit for bar examinations or for admission to the bar itself.⁸

⁶ RICHARD B. HUMPHREY, *THE AMERICAN NOTARY MANUAL* 7 (4th ed. 1948) (characterizing the work of notaries as "indispensable for . . . business"); Michael L. Closen, *The Public Official Role of the Notary*, 31 J. MARSHALL L. REV. 651, 701 (1998) (concluding "that notaries in their role as public officials are absolutely vital to both commerce and government") [hereinafter Closen III].

⁷ *Do Use a Notary Seal on Each Document*, NOTARY BULL., Aug. 1995, at 11. "Historically, the notary has symbolized genuineness and truth." CLOSEN ET AL., *infra* note 17, at 1. "For more than 2000 years, the Notary seal has symbolized genuineness." Douglas M. Fischer, *The Seal: Symbol of Security*, NAT'L NOTARY, Nov. 1995, at 10. "[E]very notarization we perform is an act of law, prescribed by law." *The Unauthorized Practice of Law Isn't the Boogie Man!*, THE NOTARY, May/June 2000, at 3. Similarly, the performance of oral notarial oaths and affirmations with appropriate ceremony (standing and raising of the right hands, with the oath-taker's left hand upon a Bible - unless the oath-taker objects on religious grounds) instills respect for the notarial procedure and the significance of the instruments on which notarizations are performed. See generally Closen II, *supra* note 4, at 6.

⁸ See Carole Clarke & Peter Kovach, *Disqualifying Interests for Notaries Public*, 32 J. MARSHALL L. REV. 965, 973 (1999) (pointing out that "[a] significant number of jurisdictions require the notarization of election related documents such as absentee ballots, nomination petitions, recall petitions and referendum petitions"); Bruce Lambert, *What Happens If Process Server Doesn't Serve?*, N.Y. TIMES, April 4, 1999, Sect. 14LI, at 1 (noting the need for notarizations of signatures on affidavits of service of process in litigation matters). "Several states, including Pennsylvania, require the seller of a vehicle to have his or her signature acknowledged on the vehicle title . . . [to] transfer title to the new owner." Clarke & Kovach, *supra*, at 980; see, e.g., *Sambor v. Kelley*, 518 S.E.2d 120, 121 n.6 (Ga. 1999) (listing several state statutory notarization requirements for petitions for injunctions, certain powers of attorney, affidavits for arrest warrants, mothers' affidavits to surrender parental rights, certain deeds that are to be recorded, etc.); see also Michael L. Closen et al., *Notarial Records and the Preservation of the Expectation of Privacy*, 35 U.S.F. L. REV. 159, 163-64 (2001) (noting that the "signatures on wills, living wills, and powers of attorney are often notarized. The signatures on mortgage and loan documents and firearm owner identification cards are often notarized. The signatures on civil and criminal litigation documents including bankruptcy, divorce, and traffic violation cases, are also consistently notarized"). "The law continues to recognize the important function notaries perform in acknowledging, attesting, and verifying a wide variety of documents." *Sambor*, 518 S.E.2d at 134; see also *supra* notes 2-3.

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If notaries were to go on strike for a day, much of business and government would grind to a standstill.⁹ As the *Wall Street Journal* has rightly emphasized, “[notaries] witness the signatures on all that paper that keeps the nation ticking.”¹⁰ In the world of international business, notaries are so fundamentally important that more than 100 years ago the United States Supreme Court characterized them as “officers recognized by the commercial law of the world” and concluded that the Court would “take judicial notice of the seals of notaries public.”¹¹

A substantial body of law and legal literature has grown up about the notary public in the United States. The notary in this country is a creature almost strictly of statute, in that all jurisdictions have enacted laws which create, empower, disqualify, and otherwise regulate notaries.¹² Many jurisdictions have also created official handbooks and/or websites that address legal issues faced by notaries in performing their duties.¹³ A sizeable body of case law has developed,¹⁴

⁹ See IDAHO NOTARY PUBLIC HANDBOOK 1 (1997) (opining that “[y]our job as a notary public is a serious one, essential to the operation of business, the judicial system, and many other important arenas”); Lambert, *supra* note 8, at 1 (pointing out that: “Although the functions of process servers and notaries are usually taken for granted, legal experts said they were essential to a business and legal system that relied on authentic documents, certified signatures and proper notifications.”); see also *supra* note 6.

¹⁰ Lee Berton, *It's a Proud Calling, but the Notary's Lot is Full of Indignities*, WALL ST. J., June 15, 1993, at A1.

¹¹ Pierce v. Indseth, 106 U.S. 546, 549 (1883). As the Alabama Supreme Court commented in 1838, “a notary public is an officer known to the law merchant, and of consequence, to the common law, of which it is a part.” Kirksey v. Bates, 31 Am. Dec. 722 (Ala. 1838), quoted in CLOSEN ET AL., *infra* note 17, at 10.

¹² See John C. Anderson & Michael L. Clozen, *A Proposed Code of Ethics for Employers and Customers of Notaries: A Companion to the Notary Public Code of Professional Responsibility*, 32 J. MARSHALL L. REV. 887, 887 (1999) (pointing out that “every state has a statute creating and regulating the office of notary public”) [hereinafter Anderson & Clozen II]; see also Clark & Kovach, *supra* note 8, at 965 (observing that “[t]he need to protect the integrity of the notary public office is so great that all commissioning jurisdictions have statutes regulating notaries public”).

¹³ Some state notary statutes include provisions that require publication and distribution of notary manuals or guidebooks. For example, the Virginia section states:

The Secretary shall prepare, from time to time, a handbook for notaries public which shall contain the provisions of this title and such other information as the Secretary shall deem useful. Copies of the handbook shall be made available to persons seeking appointment as notaries public and to other interested persons.

VA. CODE ANN. §47.1-11; see also *Updated Kansas Handbook Now Available Online*, NOTARY BULL., April 2001, at 3 (referring notaries and other interested persons to the “newly updated Notary Public Handbook” available through the Kansas Secretary of State’s web site at www.kssos.org).

¹⁴ See, e.g., cases cited *infra* notes 25-26, 42, 44-45, 50, 106, 263-65, 268, 480.

along with a moderate number of attorney general opinions.¹⁵ A few dozen law review articles have been published about notary practice,¹⁶ and these are complimented by several authoritative books on the subject.¹⁷ Unfortunately though, the topics of notary ethics and conflicts of interest have received very limited attention within the substantial body of law and other legal writings. Two of the national notary membership organizations have drafted standards of conduct for notaries, but one of those sets of guidelines is quite scant and the other is of very recent vintage.¹⁸

The position of notary public is among the oldest public offices in existence. The relationship between a notary and a would-be signer has existed since the time of ancient Rome when one known as a *notarius*¹⁹ or *tabellio*²⁰ or by another Latin name²¹ was a "public [official] who recorded and registered public and judicial proceedings, and . . . also engaged in drafting private documents such as wills, deeds, and contracts."²²

¹⁵ See, e.g., 1995 Ala. Op. Atty. Gen. 24; 1985 Nev. Op. Atty. Gen. 63; 1991 Va. Op. Atty. Gen. 207; see also, e.g., opinions cited *infra* notes 489, 492, 496, 507.

¹⁶ See, e.g., Klint L. Bruno & Michael L. Closen, *Notaries Public and Document Signer Comprehension: A Dangerous Mirage in the Desert of Notarial Law and Practice*, 44 S.D. L. REV. 494 (1999); Vincent Gnoffo, Comment, *Notary Law and Practice for the 21st Century: Suggested Modifications for the Model Notary Act*, 30 J. MARSHALL L. REV. 1063 (1997); Nancy Perkins Spyke, *Taking Note of Notary Employees: Employer Liability for Notary Employee Misconduct*, 50 ME. L. REV. 23 (1998). Two law review symposium volumes have recently been published. Symposium: *Issues Affecting Notarial Law and Policy*, 31 J. MARSHALL L. REV. 647 (1998) (including 20 articles); Symposium II, *Issues Affecting Notarial Law and Policy*, 32 J. MARSHALL L. REV. 863 (1999) (including eight articles, as well as an appendix of the codes of ethics of both the American Society of Notaries and the National Notary Association).

¹⁷ See, e.g., MICHAEL L. CLOSEN ET AL., *NOTARY LAW & PRACTICE: CASES & MATERIALS* (1997) (constituting the only law school casebook on the subject); CARL LOUIS MEIER, *ANDERSON'S MANUAL FOR NOTARIES PUBLIC* (1940); *THE NOTARY'S MANUAL* (5th ed. 1916); ALFRED E. PIOMBINO, *NOTARY PUBLIC HANDBOOK* (Nat'l ed. 1996); RAYMOND C. ROTHMAN, *NOTARY PUBLIC PRACTICES & GLOSSARY* (1978); PETER J. VAN ALSTYNE, *NOTARY LAW, PROCEDURE & ETHICS* (1998) (representing the only book on the subject with the word "ethics" or any comparable term in its title).

¹⁸ For the scant AMERICAN SOCIETY OF NOTARIES CODE OF ETHICS of 1980, see *infra* notes 184-85. For the recent NATIONAL NOTARY ASSOCIATION NOTARY PUBLIC CODE OF PROFESSIONAL RESPONSIBILITY of 1998, see *infra* notes 186-88.

¹⁹ See Michael L. Closen & G. Grant Dixon, *Notaries Public From the Time of the Roman Empire to the United States Today, and Tomorrow*, 68 N.D. L. REV. 873, 875 (1992); Jill Roberts, *Through the Ages*, NAT'L NOTARY, Nov. 2000, at 14.

²⁰ See John E. Seth, *Notaries in the American Colonies*, 32 J. MARSHALL L. REV. 863, 865 (1999).

²¹ See ANDERSON'S MANUAL FOR NOTARIES PUBLIC 7 (8th ed. 1999) (referring to the Roman era notary also "as scriba, cursor, tabularius, tabellio, exceptor, and actuarus").

²² Seth, *supra* note 20, at 865 (noting also that the documents these ancient notaries drafted and recorded "were sealed before a magistrate and became public and authentic acts entitled to registration in the public archives . . . Documents prepared by tabelliones

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However, there is a relationship that has existed far longer than the *notarius*-signer relationship of ancient Rome, one that has existed from the time of Adam and Eve. It is the relationship between family members.²³ Notarizations performed by notaries for their family members undoubtedly occur thousands of times a day all over the United States. Notaries regularly notarize for their spouses, domestic partners, parents, children, and other family. The reasons notaries undertake these practices are that few jurisdictions have expressly prohibited them in the notary statutes and that very few notaries care enough or know enough to avoid them.²⁴ Yet, the impartiality and professionalism of notaries are necessarily compromised when they serve as notaries for their own family members. Furthermore, to outsiders who deal with notarizations, or who actually notice them and think about them, intra-family notarizations must create the appearance of impropriety.

Incredibly, some notaries even notarize their own signatures, and notarize signatures on instruments in which the notaries themselves are named as parties.²⁵ Equally hard to fathom is that about half of the

received a higher degree of respect than documents executed by private parties but did not have the status of official records"). "A 'notarius' was appointed as a public official to create written documents of agreement or wills and to hold them for safekeeping." WYOMING NOTARIES PUBLIC HANDBOOK 1 (June 1999).

²³ Certainly, the concept of a family is expansive enough to include the earliest people who banded and bonded together for their mutual security and support. "Broadly, a 'family' may include a nontraditional family, meaning one of a group living in the same household." JOHN D. GREGORY ET AL., UNDERSTANDING FAMILY LAW 5 (1993). Or, in the same cave, tree, or hut. Even the concept of marriage is centuries old. "Marriage, or the public bonding of a man and a woman to give legitimacy to their conjugal relationship, has existed since Biblical times." *Id.* at 6.

²⁴ "Often, the [notary's] customer is a friend or relative of the notary. . . ." Anderson & Closen II, *supra* note 12, at 896. By 1896, the Tennessee Supreme Court remarked that acknowledgments being taken by family members "has become so prevalent . . ." *Cooper v. Hamilton Perpetual Bldg. & Loan Ass'n*, 37 S.W. 12, 13 (Tenn. 1896); see *infra* notes 443-52 and accompanying text; see also Table 3.

²⁵ See, e.g., *In re Kersten*, 575 A.2d 542 (Pa. 1990) (noting that the circulator of election nominating petitions had notarized her own signatures on the affidavits on those petitions); *State ex rel. Marquis v. United States Fid. & Guar. Co.*, 424 S.W.2d 199 (Tenn. 1966) (involving a case where a used car dealer in executing a bill of sale for a car notarized his own signature); *Dementas v. Estate of Tallas*, 764 P.2d 628, 629 (Utah 1988) (indicating that the notary notarized his own signature on a memorandum relating to his own estate); see also, e.g., *In re Livingston*, 199 A.2d 37 (N.J. Super. 1964) (concerning a candidate who notarized signatures on absentee ballots for an election in which the notary was a candidate); *State ex rel. Reed v. Malbrick*, 165 Ohio St. 483 (Ohio 1956) (involving candidates who notarized signatures of circulators on their own nominating petitions intended to place the candidate-notaries on the ballot); *Wolfe v. Switaj*, 525 A.2d 825 (Pa. Commw. Ct. 1985) (considering a case in which a voter-signer of an election nominating

United States jurisdictions do not expressly prohibit those practices in their notary statutes.²⁶ See Table 1. Disappointingly, little concern has been demonstrated about this conspicuous problem. There is little attention focused upon notarial conflicts of interest in general, and even less attention to intra-family notarizations (including self-notarizations) in particular. For instance, in one contemporary appellate court opinion, the court noted in its recital of the facts that the notary had notarized his own signature on the instrument in question in the case.²⁷ Even though the validity of the notarization was not at issue in the case, the court did not utter one word of criticism about that fundamentally flawed notarial act.²⁸ The court sacrificed this opportunity to advance the cause of sound notarial practice. There is an even greater void in notary law regarding the propriety of notaries performing notarizations for their family members.²⁹ This Article, however, takes aim at conflicted notarial practices arising out of family relationships and issues a strong rebuke to all parties interested in notarial practices who have neglected this area at the intersection of law, business policy, and ethics.

This Article first presents a brief history of the notarial process, focusing upon the necessity for impartiality among notaries and the evolution of the slight attention to family-based conflict of interest concerns. Second, this Article explores why family-based notarizations compromise the integrity of the notarial process. Third, this Article

petition had notarized the signature of the petition's circulator on the petition's affidavit). Notaries sometimes have notarized their own signatures as part of fraudulent schemes. See, e.g., *Bank of Am. v. Dowdy*, 9 Cal. Rptr. 779 (Cal. Dist. Ct. App. 1960) (reporting the extreme case of a notary who signed a false name on a document and notarized his own forged signature).

²⁶ Not surprisingly, courts are often influenced by the legislatures' failures to prohibit activity through statutory disqualifications. In *In re Livingston*, the court upheld the conduct of a candidate in notarizing signatures on absentee ballots in the election in which the notary was a candidate, noting that the legislature had not expressly prohibited this practice. *In re Livingston*, 199 A.2d 37 at 40; see *infra* notes 313-40 and accompanying text; see also Table 1.

²⁷ *Dementas*, 764 P.2d at 629.

²⁸ *Id.*

²⁹ Because the family relationship is extremely important in our society, individuals may rationalize that what is good for them is good for their families. Other family members may also rationalize that assisting their own relatives necessarily promotes the family regardless of the propriety of the relatives' purposes. "An organic family model emphasizes the good of the family unit at the expense of its individual members" GREGORY ET AL., *supra* note 23, at 5. "[T]he remarkable resilience of the family unit has been primarily related to its role in the raising and socialization of children, and in the mutual economic support of its members." *Id.* at 6; see *infra* notes 443-52 and accompanying text; see also Table 3.

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analyzes the present state of confusion about whether notaries can verify the signatures of themselves and other family members and how state legislatures and other entities have reacted to this issue. Finally, this Article proposes several methods by which state legislatures and other public and private sources can eliminate family-based conflicts of interest in the provision of notarial services. The Latin maxim introducing this Article that *in dubious cases, you should not act* will become the watchwords for those recommendations.³⁰

II. HISTORY OF NOTARIES AND THE FOCUS ON INTEGRITY AND IMPARTIALITY

*"Consuetudinis magna vis est."*³¹

As that Latin passage observes: "The force of habit is great."³² History plays a significant role in the development of the notary public office and the influence of ethical standards on that development because established viewpoints and approaches are likely to have become entrenched and to be continued. It will be most difficult to reverse such attitudes and practices. Nothing short of express statutory mandates would be likely to succeed. Inertia and indifference represent formidable obstacles to change.

Most Americans hold notaries in high regard because they know too little about notaries to appreciate the true circumstances.³³ Many people

³⁰ *Supra* note 1.

³¹ Latin maxim which means "the force of habit is great." *Latin Maxims*, at <http://www.user.tninet.se/~dfr732s/show-off.html> (last updated Jan 20, 1999).

³² *Id.* Similarly, there is the famous proverb "[o]ld habits die hard," which is listed in one book of quotations as #321. THE MACMILLAN DICTIONARY OF QUOTATIONS 458 (2000).

³³ "A document that contains a notary public's seal and signature is instinctively given more credibility than an unnotarized document." Clarke & Kovach, *supra* note 8, at 983. "A notarization does not prove truthfulness of the contents of a document, nor validate a document and render it legal." SOUTH DAKOTA NOTARY PUBLIC HANDBOOK 11 (1997). Similarly, according to the Wyoming guidebook, "Notaries do not: . . . Prove a document to be true or accurate . . . Validate a document . . . Legalize a document." WYOMING NOTARIES PUBLIC HANDBOOK 6 (June 1999).

American society as a whole tends to attach greater expectations to notarizations. It is common to find notarizations on signed documents performed in the belief that the notarization legalizes or validates the document, or makes it 'legal.' Most frequently, American society assumes that because a notarization is affixed to the instrument, it guarantees the truthfulness of its contents. These assumptions are groundless

VAN ALSTYNE, *supra* note 17, at 22. When distilled to its very essence, the question most Americans would undoubtedly ask was suggested by notary expert Charles Faerber of the

mistakenly believe that notarization validates or legalizes a document, almost as though notaries serve as document police.³⁴ For example, one old general encyclopedia in 1913 explained the role of the notary as “an officer authorized to attest or certify legal documents.”³⁵ In 1958, the *World Book Encyclopedia* continued this myth by describing a notary public as “an officer who is authorized by state law to certify certain documents.”³⁶ And, in 1979, the *Encyclopaedia Britannica* was guilty of the same kind of oversimplification when it stated that a notary public “is to authenticate . . . documents.”³⁷ Even agencies occasionally lapse into imprecise shorthand and contribute to the public’s misunderstanding of the actual effect of notarization. The National Notary Association, for instance, recently printed the description of the function of the notary “to ensure the authenticity of important documents.”³⁸ Such imprecise language can be misleading because notaries do not notarize instruments; they notarize the signatures on instruments.³⁹ It is only

National Notary Association, when he posed the inquiry: “If you can’t trust the notary, who can you trust?” Lambert, *supra* note 8, at 1; *see also infra* note 34.

³⁴ Various sources such as encyclopedias and dictionaries misinform the public about the notaries’ functions. *See, e.g.*, THE NEW AMERICAN ENCYCLOPEDIA 1018 (1939) (stating a notary is “a public officer . . . who attests and certifies deeds or other documents to [establish] their authenticity . . .”); WEBSTERS’ NEW WORLD DICTIONARY 973 (2d College ed. 1972) (defining a notary as “an official authorized to certify or attest documents . . .”). People “usually assume that your notarization will magically make their document legal and valid.” Q & A, THE NOTARY, March/April 2001, at 8. “A legal paper or document that contains invalidating flaws before notarization will still contain the same flaws afterward.” *Adviser*, NAT’L NOTARY, May 2001, at 35; *see also supra* note 33.

³⁵ 4 THE NEW PRACTICAL REFERENCE LIBRARY (1913) [pages unnumbered].

³⁶ WORLD BOOK ENCYCLOPEDIA 5774 (1958). Incidentally, some early reference works omitted any reference to notary public or notaries altogether. *See, e.g.*, THE COLUMBIA ENCYCLOPEDIA (IN ONE VOLUME) 1283 (1940) (giving no entry for notary or notarization but skips from “Nostradamus” to “Notation”); 19 FUNK & WAGNALLS NEW ENCYCLOPEDIA 226 (1971).

³⁷ 7 ENCYCLOPAEDIA BRITANNICA, *supra* note 3, at 416.

³⁸ Ronni Ross, *The American Notary: Celebrating a 350-Year Heritage*, NAT’L NOTARY, Nov. 1989, at 10. Even *Black’s Law Dictionary* contributed to the misunderstanding by defining a notary public to be “a public officer whose function it is . . . to attest and certify . . . certain classes of documents . . .” BLACK’S LAW DICTIONARY 1209 (4th ed. 1968). The Supreme Court of Georgia has recently said, “[t]he law continues to recognize the important function notaries perform in acknowledging, attesting, and verifying a wide variety of documents.” *Sambor v. Kelley*, 518 S.E.2d 120, 121 (Ga. 1999).

³⁹ “A notarization is nothing more than a written verification that a person’s signature is genuine.” *Understanding Our Fiduciary Duties As Notaries*, THE NOTARY, May/June 1999, at 3. “Notarization does not guarantee the truth or accuracy of statements in a document Notarization does not ‘legalize’ or ‘validate’ a document.” ALASKA NOTARY HANDBOOK 12 (n.d.). “The notary does not validate or legalize the document or guarantee its truth.” OREGON NOTARY PUBLIC GUIDE 6 (Jan. 1996).

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indirectly that the act of notarizing a document signer's signature heightens the credibility and authenticity of an instrument.

Nevertheless, the erroneous view of notaries' authority carries with it the misimpressions that notaries have far greater authority than they do, and that they must necessarily be officers of integrity and competence in order to exercise so much authority. Notaries are also generally thought to be people of impartiality and diligence because a little is remembered about the ancient origin of the noble notary,⁴⁰ because notaries are known to be public officials (not merely private functionaries),⁴¹ because notaries are thought to be "bonded" and therefore trustworthy,⁴² and because episodes of notarial neglect and misconduct go largely unreported or unnoticed.⁴³ Yet, when the facts

⁴⁰ See generally Closen & Dixon, *supra* note 19 (discussing the history of notaries public). "[P]eople generally do not know of the cloud on the reputation of notaries. The public is only vaguely familiar with the office of notary and its occupants. The public vaguely knows of the noble notary of an origin dating to antiquity." Closen III, *supra* note 6, at 682.

⁴¹ "Notaries are not merely licensed, they are almost always commissioned by elected officials such as the state governor or secretary of state." Closen I, *supra* note 2, at A23. In fact, in early years, some states and territories even statutorily designated notaries to be public officers. See, e.g., 1854 Oregon Laws ch. 36, §1 (announcing that "notaries public . . . shall be considered state officers"). Incidentally, in more recent times, some states have gone full circle and, due to liability concerns, have declared that notaries are not state officials. See, e.g., KAN. STAT. ANN. § 53-101 (1994) (declaring: "notaries public shall not be considered as state officers"); MD. CODE ANN CONST. art. 35 (2000) (stating "[t]hat no person shall hold, at the same time, more than one office of profit, created by the Constitution or Laws of this State . . . the position of Notary Public shall not be considered an office of profit within the meaning of this Article"); OR. REV. STAT. § 194.010 (6) (1989) (providing that "[t]he functions of a notary public are not considered official duties under section 1, Article III of the Oregon Constitution"); see also *infra* note 289.

⁴² "The public thinks that notaries are bonded, and that therefore they must be honorable and diligent." Closen III, *supra* note 6, at 682. Even judges seem to be impressed by the bonding feature of notarial qualifications, as this passage suggests: "In Idaho, as in most states, there is a presumption of regularity in the performance of official duties by public officers. A notary public is a bonded official appointed by the governor." *Farm Bureau Fin. Co. v. Carney*, 605 P.2d 509, 514 (Idaho 1980).

⁴³ "Until I was in office [as Secretary of the Commonwealth of Virginia] I was not aware of the number of notaries, and was not aware of the number of people who were unconcerned with or unaware of the significance of their Commissions." Jennifer Workman, *Spotlight On . . . Anne Petera, Secretary of the Commonwealth of Virginia*, AM. NOTARY, 2d Qtr. 2001, at 8 (quoting Secretary Anne Petera). Although some instances of notarial misconduct get reported, rarely does the notarial feature earn a by-line. See, e.g., Lambert, *supra* note 8, at 1 (reporting a case involving allegedly false notarizations of signatures of process servers under a by-line that made no reference to notaries or notarizations). More frequently, even if the title of a piece makes a reference to its notarial focus, it gets buried somewhere inside the print media, virtually never making front-page headlines. "The public does not stay abreast of the incidence of notary misconduct, because not often do such incidents make the news media's coverage of events. Most assuredly, episodes of notary mistakes and

about actual notarial practice in this country are more fully understood quite a different viewpoint comes to light. The most significant, historic, substantive duties of notaries in Europe and the Americas have been gradually stripped away from United States notaries, leaving them with important but lesser responsibilities described by the Supreme Court as "essentially clerical and ministerial" in nature.⁴⁴ Moreover, notary mistakes, misconduct, and outright notarial fraud are not uncommon,⁴⁵

dishonestly tend not to make front-page stories." Closen III, *supra* note 6, at 682-83. This is even true in the publications of the notary membership organizations. For example, a recent article about notarial malpractice resulting in a judgment for liability against a notary for more than \$45,000 appeared on page three of a notary newsletter. *Charleston Notary Pays The Price For Carelessness*, NOTARY BULL., April 2001, at 3.

⁴⁴ *Bernal v. Fainter*, 467 U.S. 216, 216-17 (1984). For example, the responsibilities of notaries to process marine and bank protests, to take evidentiary depositions, and to maintain and keep secure records of original documents have virtually disappeared. According to Nevada Attorney General Frankie Sue Del Papa, notaries' "former conveyancing and document-drafting powers were taken over by attorneys and solicitors centuries ago during the evolution of the English common law." CLOSEN ET AL., *supra* note 17, at ix. "The protest was the first and most lengthily described of all the notarial acts in early California law, reflecting the former importance of this now rarely seen form of notarization." *Id.* "In the predominantly rural, less mobile California society of the late 1800s, a Notary's powers and duties were more considerable than they are today." *Id.* at 6; *see also id.* at 109-208 (discussing notarial protests and notarial depositions).

⁴⁵ "Because notaries don't always seek out the proper training, many perform their notarial duties incorrectly or incompletely . . ." Workman, *supra* note 43, at 8. For instance, in *New Hanover Rent-A-Car, Inc. v. Martinez*, 525 S.E.2d 487 (N.C. Ct. App. 2000), a notary preformed a notarization on a document even though it had not been signed. "With over 4.2 million notaries in the United States, the likelihood of notarial mistakes and misconduct is considerable." Bruno & Closen, *supra* note 16, at 495. "Criminal imposters can be very conscientious and creative, and they succeed in deceiving notaries far too frequently." CLOSEN ET AL., *supra* note 17, at 149; *see Lambert, supra* note 8, at 1 (disclosing an alleged widespread fraud scheme in one major New York process server's business, involving false notarizations of signatures on affidavits of service of process in litigation matters). As additional examples, in *Meyers v. Meyers*, 503 P.2d 59 (Wash. 1972), it was established that a notary had notarized the signatures of two impostors on a deed although the notary did not know them and apparently without asking for their identification. In *Facey v. Dept. of State*, 132 A.D.2d 698 (N.Y. App. Div. 1987), a notary was found guilty of misconduct in an administrative proceeding due to the notarization of a signature on a forged satisfaction of judgment, where the signer had been unknown to the notary and had not appeared at the time of the notarization. In *Transamerica Insurance Co. v. Valley Nat'l Bank*, 462 P.2d 814 (Ariz. Ct. App. 1969), the notary had notarized a forged signature of a party who was not present at the time of the notarization. In *McDonald v. Plumb*, 90 Cal. Rptr. 822 (Cal. Ct. App. 1970), a notary had notarized the forged signature of an imposter on a deed. In *Commonwealth v. American Surety Co.*, 149 A.2d 515 (Pa. Super. Ct. 1959), the notary notarized the purported signature of a party who was not present before the notary. In *Ameriseal of North East Florida, Inc. v. Leiffer*, 673 So. 2d 68 (Fla. Dist. Ct. App. 1996), the notary notarized the purported signatures of two parties who were not present before the notary for the notarizations. Also, in *Anderson v. Aronsohn*, 184 P. 12 (Cal. 1919), a notary public notarized a number of signatures of imposters. *See generally* Charles N. Faerber,

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regularly resulting in direct liability for the notary and in vicarious liability for the employer of the notary.⁴⁶ According to Alfred Piombino, a leading American notary expert, those facts serve as "evidence of the advanced stage of decay and neglect that the office of notary public has suffered."⁴⁷ It has even been suggested by one observer of notary practice that the 4.2 million notaries public in this country "is at least 4 million too many."⁴⁸

The pedestal of high regard upon which notaries triumphed centuries ago has been contemporarily distilled to a position of convenience and indifference, with most modern-day United States notaries disregarding fundamental legal standards, sound notarial practices, and accepted ethical principles.⁴⁹ As very few notaries in this country serve full-time in their posts, most have become notaries at the

Being There: The Importance of Physical Presence to the Notary, 31 J. MARSHALL L. REV. 749 (1998); Nancy Perkins Spyke, *Promoting the Intermediate Benefits of Strict Notary Regulation*, 31 J. MARSHALL L. REV. 819 (1998).

⁴⁶ At least as early as 1858, a notary was held liable for notarial misconduct. See *Forgarty v. Finlay*, 10 Cal. 239 (Cal. 1858) (holding that the notary was liable whether the conduct was intentional or negligent). See generally J. Michael Gottshalk, Comment, *The Negligent Notary Public-Employee: Is His Employer Liable?*, 48 NEB. L. REV. 503 (1969); Gerald Haberkorn & Julie Z. Wulf, *The Legal Standard of Care for Notaries and Their Employers*, 31 J. MARSHALL L. REV. 735 (1989).

⁴⁷ PIOMBINO, *supra* note 17, at xxii. "Unfortunately, many notaries are not competent, diligent, or honest." *Closen & Richards I*, *infra* note 49, at 724. According to the National Notary Association Notary Ambassador for Indiana, the "Hoosier State is in a notarial Dark Age . . . Indiana Notaries are commissioned without the benefit of training and examination and some of the practices taking place would make even the casual observer cringe." *Indiana Forums Demonstrate Need for Update of Statutes*, NOTARY BULL., June 2001, at 7.

⁴⁸ *Closen I*, *supra* note 2, at A24. "If the notary is to become a business professional deserving respect, then the position cannot remain available on demand to virtually anyone who is willing to pay the small application fee." *Closen & Richards I*, *infra* note 49, at 722. "[Michelle Ford, Notary director for the Commonwealth of Virginia] said her office has concluded there are too many Notaries in her state, a situation that can only be remedied legislatively. Regulators should consider quality over quantity, she said." *Does Boom Include Notaries?*, NOTARY BULL., June 2001, at 3.

⁴⁹ 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, 707 (1997) (expressing the view that "[t]he notary's business worth (or lack thereof) is largely due to two fundamental and interrelated factors: inadequate knowledge of their responsibilities and, consequently, poor job performance") [hereinafter *Closen & Richards I*]; see also P. Michael McWilliams, *Notary Procedures: Dot Your 'i's and Cross Your 't's*, CHI. BAR ASS'N REC., May 2001, at 63 (pointing out that even attorneys violate notary statutes due to "[h]eavy caseloads, deadlines, and ignorance of proper notarial procedures," as well as "carelessness" on the part of lawyers).

behest of their employers.⁵⁰ The office of notary public has become a bastion of apathetic administrators who file simple state applications, pay modest filing fees and bond premiums, and buy their official seals all in the name of being the notaries “around the office” who can quickly and efficiently authenticate signatures.⁵¹ This apathy, which is a result of minimal eligibility standards, poor notary training or no training at all, the lack of state-mandated testing, and a general disrespect for the office has transcended into the arena of conflicted practices and family notarizations.⁵² The American office itself had a dubious commencement with the inauguration of notaries public in the colonies in the seventeenth century, as will be explained shortly.⁵³

⁵⁰ “Most notaries do not work full-time as notaries; their notarial roles are supplemental to their main occupations.” Anderson & Closen II, *supra* note 12, at 894-95. “Businesses, agencies and institutions of many varieties require one or more employees to obtain and maintain a notarial commission” CLOSEN ET AL., *supra* note 17, at 2.

No doubt a private employer . . . may gather goodwill through the presence of a notary public and may have that advantage in mind when it encourages its employee to seek the office, but it is also true the public convenience is furthered when the services of a notary public are thus made available.

Commercial Union Ins. Co. v. Burt Thomas-Aitken Constr. Co., 230 A.2d 498, 501 (N.J. 1967). In *Transamerica Insurance Co. v. Valley Nat'l Bank*, 462 P.2d 814, 815 (Ariz. Ct. App. 1969), the court noted that the notary was urged to seek her commission by the bank that employed her:

During most of that time she was a commissioned notary public and had obtained the commission at the direction and insistence of the defendant [bank] who paid all fees required by the State for the commission, purchased her seal, paid premiums on her surety bond, and paid all renewal fees and premiums.

Id.

⁵¹ “We usually become notaries at the request of our employers to have the luxury of having a notary available at the workplace.” *Employer & Notary Relations*, THE NOTARY, March/April 1999, at 6.

Indeed, many employees become notaries because their employers insist upon it. Employers pay notary commissioning fees, notary bond premiums, and other expenses associated with employees becoming notaries. Thus, many notaries tend to be entry-level employees such as clerks, secretaries, paralegals, and the like because no one else wants to perform the menial notarial function.

Closen et al., *supra* note 8, at 187. There is a positive consequence of the employment of notaries in so many places of business. “[H]aving a notary on the premises encourages the personal appearance of the signers to the document.” Clarke & Kovach, *supra* note 8, at 969.

⁵² See Michael L. Closen & R. Jason Richards, *Cyberbusiness Needs Supernotaries*, NAT'L L. J., Aug. 25, 1997, at A19 (noting the “historic underqualification of notaries in this country” and predicting the “debasement of the office [of notary public] in America is likely to become a problem for international commerce”) [hereinafter Closen & Richards II].

⁵³ See *infra* notes 76-77.

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The office of notary public originated during the Roman Empire in the time of Cicero.⁵⁴ From the very beginning, the *notarius* was a trusted individual.⁵⁵ The *notarius* was trusted to correctly record or prepare documents, to accurately translate or interpret those writings, and to competently and securely maintain those documents for the public archives.⁵⁶ The first notaries had to be trusted, for they were literate at a time when most of the populace (including many of the wealthiest) were neither literate nor experienced in commerce or government, so those notaries were entrusted with the most significant public and private transactions.⁵⁷ The importance of the Roman notary grew,⁵⁸ and the ranks of notaries expanded into the provinces of Europe and into England.⁵⁹

⁵⁴ See Closen & Dixon, *supra* note 19, at 874; Seth, *supra* note 20, at 865.

⁵⁵ See Ross, *supra* note 38, at 11 (referring to the earliest notary as a "Notarius" in ancient Roman times); see also *supra* note 21.

⁵⁶ Ross, *supra* note 38, at 11 (describing the duties of the notaries "to put documents in writing, witness their signing and hold them in safekeeping").

⁵⁷ "Because the art of writing was not widespread during Roman times, it became the duty of the notary public, as a literate and trusted public official, to draft and safeguard documentary items (such as contracts and wills) for the public record." Closen & Richards I, *supra* note 49, at 716-17.

⁵⁸ "The importance of the notary's authority became realized outside the [Roman] Empire itself, leading to the presence of notaries in the surrounding provinces of England, France, and Spain." Closen & Richards I, *supra* note 49, at 717. Indeed, the Roman notary became the model for the civil law notary that eventually served as the foundation for notaries in Europe, Central and South America, Japan, and elsewhere (except in most jurisdictions of the United States and in England). "Around the rest of the world, the civil law notary is the predominant kind of notary and is recognized as a highly trained and experienced professional." Closen et al., *supra* note 8, at 175-76. For further analysis of international notaries, see Stewart Baker & Theodore Barassi, *The International Notarial Practitioner*, 24 INT'L L. NEWS 1 (Fall 1995); Pedro A. Malavet, *Counsel for the Situation: The Latin Notary, A Historical and Comparative Model*, 19 HASTINGS INT'L & COMP. L. REV. 389, 432-33 (1996); Shinichi Tsuchiya, *A Comparative Study of the System and Function of the Notary Public in Japan and the United States* (May 30-June 1, 1996), in NAT'L NOTARY ASS'N, Jan. 1997 (available from the National Notary Association) (indicating that Japanese notaries are held in considerable esteem, for several reasons, including: there are so few of them; one may not become a notary until fifty or sixty years of age; most notaries are former judges or prosecutors or otherwise have extensive legal experience; and notaries are authorized to perform several important functions that are judicial in nature). In Japan, the individuals who are appointed "are of such high integrity, diligence and legal knowledge that they are extremely qualified to be Notaries." Tsuchiya, *supra*, at 2.

⁵⁹ See Closen & Dixon, *supra* note 19, at 875; Seth, *supra* note 20, at 867. "[T]he number and esteem of the *notarius* swelled as the Roman Empire expanded in power and affluence. Notaries spread out into the far-flung provinces of the Empire including what is . . . present-day England, Spain, and France." ANDERSON'S MANUAL FOR NOTARIES PUBLIC, *supra* note 21, at 7. "As the Roman Empire expanded, so too did the experience and influence of the notary become incorporated into basic commercial and legal functioning of

The notaries of Olde England were also men of trust and honor.⁶⁰ They were men of relatively high education, while common men were not.⁶¹ Notaries, in general, were also known for their intimate involvement in the affairs of the church, as record keepers for the ecclesiastical courts and in other features of the business of the Catholic Church.⁶² Early notaries, in what was to become England, were first appointed by authority of the Roman Pope and later by authority of the Archbishop of Canterbury (whose auspices continue to be the source of English notarial appointments).⁶³ Certainly, the connection to the church lends credibility to the integrity of the English notary.⁶⁴ Moreover, most

the various civil law countries of Europe, eventually including England." Closen et al., *supra* note 8, at 175. These ancient Roman notaries became the forerunners of the civil law notaries of more recent times, including through to today.

In countries such as France and Italy . . . and in the province of Quebec, which follow the civil-law tradition, there are educational requirements similar to those for lawyers. In the civil-law countries of western Europe, and in Latin America and French areas of North America, the office of notary is a much more important position than in the United States and England. The civil-law notary may be roughly described as a lawyer who specializes in the law relating to real estate, sales, mortgages, and the settlement of estates. . . .

7 ENCYCLOPAEDIA BRITANNICA, *supra* note 3, at 416. "In Latin countries, notaries retain many of their attorney-like powers." OREGON NOTARY PUBLIC GUIDE 5 (Jan. 1996).

⁶⁰ Early English notaries were entrusted with important functions, including accurately making records of proceedings and safely and securely maintaining such records, as well as preparing documents for use especially in international commerce. See Closen et al., *supra* note 8, at 176-78.

⁶¹ Notaries were introduced to English history in about the thirteenth century, which was a time when literacy was not yet widespread. See Seth, *supra* note 20, at 866-67. The fact that so many of the general population were not literate served as an important impetus for the creation of the post of notary, just as it had in ancient Rome. See *supra* note 57 and accompanying text; see also Closen et al., *supra* note 8, at 174 (observing that "[t]he first forerunners of the modern notaries were scribes who were men of learning at a time [in ancient Rome] when most of the populace was illiterate . . ."). The same was true of the early colonial days of the United States.

⁶² Indeed, it has been suggested that the very first notaries were established for religious purposes. Notaries were "originally appointed by the Fathers of the Christian Church to collect the acts and also memoirs of martyrs in the first century . . ." CENTURY BOOK OF FACTS 365 (1907); see Closen et al., *supra* note 8, at 177 (pointing out that "[i]n the ecclesiastical courts, [English] notaries prepared documents including reports of proceedings and served as record keepers").

⁶³ See Martin Silverman, *The Work of an English Notary*, AM. NOTARY, 2d Qtr. 1999, at 10; Ross, *supra* note 38, at 11; see also C.W. BROOKS, ET AL., NOTARIES PUBLIC IN ENGLAND SINCE THE REFORMATION 122 (1991) (specifying that it is actually "the Court of Faculties of the Archbishop of Canterbury" that oversees the training and admission of notaries). Notaries today continue to be appointed by the Master of the Faculties of the Archbishop of Canterbury. Brooks, *supra*, at 134.

⁶⁴ See Seth, *supra* note 20, at 865-66 (noting that in "803, Charlemagne, who had been crowned Holy Roman Emperor by the Pope three years before, ordered that his Royal

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English notaries over time have also been solicitors, which is regarded as an honorable profession.⁶⁵ English notaries were also esteemed in substantial measure because they were so very few in number. Historically, the number of English notaries was always quite small, resulting in shortages of notaries in some areas in the 1800s.⁶⁶ Even in the 1900s, as the number of notaries in America exploded, no such expansion occurred in Great Britain. By "the mid-1920s there were approximately 500 notaries of all categories in England and Wales."⁶⁷ To this day, there are only about 1000 notaries in all of England and Wales,⁶⁸ in comparison to the more than 4.2 million notaries public in the United States.⁶⁹ An important reason for the small number of English notaries and the high esteem in which they are held is their substantial qualifications, such as having served a lengthy apprenticeship and having passed a rigorous written examination on notarial practice.⁷⁰

The story of the first American notary is founded upon great trust reposed in him by a King and Queen. When King Ferdinand and Queen Isabella of Spain agreed to finance Christopher Columbus' exploration of 1492, they sent Diego de Arana, a Spanish notary, along to assure that any gold or other treasure that was discovered would be fully reported to the royal treasury.⁷¹ Thus, while the King and Queen did not trust Columbus, they apparently trusted the notary. Notary de Arana became the first notary in the Americas when he landed along with Columbus on

Commissioners appoint notaries to accompany them on their circuits and that all bishops, abbots, and counts be provided with notaries. By the tenth century, these notaries had fixed residences and were employed in recording judicial proceedings and preparing private deeds. During the twelfth century, the Pope and the emperors of the Holy Roman Empire appointed notaries. These papal and imperial notaries had the right to practice anywhere in the Western world").

⁶⁵ See BROOKS ET AL., *supra* note 63, at 2, 125, 134; Silverman, *supra* note 63, at 10.

⁶⁶ See BROOKS ET AL., *supra* note 63, at 123.

⁶⁷ *Id.* at 136.

⁶⁸ See *id.*; Silverman, *supra* note 63, at 10.

⁶⁹ See *supra* note 2.

⁷⁰ Closen et al., *supra* note 8, at 178.

Beginning in the early nineteenth century, Parliament passed a series of laws regulating notaries, regarding such matters as their training, examination, and authority. Today, English notaries are appointed by the authority of the Archbishop of Canterbury and are highly regarded professionals, most of whom must study notarial law and pass a written examination on the subject.

Id.; see *supra* note 2; see also BROOKS ET AL., *supra* note 63, at 123, 133.

⁷¹ See Roberts, *supra* note 19, at 14; Ross, *supra* note 38, at 11.

San Salvador Island in 1492.⁷² Sadly, notary de Arana was killed on San Salvador sometime in 1492-93.⁷³

After 1492-93, there were no known notaries in North America until the seventeenth century, when the English were settling the colonies.⁷⁴ While a small number of Englishmen bearing notarial grants from the Archbishop of Canterbury came to North America and performed official functions, the great majority of the earliest American notaries were appointed by the various colonial governments.⁷⁵ Again, the main reason for the appointment of notaries in the American colonies was the impartiality and integrity that notaries brought to commercial transactions. Early colonial merchants realized that in order for them to effectively participate in international commerce, they would have to be able to prepare documents in ways that would conform to the European practice of being properly notarized.⁷⁶ In other words, European businessmen would have to be able to trust documents coming from America.

The first notary public actually appointed in the Americas was Thomas Fugill, who was appointed a notary for the New Haven Colony in 1639.⁷⁷ In turn, the other colonies appointed their own notaries. Thus, in 1644, William Aspinwall became the first notary appointed for the Massachusetts Bay Colony.⁷⁸ The first notary was appointed in Virginia in 1662,⁷⁹ in Maryland in 1663,⁸⁰ in New Hampshire in 1690,⁸¹ in Rhode

⁷² See Closen et al., *supra* note 8, at 178; Ross, *supra* note 38, at 11.

⁷³ See Ross, *supra* note 38, at 11.

⁷⁴ See generally *id.* at 10-11; Seth, *supra* note 20, at 868. Interestingly, just as the English model was used to develop American notary law, so too the English approach served as the model for the concept of the family, which is the focus of attention (regarding intra-family notarizations) of this paper. "English law concerning marriage and family law generally was largely adopted by the American colonies, and was later readopted by most American states." GREGORY ET AL., *supra* note 23, at 7.

⁷⁵ "While some colonial notaries acted under authority of a commission granted in England from the Archbishop of Canterbury, most were appointed by local authorities in each of the colonies." Closen et al., *supra* note 8, at 179; see also Seth, *supra* note 20, at 867.

⁷⁶ See Ross, *supra* note 38, at 12 (commenting that "[t]he early settlers could not get along without [notaries]"). "A real need for qualified notaries emerged . . . as trade with Europe increased." Closen & Richards I, *supra* note 49, at 718. "The office [of notary public] also is a product of English Common Law and was used in both Roman and Common Law to assist trade between merchants of different nations." MISSISSIPPI NOTARIES PUBLIC APPLICATION & REFERENCE GUIDE 1 (May 1997); see also *infra* notes 79, 80.

⁷⁷ See Ross, *supra* note 38, at 10.

⁷⁸ See Seth, *supra* note 20, at 872 (noting that "on November 13, 1644, the General Court appointed William Aspinwall the first notary public of the colony").

⁷⁹ *Id.* at 879. Seth notes that:

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Island in 1705,⁸² in South Carolina in 1744,⁸³ and so on.⁸⁴ These colonial notaries were educated men of substance, were quite few in number and were to serve as impartial and trusted public servants.⁸⁵

Although the colonial notarial ideal was a man of integrity, the history of American notaries began with a rather unhappy start. Both Thomas Fugill and William Aspinwall were removed from office due to

[An] act by the General Assembly appointing the first notary public in Virginia on March 23, 1662, stated: [w]hereas for want of a publique notary the certificates and other instruments to be sent out of this country, have not that credit given to them in foreign parts as duly they ought; Be it therefore enacted that Henry Randolph, clerke of the assembly to be authorized and sworn a public notary for this Country, to whose attestation at home or abroad we desire all credence to be given.

Id.

⁸⁰ *Id.* at 879-80.

[S]imilarly, the following year [1663], an act of the General Assembly appointing the first notary public in Maryland, stated: [t]he Burgesses of this present General Assembly observing that little regard or Credit hath been usual in former, Tymes given to Public Instrum As Protests, Certificates and Copys of Records sent out of this province into Foreign Precincts for want of a Public Notary Authorized for that end And conceiving it necessary that such an officer be appointed whereby such instruments as aforesaid pass with greater Credence both in foreign precincts and at home amongst the People of this Province be it enacted by the Right Honorable the Lord Proprietor by and with the Assent of the upper and lower house of this present general assembly that the Secretary of this province for the tyme being be hereby appointed and authorized to be the Public Notary of this Province and that he be sworne by the Lieutenant Governor for the tyme being for that end and purpose.

Id.

⁸¹ *Id.* at 878 (determining that "in 1690, the Governor of Massachusetts appointed Thomas Brattle, the first known notary public in New Hampshire").

⁸² *Id.* at 879 (stating that because Massachusetts residents had been banned for political or religious reasons, most settled into a new colony they named Rhode Island). Seth notes that eventually, in "1705 the General Assembly established the office of notary public and appointed the Colony Recorder to fill the office. The only notary in the colony resided in Newport until 1751, when an Act establishing the office in Providence was passed. Fees for notaries were established in 1766." *Id.*

⁸³ *Id.* at 881 (maintaining that the "first notary public in South Carolina was William Whiteside from Georgetown, near Charleston, who was appointed March 13, 1741").

⁸⁴ See Seth, *supra* note 20, at 868-83 (providing a comprehensive list of the names and commission dates of the other colonial notaries).

⁸⁵ "The colonial notaries were men of substance who were literate and trusted to perform their notarial duties with diligence and integrity." Cloisen et al., *supra* note 8, at 179. "The notaries of the colonies were of considerable importance to early commerce in part because they were so few in number." *Id.* at 180.

their dishonest practices.⁸⁶ One respected historian of the office of notary public has perceptively remarked, “[t]he fact that the first notary in the American colonies was removed from his position because of dishonesty has not gone unnoticed by notary observers and commentators.”⁸⁷ Colonial notaries remained few in number and, despite the unfortunate misdeeds of Fugill and Aspinwall, notaries of the day were respected public officers who prepared important commercial documents, such as marine and bank protests, and who kept detailed records of their notarial acts.⁸⁸

After the United States was established, each state and territory, in due course, enacted a notary statute that created and empowered the office of notary public.⁸⁹ Almost every jurisdiction in this country grants the notary a commission as a public officer.⁹⁰ Notaries were permitted to charge and retain fees for their official services, which were set at levels that were significant for those times (commonly in the range of fifty cents to two dollars).⁹¹ Historically, in most states, notaries have been required to obtain surety bonds to provide financial backing of their diligence and integrity.⁹² An additional method used in the majority of

⁸⁶ See Seth, *supra* note 20, at 869, 875; see also Closen et al., *supra* note 8, at 179 (noting that the first notary appointed in the American Colonies (Thomas Fugill who was appointed in 1639 in New Haven) and the first notary appointed in the Massachusetts Bay Colony (William Aspinwall in 1644) were both removed from office due to their fraudulent practices). Unfortunately, their corruption did not represent mere isolated incidents, for too many other notaries public have been guilty of dishonesty over the last 350 years.

⁸⁷ Seth, *supra* note 20, at 869.

⁸⁸ But, as time passed, the notarial practice of performing such protests diminished. Eventually, colonial notaries’ “responsibilities for the preparation of important commercial documents such as bank protests and marine protests nearly evaporated.” Closen et al., *supra* note 8, at 181.

⁸⁹ “It is well settled that the authority of modern day notaries is statutorily based. Each jurisdiction has enacted legislation to regulate the profession and its practice.” CLOSEN ET AL., *supra* note 17, at 60. “Today, all fifty states have some form of law regulating notaries” Closen & Richards I, *supra* note 49, at 719; see also ANDERSON’S MANUAL FOR NOTARIES PUBLIC, *supra* note 21 (including the notary statutes for all the states and virtually all territories of the United States).

⁹⁰ “Notaries are not merely licensed, they are almost always commissioned by elected officials such as the state governor or secretary of state.” Closen I, *supra* note 2, at A23; see also, e.g., Kaufman v. McCrory Stores, 613 F. Supp. 1179 (M.D. Pa. 1985) (addressing whether the actions of a notary public are performed under color of state law).

⁹¹ See, e.g., COMP. LAWS OF THE HAWAIIAN KINGDOM art. 52, §1276 (1884) (setting the notarial fee for official certificates at two dollars); LAWS OF THE TERRITORY OF MICHIGAN, at 780 (1871) (pointing out that under the 1821 laws, the fees of notaries public include the amount of 50¢ for “[e]very certificate with the seal annexed”).

⁹² See CLOSEN ET AL., *supra* note 17, at 277 (noting that “[h]istorically, state laws required notaries to be bonded - often in amounts which in early days were significant. Moreover, in those days, if one was ‘bonded,’ that was something quite special, and a level of esteem

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jurisdictions to help assure the integrity of notaries was the requirement that applicants for the post obtain references or endorsements from other individuals, such as judges, legislators, or electors.⁹³ In small communities, where people tended to know one another, or the reputations of one another, this method may have been helpful in the selection of trustworthy notaries.⁹⁴ The number of notaries was often limited by early statutes, and often to just one notary per city, town, island, parish, or county.⁹⁵ Certainly, the smaller the number of notaries, the more substantial their stature in the eyes of the community.

In a number of jurisdictions, there has been what some have called a close or intimate relationship between the posts of notary public and justice of the peace.⁹⁶ For instance, the 1942 Virginia notary statute, directed notaries to “exercise the powers and functions of conservators

attached”); see also *Guide To Notary Commission Eligibility*, NAT’L NOTARY, May 2001, at 25 (listing some 35 United States jurisdictions that require notaries to be bonded, as follows: Alabama, Alaska, Arizona, Arkansas, California, District of Columbia, Florida, Guam, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky (varies by county), Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, North Marianas, Oklahoma, Pennsylvania, Puerto Rico, South Dakota, Tennessee, Texas, Virgin Islands, Utah, Washington, Wisconsin, and Wyoming).

⁹³ See *Guide To Notary Commission Eligibility*, *supra* note 92, at 21 (identifying the following 30 United States jurisdictions as requiring one or more references or endorsements for applicants for notary commissions: Alabama, American Samoa, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Missouri, Nebraska, New Hampshire, New Jersey, New Mexico, North Carolina, the Northern Marianas, Ohio, Pennsylvania, Rhode Island, South Carolina, Virgin Islands, Utah, Virginia, Washington, and West Virginia). See generally Jill Roberts, *Vouching For Good Character*, NAT’L NOTARY, Mar. 2001, at 22 (describing the procedure for character endorsements for notary applicants).

⁹⁴ See Roberts, *supra* note 93, at 23 (quoting Charles Faerber as follows: “Endorsements may have been worthwhile years ago when legislators knew their constituents personally”).

⁹⁵ See Ross, *supra* note 38, at 11 (pointing out that “the states at first placed tight restrictions on the number of Notaries”). The 1837 Arkansas statute provided for the appointment of “one notary public in each county.” ARK. REV. STAT. ch. 104, § 1 (1838). The 1836 statute in Tennessee limited the number of notaries to just two per county, except for one county that was allowed three. TENN. STAT. ch. 11, §1 (1836). Under the 1876 and 1879 laws of Texas, the governor could appoint one notary in each of the unorganized counties and between five and twenty notaries in the other counties. 65 TEX. REV. STAT. §3362 (1879). Under the 1866 laws for the Territory of Nebraska, the number of notaries was limited to between six and twelve notaries per county. NEB. REV. STAT. ch. 38, §14 (1866).

⁹⁶ “Certain other officials may be given notarial functions by statute, such as justices of the peace” 8 THE NEW ENCYCLOPAEDIA BRITANNICA 803 (15th ed. 1992); see, e.g., MAINE STAT. ch. 34, §3 (1904) (providing that a notary may “do any official act which may be performed by a justice of the peace”); see also *Wilson v. Traer & Co.*, 20 Iowa 231 (1866) (referring to the duties of notaries public as “this class of executive semi-judicial duties”).

of the peace."⁹⁷ One respected source explained: "The authority of a notary public frequently corresponds with the authority of a justice of the peace."⁹⁸ In a few states, the duties of the two offices were merged into one post.⁹⁹ Moreover, even in other states, notaries exercised powers typically reserved to judicial officers, such as the taking of depositions (sometimes including the authority to cite deposition witnesses for contempt).¹⁰⁰ Hence, the stature of notaries as individuals of integrity was heightened due to their kinship with judicial officials. Indeed, some of the first notaries were personally appointed by the Presidents, others by the governors of the states.¹⁰¹ Holding the office of notary public in some states disqualified men from holding other public offices, such as elected positions in the state legislatures.¹⁰² The

⁹⁷ VA. CODE ANN. §2850 (Michie 1942); *see also* N.H. REV. STAT. ch. 14, §1 (1843). The New Hampshire statute recites that:

Every notary public, in addition to the usual powers of such office, shall have the same powers as a justice of the peace in relation to depositions and the acknowledgement of deeds and other instruments, and his certificate of any such official act shall be as valid, as that of a justice of the peace.

N.H. REV. STAT. ch. 14, §1.

⁹⁸ ANDERSON'S MANUAL FOR NOTARIES PUBLIC, *supra* note 21, at 9; MEIER, *supra* note 17, at 14.

⁹⁹ *See* THE NEW PRACTICAL REFERENCE LIBRARY, *supra* note 35 (pointing out that "in some states [notaries] may exercise the powers of a justice of the peace"; Closen & Dixon, *supra* note 19, at 885 (observing that "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"); *see also* Coleman v. Roberts, 21 So. 449, 450 (Ala. 1896) (acknowledging that notaries enjoyed justice of the peace authority); *Notaries, Justices Blend Role*, NOTARY BULL., Oct. 2000, at 8 ("In 1983, the state of Maine officially merged the offices of justice of the peace and Notary Public after acknowledging that they were effectively performing the same functions.").

¹⁰⁰ "The right to issue subpoenas and compel the attendance of witnesses is occasionally granted [to notaries public]." ANDERSON'S MANUAL FOR NOTARIES PUBLIC, *supra* note 21, at 9; *see, e.g.*, Bevan v. Krieger, 289 U.S. 459, 464 (1933) (holding that Ohio notaries may hold deponents in contempt under appropriate circumstances); Gall v. St. Elizabeth Med. Ctr., 130 F.R.D. 85 (S.D. Ohio 1990) (same).

¹⁰¹ "Some [early United States notaries] were even appointed by the President." Closen & Richards I, *supra* note 49, at 718. Copies of Presidential notarial commissions have been reproduced in numbers of publications. For example, for an 1878 notarial appointment by President Rutherford B. Hayes, *see* Rothman, *supra* note 17, at [an unnumbered page]. For a 1941 commission from President Franklin D. Roosevelt, *see* NOTARY BULL., Aug. 2000, at 9. Notaries were appointed by governor in New Mexico, Oregon, North Carolina, Texas, and Tennessee. N.C. REV. STAT. ch. 78, §1 (1837); N.M. GEN. LAWS Art. 40, ch. 80, §1 (1880); OR. LAWS ch. 36, §1 (1866); TENN. STAT. ch. 11, §4 (1836); 65 TEX. REV. STAT. §3362 (1876). But, in Vermont, notaries were appointed by the county court judges, VT. REV. STAT. ch. XI, §68 (1840), and in the Hawaiian Kingdom by the King in Privy Council, COMP. LAWS OF THE HAWAIIAN KINGDOM, art. 99, §1266 (1884).

¹⁰² *See, e.g.*, ME. CONST. art. IV, §11 (1819).

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Confederacy even felt the need to appoint notaries during the Civil War.¹⁰³

The earliest United States notary statutes were quite brief, leaving numerous matters of consequence unaddressed.¹⁰⁴ Some of those laws did not even expressly authorize notaries to administer oaths,¹⁰⁵ and thus, vintage legal cases sometimes considered whether notaries had inherent authority to administer oaths in the absence of statutory grants.¹⁰⁶ Early statutes omitted altogether notary ethics standards, including any attention to family-based conflicts of interest. To illustrate, the 1837 North Carolina law contained only three one-sentence paragraphs,¹⁰⁷ while the 1840 Vermont notary statute contained just four one-sentence paragraphs.¹⁰⁸ Neither law contained any ethical standards or conflicts of interest provisions. Many notary laws of the 1800s included only three to ten short paragraphs and could easily fit onto just one page in the statute books.¹⁰⁹ The 1828 Illinois notary law contained only six short paragraphs and said nothing about notarial ethics or

¹⁰³ See *Donegan v. Wood*, 49 Ala. 242 (1873) (referring to a notary who had been commissioned by the Confederate States of America).

¹⁰⁴ See, e.g., ARK. REV. STAT. ch. 104, §§ 1-9 (1837) (including a total of two chapters and eleven sections); An Act Concerning Notaries Public, TERRITORY OF FLA. (1839) (containing just four sections); Notary Public, TENN. STAT. (1831) (containing eight sections); N.H. REV. STAT., ch. 14 §§ 1-8 (1843) (including eight sections); see also *infra* notes 105, 107-10.

¹⁰⁵ See, e.g., COMP. LAWS OF HAWAIIAN KINGDOM art. 52 (1884); ME. LAWS ch. 101, Vol. I (1821); N.H. REV. STAT. ch. 14 (1843). Certainly, some old laws did specifically empower notaries to administer oaths (and sometimes even affirmations). See, e.g., An Act Concerning Notaries Public, §2, TERRITORY OF FLA. (1839); TERRITORY OF NEB. REV. STAT. ch. 38, §5 (1866); OR. LAWS ch. 36, §9 (1854); 65 TEX. REV. STAT. art. 3350 (1879); 47 UTAH REV. STAT. §1669 (1898). By 1940, Meier was able to conclude that “[t]he statutes of practically every state grant to a notary public power to administer oaths” MEIER, *supra* note 98, at 14.

¹⁰⁶ See, e.g., *Simpson v. Wicker*, 47 S.E. 965 (Ga. 1904) (holding that administering an oath is within the common law authority of the notary office). But see the following cases where courts found notaries to be without the power to administer oaths: *Keefer v. Mason*, 36 Ill. 406 (1865); *Teutonia Loan & Bldg. Co. v. Turrell*, 49 N.E. 852 (Ind. App. 1898); *Berkery v. Reilly*, 46 N.W. 436 (Mich. 1890); *Campbell v. Brady*, 11 S.W.2d 687 (Tenn. 1928); *Kumpe v. Gee*, 187 S.W.2d 932 (Tex. App. 1945). These cases became part of the majority position, which the United States Supreme Court even joined. See *United States v. Curtis*, 107 U.S. 671 (1882).

¹⁰⁷ N.C. REV. STAT. ch. 78, §§1-3 (1837).

¹⁰⁸ VT. REV. STAT. ch. XI, §§67-70 (1840).

¹⁰⁹ See, e.g., ARK. REV. STAT. ch. 104, § 1 (1838) (including nine one-sentence sections in one and one-half pages); N.H. REV. STAT. ch. 14 (1843) (including eight sections that would have fit onto one page); N.M. LAWS art. 40, ch. 80 (1880) (including ten sections that would fit on one page); TENN. STAT. ch. 11 (1836) (including seven sections on one page); 47 UTAH REV. STAT. §1666 (1898) (including eight sections on one page); see also *infra* notes 104-05, 107-08.

disqualifications due to conflicts of interest.¹¹⁰ The Illinois statute remained brief for more than 150 years, until it was substantially expanded to its present length in 1991.¹¹¹ It was with the 1991 changes to the Illinois notary law that the prohibition against a notary notarizing “any instrument in which the notary’s name appears as a party to the transactions” was added.¹¹² Indeed, as will be pointed out in detail later, numerous jurisdictions have never confronted such matters in their statutes.¹¹³

Occasional early common law decisions considered questions about notarial ethics, in particular, about self-notarization and notarizing for one’s relatives (and those cases will be noted at greater length later in this Article).¹¹⁴ For the moment, consider a few of the typical expressions of the judges in those old cases about the ethical standards for notaries and other officials authorized to take acknowledgments and to perform jurat notarizations. As the Illinois Supreme Court concluded in 1902, “[t]he intention of the law is that the certificate of acknowledgment shall be the official act of a disinterested officer.”¹¹⁵ In 1929, the Montana Supreme Court observed, “[t]he authorities are in substantial agreement that an officer is disqualified from taking an acknowledgment if he is directly interested in the transaction to which the instrument relates, either financially or beneficially, the rule being founded on public policy.”¹¹⁶ An 1897 California Supreme Court decision, which pre-dated the California statute against notarizing for oneself, emphatically held:

[We are] not aware of any statute law in this state prohibiting a notary from taking the acknowledgement of a conveyance of property in which he has an interest. We must therefore resort to the general law upon that subject, and it is uniform that no such thing can be legally done.”¹¹⁷

¹¹⁰ Notaries Public, §§ 1-6, ILL. LAWS (the “Act for An Appointment of Notaries Public” was adopted on December 30, 1828).

¹¹¹ See generally 5 ILL. COMP. STAT. 312/1-104 (1993) (effective from January 10, 1991). The 1991 statute dealt with such subjects as a notary’s seal, fee schedule, reappointment, prohibited acts, and name changes. *Id.*

¹¹² *Id.* at 312/6-104(b) (1993).

¹¹³ See *infra* notes 349-70 and accompanying text; see also Table 1.

¹¹⁴ See *infra* notes 468-87 and accompanying text.

¹¹⁵ *Ogden Bldg. & Loan Ass’n v. Mensch*, 196 Ill. 554, 568 (1902).

¹¹⁶ *Musselshell Valley Farming & Livestock Co. v. Cooley*, 283 P. 213, 216 (Mont. 1929).

¹¹⁷ *Lee v. Murphy*, 51 P. 549, 551 (Cal. 1897).

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It should be noted that there were a few early, general statutory forerunners of the more specific contemporary treatments of conflict of interest disqualifications of notaries. For example, the 1836 Tennessee law provided that each notary "will, *without favor or partiality*, honestly, faithfully, and diligently, discharge the duties of notary public."¹¹⁸ What was meant by the notary's responsibility to serve "without favor or partiality" was not explained. Similarly, the 1866 notary law of the Territory of Nebraska directed the notary to "faithfully and *impartially* discharge and perform all the duties of his office," but it did not further detail the duty of impartiality.¹¹⁹ Among the very first conflict of interest disqualification provisions was this section of that 1866 Nebraska notary statute: "[n]o banker or broker, nor any officer, salaried attorney, stockholder, clerk or agent of any bank, banker or broker, shall be appointed to or shall hold the office of notary public in this territory."¹²⁰

As another revealing illustration of the historic neglect of notary ethics issues, especially conflict of interest situations, consider this example from the 1880s. The leading treatise of the day, and one of the only such works of its time, was John Proffatt's *A Treatise On The Law Relating To The Office And Duties of Notaries Public*.¹²¹ That 360 page work reviews both statutory and common law doctrines and contains just one short five-sentence paragraph about notarial ethics matters.¹²² While this treatise sensibly determines that "[a] person cannot take the acknowledgment of a deed to himself or for his use," its very next statement is disturbing in concluding that an acknowledgment "may be taken by an officer who is related to the parties."¹²³ The work's subject-matter index contains no entry for any term or phrase suggesting coverage of impartiality and integrity, such as "ethics," "conflicts of interest," "beneficial interest," or "disqualification."¹²⁴ Thus, it is clear that while notarial impartiality was desired, it was principally a wishful ideal rather than a legally demanded standard.

Although the number of notaries remained relatively small in the early United States, with the westward expansion of the country, the significant growth of the population due to immigration, and

¹¹⁸ TENN. STAT. ch. 11, §2 (1836) (emphasis added).

¹¹⁹ TERRITORY OF NEB. REV. STAT. ch. 38, § 3 (1866) (emphasis added).

¹²⁰ TERRITORY OF NEB. REV. STAT. ch. 38, § 9 (1866).

¹²¹ JOHN PROFFATT, *A TREATISE ON THE LAW RELATING TO THE OFFICE AND DUTIES OF NOTARIES PUBLIC* (1877).

¹²² *Id.* at 33.

¹²³ *Id.*

¹²⁴ *Id.* at 359-380.

burgeoning domestic and international commerce, the numbers of notaries increased dramatically.¹²⁵ "In Connecticut, for example, there were 15 Notaries in 1800, 32 in 1812, 64 in 1827, 10,789 in 1932, . . . 39,000 in 1986,"¹²⁶ and 48,000 in 1997.¹²⁷ "[I]n California, no more than 405 Notaries could be commissioned in 1853 to serve the entire state,"¹²⁸ while there were more than 130,000 notaries in California in 1997.¹²⁹ The single biggest factor contributing to a surge in the ranks of notaries was the opening of the office to women in the early 1900s.¹³⁰ The growth in the notary population continued unabated throughout the 1900s.¹³¹ In fact, in the twenty-five year period between 1972 and 1997, the number of notaries more than doubled from about 1.8 million to more than 4.2 million.¹³² That number continues to climb.¹³³

With the large populations involved in contemporary times, the old-fashioned method of requiring notary applicants to obtain references or endorsements from local individuals has lost its effectiveness in contributing to increased assurances that notaries will be people of honor and impartiality.¹³⁴ Indeed, under present circumstances, the many

¹²⁵ "[T]he nation's explosive growth through the 1800s and early 1900s caused an unprecedented demand for Notaries and the restrictions [on the number of Notaries] were lifted." Ross, *supra* note 38, at 11.

¹²⁶ *Id.*

¹²⁷ See Birenbaum, *supra* note 2, at 31.

¹²⁸ Ross, *supra* note 38, at 11.

¹²⁹ See Birenbaum, *supra* note 2, at 30.

¹³⁰ See Ross, *supra* note 38, at 12 (stating that today "the overwhelming majority of American Notaries are female"). In fact, eighty percent of notaries who responded to a 1998 NNA membership survey were women. *Id.* See generally Deborah M. Thaw, *The Feminization of the Office of Notary Public: From Femme Covert to Notaire Covert*, 31 J. MARSHALL L. REV. 703 (1998).

¹³¹ See Birenbaum, *supra* note 2, at 30.

¹³² *Id.*

¹³³ Wisconsin, for example, "has reported an increase of 20,000 more notaries between 1997 and 2000." Closen et al., *supra* note 8, at 184. The number of notaries in Virginia was about 126,000 in 1997. Birenbaum, *supra* note 2, at 31. It has now grown to about 180,000. See Workman, *supra* note 43, at 8. "[M]any state regulators are convinced Notary numbers have swelled dramatically. Texas officials reported a five-year bulge to more than 346,6000 as of [2000], and Virginia officials said its Notary population has cracked the 200,000 threshold." *Does Boom Include Notaries?*, *supra* note 48, at 3. An important reason that contributes to the unbridled increase in the number of notaries is the widespread lack of background checks of notary applicants. See Armando Aguirre, *States Set Bar Low For Notary Applicants*, NAT'L NOTARY, July 2001, at 16 (providing examples of states that do little or no background checks, such as Massachusetts, Utah, Colorado, and Virginia). Virginia notary director Michelle Ford said that "[i]n the six years she has worked in the Notary Division no one has ever been denied a commission." *Id.* at 19.

¹³⁴ See Roberts, *supra* note 93, at 23 (concluding that "[c]haracter endorsements may be a quaint tradition of a bygone era"); see also *infra* notes 136-38.

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remaining statutory mandates of this type¹³⁵ usually result in purely political or meaningless recommendations of strangers, and therefore, do not generally contribute to improved integrity on the part of notaries.¹³⁶ To the contrary, these practices are demeaning and may detract from the image of the notary public. One notary, for instance, candidly admitted that when she needed the endorsements of local voters on her application, she left the form at the shop of her hairdresser so that customers could sign it.¹³⁷ When local politicians, such as legislators, judges, or other elected officials, are statutorily needed to endorse applicants for notary public positions, they tend to do the politically expedient thing and rubber-stamp any applications that are presented (which recently caused surprise and embarrassment for some Michigan legislators who were unknowingly endorsing the notary applications of prisoners).¹³⁸ Such practices do not promote integrity within the ranks of notaries.

Even though this country cannot possibly need over 4.2 million notaries, we continue to commission more of them every business day.¹³⁹ The notarial industry constitutes a multi-million dollar business that few seem willing to challenge. State and local governments reap millions of dollars annually from notary application fees and notary commission

¹³⁵ See *Guide To Notary Commission Eligibility*, *supra* note 92, at 23; see also Roberts, *supra* note 93, at 22 (saying that character endorsements are “[a] little known requirement of the Notary application process in 30 United States’ states and jurisdictions”).

¹³⁶ See Roberts, *supra* note 93, at 23 (stating that “[m]any elected officials . . . [admit] they do not feel that strongly about character endorsements”); see also *supra* note 134.

¹³⁷ See Roberts, *supra* note 93, at 23 (indicating the hair stylist parlor was in Nebraska).

¹³⁸ *Id.* (quoting the director of the Kentucky Notary Division who said she did “not see any value in character endorsements,” because “[a]ll they are doing is recommending someone they don’t know anything about”). According to Michigan Assistant Attorney General Peter Govorchin, Michigan requires notary applicants to obtain the endorsement of a member of the state legislature or a judge, and some prisoners had obtained such endorsements — prior to the time Michigan recently decided to refuse notary commissions for prisoners. *Prison Notarizations: Meeting the Needs of Inmates*, NOTARY BULL., June 2001, at 13. As Govorchin said, “Back when members of the legislature or judges knew all the members of a community it made sense to have an endorsement but that system seems pretty out of date now.” *Id.*; see also *Pennsylvania Bill Dies in Senate*, NAT’L NOTARY, Jan. 2001, at 29 (describing the political feud in Pennsylvania where the endorsement process has resided in the Senate but where an “intramural squabble between the state’s House and Senate” resulted from a proposal to move the endorsement authority to members of the House); *supra* notes 134, 136-37.

¹³⁹ One of the few places where there is sometimes a felt need for more notaries is in the jails and prisons. See generally R. Jason Richards, *Stop! . . . Go Directly to Jail, Do Not Pass Go, and Do Not Ask for a Notary*, 31 J. MARSHALL L. REV. 879 (1998).

filing fees.¹⁴⁰ There is also a multimillion dollar cottage industry in the private sector associated with the commissioning of notaries.¹⁴¹ The notary support industry provides notary bonds, notary seals, notary education programs, notary membership organizations, and a seemingly endless array of other goods (notary T-shirts, mugs, hats, etc.) and services (notary malpractice insurance, notary on-line networking, notary group health insurance, etc.).¹⁴²

Unfortunately, government-sponsored notary education, testing, certification, oversight, and discipline have not kept pace with the expansion of the notary population.¹⁴³ As the United States Supreme Court has observed, “[t]he significance of the position [of notary public] has necessarily been diluted by changes in the appointment process and by the wholesale proliferation of notaries.”¹⁴⁴ The qualifications required of notaries are minimal. Only Wisconsin mandates that notaries have achieved a prescribed level of general education, and that standard is a mere eighth-grade education.¹⁴⁵ So, a barely literate elementary school dropout could become a notary once he/she reaches the prescribed minimum age in fifty-four United States jurisdictions.¹⁴⁶ Only Florida and North Carolina have compulsory training in notarial law and

¹⁴⁰ “A conservative estimate is that notaries pay more than \$28 million annually to state and local governments in commissioning fees alone.” Closen et al., *supra* note 8, at 185.

¹⁴¹ *Id.* “This amount does not take into account the millions spent annually in support of the cottage industry that has developed to accommodate notaries with supplies (seals, recordbooks, signage, etc.) and services (bonds, insurance, organization dues, etc.)” *Id.*

¹⁴² Periodically, the National Notary Association and the American Society of Notaries distribute catalogs designed strictly for notaries public. See generally National Notary Association, NOTARY ESSENTIALS CATALOG, Spring/Summer (2001) (listing notary key rings for sale for \$6.95 [at 3], notary automobile license plate frames for \$7.95 [at 13], notary caps for \$15.95 [at 5], notary pens for \$29.95 [at 7], and so on). Additionally, these items are sold on their websites: <http://www.nationalnotary.org> and <http://www.notaries.org>.

¹⁴³ “[E]stablished qualification standards [for] notaries . . . [often] are not particularly stringent . . . [T]he commissioning process is relatively lax.” CLOSEN ET AL., *supra* note 17, at 67. “Only a few states mandate any kind of education, testing, continuing education, or re-testing upon re-commissioning for notaries.” Gnoffo, *supra* note 16, at 1089; see also Aguirre, *supra* note 133, at 16 (pointing out that many states do little or no background checks of applicants for notary commissions).

¹⁴⁴ Bernal v. Fainter, 467 U.S. 216, 223 n.12 (1984).

¹⁴⁵ WIS. STAT. ANN. § 137.01 (West 1989 & Supp. 2000) (establishing that the notary must have “the equivalent of an 8th grade education . . .”).

¹⁴⁶ “[A] grade school drop-out barely proficient in the relevant language can become a notary, and can notarize documents involving hundreds of thousands or millions of dollars of transactions.” Closen & Richards I, *supra* note 49, at 722; see also Gnoffo, *supra* note 16, at 1089-91, 1094-95.

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practice for notaries, which demand only a few hours of instruction.¹⁴⁷ Only a few states have established mandatory testing on notary rules and practice for notary applicants, and fewer still have established proctored written examinations.¹⁴⁸ An average of some 4000 notary commissions expire every business day in this country,¹⁴⁹ and yet there is no mandatory retraining, updating, or retesting of notaries as a condition of renewal of their commissions.¹⁵⁰ Due to budgetary constraints, few jurisdictions can effectively supervise notaries in general, investigate complaints of notarial misconduct, and discipline errant notaries.¹⁵¹

¹⁴⁷ "The problem [of notarial misconduct] is compounded by the fact that most notaries are lay citizens, untrained and unskilled in their duties as public officers." Anderson & Closen II, *supra* note 12, at 888. As Charles Desmond, the former chief judge of the New York Court of Appeals observed, "[w]ithout full knowledge of his powers, obligations and limitations, a notary public can be a positive danger to the community in which he is licensed to act." SKINNER'S NOTARY MANUAL, foreword (3d ed. 1963); see also Gnoffo, *supra* note 16, at 1089-91, 1094-95. Proposed legislation is pending in both Pennsylvania (House Bill 851) and Texas (House Bill 3224) to adopt mandatory notary education. *Legislative Updates*, AM. NOTARY, 2d Qtr. 2001, at 23 [hereinafter *Legislative Updates*].

¹⁴⁸ Anderson & Closen II, *supra* note 12, at 888-89. "Only a handful of states currently require notary education or testing." *Id.* For instance, Wyoming includes an open-book examination in its notary handbook, and "[c]ompletion of the test is encouraged but not mandatory." WYOMING NOTARIES PUBLIC HANDBOOK 22 (June 1999); see also Gnoffo, *supra* note 16, at 1089-91, 1094-95.

¹⁴⁹ This number was estimated based upon the following calculations. First, there are more than 4.2 million notaries public in the United States. Second, the average length of term for those notaries is about four years. See *Comparison of Notary Provisions*, NAT'L NOTARY, May 2000, at 27 (indicating that some thirty-three jurisdictions have a four-year term for notary commissions, and another eight jurisdictions have terms of three or five years). When 4.2 million is divided by four, this produces an average of about 1.05 million commissions expiring annually. Third, there are 260 business days in a year. When 1.05 million is divided by 260 days, the result is about 4038 notary commissions expiring every business day. When calculated for the 365 days in a year, the number is smaller. "Every day in this country, the commissions of more than 2,700 Notaries expire." Michael L. Closen, *Caution About Notarizing After Commissions Expire*, NOTARY BULL., Apr. 2001, at 1 [hereinafter Closen IV].

¹⁵⁰ For states to omit mandatory retraining or retesting only contributes to poor notarial practices. Notary laws change every year, and the fact that no notary commissioning agency in the United States ensures that these notaries are kept abreast of these modifications is very troubling. In a recent survey conducted by the National Notary Association, members were asked if new commission applicants should be required to take a course in notary laws and procedures. Eighty-eight percent responded 'yes.' *NNA Web Poll*, NOTARY BULL., Apr. 2001, at 1. If this many notaries believe new applicants should be required to take a course regarding laws and procedures, the next logical step is that many would likely support retesting and retraining sessions every few years.

¹⁵¹ See, e.g., Lambert, *supra* note 8, at 1 (mentioning that in New York "notaries . . . operate with scant oversight"). Lisa Fisher of the American Society of Notaries was quoted as observing: "A lot of this [fraudulent] activity goes on, and there are no notary police to detect it." *Id.* When Clarke and Kovach commented that "it is critical for notaries public to

It simply cannot be expected that, in an atmosphere of such cavalier credentialing, notaries will know anything of consequence about conflicts of interest or care the slightest about ethical issues. Currently, some notaries and former notaries are so uninformed and indifferent about their responsibilities that they allow their real notary seals to be used by someone else or to be sold through on-line auction sites, thereby risking forgeries of notarial certificates by conartists intent on perpetrating frauds.¹⁵² Consider two other telling features of notary qualification and functioning in this country. First, most states have historically required notaries to be bonded,¹⁵³ people seem to think all notaries are bonded; and many people tend to look upon one's being bonded as significant.¹⁵⁴ The assumption seems to be that private surety companies would not issue bonds unless the companies had independently concluded notaries were diligent and honorable and would, therefore, represent good risks for coverage. But those impressions are grossly exaggerated, if not completely mistaken, with regard to notaries. To begin, a substantial number of notaries are not required to be bonded at all. Some twenty-one states and territories do not presently mandate it.¹⁵⁵ Moreover, the levels of notary bonds are set

police themselves," they undoubtedly had in mind at least in part that the states do not have the resources to satisfactorily do so. Clarke & Kovach, *supra* note 8, at 983. See generally John T. Henderson & Peter D. Kovach, *Administrative Agency Oversight of Notarial Practice*, 31 J. MARSHALL L. REV. 857 (1998).

¹⁵² See 'Sorry, No Can Do!' *Says Notary To Bribery Offer*, NOTARY BULL., June 2001, at 5 (relating the case of a notary whose son obtained her official seal and forged her signature for a \$700 payment to perform the false notarization in order to commit a real estate fraud on an elderly woman). See generally Michael L. Closen, *The Dangers of On-Line Sales of Notary Seals*, THE NOTARY, March/April 2001, at 5 (pointing out that "[o]n a daily basis, real notary seals, some expired but some not bearing any commission expiration dates, are being bought and sold through on-line auction sites," and warning that such "sales of real, contemporary notary seals may contribute to document forgery and fraud") [hereinafter Closen V].

¹⁵³ See generally Michael J. Osty, *Notary Bonds and Insurance: Increasing the Protection for Consumers and Notaries*, 31 J. MARSHALL L. REV. 839 (1998).

¹⁵⁴ However, notary bonds are not insurance and many notaries confuse the bond as such. Used as a historic device, a notary bond does not cover notaries for their malpractice or negligence. If a notary is sued and his bond is used, the bonding company will likely demand that the notary pay the company back. Furthermore, bond amounts are almost insignificant. In an era where million dollar settlements are given, five or ten thousand dollars does not go very far.

¹⁵⁵ See *Comparison of Notary Provisions*, *supra* note 149, at 27 (noting that the states that do not require bonds are the American Samoa, Colorado, Connecticut, Delaware, Georgia, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oregon, Rhode Island, South Carolina, Vermont, Virginia, and West Virginia).

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so low as to be laughable.¹⁵⁶ The highest notary bond in any jurisdiction is just \$15,000, and only California and Puerto Rico have set their notary bonds at that level.¹⁵⁷ About twenty-one of the thirty-five jurisdictions which require their notaries to be bonded set the bond amounts at \$5000 or less.¹⁵⁸ In other words, a total of some forty-two United States jurisdictions require no notary bonds at all or set their bond levels at no more than \$5000. Three states still have in place meaningless \$500 notary bond requirements that were first fixed in the 1800s and were never increased.¹⁵⁹ By contrast, in the mid-1800s, when California and Tennessee first set their notary bond level, it was set at \$5000.¹⁶⁰ That was meaningful at the time, but it did not become the model for those or other states as the years passed.

The relevance of the senselessly low notary bond amounts is that they suggest the low level of concern about the ethical responsibilities of notaries. These trifling bonds suggest a wide latitude for dereliction and misconduct among notaries. The public is actually misled because they do not realize the pitifully low levels at which notaries are bonded and

¹⁵⁶ *Id.* Such low amounts will barely cover an hour of attorneys' fees let alone any damages the notary is found liable for. Clearly, a change needs to be made - many states have kept their bond amounts the same as when the notary statute was enacted. Inflation has not been considered by the legislature.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* (identifying the states and territories that have notary bonds below \$5000 as Alaska, Arkansas, District of Columbia, Guam, Hawaii, New Mexico, Northern Marianas Islands, Oklahoma, Pennsylvania, Wisconsin, and Wyoming; and identifying the states that have the notary bond amount at \$5000 as Arizona, Illinois, Indiana, Louisiana (attorneys are exempt), Mississippi, Montana, South Dakota, Virgin Islands, and Utah). Kentucky is unique in its approach to notary bonding, because there "[b]ond requirements vary in each country." COMMONWEALTH OF KENTUCKY NOTARY PUBLIC HANDBOOK 3 (Mar. 1997).

¹⁵⁹ See Closen et al., *supra* note 8, at 187-89. The authors note that:

[One of the] best pieces of evidence of the trivialized position of notaries in the United States is the paltry sums most states allow notaries to charge for their services. On average, the states that regulate notary fees set the maximum charge for a standard jurat or notarization are \$2 or less. And, a few states still set the charges for jurats and between \$0.25 and \$1. Some twenty states do not require notaries to be bonded at all, and no state requires notaries to carry liability insurance (such as malpractice or errors and omissions insurance). Of the proximately thirty states which statutorily mandate that notaries be bonded, the bond levels are set at such low levels - ranging from \$500 to \$15,000 - as to make them nearly worthless and perhaps counterproductive.

Id.

¹⁶⁰ TENN. STAT. ch. 11, §2 (1836). In 1822, Florida set its first notary bond at \$500. An Act Concerning Notaries Public, §1, TERRITORY OF FLA. (1822).

are thereby lulled into a false sense of security.¹⁶¹ The low or non-existent bonds also mean that being "bonded" is not really meaningful. Bond companies do not care who they cover, because if they have to pay on any claims, they will not have to pay very much, and if they do have to pay they will seek reimbursement from the notaries who caused the losses anyway.¹⁶² Incidentally, no jurisdiction requires notaries to be covered by any kind of errors and omissions insurance or liability insurance.¹⁶³

Second, the maximum fees that notaries in some forty-nine jurisdictions in this country are statutorily allowed to charge to document signers are ridiculously small. In some thirty-four states and territories, notaries are statutorily restricted to charging no more than one to five dollars for standard acknowledgments and jurats.¹⁶⁴ The highest fee in any jurisdiction is a paltry ten dollars, and only four places allow notaries to charge that much.¹⁶⁵ Nine jurisdictions continue to permit notaries to charge the worthless amounts of twenty to fifty cents for standard acknowledgements or jurats.¹⁶⁶ Is it any wonder that, to many people, notarization in this country is a joke? Most notaries cannot

¹⁶¹ See Michael L. Closen & Michael J. Osty, *The Illinois Notary Bond Deception*, ILL. POL., Mar. 1995, at 14 (asserting that the "notary bonding practice now in place in Illinois constitutes a hoax"). The bonding practice provides a false sense of security because it deceives notaries into thinking that their bonds will cover them as insurance for any notarial malpractice or negligence.

¹⁶² *Id.* at 13. The authors point out that:

Most assuredly, the companies which sell these token bonds collect premiums add up . . . [T]here is at least a million-dollar annual notary bond industry. In the generations during which these useless bonds have been bought and issued, many millions of dollars of profit have been realized by the bond companies because there has been no risk of liability . . . (especially because bond companies will seek reimbursement from a notary if the bond company has to pay due to a notary's mistake or omission).

Id. Regarding a claim against a notary's bond, "[i]f collected by the claimant, the bond company collects reimbursement from the notary." WYOMING NOTARIES PUBLIC HANDBOOK 21 (June 1999). "The surety can demand reimbursement from the notary if a claim is properly paid." KANSAS NOTARY PUBLIC HANDBOOK 25 (n.d.).

¹⁶³ See CLOSEN ET AL., *supra* note 17, at 286 (asserting that "[n]o state requires notary liability insurance").

¹⁶⁴ See *Guide to Notary Fees*, NAT'L NOTARY, May 2001, at 23 (listing the notary fees set out in the fee schedules of virtually all the states and territories). Incidentally, some eight jurisdictions (including, Alaska, American Samoa, Iowa, Kansas, Louisiana, Maine, and Massachusetts) have no fee schedule for standard jurat and acknowledgment notarizations. *Id.*

¹⁶⁵ *Id.* Those four jurisdictions are California, Florida, Guam, and South Dakota. *Id.*

¹⁶⁶ *Id.* Those nine jurisdictions include Alabama, Kentucky, New Jersey, Northern Marianas, Oklahoma, Rhode Island, South Carolina, Vermont, and Wisconsin. *Id.*

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possibly be expected to know about or to care about notarial ethics and conflicts of interest when they are being paid peanuts. These inconsequential notary fee levels send the clear message that the legislatures regard notarial services to be inconsequential as well. Can it reasonably be expected that officers who are paid sums ranging between a mere twenty cents and the lowly figure of five dollars per notarial act will be inclined to recognize ethical issues including family-based conflicts of interest and to avoid misconduct associated therewith? Hardly.¹⁶⁷

The notary statutes of the early to late 1900s did begin to cover specific ethics matters, with most conflict of interest provisions being adopted in the 1980s and 1990s. Some provisions prohibited notaries from notarizing for themselves;¹⁶⁸ some applied in the banking and corporate settings to forbid company officers, directors, and stockholders from notarizing if they were named individually or as company representatives;¹⁶⁹ some established general beneficial interest

¹⁶⁷ “[B]ecause notaries earn at most paltry fees for their services, they generally have little or no financial incentive to learn and perform their duties.” Anderson & Closen II, *supra* note 12, at 889. “The fees paid for notary services may make the strongest case of all for the fact that this position has been trivialized to the point where it is no longer justifiable.” Closen I, *supra* note 2, at A23.

¹⁶⁸ For example, Idaho adopted its provision on disqualifying interests (where a notary is “named as a party to the transaction”) in 1985. IDAHO CODE §51-108(3) (Michie 1985). Nevada also did so in 1985. NEV. REV. STAT. 240.065 (1)(a) (1985) (stating that “[a] notary public may not perform a notarial act if . . . [h]e executed or is named in the instrument acknowledged or sworn to”). Virginia had done so much earlier. See VA. CODE ANN. § 47.1-30 (Michie 1950) (providing that “[n]o notary shall perform any notarial act with respect to any document or writing to which the notary . . . shall be a party”). Indiana did so in 1955. IND. CODE § 33-16-2-2(2) (1955) (declaring that no notary could “acknowledge any instrument in which his name appears as a party to the transaction”); see also COLO. REV. STAT. § 12-55-110 (2)(b) (1985) (disqualifying a notary when the notary “[i]s named, individually, as a party to the transaction”); FLA. STAT. ANN. § 117.107(2) (West 1995) (stating that “[a] notary public may not acknowledge an instrument in which the notary public’s name appears as a party to the transaction”); Table 1.

¹⁶⁹ See, e.g., MICH. COMP. LAWS, § 55.251 (1909) (mandating that “[i]t shall not be lawful for any notary public to take the acknowledgment of an instrument by or to a bank or other corporation of which he is a stockholder, director, officer or employee, where such notary is named as a party to such instrument, either individually or as a representative of such bank or other corporation, or to protest any negotiable instrument owned or held for collection by such bank or other corporation, where such notary is individually a party to such instrument”); 1917 NEV. STAT. ch. 38, § 1 (1917) (proscribing “it shall be unlawful for any notary public to take the acknowledgment by or to a bank or other corporation of which he is a stockholder, director, officer, or employee, where such notary is a party to such instrument either individually or as a representative of such corporation, or to protest any negotiable instrument owned or held for collection by such corporation, where such notary is individually a party to such instrument”); 1929 S.D. LAWS ch. 5, §5250 (stating that

disqualifications for notaries;¹⁷⁰ and a few even barred notaries from notarizing for their own relatives.¹⁷¹ Three uniform laws about notarization were drafted and adopted by the Commissioners on Uniform State Laws. The Uniform Acknowledgment Act was approved in 1939,¹⁷² the Uniform Recognition of Acknowledgments Act was approved in 1968,¹⁷³ and the Uniform Law on Notarial Acts was

“it shall be unlawful for any notary public to take the acknowledgment of an instrument by or to a bank or other corporation of which he is a stockholder, director, officer or employee, where such notary is a party to such instrument, either individually or as a representative of such corporation”); *see also* Table 2.

¹⁷⁰ *See, e.g.*, COLO. REV. STAT. § 12-55-110(2)(a) (1985) (defining a disqualifying interest to exist where a notary “[m]ay receive directly, and as a proximate result of the notarization, any advantage, right, title, interest, cash, or property exceeding in value the sum of any [notarial] fee”); FLA. STAT. ANN. § 117.107(12) (West 1999) (declaring, in part, that “[a] notary public may not notarize a signature on a document if the notary public has a financial interest in . . . the underlying transaction”); NEV. REV. STAT. § 240.065(1)(b) (1985) (providing that a notary may not act if “[h]e will receive directly from a transaction relating to the instrument or pleading a commission, fee, advantage, right, title, interest, property or other consideration in excess of the [notarial] fees”); VA. CODE ANN. § 47.1-30 (Michie 1950) (declaring that “[n]o notary shall perform any notarial act with respect to any document or writing to which the notary or his spouse shall be a party, or in which either of them shall have a direct beneficial interest”); *see also* Table 1.

¹⁷¹ For instance, Maine adopted its provision on “conflict of interest if notary related” in 1987, prohibiting notaries from “perform[ing] any notarial act for any person if that person is the notary public’s spouse, parent, sibling, child, spouse’s parent or child’s spouse.” ME. REV. STAT. ANN. tit. 4, § 954-A (West 1987). Florida did so in 1998. FLA. STAT. ANN. § 117.107(11) (West 1999) (stating that “[a] notary public may not notarize a signature on a document if the person whose signature is to be notarized is the spouse, son, daughter, mother, or father of the notary public”); *see also* VA. CODE ANN. § 47.1-30 (Michie 1950) (establishing that “[n]o notary shall perform any notarial act with respect to any document or writing to which . . . his spouse shall be a party”). Curiously and unfortunately, in its 1939 law, South Dakota included a provision regarding notaries related commercially or financially (rather than as family) to a party to a notarial act, and it provided as follows:

A notary public who is personally interested directly or indirectly, or as a stockholder, officer, agent, attorney, or employee of any person or party to any transaction concerning which he is exercising any function of his office as such notary public, may make any certificates, take any acknowledgments, administer any oaths or do any other official acts as such notary public with the same legal force and effect as if he had no such interest except that he cannot do any of such things in connection with any instrument which shows upon its face that he is a principal party thereto.

S.D. CODIFIED LAWS § 18-1-7 (1939). This law seems to encourage financial conflicts of interest. Otherwise, why did the legislature deem it necessary to include the provision in its statute? *See* Table 3.

¹⁷² *See generally* UNIFORM ACKNOWLEDGMENT ACT (1939). This uniform law was revised in 1960. *See* CLOSEN ET AL., *supra* note 17, at 19.

¹⁷³ *See* Meaghan B. Stevenson, *When the Paper Trail Crosses State Lines*, NAT’L NOTARY, Jan. 2001, at 23 (pointing out that “[t]wenty-five states and the District of Columbia have adopted either the Uniform Recognition of Acknowledgments Act or the Uniform Law on

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approved in 1981-82.¹⁷⁴ None of those statutes identified circumstances in which particular notaries would be disqualified from performing official services or otherwise established any rules of impartiality for notaries. On the other hand, the National Notary Association's influential Model Notary Act of 1984 focused considerable attention on notary ethics.¹⁷⁵ It contained the most comprehensive ethics coverage of any law of its time. The Model Act prohibited notaries from notarizing for themselves, from notarizing for certain identified relatives, and from notarizing when notaries were beneficially interested in transactions connected with notarizations. Its provision on notary "disqualifications" states as follows:

A notary is disqualified from performing a notarial act if the notary:

- (1) is a signer of or named in the document that is to be notarized;
- (2) will receive directly from a transaction connected with the notarial act any commission, fee, advantage, right, title, interest, cash, property, or other consideration exceeding in value the [notarial] fees specified in Section 3-201; or
- (3) is related to the person whose signature is to be notarized as a spouse, sibling, or lineal ascendant or descendant.¹⁷⁶

Unfortunately, not many jurisdictions have accepted the invitation to adopt the disqualification provisions of the Model Act or comparable ones.

Notarial Acts. Two other states have adopted just the statutory certificates for acknowledgments and other acts of the Uniform Law on Notarial Acts"). See generally UNIFORM RECOGNITION OF ACKNOWLEDGMENTS ACT (1968).

¹⁷⁴ See generally UNIFORM LAW ON NOTARIAL ACTS (1982). "[N]ine states and the District of Columbia have adopted the 1981 Uniform Law on Notarial Acts." CLOSEN ET AL., *supra* note 17, at 19.

¹⁷⁵ See generally MODEL NOTARY ACT (1984). "Both the Territory of Guam and the Commonwealth of the Northern Marianas enacted laws taken virtually verbatim from the Model Notary Act, and many states have enacted some provisions from the Model Notary Act." CLOSEN ET AL., *supra* note 17, at 19.

¹⁷⁶ MODEL NOTARY ACT §3-102 (1984).

Notary membership groups have been around for decades.¹⁷⁷ The subject of the integrity and impartiality of notaries has been a frequent topic of discussion and attention in their meetings and publications.¹⁷⁸ Today, the three most significant national notary membership and education organizations are the Notary Law Institute (NLI),¹⁷⁹ the American Society of Notaries (ASN),¹⁸⁰ and the National Notary Association (NNA).¹⁸¹ Each of these three not-for-profit groups is led by strong, capable administrators who are knowledgeable about notarial issues and who are among the country's leading authorities on those issues. However, until the late 1990s, none of those three national notary groups had taken a detailed substantive stand about ethical issues across the range of notarial activities. Unless and until a group seriously undertakes a self-evaluation of ethical concerns, including conflicts of interests, and establishes a set of standards of conduct, it cannot truly join the ranks of the professions.¹⁸² In fact, the NLI has not yet

¹⁷⁷ "There are two principal voluntary membership organizations of notaries public in the United States, and a small number of organizations devoted to notary education." CLOSEN ET AL., *supra* note 17, at 20. The National Notary Association was founded in 1957. *Id.* By 1997, it had more than 140,000 members. *Id.* The American Society of Notaries was established in 1965. *Id.* By 1997, it had more than 20,000 members. *Id.* And there is another private notary education agency known as the Notary Law Institute. *Id.* at 20-21.

¹⁷⁸ The American Society of Notaries and the National Notary Association have annual conferences that provide notaries and state officials with programs highlighting specific areas of notary law. Many of these conferences have programs or panel discussions regarding the ethical standards for notaries. For example, the 2000 conference of the American Society of Notaries was held in Maine and had several such programs, including "The Notary's Responsibility" featuring Michael L. Closen and Alfred Piombino, and "Notary Ethics" presented by Don Bell. AM. NOTARY, 2d Qtr. 2000, at 18-19. In 2001, the National Notary Association Annual Meeting in Montreal, Canada, included a presentation by Professor Malcolm Morris entitled "*Position of Trust: The Notary As Impartial Witness.*"

¹⁷⁹ The Notary Law Institute is headed by Peter Van Alstyne and was founded in 1991. According to its website, the "Notary Law Institute is unlike any other notary organization. Others are unable to deliver the high results we do. We have trained over 150,000 notaries nationwide with 100% approval ratings!" The Notary Law Institute at <http://www.notarylaw.com/philosophy.html> (last visited Oct. 16, 2001).

¹⁸⁰ See generally Milton G. Valera, *The National Notary Association: A Historical Profile*, 31 J. MARSHALL L. REV. 971 (1998).

¹⁸¹ See generally Lisa K. Fisher, *American Society of Notaries: History of a Legacy*, 31 J. MARSHALL L. REV. 1001 (1998).

¹⁸² See Paul T. Hayden, *Professorial Conflicts of Interest and "Good Practice" in Legal Education*, 50 J. LEGAL EDUC. 358, 359 (2000) (commenting that "[a]ll self-regulating professions must be concerned with conflicts of interest which threaten their constituents' ability to perform their professional functions competently or which spring from activities the profession regards as inherently improper"). "[I]t may be that a group or occupation cannot truly achieve 'professional' status without developing and adhering to an ethical code." Anderson & Closen II, *supra* note 12, at 891. Indeed, it seems as though just about every organized group has its own code of ethics — including bankers, accountants, engineers,

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developed a code of conduct for notaries. In 1980, the ASN adopted a one-page, twelve-point Code of Ethics for its member notaries. However, that one-page document is woefully inadequate to fully consider the myriad of complex issues that can confront notaries.¹⁸³ Indeed, the ASN's simple one-page Code does not even expressly address the subject of notaries engaging in self-notarization and notarizing for other family members. The ASN Code contains a prohibition against notaries acting when they have beneficial interests in the instruments on which notarizations will be performed.¹⁸⁴ But, that provision is not expansive enough to cover other family-based conflicts of interest.

While attention to notarial ethics had been a topic of occasional concern to the national notary membership organizations over the years, it was not until the mid-1990s that the National Notary Association confronted the subject in a truly serious manner. The NNA appointed a blue-ribbon commission to draft a detailed code of conduct.¹⁸⁵ After some two years of work, including a number of preliminary drafts, the *Notary Public Code of Professional Responsibility* was released in November

architects, nurses, doctors, lawyers, judges, arbitrators, and on and on. See CODES OF PROFESSIONAL RESPONSIBILITY (Rena A. Gorlin ed. 2d ed. 1990) (setting out some forty-three codes of ethics for various business, health care, and legal professionals). Even a code of ethics for the newly created post of certification authorities (who will authenticate electronic documents and digital signatures) has recently been proposed and drafted. See Dina Athanasopoulos-Arvanitakis & Marilyn J. Dye, *A Proposed Code of Professional Responsibility for Certification Authorities*, 17 J. MARSHALL J. COMPUTER & INFO. L. 1003 (1999).

¹⁸³ See AMERICAN SOCIETY OF NOTARIES, RESPONSIBILITY CODE OF ETHICS OF THE AMERICAN SOCIETY OF NOTARIES (1980), reprinted in *Symposium II: Issues Affecting Notarial Law and Policy*, 32 J. MARSHALL L. REV. 1195 (1999) [hereinafter CODE OF ETHICS]. In addition, the Code of Ethics of the American Society of Notaries . . . has not been amended nor expanded over the last two decades. Clearly, a token one-page code is simply too general and insufficient to adequately inform and guide notaries public, especially as we approach the twenty-first century.

Anderson & Closen II, *supra* note 12, at 890.

¹⁸⁴ Among the ASN Code's standards of conduct for each member notary is the duty "[t]o never perform any notarial act in which I am a party in interest or from which I stand to benefit." See CODE OF ETHICS, *supra* note 183, at 1195.

¹⁸⁵ The National Notary Association began work on its *Notary Public Code of Ethics* in 1997, and that Code was ultimately renamed the *Notary Public Code of Professional Responsibility*. A special commission was directed to provide the first-ever code for United States notaries. "Throughout 1997 the Association will regularly interact with commission members as the Code is refined. A final draft is slated for publication in early 1998." 'Notary Public Code of Ethics,' NAT'L NOTARY, July 1997, at 7.

of 1998.¹⁸⁶ The monograph published by the NNA is thirty pages long, and sets out ten guiding principles accompanied by many subdivisions, illustrations, explanations, and a lengthy legal commentary (in fine print).¹⁸⁷ This substantial document represents the most important event in the development of ethics standards for notaries in the more than 350 years of their presence in North America. But, that Code is in its infancy. It is the work-product of just one private organization (albeit the largest notary membership organization in the world), having a membership of less than 170,000 notaries.¹⁸⁸ The *Code of Professional Responsibility* should be widely disseminated by both private notary organizations and public agencies that oversee the conduct of notaries in the various United States jurisdictions, in order to spread the word of the ethical standards for notarial performance.¹⁸⁹

Among many other ethics considerations, the *Notary Public Code of Professional Responsibility* addresses concerns about actual and apparent conflicts of interest arising out of familial relationships. It unequivocally declares unethical the practices of notaries performing official services for themselves,¹⁹⁰ and of notaries providing official services for certain of

¹⁸⁶ See generally NATIONAL NOTARY ASSOCIATION, NOTARY PUBLIC CODE OF PROFESSIONAL RESPONSIBILITY (1998) reprinted in Symposium II: *Issues Affecting Notarial Law and Policy*, 32 J. MARSHALL L. REV. at 1123 (1999) [hereinafter NOTARY PUBLIC CODE].

¹⁸⁷ Anderson & Closen II, *supra* note 12, at 891.

The complete *Notary Public Code* is a sizeable document about thirty pages in length; it contains illustrations and explanations of ethical choices as well as extensive legal commentaries and citations to statutory authority. Although not everyone may agree with every feature of the *Notary Public Code*, it represents a truly monumental advancement of the office of notary public.

Id. Copies of the monograph are available from the NNA, 9350 De Soto Ave., P.O. Box 2402, Chatsworth, CA 91313-2402, or through its web-site at <http://www.nationalnotary.org> (last visited Oct. 16, 2001).

¹⁸⁸ Deborah M. Thaw, *Establishing Standards and Embracing High-Tech Innovations*, NAT'L NOTARY, Mar. 2001, at 19 (disclosing that the NNA membership in 2000 "climbed to an all-time high of 162,000," with "a membership of 200,000 . . . projected by the end of 2001").

¹⁸⁹ The need for the promulgation of a standard code of ethics for notaries public cannot be overstated. Because of the lack of training and education for notaries, a national code of responsibility (such as the *Notary Public Code of Professional Responsibility*) will help ensure that each notary has attained some level of awareness and appreciation of the significance of the office.

¹⁹⁰ See NOTARY PUBLIC CODE, *supra* note 186, at § II (providing that "[t]he notary shall act as an impartial witness and not profit or gain from any document or transaction requiring a notarial act, apart from the fee allowed by statute"). Subdivisions of that Guiding Principle specifically announce that "[t]he Notary shall not notarize his or her own signature" and "[t]he Notary shall not notarize a document that bears the name of the Notary . . ." *Id.* at §§ II-B-1, II-B-3.

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their "close relative[s]." ¹⁹¹ However, that Code does not bar notarization for one's own domestic partner or significant other, and it does not bar notarization for all known relatives but only for so-called "close" ones.

The *Notary Public Code of Professional Responsibility* identifies the obligation of impartiality to be one of the fundamental professional duties of notaries. In its Guiding Principle II, the Code recites that "[t]he Notary shall act as an impartial witness and not profit or gain from any document or transaction requiring a notarial act, apart from the fee allowed by statute." ¹⁹² As noted above, the Code proceeds to declare unethical a notary's performance of notarial services for himself or herself, as well as for a "close relative." ¹⁹³ The Code's official Commentary explains that those standards of conduct "are justified on the theory that the situations presented constitute a conflict that may compromise the Notary's ability to act impartially." ¹⁹⁴ As the official Commentary further explains: "The Notary is first and foremost an impartial witness. It is the Notary's impartiality that lends credence to other parties' actions, whether it be signing a document or some other participation in a transaction." ¹⁹⁵

At least a few contemporary state statutes expressly provide that a notary is to act with impartiality. ¹⁹⁶ Under the current Wyoming notary law, for instance, "[a] notary serves as an impartial witness to the signing of a document . . ." ¹⁹⁷ Arizona has enacted a very similar provision. ¹⁹⁸ Countless other sources have also stated the axiom that notaries are to serve as public officials possessing trust, integrity, and impartiality. The recital of the notary's obligations of honor and diligence have truly been proverbial. For instance, Profatt's 1887 legal treatise explained: "Where the [notary] is a party in interest, he cannot take the acknowledgement . . .

¹⁹¹ *Id.* at § II-B-3 (stating that "[t]he Notary shall not notarize a document that bears the name . . . of a close relative . . ."). "The Notary shall decline to notarize the signature of a close relative or family member, particularly a spouse, parent, grandparent, sibling, son, daughter or grandchild of the Notary, or a stepchild, stepsibling, stepparent, stepgrandparent or stepgrandchild of the Notary." *Id.* at § II-B-5.

¹⁹² *Id.* at § II.

¹⁹³ See *supra* note 172.

¹⁹⁴ NOTARY PUBLIC CODE, *supra* note 186, at § II-B cmt.

¹⁹⁵ *Id.*

¹⁹⁶ "Because a notary's whole purpose is to detect and deter fraud, Oregon statutes require notaries to be of 'good moral character.'" OREGON NOTARY PUBLIC GUIDE 5 (Jan. 1996); see also Table 1.

¹⁹⁷ WYO. STAT. ANN. § 32-1-1059(b) (Michie 2001).

¹⁹⁸ ARIZ. REV. STAT. ANN. § 41-328(B) (West Supp. 2000) (mandating that a "notary public is an impartial witness").

. . . A person cannot take the acknowledgment of a deed to himself or for his use."¹⁹⁹ A 1913 general encyclopedia announced that "[t]he notary is disqualified from acting in any matter in which his own interests are involved."²⁰⁰ According to the current *Indiana Notary Public Pamphlet*, "[n]otaries are expected to be impartial, unbiased and without a financial interest in the agreements they notarize."²⁰¹ Today's *Kansas Notary Public Handbook* summarizes the principle this way: "[T]he purpose of notarization is to prevent fraud and forgery. The notary acts as an official and unbiased witness" ²⁰² The *Missouri Notary Public Handbook* puts it simply: "[a] notary is to be an impartial witness."²⁰³ Both the *New Mexico Notary Public Handbook* and the *South Dakota Notary Public Handbook* use identical language: "[a] notary is an impartial witness to a transaction."²⁰⁴ Or, as *A Guide For Notaries Public Practicing In Montana* says it, "[a] notary acts as an official, unbiased witness" ²⁰⁵ The *Iowa Notaries Public Handbook* announces, "[t]he notary's duties are confined to those of an impartial witness."²⁰⁶

Although there has been universal lipservice to the proposition that notaries are to act as impartial witnesses and oath-givers at document signing ceremonies, the legislatures, notary oversight agencies, and most other entities have fallen far short of advancing and achieving the ideal. Notary ethics reforms are largely ignored in the places where it counts most - in the state legislatures and oversight agencies. Attention to conflict of interest restrictions of notaries is nearly nonexistent. As a subsequent Section of this Article examines more fully, almost half the state notary statutes do not even bar self-notarization.²⁰⁷ Just nine jurisdictions prohibit notaries from notarizing for their spouses,²⁰⁸ and only seven disqualify notaries from notarizing for certain other enumerated relatives.²⁰⁹ No United States jurisdiction bars notarization for one's own domestic partner, and no jurisdiction prohibits notaries

¹⁹⁹ PROFFATT, *supra* note 121, at 33.

²⁰⁰ THE NEW PRACTICAL REFERENCE LIBRARY, *supra* note 35.

²⁰¹ See SUE ANNE GILROY, INDIANA NOTARY PUBLIC PAMPHLET 1 (1996). The Oregon handbook includes a similar statement. OREGON NOTARY PUBLIC GUIDE 6 (Jan. 1996) ("It is important to the validity of the witnessed act that the notary be impartial").

²⁰² RON THORNBURGH, KANSAS NOTARY PUBLIC HANDBOOK 5 (n.d.).

²⁰³ REBECCA McDOWELL COOK, MISSOURI NOTARY PUBLIC HANDBOOK 15 (March 1997).

²⁰⁴ NEW MEXICO NOTARY PUBLIC HANDBOOK 7 (July 1996); SOUTH DAKOTA NOTARY PUBLIC HANDBOOK 11 (1997).

²⁰⁵ A GUIDE FOR NOTARIES PUBLIC PRACTICING IN MONTANA 1 (June 1995).

²⁰⁶ IOWA NOTARIES PUBLIC HANDBOOK 6 (n.d.).

²⁰⁷ See *infra* notes 313-40 and accompanying text; see also Table 1.

²⁰⁸ See *infra* notes 443-52 and accompanying text; see also Table 3.

²⁰⁹ See *infra* notes 352-55 and accompanying text; see also Table 3.

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from notarizing for all of their known relatives. To put it simply, notarization in this country is not taken very seriously in many quarters.

Consider one last example of the utter failure historically to address notarial conflicts of interest. No United States statute prohibits attorney-notaries from notarizing for their own clients on documents drafted or prepared by those attorney-notaries.²¹⁰ Even though attorney-notaries in the described circumstances would serve the dual roles of private attorneys for their clients and public officers as well, and even though those attorney-notaries would have direct interests in the validity of those documents, almost no one seems to care that the attorney-notaries' impartiality may be compromised in the described situations.²¹¹ Indeed, several jurisdictions have passed special legislation permitting lawyer-notaries to notarize for their own clients on documents prepared by those lawyer-notaries.²¹² These laws would not have been necessary

²¹⁰ "The question of whether an attorney-at-law may perform notarial work for his or her client has, for the most part, been settled in favor of permitting such action." Clarke & Kovach, *supra* note 8, at 982; see also Michael L. Closen, *Reform the Potential Attorney-Notary Conflict*, NAT'L L. J., July 6, 1998, at A24 [hereinafter Closen VI]. West Virginia is one of the few jurisdictions to discourage attorney-notaries from notarizing where they have "disqualifying interests." "If you are an attorney and have prepared the documents for your client, the West Virginia State Bar advises that you have a third party perform the notarization." WEST VIRGINIA NOTARY HANDBOOK 3 (1998).

²¹¹ See, e.g., *Kutch v. Holly*, 14 S.W. 32 (Tex. 1890) (holding that an attorney was not disqualified from notarizing on a client's mortgage); see also Michael L. Closen & Thomas W. Mulcahy, *Conflicts of Interest in Document Authentication by Attorney-Notaries in Illinois*, 87 ILL. B. J. 320 (1999).

²¹² See, e.g., CAL. GOV'T. CODE § 8224 (West 1992) (noting that among the "exception[s]" to a notary having a financial or beneficial interest in a transaction is when the "notary acts in the capacity of an . . . attorney"); 5 ILL. ANN. STAT. ANN. 312/6-104(h) (West 1993) (determining that "[n]o notary public shall be authorized to prepare any legal instrument, or fill in the blanks of an instrument, other than a notary certificate; however, this prohibition shall not prohibit an attorney, who is also a notary public, from performing notarial acts for any document prepared by that attorney"); KAN. STAT. ANN. § 53-109(c) (1994) (directing that for the purposes "of this act, a notary public has no direct financial or beneficial interest in a transaction when the notary public acts in the capacity of an . . . attorney"); S.C. CODE ANN. § 26-1-110 (Law. Co-op 1991) (declaring that "[a]ny attorney at law who is a notary public may exercise all his powers as a notary notwithstanding the fact that he may be interested as counsel or attorney at law in any matter with respect to which he may so exercise any such power and may probate in any court in this State in which he may be counsel"). Additionally, South Dakota law provides that:

[A] notary public who is personally interested directly or indirectly, or as a stockholder, officer, agent, attorney, or employee of any person or party to any transaction concerning which he is exercising any function of his office as such notary public, may make any certificates, take any acknowledgments, administer any oaths or do any other official acts as such notary public with the same legal force and effect as if he had no such interest except that he cannot do any of such

unless legislators felt that without such provisions attorney-notaries would or probably would be violating ethical standards when notarizing the signatures of clients on documents prepared for those clients.²¹³ These laws have been adopted even though it is well-known that attorneys are among the worst offenders of notary laws and sound notarial practices.²¹⁴ What has happened historically is that attorneys have been afforded a variety of favored treatments through the notarial-

things in connection with any instrument which shows upon its face that he is a principal party thereto.

S.D. CODIFIED LAWS § 18-1-7 (Michie 1995) The Northern Marianas has adopted a provision that expressly authorizes attorney-notaries to "perform[] any notarial act done in the course and scope of the attorney's practice of law or the employee's employment . . ." COMMW. MARIANAS CODE AGR § 3-102(4) (n.d.). The Louisiana statute has created a narrow field of express exception for attorney-notaries with respect to wills:

Notwithstanding any provision in the law to the contrary, a notary public shall have power, within the parish or parishes in which he is authorized, to exercise all of the functions of a notary public and to receive wills in which he is named as administrator, executor, trustee, attorney for the administrator, attorney for the executor, attorney for the trustee, attorney for a legatee, attorney for an heir, or attorney for the estate.

LA. REV. STAT. ANN. § 35:2(A)(3) (West 1985). Moreover, it should be expected that with their civil law heritages, attorney-notaries in both Louisiana and Puerto Rico would be involved in both the preparation and notarization of legal instruments, for that is the customary practice of civil law notaries.

²¹³ For example, the California legislature has placed a section called "Conflict of Interest; financial or beneficial interest transaction; exceptions" in their notary statute. CAL. GOV'T CODE § 8224 (West 1992). Clearly, this suggests that if the legislature did not allow an exception, then a conflict of interest would be present. As some commentators have noted:

Curiously, about the same time as lawyer-notaries were granted express statutory permission to notarize documents they had prepared for their clients, the Illinois legislature removed a 50-year-old provision that had allowed a notary who was a corporate 'officer, director, stockholder, or employee' to notarize such corporation's documents (provided the notary 'did not sign such instrument[s] on behalf of the corporation'). Hence, the only Illinoisans granted an express exception in the Notary Public Act to engage in conflicted practices are lawyers.

Closen & Mulcahy, *supra* note 211, at 321.

²¹⁴ See Michael L. Closen & Christopher T. Shannon, *The 10 Commandments of Notarial Practice for Lawyers*, FLA. BAR NEWS, June 1, 1999, at 32 (opining that "lawyers are perhaps the worst offenders of sound notarial practices and of notary public laws"). See generally McWilliams, *supra* note 49, at 63 (pointing out that the "failure to follow appropriate notarial procedures can be a factor in the attorney disciplinary procedure"); Christopher B. Young, Comment, *Signed, Sealed, Delivered . . . Disbarred? Notarial Misconduct by Attorneys*, 31 J. MARSHALL L. REV. 1085 (1998). For example, in *People v. Olinger*, 615 N.E.2d 794 (Ill. App. Ct. 1993), an attorney-notary performed a notarization on a document he had prepared for his client who was not present at the time the notarization was performed.

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legislative agenda²¹⁵ because so many legislators have been lawyers and because so many legislators have been inclined to vote for what is expedient for the business and financial interests of themselves and their attorney friends.²¹⁶

In addition to the favored treatment of attorney-notaries, other professionals who are also notaries are not expressly prohibited from notarizing their own clients' documents, which they have drafted for their clients or assisted their clients to prepare, or on documents directly related to the services they perform for their clients (except where jurisdictions have enacted beneficial interest disqualifications that would apply).²¹⁷ Thus, certified public accountants who are notaries could notarize financial statements or other business documents they have helped prepare for their clients. Real estate brokers who are notaries could notarize for their clients on documents related to real estate transfers. Health care professionals, bankers, insurance agents, financial planners, funeral directors, process servers, and other businesspeople who are notaries could notarize for their own clients on documents those businesspeople have prepared or on documents dealing directly with the work of those businesspeople for their clients. Impartiality is sacrificed in such settings.²¹⁸

²¹⁵ See, e.g., LA. REV. STAT. ANN. § 35:72 (West 1985) (providing that "no notary, who is a licensed attorney at law, shall be required to post a bond of any kind"). Of course, non-attorney Louisiana notaries are required to be bonded. *Id.* §§ 35:71, 35:191(c)(3), 35:331; see also Closen & Mulcahy, *supra* note 211, at 321. Speaking of the lack of attorney-notary prohibitions in Illinois, the authors stated that:

[The] 1829 Illinois Notary Public Act provided for the appointment by the governor of just one notary in each county. Thus, it was inconvenient and more costly to legal clients for lawyers to send them out to find notaries to notarize documents prepared in attorneys' offices. So, either nothing was said in the notary law one way or another about attorney-notaries notarizing for their clients, or laws like the one in Illinois were passed allowing attorney-notaries to notarize for the convenience of their own law practices.

Closen & Mulcahy, *supra* note 211, at 321.

²¹⁶ Closen & Mulcahy, *supra* note 211, at 321. The authors assert that: For almost 170 years in Illinois, the notary statute was silent about the issue [of attorneys notarizing for their clients]. Then, in 1988, the law was amended to expressly permit attorney-notaries to notarize documents they prepare for their clients. After all, many of those supporting such legislation were lawyer-legislators, and they and their fellow attorneys would benefit from such special treatment.

Id.

²¹⁷ See Table 1.

²¹⁸ For example, South Dakota permits:

In conclusion, the 350 year history of notaries in the colonies and in this country has demonstrated widespread indifference to notarial ethics. Consequently, numerous instances of neglect and intentional misconduct have plagued the office of notary public.²¹⁹ To the extent that there have not been even more cases of breaches of ethical obligations, this result is much more the product of good fortune and chance, than of a system focused on heightened standards of professional conduct.²²⁰ Indeed, the laissez-faire notarial system of this country in many ways promotes unethical performance by notaries, their employers, and consumers of notarial services.²²¹ Only in the last few years has genuinely intensified attention been directed at the impartiality and integrity of notaries, and then only in a few quarters. It is hoped that this Article becomes part of greatly expanded efforts to enhance the competence and performance of

A notary public who is personally interested directly or indirectly, or as a stockholder, officer, agent, attorney, or employee of any person or party to any transaction concerning which he is exercising any function of his office as such notary public [to] make any certificates, take any acknowledgments, administer any oaths or do any other official acts as such notary public with the same legal force and effect as if he had no such interest except that he cannot do any of such things in connection with any instrument which shows upon its face that he is a principal party thereto.

S.D. CODIFIED LAWS § 18-1-7 (Michie 1995). No matter what the situation or occupation, notaries who are going to notarize the signatures of their clients should be wary. A certain professional relationship has been established and by notarizing documents for their clients, the notaries are overstepping their boundaries.

²¹⁹ “[N]umerous mistakes are made in the document notarization process, and transactions are often needlessly jeopardized as a result.” CLOSEN ET AL., *supra* note 17, at 109.

²²⁰ By comparison, the authors have made the following comparable complaint about the handling of document signer privacy issues by notary legislation and notaries public: “Notary recordkeeping and disclosure of notary records are almost completely unregulated, leaving notaries to their own devices in dealing with these significant privacy issues.” Michael L. Closen & Trevor J. Orsinger, *Notary Record Privacy and Wisconsin’s New Law*, AM. NOTARY, First Qtr. 2001, at 10 [hereinafter Closen & Orsinger III]. “To the extent there have not been widespread breaches of privacy of notarial records to date, that result has been more a matter of luck, rather than design.” See Closen et al., *supra* note 8, at 251-52. The same is true about the notary’s oath-administration function. “The matter of notarial oaths is simply too important to continue to be left to the chance that notaries will take their duties as seriously as they should and perform those oral oaths.” Closen II, *supra* note 4, at 7.

²²¹ As we have previously written, “[T]he notary public operates in a laissez faire system that inspires an atmosphere of tolerance for questionable conduct on matters of conflicts of interest. A system which consciously permits doubtful practices is fundamentally flawed.” Closen et al., *supra* note 8, at 234.

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notaries, for it will take considerable momentum to reverse the "force of habit," bad habit, in the present notarial system.²²²

III. THE LOSS OF IMPARTIALITY AND PROFESSIONALISM WITHIN THE FAMILY

*"Commodum ex iniuria sua nemo habere debet."*²²³

To borrow part of another writer's analogy, "Elvis is to rock and roll" what impartiality is to notarization: "the King."²²⁴ A fundamental principle of any system in which fairness and justice constitute genuine standards of conduct is that "no person ought to have advantage from his own wrong,"²²⁵ including that no notary ought to have advantage from notarizing for herself or himself, or for one's own relatives. To merely utter the proposition in Latin, however, is not enough. Rather than to simply assume that notarizing for oneself and other family members erodes notarial impartiality and professionalism, this Section of the Article examines the subject to establish this legitimate concern. Central to this Section, attention will be directed not only toward actual conflicts of interest, but also toward the appearance of impropriety because the appearance of impropriety can be nearly as detrimental as an actual conflict, and sometimes more so (if greater numbers of people notice the apparent misconduct).

There are a number of ways in which family-based conflicts may diminish impartiality and professionalism. In the *Iowa Notaries Public Handbook*, this observation is made: "The law does not forbid notaries from notarizing the signatures of relatives. However, it is not a good practice because, if the notarized document was ever contested, a judge might determine the notary was not an impartial witness to the signing of the document."²²⁶ Similarly, the *Missouri Notary Public Handbook* cautions:

²²² See *supra* notes 31-32.

²²³ Latin maxim which means "no person ought to have advantage from his own wrong." *Latin Maxims*, at <http://user.tninet.se/~df732s/show-off.html> (last updated Jan. 20, 1999).

²²⁴ James D. Gordon, *A Dialogue About The Doctrine of Consideration*, 75 CORNELL L. REV. 987, 987 n.2 (1990).

²²⁵ See *supra* note 223.

²²⁶ IOWA NOTARIES PUBLIC HANDBOOK 6 (n.d.). As another example, consider Alaska. "Although the statutes do not forbid notarizing the signature of relatives, it is not a good idea. If the notarized document should ever be challenged in court, it may be determined that you were not acting as an impartial witness when the document was notarized." ALASKA NOTARY HANDBOOK 12 (n.d.).

The law does not forbid notaries from notarizing the signatures of relatives. However, if the notarized document was ever the subject of a court suit, a judge might determine the notary was not an impartial witness to the signing of the document. We suggest that you do not notarize documents for a spouse, grandparent, parent, brother, sister, niece, nephew, aunt, uncle, child or grandchild.²²⁷

Family-based notarizations may jeopardize the validity of those notarizations. Even if some challenged intra-family notarizations were ultimately sustained in arbitration, litigation, or administrative agency proceedings, those victories would be expensive and disruptive to all the parties involved — the notaries, their relatives, and perhaps other persons who had relied upon the notarizations.

It is well known, as the old saying warns, that “familiarity breeds contempt.”²²⁸ As has been observed in the notarial context, parties in relationships with notaries, namely their employers and customers, will often be the ones to tempt notaries from the path of thorough and honest practices.²²⁹ Of course, some employers and customers of notaries are also relatives of those notaries. Relatives may take advantage of their connections with notaries to urge shortcuts in notarizations, omissions of required steps in notarial procedures, and outright falsifications about

²²⁷ MISSOURI NOTARY PUBLIC HANDBOOK 15-16 (March 1997).

²²⁸ THE MACMILLAN DICTIONARY OF QUOTATIONS, *supra* note 32, at 456 (2000). And, especially relevant to this paper, Mark Twain said: “Familiarity breeds contempt — and children.” *Id.* at 582.

²²⁹ “Sometimes a client or employer may insist that you do something contrary to notary law.” OREGON NOTARY PUBLIC GUIDE 12 (Jan. 1996). “Notaries are sometimes pressured by an employer or customer to enter incorrect information on a notarial certificate, or perform other improper acts to facilitate execution of a document.” *Tip Sheet*, NAT’L NOTARY, May 2001, at 38. “Notarial misconduct is usually initiated not by the notary, but by a third party.” Anderson & Closen II, *supra* note 12, at 895. “More and more employers are being named in lawsuits because courts are finding that they are responsible for instructing Notaries to violate the law.” NATIONAL NOTARY ASSOCIATION, *What You Need to Know as a Notary-Employee or Notary-Employer* (1998). In *Transamerica Insurance Co. v. Valley National Bank*, the court concluded that a bank employee-notary “had been requested by her superiors on numerous occasions to notarize signatures without the necessity of seeing the person actually sign the document in question.” 462 P.2d 814, 815 (Ariz. Ct. App. 1969); see also NOTARY PUBLIC CODE, *supra* note 186, at V-A-1 (contemplating that legally required notarial procedures are at times likely to “conflict with the dictates or expectations of an employer, supervisor, client, customer, coworker, associate, partner, friend, relative or any other person or entity” (emphasis added)). Moreover, “the incidence of fraud by forgery or false identification continues to increase in our country.” WYOMING NOTARIES PUBLIC HANDBOOK 2 (June 1999).

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notarizations.²³⁰ At the risk of stating the obvious, it should be emphasized that, as a general proposition, family relationships are stronger and more significant than other relationships. Most family relationships last longer than other kinds of relationships, such as friendships, student-teacher relationships, and employment relationships. Spouses and significant others are thought of, at least initially, as life partners, and other blood and adoptive relatives remain family members for life. Thus, family relationships present heightened prospects for conflicts of interest among the parties.²³¹

One of the places family-based conflicted notarial practices are most obvious is in the administration of oral oaths and affirmations. Many notarizations on documents require the taking by document signers of oral oaths or affirmations. The standard jurat notarization is one such example, reciting that it has been "subscribed and sworn to" before a notary.²³² The oath or affirmation results in the document signer attesting to the truthfulness of a document's substance and in the application of the law of perjury.²³³ Conversely, the failure to somehow

²³⁰ "[Some] notaries are willing to forego the formal requirements of a proper notarization as a favor to the customer. Often, the customer is a friend or relative of the notary, and the notary is more inclined to notarize a document in violation of sound notarial practice." Anderson & Closen II, *supra* note 12, at 895-96.

²³¹ "Traditionally, the American family unit was highly valued as the fundamental cornerstone of our society. . . ." GREGORY ET AL., *supra* note 23, at 181. "By the turn of the twentieth century, European and American legal systems had come to share a common set of traditional assumptions regarding marriage and the traditional family unit as a basic social institution: . . . (2) marriage in principle was to last until the death of a spouse. . . ." *Id.* at 7. Many well-known proverbs listed in THE MACMILLAN'S DICTIONARY OF QUOTATIONS also suggest the importance of the family relationship. See generally THE MACMILLAN'S DICTIONARY OF QUOTATIONS, *supra* note 32. For example, "[h]ome is where the heart is." *Id.* at 457. "There's no place like home." *Id.* at 459. Numerous proverbs suggest the close family bond that may contribute to bias in favor of fellow family members. For instance, there is "[l]ike father, like son." *Id.* at 458. "There's only one pretty child in the world, and every mother has it." *Id.* at 460. "The devil looks after his own." *Id.* at 459. "Blood is thicker than water." *Id.* at 206.

²³² "[T]he notary will complete the jurat language, which typically reads, "Subscribed and sworn (or affirmed) before me on (date) by (name of signer)." *Administering Oaths, Affirmations and Jurats*, *supra* note 4, at 23. Regarding jurats, "the signer swears an oath or affirmation before the Notary that the statements in the document are accurate and true." *Id.*

²³³ In its first notary law, Florida provided for the application of the law of perjury to notarial oaths. An Act Concerning Notaries Public, §2, TERRITORY OF FLA. (1822). In Louisiana, the current notary statute expressly refers to the application of the law of perjury: "Such oaths [administered by notaries], and the certificates issued by such notaries shall be received in the courts of this state and shall have legal efficacy for purposes of the laws on perjury." LA. REV. STAT. ANN. § 35:2(B) (West 1985); see, e.g., Webster Bank v. Flanagan, 725 A.2d 975, 985 (Conn. App. Ct. 1999) (concluding that "the

administer the oath or affirmation will cause the failure of the law of perjury to apply to a signer's execution of an instrument. If the result is an invalid notarization, the document on which it appears may be considered invalid as well. In turn, the underlying transaction of which the faulty instrument is a part might also be voided.²³⁴ Hence, oaths and affirmations are important to many notarizations on documents and should be taken seriously.

Remembering that half of the United States jurisdictions do not statutorily disqualify notaries from notarizing their own signatures or from notarizing on documents to which they are parties,²³⁵ might notaries administer oral oaths or affirmations to themselves or to other family members? It is preposterous to imagine a notary administering an oral oath or affirmation to himself or herself. Would a notary need to stand in front of a mirror in order to self-administer an oral oath or affirmation? It takes two to tango, two to argue, two to marry, two to serve as witness and examiner in litigation, two to sign and impartially verify a signature, and two to give and take an oral oath or affirmation.²³⁶ A comment in the *Notary Public Code of Professional Responsibility* posits that the "very concept of 'notarizing for oneself' is as much a contradiction in terms as 'marrying oneself' or 'pardoning oneself.'"²³⁷ This is not to say that a statutory procedure cannot be created whereby an individual can self-authenticate her or his own

affidavit was sworn to before a notary public, thus making the affiant subject to penalty for giving false information"); see Closen II, *supra* note 4, at 7 (stating that "the law of perjury will not apply if a signer has not, in the eyes of the law, been put under oath"); see also *Administering Oaths, Affirmations and Jurats*, *supra* note 4, at 23 (referring to "the potentially serious criminal penalties [for perjury] that may result from oaths, affirmations and jurats . . ."). *But see* State v. Crumley, 625 P.2d 891 (Ariz. 1981) (dismissing perjury charges where the required oral notarial oath had not been properly administered).

²³⁴ This is the possible domino effect any time that a notarization is faulty. "By notarizing a document in which you have a financial interest, you are simply increasing the chances that that document – and the underlying transaction – might be attacked. Therefore, the practice should be avoided." COMMONWEALTH OF KENTUCKY NOTARY PUBLIC HANDBOOK 4 (March 1997). An "invalid notarization might invalidate the instrument on which it appears and in turn invalidate the underlying transaction of which the instrument is a part." Michael L. Closen, *The De Facto Notary Doctrine And How To Avoid Tardy Notarizations*, THE NOTARY, May/June 2001, at 4 [hereinafter Closen VII].

²³⁵ See Table 1.

²³⁶ Among hundreds of well-known proverbs set out in one book of famous quotations are the following: "It takes two to make a quarrel," and "It takes two to tango." THE MACMILLAN DICTIONARY OF QUOTATIONS, *supra* note 32, at 457. "Obviously, a notary can not appear before himself or take his own affidavit." SOUTH DAKOTA NOTARY PUBLIC HANDBOOK 9 (1997).

²³⁷ NOTARY PUBLIC CODE, *supra* note 186, at § II-B-1.

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signature, thereby submitting as well to the application of the law of perjury.²³⁸ Indeed, there is a federal statute to that effect, and several comparable state laws.²³⁹

Under ordinary circumstances, notaries fail miserably at their responsibility to actually perform the oral oath-giving function.²⁴⁰ In studies of the performance of notaries, it has been learned that in the great majority of instances notaries neglect to really administer such oaths or affirmations. In perhaps as many as eighty to ninety percent or more of the situations, notaries do not administer required oral oaths or affirmations.²⁴¹ It can be expected that even more often than would otherwise be the case, notaries would be disinclined to administer oral oaths and affirmations to themselves and to their relatives. Notaries and their family members may harbor the misguided belief that it is demeaning and/or unnecessary to administer oaths or affirmations to fellow family members.²⁴² They certainly may think they can get away

²³⁸ See generally Thomas W. Tobin, *The Execution "Under Oath" of U.S. Litigation Documents: Must Signatures Be Authenticated?*, 31 J. MARSHALL L. REV. 927 (1998) (discussing the statutory self-authentication alternatives to notarization).

²³⁹ See 28 U.S.C. § 1746 (1994). The Code provides that:

Whenever under any law of the United States or under any rule . . . any matter is required or permitted to be supported, evidenced, established or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit in writing of the person making the same . . . such matter may, with like force and effect, be supported, evidenced, established or proved by the unsworn declaration, certification, verification, or statement, in writing of such person which is subscribed by him, as true under penalty of perjury, and dated, in substantially the following form: (1) If executed without the United States: I declare (or certify, verify or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date).

28 U.S.C. § 1746. Tobin lists several states that have adopted comparable self-authentication provisions. See Tobin, *supra* note 238, at 939.

²⁴⁰ See Closen II, *supra* note 4, at 6 (observing "that seldom do notaries actually administer oral oaths or affirmations to document signers"). There have been numerous reported legal cases about the failure of notaries to administer oral oaths and affirmations. See, e.g., *Gargan v. State*, 805 P.2d 998 (Alaska Ct. App. 1991) (addressing whether the failure of the notary to administer an oral oath or affirmation resulted in the failure of the law of perjury to apply).

²⁴¹ PIOMBINO, *supra* note 17, at xxii (reporting the results of a 1989 survey of 220 notaries in twenty-two cities, including the result that "91.7% failed to administer an oath of any form").

²⁴² Such thinking is comparable to the unfounded beliefs of employers, customers, and friends of notaries who attempt, and often succeed in getting notaries to take shortcuts in the performance of their notarial duties. "Notarial misconduct is usually initiated not by the notary, but by a third party." Anderson & Closen II, *supra* note 12, at 895.

with the omission of required oaths and affirmations. However, the failure to give the required oath or affirmation undermines the significance of the notarial act and jeopardizes the validity of the notarization. Some may take the view that notarizations are unimportant, that no one will care about abuses of the process, and that there will consequently be little risk of abuses coming to light.²⁴³ That mentality about notarizations must be changed.

Unfortunately, the most famous of all notarial oaths was administered by a father to his son, and therefore should not have been undertaken. It happened in 1923 when word of the death of President Warren Harding was received by Vice-President Calvin Coolidge at the family homestead in Vermont.²⁴⁴ Coolidge's father, Colonel John Coolidge was a Vermont notary public, was present at the home and gave the ceremonial oath of office of the Presidency to his son.²⁴⁵ Later, in Washington, D.C., due to some concern about the validity of that oath, Calvin Coolidge was given the Presidential oath of office a second time by a member of the United States Supreme Court.²⁴⁶ While an interesting debate might be had about whether an oath of office is necessary to install the successor into the Presidency upon the death of the former President, or whether there is an automatic constitutional vesting,²⁴⁷ the Coolidge-Coolidge oath nevertheless took place. But, it should not have occurred because notaries should not perform notarial services for their children. Parents and children are simply not impartial about one another. It looks unseemly too, if notaries render official services for their parents or children. When Colonel Coolidge was later asked how he knew he "could administer the Presidential Oath to [his] own son," he reportedly answered, "I didn't know that I couldn't."²⁴⁸

The family arena is also a potential quagmire of legal troubles that notaries should not further complicate by servicing their own relatives.

²⁴³ "Rationalizers assuage themselves by thinking the notarizations don't mean anything and that it is merely a small detail." *Understanding Our Fiduciary Duties As Notaries*, *supra* note 39, at 5.

²⁴⁴ See CLOSEN ET AL., *supra* note 17, at 188; see also PIOMBINO, *supra* note 17, at viii.

²⁴⁵ PIOMBINO, *supra* note 17, at 73.

²⁴⁶ See Jacqueline O'Neal, *The Notary: Yesterday, Today, and Tomorrow*, The Louisiana Notary Association at <http://www.cris.com/~acadian/lna/onealspeech.html> (last updated Dec. 2, 1996) (noting that Coolidge "later had the [swearing in] ceremony repeated by a Supreme Court Justice"); see also CLOSEN ET AL., *supra* note 17, at 188 (noting that an additional oath was given to Coolidge "by a federal officer, lest the oath to a federal official by a state officer be challenged as invalid").

²⁴⁷ PIOMBINO, *supra* note 17, at 73.

²⁴⁸ *Id.* at viii.

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Episodes of family frauds and disputes are legion, especially involving elderly relatives, and often including instances dealing with notarizations on documents.²⁴⁹ Family members have been known to enlist the assistance of unwary and cavalier notaries to pre-date or post-date notarizations of their relatives, to notarize for alleged family members solely on the word of sponsoring alleged relatives, and more commonly to obtain notarizations of absent family signers (upon the pledges of relatives that they observed the actual signings, that they recognize the signatures, or that they simply vouch for the authenticity of such signatures).²⁵⁰ Not surprisingly, the signatures of unknown or

²⁴⁹ For numerous cases see those cited *infra* notes 260, 263-66. As relatives advance in age, the prospects increase for family members to become caregivers of various services, and in turn, for the relationships to sour and for the younger family to attempt to unduly influence the elderly to part with their money and property. "Elderly individuals have three options available to them to meet their ongoing needs: . . . (2) to receive care from a family member, such as a grown child, with or without the assistance others . . ." Sana Loue, *Elder Abuse and Neglect in Medicine and Law*, 22 J. LEGAL MED. 159, 160-61 (2001). "For many mildly impaired elderly persons informal networks provide the primary means of support. Informal networks typically are comprised of spouses, relatives, and friends." LAWRENCE A. FROLIK & ALISON MCCRYSTAL BARNES, *ELDERLAW: CASES AND MATERIALS* 22 (2d ed. 1999). The predominant number of these elderly victims are likely to be widows and other women, many of whom due to historical and societal factors have not attained significant education, experience, and sophistication in business and financial matters. According to Frolik and Barnes:

Elderly women are more than three times as likely as men to be widowed (14 percent of men compared to 48 percent of women). Since wives are four years younger on average than husbands, and because women outlive men an average of seven years, married women can expect an average widowhood of eleven years. Approximately two-thirds of the women over age seventy-five are widows. Because women live longer and individuals who live alone have far higher institutionalization rates, women account for an overwhelming majority of nursing home residents.

Id.

²⁵⁰ See, e.g., *NCNB Bank v. Spiwak*, No. 89-L-13696 (Cir. Ct., Cook Cty, Ill. Apr. 20, 1994) (resulting in a jury finding of negligence liability against a notary where the notary accepted the husband's representation that the signer of a deed was his wife (when in fact it was his girlfriend) and where the notary notarized the forged signature); Paul D. Bresnan, *Investigator Relates A Shocking 'Typical' Case of Notary Fraud*, NOTARY BULL., June 1997, at 5 (presenting a common kind of case observed by a veteran state notary fraud investigator in which a "husband explained [to the notary] that his wife was out of town (but would) come in the next day" to present herself to the notary and in which the wife's name was forged because they "were in a hotly contested divorce"); *Tricky Situations*, NAT'L NOTARY, Mar. 2001, at 38 (hypothesizing a case where "a distraught couple comes to you [a notary]. Unless you agree to put yesterday's date on an acknowledgment for home loan documents, they will lose their new house"). Additionally, "[t]he husband implored the Notary to notarize the document because of time constraints surrounding the filing of the document." Bresnan, *supra*, at 5. Dates on documents can be quite significant. Among the "safeguards" urged upon Wyoming notaries is the following directive: "Compare the

absent relatives have sometimes turned out to be forgeries.²⁵¹ Importantly, placing any date other than the present date on the certificate of notarization is always improper.²⁵²

When spouses and domestic partners are on good terms, they have common financial interests. *The Idaho Notary Public Handbook* includes this illustration: “[A] wife could not take her husband’s acknowledgement on a deed conveying community property, because she shares her husband’s interest in the property and the transaction.”²⁵³ The *Nebraska Notary Public Reference Guide* contains this broader statement: “[U]nder a Notary’s duty to be a disinterested or impartial witness, it would not be prudent to notarize the signature of relatives in case you would be a benefactor of the transaction.”²⁵⁴ When spouses and domestic partners are on good terms and share mutual financial and other interests, they may engage in collusion and misconduct to further those shared interests.²⁵⁵ If one of those spouses or significant others is also a notary, their cause may be advanced by the notary’s official

notarization date with the document date. The date of notarization must coincide with or follow the document’s date of signing. Never post-date or ante-date any oath or acknowledgment.” WYOMING NOTARIES PUBLIC HANDBOOK 10 (June 1999).

²⁵¹ See, e.g., *City Consumer Servs., Inc. v. Metcalf*, 775 P.2d 1065 (Ariz. 1989) (in which a notary authenticated the signature of a couple). The man told the notary that the woman was his wife and the notary did not ask for any identification from her. *Id.* at 1066. In reality, the woman was not the wife of the man, and with the notary’s help, the two were able to fraudulently prepare a quitclaim deed on a house. *Id.*; see also *First Bank of Childersburg v. Florey*, 676 So. 2d 324 (Ala. Civ. App. 1996) (in which a woman took a deed to a local notary already bearing the signature of her alleged husband). In truth, the husband never signed the deed. *Florey*, 676 So. 2d at 326.

²⁵² “Legal and ethical issues arise when the notary is asked to pre- or post-date the notary’s date of action with a different date than the actual date of the signer’s appearance and execution of the document.” Lisa Miller, *Dates and Documents*, AM NOTARY, 2nd Qtr. 2000, at 7. “[T]he date of the notarization should always be the date the notarization was made which is the day the signer actually appeared in person for the notarial act. Notarizations should not be backdated.” COMMONWEALTH OF KENTUCKY NOTARY PUBLIC HANDBOOK 6 (Mar. 1997). Among the “[m]ore common requests for improper notarizations” . . . are those “[t]o falsify the [d]ate of [n]otarization.” NATIONAL NOTARY ASSOCIATION, WHAT YOU NEED TO KNOW AS A NOTARY-EMPLOYEE OR NOTARY-EMPLOYER (1998).

²⁵³ IDAHO NOTARY PUBLIC HANDBOOK 6-7 (1997).

²⁵⁴ NEBRASKA NOTARY PUBLIC REFERENCE GUIDE 6 (n.d.).

²⁵⁵ See, e.g., *Meyers v. Meyers*, 503 P.2d 59, 60 (Wash. 1972) (describing a case in which a couple “without the true owners’ knowledge, executed a quit claim deed which, when recorded, appeared to clear title in the forgers. Thereafter, the forgers sold the property, subject to an existing mortgage, to the purchaser. Appellant is a notary public who took the acknowledgement on the forged deed. Respondents (petitioners in this court) are the abortive purchasers. The forgers have absconded with the purchase money.”); see also *Florey*, 676 So. 2d at 324 (in which a woman, with her husband’s knowledge, forged her father-in-law’s signature to obtain a deed on certain property).

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authority.²⁵⁶ As an incidental matter, it should be noted that notaries have all too frequently allowed other individuals, including spouses and relatives, to possess and misuse notarial seals in order to fraudulently notarize signatures on documents. Of course, the official seal of a notary public is his or her exclusive property, and it is unlawful for anyone else to possess and use such a seal.²⁵⁷

In these troubled times, it is well known that for as many marriages and domestic partnerships that endure, just as many do not last.²⁵⁸ There are enormous possibilities for turmoil between spouses or significant others, including conflicts about money, property, children, and sexual and romantic liaisons. Fraudulent practices are regularly perpetrated or

²⁵⁶ Even in the context of ordinary, non-familial fiduciary relationships, there is an opportunity for abuse of the relationship. "Between the parties there is often opportunity to take unfair advantage as a result of the trust that has been reposed in the fiduciary." *Understanding Our Fiduciary Duties As Notaries*, *supra* note 39, at 2.

²⁵⁷ See *Closen V*, *supra* note 152, at 5 (revealing the recent problem of notaries, former notaries, and family or estate representatives of deceased notaries selling actual, contemporary notary seals through on-line auction sites). "[T]he people close to notaries," such as their family members, and those who will be "the representatives of the estates of notaries who die in office" should be informed by the notaries for the proper procedures for disposing of notary seals. *Id.*; see also NOTARY PUBLIC CODE, *supra* note 186, at § VII-B-2 (noting that the "Notary shall not allow the official seal to be used or possessed by another person"). See generally *Closen V*, *supra* note 152, at 5 (asserting that a notary seal belongs exclusively to the notary for his or her exclusive official use, so that at the end of the notary's term in office he or she should "[t]urn your seal in to the proper government authority, or deface and destroy the seal"). "A few notary statutes declare that notary seals belong only to the notaries and may not be sold to anyone else. Some notary laws make it a crime to unlawfully possess a seal." *Id.* There is also the view that the seal is public property, and should only be used by the public official who holds the office. See *PIOMBINO*, *supra* note 17, at 38 (noting that it "is clearly evident that the notarial service is not an act to be taken lightly. The official seal of the notary public is classified as a public seal, since the notary public is a public officer").

²⁵⁸ The divorce statistics in the United States are staggering. About 50% of all first-time marriages end in divorce, and the average marriage lasts little more than seven years. For a comprehensive list of statistics visit *Divorce Magazine.com*, which provides a comprehensive examination of these statistics. <http://www.divorcemag.com/statistics/statsUS.shtml> (Apr. 2001).

During the decade between 1970 and 1980, the divorce rate more than doubled, and more than a million divorces currently are granted each year. An estimated one-half or more of American marriages will end in divorce. The average duration of marriage was seven years in 1987 and re-marriage of divorced persons accounts for nearly one-half of the marriages in this country.

GREGORY ET AL., *supra* note 23, at 188. Even in the 1700s, Lord Chesterfield cynically observed that "[t]he only solid and lasting peace between a man and his wife is doubtless a separation." ROBERT BYRNE, *THE 2458 BEST THINGS ANYBODY EVER SAID*, Book II, #146 (1996).

attempted by one spouse or partner against the other, involving real estate transfers, banking and credit transactions, powers of attorney, estate planning documents, and other instruments.²⁵⁹ The conflict and animosity between spouses and ex-spouses often become so extreme as to prompt vindictive and malicious actions toward one another.²⁶⁰ This guarded advice appears in the *Michigan Notaries Public Guide*: "A notary public may take the acknowledgment of a relative, even a spouse, if the notary has no interest in the transaction. However, to avoid questions concerning possible disqualifying interests, it is advisable to use an independent third party notary public, if possible."²⁶¹ That advice is both unclear and unsound, and it should definitely not be advocated in an official state publication. Notaries are inviting trouble if they notarize for their spouses or significant others, or if they notarize for relatives with spouses or significant others.

Minnesota's notary statute includes an odd provision under the caption "married persons," and it reads as follows:

*No separate examination of each spouse shall be required, but if husband and wife join in and acknowledge the execution of any instrument, they shall be described in the certificate of acknowledgment as husband and wife; and, if they acknowledge it before different officers, or before the same officer at different times, each shall be described in the certificate as the spouse of the other.*²⁶²

The meaning of that section is not perfectly clear. If the provision means that a husband or a wife can be accompanied to a notary by

²⁵⁹ See, e.g., Robert Bruss, *Tapped Out: Ex-Wife Forged Signature To Drain Away House Equity*, CHI. TRIB., Sept. 25, 1998, at 10 (reciting the facts of a case in which an ex-wife "forged [her then husband's] signatures on loan papers and refinanced [their] house to the hilt" and in which a notary notarized the forged signatures). In *Iselin-Jefferson Fin. v. United California Bank*, 549 P.2d 142 (Cal. 1976), a husband presented the forged signature of his wife to a guarantee agreement, and it was notarized even though the wife was not present before the notary at the time of notarization. Similarly, in *McWilliams v. Clem*, 743 P.2d 577 (Mont. 1988), a husband presented a deed bearing the claimed signature of his wife although the wife had not signed and was not present at the notarial ceremony. The signature was forged. In *City Consumer Services, Inc. v. Metcalf*, 775 P.2d 1065 (Ariz. 1989), a man known to a notary presented a woman who was said to be his wife along with an already-signed deed. Without asking for the woman's identification, the notary simply notarized her signature, which later proved to be a forgery. *Id.*

²⁶⁰ There is a well known quotation attributed to Tacitus to the effect that "[t]he hatred of relatives is the most violent." BYRNE, *supra* note 258, at Book II, #533.

²⁶¹ MICHIGAN NOTARIES PUBLIC GUIDE 3 (Feb. 1999) (emphasis added).

²⁶² MINN. STAT. ANN. § 358.14 (West 1998) (emphasis added).

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another person of the opposite sex, can represent to the notary that the other individual is his or her spouse, and can obtain notarial service for the purported spouse without any further identification of the spouse being required, then this old-fashioned statute is an open door to abuse. There have been many reported cases of frauds being perpetrated upon notaries and others by husbands and wives who claimed to be accompanied by their spouses at the times notarizations were performed,²⁶³ or who claimed to be bearing instruments already signed by absent spouses and needing notarizations.²⁶⁴ Because not all marriages are like the one between Ozzie and Harriett, the Minnesota law could readily result in a husband or wife falsely representing an

²⁶³ According to the *Idaho Notary Public Handbook*:

When a 'husband and wife' appear before a notary to acknowledge a document such as a deed, the same degree of care is required in identifying each of them. One of the most common situations involving notary fraud is that of a husband conveying a community property without his wife's knowledge by using an imposter to sign and acknowledge a deed in place of his wife. A notary should not, therefore, rely on a 'husband's' introduction as a means of identifying a 'wife' when taking the 'wife's' acknowledgment.

IDAHO NOTARY PUBLIC HANDBOOK 4 (1997). For a factually similar example see *Metcalf*, 775 P.2d at 1065 (indicating that: Bruce Vickers and Jane Vickers purchased a house in 1975. In 1981, Bruce went to the local notary with a woman he introduced as his wife. Bruce asked the notary to authenticate both signatures for a quit claim deed on the house which passed all of Jane's interest to Bruce. The notary did not ask for the mysterious woman's identification because the signature was on the deed before both parties went to see the notary. Thus, the notary only asked Bruce for identification. The woman was an impostor.). "An often-heard admonition in these days of advanced technology and e-commerce is that there are more prospects today than at any time in history for unscrupulous people to commit crimes, including identity theft and misdeeds associated therewith." Closen et al., *supra* note 8, at 160-61. "There exists now a greater opportunity to commit crime than there was 50 years ago, and those who live according to that lifestyle never look a gift horse in the mouth." Director General Roy Penrose of the British National Crime Squad, *quoted in* James Rodgers, *Deadly Dividends*, A.B.A. J., Sept. 2001, at 106.

²⁶⁴ "The number one complaint that [Virginia Secretary of the Commonwealth Anne] Petera says her office investigates is a notarization occurring without the signer being present. This fundamental rule of notarization should never be violated, but unfortunately often is." Workman, *supra* note 43, at 8; see, e.g., *Webb v. Pioneer Bank & Trust Co.*, 530 So. 2d 115 (La. Ct. App. 1988); see also *First Bank of Childersburg v. Florey*, 676 So. 2d 324, 326 (Ala. Civ. App. 1996). In that case, Diana Florey took a document allegedly bearing her husband's signature to a local notary. *Florey*, 676 So. 2d at 326. The court notes that:

In May 1989, Sam conveyed one-half interest in the Dead Hollow property to Diana. Diana took the deed representing that conveyance to the Bank to have it notarized. Yvonne Clinkscales, an employee of the Bank, testified that she notarized the deed based on Diana's statement that Sam had signed it. Clinkscales had seen Sam Florey's signature before, but she did not see him sign the deed she notarized.

Id.

impostor to be the other spouse, possibly resulting in serious financial and emotional injury to the real spouse and to third parties. The Minnesota law providing for special treatment of "married persons" stands alone among notary statutes, and if it means as suggested here, the law is archaic and invites fraud in notarial services. It should be repealed, or reconsidered and rewritten.

The likelihood is also considerable for family frauds and fights between parents and children, especially as parents become elderly and/or challenged by diseases or disabilities.²⁶⁵ The concern here

²⁶⁵ Attorney Peter Rundle explained that

a common scheme is for the child of a homeowner with the same last name to try to take out a mortgage without the parent's knowledge Often a kid will find out a parent has a large amount of equity in a home and impersonate the true owner to take out a loan.

Thun, *supra* note 3, at 15. In *Independence Leasing Corp. v. Aquino*, 506 N.Y.S. 2d 1003 (N.Y. Ct. Cl. 1986), the evidence established that a son had forged his father's signature and had obtained its notarization, in order to secure an automobile loan. In *Florey*, the daughter-in-law forged her father-in-law's signature and obtained a fraudulent deed and a loan on the property. She had also obtained a notarization of the forged signature. *Florey*, 676 So. 2d at 326. Her husband knew of at least part of this fraud perpetrated against his parents, and he allowed it to proceed. *Id.* Particularly among elderly relatives, perceived financial vulnerability (due especially to the high costs of assisted living and health and medical care) contributes to the potential for other younger family members of take advantage of the elderly. The sums involved may be modest, but enough to trigger deceptions and efforts to convert the money and property of the elderly. "[T]he elderly as a group have income slightly greater than the rest of the population . . ." FROLIK & BARNES, *supra* note 249, at 19. "The elderly are also economically vulnerable because the cost of their care often exceeds their income. In particular, chronic illness increases an individual's dependency and cost of living." *Id.* "The elderly are vulnerable because they are often economically dependent on the nonelderly." *Id.* at 20; see also Lawrence A. Frolik, *Insurance Fraud on the Elderly*, TRIAL, June 2001, at 48, 50 (noting "older people's fear of outliving their savings"). Novelist Peter De Vries wrote: "There are times when parenthood seems nothing but feeding the mouth that bites you." THE MACMILLAN DICTIONARY OF QUOTATIONS, *supra* note 32, at 206. George Bernard Shaw said about the same thing, even more firmly: "There is only one person an English girl hates more than she hates her elder sister; and that is her mother." *Id.* at 207. Bette Davis comically but accurately remarked, "If you have never been hated by your child, you have never been a parent." BYRNE, *supra* note 258, at Book II, #116. And Clarence Darrow put it cleverly as follows: "The first half of our lives is ruined by our parents and the second half by our children." *Id.* at #114. Sadly, financial misconduct by relatives is also consistent with what is known about elder abuse and neglect. According to Sana Loue:

Most often, abuse of the elderly in the home setting has been attributable to family members. One Los Angeles-based study found that, in two-thirds of the 1,855 substantiated cases of elder abuse, the suspected abusers were family members. Tatar's study of abuse across 18 states also found that family members were the suspected abusers in two-thirds of the cases.

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includes parent-child relationships by adoption and marriage. Wills, living wills, powers of attorney, deeds, contracts, and other documents may need signatures to be notarized and oaths to be administered.²⁶⁶ Additionally, siblings may fight about various matters involving their parents. Such rivalries might focus upon health and medical care issues, real estate and other property holdings, and/or business and other financial matters. Again, notaries should not notarize for their parents or children, or for their siblings, including such family members by adoption and marriage. The notary may be in the position to unduly influence a relative to execute an instrument, or there may at least be the appearance that a notary has done so. The advice of the *Oregon Notary Public Guide* is: "The law does not forbid notaries from notarizing the signatures of relatives, but it is not a good practice. If the document was ever taken to court, a judge might determine that the notary public was not impartial, or had influenced a relative in the signing of the document."²⁶⁷

And, of course, family feuds may be fought among more distant relatives — between grandparents and grandchildren, between nieces/nephews and aunts/uncles, and between other relatives all the way to the ends of the branches of family trees. The reasons for heightened prospects of misdeeds within families come readily to mind. There is both familiarity and contempt. Family members often know more about the substance and extent of other relatives' estates and dealings than about non-relatives. Family members can often take advantage of familial relationships to overcome security measures and inherent mistrust that would ordinarily confront intruders from outside the family. Indeed, it is undoubtedly this familiarity and contempt that succeed in tempting a family member (who might not otherwise be so

Loue, *supra* note 249, at 167. "Various characteristics of the *abusing* individual that have been found to be associated with abuse of an elder in a home setting, include . . . financial difficulties . . ." *Id.*

²⁶⁶ In a 1992 newspaper account from Florida, it was disclosed that a granddaughter (who was a notary) and her father defrauded her grandparents and his parents out of millions of dollars by "forg[ing] her grandmother's signature and notarizing various forged documents." *Story of Wealth, [Deception] Told in Court*, ST. PETERSBURG TIMES, Apr. 23, 1992, at 1B, quoted in CLOSEN, *supra* note 17, at 307; see also *Watching Out for the Danger Signs of Senior Citizen Abuse*, NOTARY BULL., Apr. 2001, at 7 (reporting the concern of one elder rights specialist who warned that "unscrupulous individuals pretend to have legal responsibility for a nursing home resident to steal benefits" and that, for instance, an elderly "signer's daughter may want money turned over to her").

²⁶⁷ OREGON NOTARY PUBLIC GUIDE 37 (Jan. 1996) (emphasis added); see also NEW MEXICO NOTARY PUBLIC HANDBOOK 6 (July 1996) (reciting that "[b]ecause of the notary's need to be impartial, he should avoid notarizing for family members when his impartiality can be questioned or challenged").

inclined toward a non-relative) to nevertheless attempt to defraud or to take advantage of someone: a relative. Relatives frequently defraud or attempt to defraud one another, particularly where the victims are elderly.²⁶⁸ If one of the unscrupulous relatives is a notary, the scheme of

²⁶⁸ A veteran state notary fraud investigator warned notaries to “[p]ay attention to the statutory requirements, and don’t let anyone — whether it be a friend, *relative* or employer — talk you into doing something you know is either improper or illegal.” Bresnan, *supra* note 217, at 5 (emphasis added). For example, in *Levy v. Western Casualty & Surety Co.*, 43 So. 2d 291 (La. Ct. App. 1949), a man and his wife presented a woman claimed to be his grandmother to a notary to obtain the notarization of his grandmother’s signature on a mortgage. *Id.* at 292. The man used an impostor to obtain a loan secured by his own grandmother’s property. *Id.* As another example, a West Virginia grandson obtained a false notarization of the forged signature of his elderly grandmother in order to fraudulently sell her real property. See ‘Sorry, No Can Do!’ Says Notary To Bribery Offer, *supra* note 152, at 5; see also Loue, *supra* note 249, at 160. Loue notes that:

12.8% of the United States’ population now consists of older adults. In 1990, one out of every eight persons in the United States was 65 years old or older, while it is estimated that, by the year 2050, one out of every five will be 65 years of age or more. Second, the life expectancy of individuals has increased. A person born in 1900, for instance, could expect to live an average of 47 years, whereas an individual born in 1989 can expect to live just over 75 years.

Loue, *supra* note 249, at 160. As family members such as grandparents and aunts and uncles grow older, there are increasing prospects that declining physical and mental health will contribute to increased dependence upon and vulnerability to other relatives, especially those family who serve as caregivers. According to Frolik and Barnes:

The elderly as a group present special challenges to the legal system because some suffer serious losses of physical and mental capacity. . . . The elderly suffer more often from loss of mental capacity than any other age group because they are susceptible to dementia, a generic term for decline in memory and cognitive function sufficient to affect the daily life of an alert patient. While there are over fifty causes of dementia, at least two-thirds of all cases with aged patients are caused by Alzheimer’s disease. The disease affects an estimated 4 million Americans The incidence of Alzheimer’s disease increases with age. Although onset could occur as early as age forty, only six to eight percent of patients are under age 65. After that age the rate of incidence doubles every five years. Alzheimer’s disease affects about 15 percent of individuals in their seventies and as much as 40 percent of those over age eighty-five.

FROLIK & BARNES, *supra* note 249, at 17. “Unfortunately, many of the elderly suffer from cogitative deficits, depression, or social isolation that makes them vulnerable to financial exploitation.” Frolik, *supra* note 265, at 48. Of course, the tendency of family members to be guilty of misdeeds toward one another and outsiders is legendary. For example, there is the proverb that “[t]here’s a black sheep in every flock.” THE MACMILLAN DICTIONARY OF QUOTATIONS, *supra* note 32, at 206. British novelist William Makepeace Thackeray penned the statement: “If a man’s character is to be abused . . . there’s nobody like a relation to do the business.” *Id.* at 207.

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deceit can be easier to perpetrate.²⁶⁹ It is better to err on the side of caution and protection of notarizations than to draw a fairly arbitrary line at prohibiting notaries from notarizing for "close relatives" or "immediate family" (whatever those phrases are defined to mean). Besides, who is a close relative or part of the immediate family? Notaries should refrain from notarizing for any and all of their known relatives, including those by adoption and marriage.²⁷⁰ The *South Dakota Notary Public Handbook* supports this view in warning that when "a relative [of the notary] is a party to the transaction, this takes away some of his independence."²⁷¹

Consider one other particularly troublesome arena into which notaries might be drawn if allowed to notarize for their relatives. Today, some jurisdictions statutorily allow notaries to serve physically disabled individuals who are unable to affix their signatures, even by marks, by permitting notaries to both sign those persons' names and notarize those signatures.²⁷² Such statutes should generally be applauded and enacted across the country to help assure that all people will have access to notarial services. However, the only safeguards built into such laws tend to be a doctor's certification of the disabled person's inability to physically sign and a notary's involvement, and occasionally the requirement that the procedure be witnessed.²⁷³ The notary public is

²⁶⁹ Unfortunately, "[n]otary-related dishonesty appears to be on the rise." Closen I, *supra* note 2, at A23. There are many fabled sayings that tout the skill of rascals who set out to deceive, and that reflect this reality. James Thurber once wrote: "You can fool too many of the people too much of the time." THE MACMILLAN DICTIONARY OF QUOTATIONS, *supra* note 32, at 571.

²⁷⁰ See *supra* note 176 and accompanying text; see also *infra* notes 444-58, 465 and accompanying text. None of the nine United States jurisdictions that disqualify notaries from notarizing for other family members disqualify notaries from notarizing for all known relatives. Instead, all nine laws set out lists of those family members considered too close to permit their notary-relatives to service them. See Table 3. Regarding relatives by adoption, of course, "[a]doption is the statutory process by which . . . a new parent-child relationship is created." GREGORY ET AL., *supra* note 23, at 144. "Simply stated, the general rule today is that the law will treat the parent and child relationship between an adopted child and the adoptive parent precisely as it would if the child were the parent's natural or birth child." *Id.* at 159.

²⁷¹ SOUTH DAKOTA NOTARY PUBLIC HANDBOOK 11 (1997).

²⁷² See, e.g., HAW. REV. STAT. § 456-19 (1995).

²⁷³ According to the Hawaiian statute:

A notary may sign the name of a person physically unable to sign or to make a mark on a document presented for notarization; provided that the notary is satisfied that the person has voluntarily given consent for the notary to sign on the person's behalf . . . and if a doctor's written certificate is provided to the notary certifying that the person is unable

trusted to be an honest public servant, there to protect the interests of the disabled individual against a false signing and notarization.

Should notaries acting pursuant to such statutory provisions be allowed to sign and notarize for disabled relatives? Absolutely not. Yet, those provisions do not contain prohibitions against notaries doing so. Unscrupulous notaries have really been given a wide opening for misconduct regarding disabled signers. Thus, a notary and his/her spouse, or a notary and his/her sibling, or a notary and his/her cousin could conspire together to take advantage of a disabled mutual relative, especially if the family member were elderly.²⁷⁴ The notary could sign the disabled relative's name to an instrument and notarize the fraudulent signature without the disabled individual's knowledge, and that instrument could grant express authority or transfer financial interests to a conspiring spouse, sibling, cousin, or other relative of the notary.

to physically sign or make a mark because of the disability, and that the person is capable of communicating the person's intention.

HAW. REV. STAT. § 456-19. Incredibly, lay witnesses are often required to the notarization of a signature by mark, and those witnesses should be impartial and unrelated to the document marker/signer. "Witnesses [to a signature by mark] should be without financial or other beneficial interest in the transaction. It is preferable that they not be related to the signer." OREGON NOTARY PUBLIC GUIDE 31 (Jan. 1996). Yet, the notary is not dissuaded from serving a relative who is a signer by mark.

²⁷⁴ Many of the individuals unable to sign for themselves will be elderly persons, and their numbers are increasing.

The world's elderly population is growing faster than the population as a whole . . . There are more elderly Americans than ever before. Whether measured by an increase in percentage of in absolute numbers, more Americans are age sixty-five and over than in any past era. In 1970, 20 million Americans were age sixty-five or older who represented 9.8 percent of the total population. By 1990 there were 31 million who represented 12.5 percent. In the year 2000 it is estimated the number will have grown to 35 million or 12.8 percent.

FROLIK & BARNES, *supra* note 249, at 2. "Though certainly not true of all elderly people, the elderly often share, to the exclusion of the nonelderly, a loss of mental alertness and agility. Even more common, if not universal, is the loss of physical strength, flexibility, endurance, and acuity of the senses." *Id.* at 3. "Chronic illnesses, which are disproportionately experienced by the elderly, include arteriosclerosis, cancer, emphysema, diabetes, cirrhosis, and osteoarthritis." *Id.* at 18. "Some of the common problems associated with aging — such as losses in vision, hearing, and short-term memory — make an affected older person easier to deceive. And more serious mental deficiencies, such as those caused by early dementia or stroke, make people susceptible to insurance fraud and other scams." Frolik, *supra* note 265, at 48. Some of the elderly may be more vulnerable when an unscrupulous notary is involved because they may especially trust the notary's status. "Some [elderly individuals] may be more trusting or deferential to an 'expert.'" *Id.*

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The absence of statutes prohibiting notaries from notarizing for relatives has prompted some sources to declare such practices lawful and appropriate. Consequently, the *Kansas Notary Public Handbook* states that a notary "may notarize the signatures of his or her spouse, children, parents or other relatives."²⁷⁵ The *Illinois Notary Public Handbook* also declares that a "notary may notarize the signature of his or her spouse, children and other relatives."²⁷⁶ Some sources almost seem to encourage the practice of notarizing for relatives. To illustrate, *A Guide For Notaries Public Practicing In Montana*, the official state handbook, announces: "As a Notary Public, you may notarize any signature other than your own . . ."²⁷⁷ No one, but especially not official agencies of government, should do anything that might encourage notaries to perform intra-family notarizations.

At a minimum, the appearance of impropriety arises when notaries notarize for their family members. Such practices should be discouraged for now, and in the future they should be declared unlawful by express statutory provisions enacted in every state and territory. The *Alaska Notary Handbook* explains: "[a]lthough the statutes do not forbid notarizing the signature of relatives, it is not a good idea. If the notarized document should ever be challenged in court, it may be determined that you were not acting as an impartial witness when the document was notarized."²⁷⁸ A comparable view is expressed in the *Commonwealth of Kentucky Notary Public Handbook*, as follows: "There is no specific prohibition against notarizing for a family member. You should probably avoid the practice, however, to avoid any possible challenges based upon allegations of bias, conflict of interest or other impropriety."²⁷⁹ As the old saying goes, "blood is thicker than water," but in the notarial context blood cannot be permitted to be thicker than ethical standards against partiality.²⁸⁰ If notaries are to continue to be

²⁷⁵ KANSAS NOTARY PUBLIC HANDBOOK 10 (n.d.).

²⁷⁶ ILLINOIS NOTARY PUBLIC HANDBOOK 24 (July 2000).

²⁷⁷ A GUIDE FOR NOTARIES PUBLIC PRACTICING IN MONTANA 2 (June 1995).

²⁷⁸ ALASKA NOTARY HANDBOOK 12 (n.d.).

²⁷⁹ COMMONWEALTH OF KENTUCKY NOTARY PUBLIC HANDBOOK 4 (March 1997).

²⁸⁰ THE MACMILLAN DICTIONARY OF QUOTATIONS, *supra* note 32, at 206. It cannot be overstated that notaries public should simply not notarize for their family members no matter what the circumstance. To allow such practices to exist compromises the integrity of any notarization. The thicker the blood, the less likely an impartial notarization occurred. "While it is not illegal for a [South Dakota] notary to take a relative's affidavit, it is not advisable to do so. If the subject matter is something that would benefit the notary or a relative, it is *not considered a good business practice*". SOUTH DAKOTA NOTARY PUBLIC HANDBOOK 9 (1997) (emphasis added). "As the old saying goes, 'blood is thicker than water,' and since blood and other close family-type relationships may tempt Notaries away

entrusted with the essential duties of verification and dating of signatures on documents and of the administration of oral oaths and affirmations to document signers, and if the instruments on which such notarizations are performed are to continue to include a wide array of significant public and private transactions, then the highest ethical conduct must be demanded of notaries. But, it cannot be left to the mere discretion of notaries to determine what their ethical standards should be — in other words, to the chance that uniformed and indifferent notaries will do the right thing.

IV. THE CURRENT STATE OF CONFUSION ABOUT INTRA-FAMILY NOTARIZATIONS

*"Non omne quod licet honestum est."*²⁸¹

Several reasons contribute to the serious misinformation and confusion about the propriety or, conversely, the impropriety of family-based notarizations. Those reasons do not justify the unethical practices of notaries notarizing for themselves and for other family members, but do help to explain why there is so much misconduct. The reasons for the confusion begin with the pervasive failure of knowledge and concern about notarial practices by both the general public and notaries themselves. The very nature of the notarial office and the nature of the services performed by notaries add to the doubt about sound procedures. Other causes for confusion result from the statutory coverage and, more importantly, the lack of coverage of the subject, as well as the inconsistent and even conflicting treatments of the topic in official notary handbooks and websites. Other authoritative sources can also be faulted for their incomplete and unsound writings and teachings on the subject. And, of course, the most serious fault of so many sources is their utter failure to address and to oppose family-based conflicts of interest, or to do so at all thoroughly. As the old maxim that introduced this Section emphasizes, "[n]ot everything that is permitted is honest."²⁸²

from impartiality, Notaries should err on the safe side." Closen & Orsinger II, *supra* note 5, at 25. "[W]e cannot allow blood to be thicker than professional responsibility." *Id.* at 27.

²⁸¹ Latin maxim which means "not everything that is permitted is honest." *Latin Maxims*, at <http://user.tninet.se/~dfr732s/show-off.html> (last updated Jan. 20, 1999). This maxim is not nearly strong enough in the notarial context according to some authorities. For instance, notarial "[i]mpartiality is *having no conflict of interest*." WYOMING NOTARIES PUBLIC HANDBOOK 2 (June 1999).

²⁸² WYOMING NOTARIES PUBLIC HANDBOOK 2 (June 1999). This cynical view is somewhat comparable to the old proverb to the effect that "[a]ll are not saints that go to church." THE MACMILLAN DICTIONARY OF QUOTATIONS, *supra* note 32, at 455. It has been pointed out that "every jurisdiction in the United States has placed limitations on a notary public's

Silence on the matter cannot be allowed to constitute approval of either self-notarization or family-based notarization.

Although the office of notary is the most populous public office in the country, it may be the office least understood by the members of the public. It is neither a highly visible nor a high profile position. In fact, it seems to be barely visible at all, as a constant refrain among notaries and other commentators is the woefully insufficient recognition attributed to the position and its procedures. Few seem to care about notaries or what they do. Even those who oversee official notarial functioning must accept some responsibility for the disinterest and uncertainty. For instance, the *Mississippi Notaries Public Application & Reference Guide* includes this virtually useless guidance to notaries: "You should be careful not to take any acknowledgments in matters in which you may have personal interest. Be careful to avoid conflicts of interest relating to your duties."²⁸³ That is the entirety of Mississippi's instruction on notary ethics. How can untrained notaries be expected to have any realistic understanding of the scope and significance of the phrase "conflicts of interest?"

The general public is guilty of unwavering apathy, resulting in ignorance about notarial practices and standards.²⁸⁴ If notaries themselves are not well informed about their roles (which has been documented earlier in this Article²⁸⁵), then the general public can hardly be expected to have more of an understanding. According to the Oregon Secretary of State, "[u]nlike many other professionals, notaries will often find themselves caught between being a faithful public servant and answering to a demanding public that may be unaware of notarial

powers." Clarke & Kovach, *supra* note 8, at 966. However, there have not been enough limitations enacted to deal effectively with family-based conflicts of interest. In their article of more than 18 pages, Clarke and Kovach use only about two pages to address family-based conflicts, because there are so few statutory prohibitions. *Id.* at 972-73.

²⁸³ MISSISSIPPI NOTARIES PUBLIC APPLICATION & REFERENCE GUIDE 2 (May 1997). Indeed, as another telling illustration, a number of modern general encyclopedias omit entirely an entry for "notary" or "notary public." See, e.g., 19 FUNK & WAGNALLS NEW ENCYCLOPEDIA 228 (1986) (including entries for "Nostradamus" and "notation," but nothing in between, including nothing for "notary" or "notary public").

²⁸⁴ See "Back Off, Bucko! What You're Asking Me To Do Is Illegal," THE NOTARY, March/April 2001, at 4 (commenting that "[m]ost of the time when people pressure notaries to violate the notary law, it's their lack of understanding that is on display, not their integrity"); see also IDAHO NOTARY PUBLIC HANDBOOK 2 (1997) (observing that "[t]he office of notary public is often not taken very seriously").

²⁸⁵ See *supra* notes 139-67 and accompanying text; see also IDAHO NOTARY PUBLIC HANDBOOK 2 (1997) (pointing out that "many notaries apply their seals and signatures to all sorts of documents with reckless abandon").

laws.²⁸⁶ Most often when notaries engage in misconduct, it is because they have been tempted to do so by others, not because notaries initially set out to do so.²⁸⁷ Of course, within the vast expanse of the uninformed and unconcerned are the relatives of notaries who may entice notaries to perform official services for them and who may suggest that notaries undertake shortcuts and other kinds of misconduct.

The unique nature of the notarial post and its procedures also contributes to confusion about whether notaries may perform official services for themselves and their relatives.²⁸⁸ The United States notary is truly an odd species — simultaneously a private and a public functionary,²⁸⁹ commissioned by the state rather than merely licensed to act,²⁹⁰ and possessing some judicial-type authority yet regarded to be simply a ministerial officer.²⁹¹ The notary public is, obviously, a public servant.²⁹² As such, a notary has both a professional and legal

²⁸⁶ OREGON NOTARY PUBLIC APPLICATION MATERIALS FOR NEW OR RE-APPLYING NOTARIES (May 1994).

²⁸⁷ See *supra* note 282.

²⁸⁸ "Notaries have a unique role in our legal system." CLOSEN ET AL., *supra* note 17, at 39.

²⁸⁹ It has been observed that notaries occupy the "unusual status as both public and private functionaries." *Introduction to NOTARY PUBLIC CODE*, *supra* note 186. There is not enough work to keep the notary occupied full-time as a public official. "The contemporary office of notary public in the United States is not structured so that the typical notary can establish an independent, full-time practice." PIOMBINO, *supra* note 17, at 29. "[A] substantial majority of state-commissioned Notaries are employees whose notarial services are only incidental to their principal job duties." NOTARY PUBLIC CODE, *supra* note 186, at Guiding Principle I Cmt.; see also *supra* note 41.

²⁹⁰ "The authority of the notary, and the appointment to the office of notary, has always come from the government. . . . Notaries in Post-Colonial America were elected or appointed to office, even by the President of the United States." See VAN ALSTYNE, *supra* note 17, at 11-12. Of course, a mere license simply permits one to act on his or her own behalf with the approval of government, whereas a commission empowers one to act on behalf of the government. According to *Black's Law Dictionary*, a license is a "[c]ertificate or the document itself which gives permission." BLACK'S LAW DICTIONARY, *supra* note 38, at 1067. A commission is defined as "[a] warrant or authority or letters patent, issuing from the government, or one of its departments, or a court, empowering a person or persons named to do certain acts, or to exercise the authority of an office." *Id.* at 339.

²⁹¹ See *supra* notes 62, 96-100. "In Roman law the notarius was originally a slave or freedman who took notes of judicial proceedings." 7 THE NEW ENCYCLOPAEDIA BRITANNICA 416 (15th ed. 1979).

²⁹² See Closen III, *supra* note 6, at 685-89 (discussing the public servant function of the notary). "It is often repeated in notary circles that one who becomes 'a notary serves as a notary public, not a notary private.'" *Id.* at 685. Interestingly, in a few jurisdictions, employers of notaries are permitted during work hours to limit notarial services to the employers' customers. "A notary has an ethical obligation to serve as a notary public At the same time, under Oregon law, an employer may prohibit notaries from notarizing for non-customers during work hours." OREGON NOTARY PUBLIC GUIDE 6 (Jan. 1996).

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responsibility to perform notarial services for the members of the public in a reasonable, lawful, and non-discriminatory manner.²⁹³ In these modern and enlightened days of laws forbidding discrimination on the bases of disability, age, gender, sexual-orientation, race, national origin, or religion, references are commonly and imprecisely made to the obligation to render official services for everyone and to treat everyone with equal dignity.²⁹⁴ Such pronouncements, however, constitute overstatements of the true ethical and legal duties of public officials.

Uncertainty may be caused by untrained notaries and unknowing citizens who have heard or read the commonly advanced proposition that notaries seemingly owe the professional obligation to provide notarial services to any and all persons. For instance, both the *New Mexico Notary Public Handbook* and the *South Dakota Notary Public Handbook* state in identical language that “[a] notary is to serve any person who makes a lawful and reasonable request for a notarization.”²⁹⁵ According to *A Guide For Notaries Public Practicing In Montana*, “[i]t is the duty of all notaries to serve the public and they may not unreasonably refuse to perform a notarial act for any member of the public who tenders the statutory fee and meets all requirements prescribed by statute [sic].”²⁹⁶ Not one of the three sources attempts to explain what is meant by unreasonable requests for notarial services that could therefore serve as the basis for refusals of services. To the casual reader or hearer of such directives, the message is to serve everyone, without exception. Yet, each of the passages quoted just above contains qualifications that should exclude family members from being serviced by notaries who are their relatives. The New Mexico and South Dakota handbooks speak of “lawful and reasonable” requests for services,²⁹⁷ while the Montana guidelines refer to avoidance of “unreasonab[le]” refusals of services.²⁹⁸ Clearly, this Article takes the view that requests by family members for

²⁹³ See CODE OF ETHICS, *supra* note 183 (requiring notaries to “treat each individual fairly and equally, with kindness and respect”); NOTARY PUBLIC CODE, *supra* note 186, at Guiding Principle I (noting that “[t]he Notary shall, as a government officer and public servant serve all of the public in an honest, fair and unbiased manner”).

²⁹⁴ See Closen III, *supra* note 6, at 686 (stating that notaries cannot discriminate “on the basis of race, religion, national origin, age, physical disability, gender, or sexual orientation”).

²⁹⁵ NEW MEXICO NOTARY PUBLIC HANDBOOK 7 (July 1996) (emphasis added); SOUTH DAKOTA NOTARY PUBLIC HANDBOOK 11 (1997) (emphasis added).

²⁹⁶ A GUIDE FOR NOTARIES PUBLIC PRACTICING IN MONTANA 1 (June 1995); see also WYOMING NOTARIES PUBLIC HANDBOOK 2 (June 1999) (describing the principle that “[n]otaries may not refuse service to anyone who makes a reasonable and lawful request for a notarization and they must treat all persons equally”).

²⁹⁷ See *supra* note 295.

²⁹⁸ See *supra* note 296.

notary-relatives to perform official services are per se unreasonable and unlawful.

The American Society of Notaries *Code of Ethics* and the National Notary Association *Code of Professional Responsibility* both urge notaries to service the public in broad language. The ASN Code urges notaries “[t]o treat each individual fairly and equally. . . .”²⁹⁹ The NNA Code advises that “[t]he Notary shall . . . serve all of the public in an honest, fair and unbiased manner.”³⁰⁰ Thus, these provisions are again written in ways that may lead some notaries to conclude they must service all persons who request it, including their own relatives. But such interpretations were not intended and are not thoughtful conclusions, especially in light of pronouncements in other sections of those two codes.³⁰¹

The nature of the services performed by notaries contributes to the lack of understanding of the ethical responsibilities of notaries and consumers of notary services.³⁰² As noted previously, it is the function of practicing notaries public to impartially verify and date the signatures on various transactions and to administer oral oaths and affirmations when required.³⁰³ The notarial ceremony is as important now as it was during the time of ancient Rome when notaries’ impartiality conferred legitimacy on signatures and documents.³⁰⁴ Nevertheless, the notary’s role in American society is undervalued and unnoticed, for notaries act as the unseen agents who ensure many millions of transactions every year are legitimately executed during the bureaucratic paper-pushing process.³⁰⁵ In part, because of the great volume of notarizations and the brevity of notarial ceremonies and because notaries can stealthily navigate through the procedure, fraudulent and unethical activities are not often detected, prosecuted, or even questioned. One such practice is the intra-family notarization. When a brother or mother who is a notary authenticates the signature of a sister or son, there is a conflict of interest so great that it undercuts the integrity of the signature and the document on which it appears. When a notary verifies the signature of a family

²⁹⁹ CODE OF ETHICS, *supra* note 183.

³⁰⁰ See NOTARY PUBLIC CODE, *supra* note 186, at Guiding Principle I.

³⁰¹ The NNA has explained that “Notaries are commissioned to serve the public, but it’s okay to refuse unlawful and improper requests.” *Know When To Say ‘No,’ NAT’L NOTARY*, Sept. 1996, at 14.

³⁰² See *supra* notes 288-91 and accompanying text.

³⁰³ See *supra* note 4 and accompanying text.

³⁰⁴ “A notary’s signature and official seal can validate otherwise lifeless papers or give instant credibility to otherwise suspect documents.” CLOSEN ET AL., *supra* note 17, at 39.

³⁰⁵ See generally Berton, *supra* note 10.

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member, the notary is no longer an impartial participant and observer who can objectively substantiate the steps in the procedure.

The unique nature of the office of notary and its functions also results in special status under the law of evidence for the resulting official notarial records. Recall the Supreme Court's conclusion, quoted in the introduction to this Article, that it would "take judicial notice of the seals of notaries public,"³⁰⁶ which seals would of course appear on paper documents. When a notarization is performed for a family member, should such circumstance impair the evidentiary value of the notarization? The acts of public officials, including notaries public, when performed with apparent regularity are entitled to the presumption of validity.³⁰⁷ Under the rules of evidence, certificates of notarization, when complete and regular on their faces, are generally admissible without any of the evidence commonly required for ordinary documents to establish sufficient foundations for their admission.³⁰⁸ That has been the law in some states since at least the 1800s.³⁰⁹ Indeed, arbitrators, judges, and agency hearing officers are inclined to automatically admit not only the certificate of notarization, but also the document to which it is

³⁰⁶ *Pierce v. Indseth*, 106 U.S. 546, 549 (1883).

³⁰⁷ "Having documents notarized allows our judicial system to accept the identity of the document signer without confirming the fact by lengthy legal proceedings." Nevada Attorney General Frankie Sue Del Papa, *quoted in* CLOSEN ET AL., *supra* note 17, at x.

³⁰⁸ "Such oaths [administered by notaries], and the certificates issued by such notaries shall be received in the courts of this state . . ." LA. REV. STAT. ANN. § 35:2(B) (1985 & Supp. 2001). Hawaii has had a notary evidentiary provision on its books since 1859. "All copies or certificates granted by the notary . . . shall be received as evidence of such transactions." HAW. REV. STAT. § 456-15 (1993). This rule undoubtedly extends to the entries in notarial registers or journals as well. "Every journal entry is legally presumed to be truthful." WYOMING NOTARIES PUBLIC HANDBOOK 17 (June 1999).

³⁰⁹ The 1837 Arkansas notary law, as well as other state notary laws, went beyond creating an evidentiary presumption and created an absolute provision for admission into evidence of notarial acts (including notarial journals or records in Arkansas). First, the Arkansas law required that "[e]ach notary shall keep a fair record of all his official acts in a book to be by him kept for that purpose. . . ." ARK. REV. STAT. ch. 104, § 5 (1838). Then, the Arkansas statute mandated that "[a]ll declarations and protests made, and acknowledgments taken by notaries public, and certified copies of their records and official papers, shall be received as evidence of the facts therein stated in all the courts of this State." *Id.* at § 8. "The attestation, protestation and other instruments of publication of the several notaries public of this state, shall and may be received in evidence in any court of record, or before any justice of the peace in this state." TENN. STAT. ch. 11, §5 (1836); *see, e.g.*, *Remington Paper Co. v. O'Dougherty*, 81 N.Y. 474, 483 (1880) (holding that "[t]he production of the deed . . . with the certificate of acknowledgment indorsed thereon, would, under the statute, be sufficient to entitle it to be read in evidence without further proof of the signature of the grantor"); *see also*, COMP. LAWS OF THE HAWAIIAN KINGDOM art. 99, § 1271 (1884) (announcing that a notarial protest "shall be legal evidence of the facts stated in such protest").

attached (assuming the relevancy of the document).³¹⁰ That is, in fact, the law in some settings.³¹¹ Thus, the notarial certificate of authenticity can be a powerful evidentiary feature of American jurisprudence. Obviously, however, that evidentiary presumption does not arise in the first place when there is an irregularity in the procedure, and that presumption can be overcome by evidence suggesting a serious enough fault or flaw in the procedure.³¹² Because impartiality is impaired, if not completely lost, in the case of an intra-family notarization, this impairment should undercut the presumption of validity and admissibility of an intra-family notarization.

Confusion is caused by the haphazard statutory coverage of notaries public and notarizations across the country. Consider next whether the states and territories have enacted effective legislation against the practice of self-notarizations, including circumstances in which notaries possess disqualifying beneficial interests and circumstances in which notaries hold disqualifying corporate interests. Many jurisdictions have failed to enact legislation specifically prohibiting notaries from notarizing their own signatures or from notarizing instruments in which they are named. The idea of notarizing one's own signature is almost unimaginable, for to allow such a notarial practice completely undermines the role of impartiality: the cornerstone of sound notarial transactions. Despite the fact that self-notarizations seem so clearly antithetical to the fabric of notarial practice, only twenty-eight United States notary statutes specifically bar notaries public from authenticating their own signatures or from authenticating on documents in which they are named. The legislatures that have enacted "self-notarization" prohibitions include those of California,³¹³ Colorado,³¹⁴ Connecticut,³¹⁵

³¹⁰ See Closen III, *supra* note 6, at 683-84 (considering the admissibility under the rules of evidence of documents, and concluding that "there is usually no need to elicit proof of the notarization ceremony because the notarization is presumptively valid").

³¹¹ See FED. R. EVID. 902(8) (declaring that "[e]xtrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to . . . [d]ocuments accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public . . .").

³¹² See Closen III, *supra* note 6, at 684-85 (discussing challenges to notarizations). "By its nature, a presumption is subject to being rebutted or defeated in the wake of sufficient damning evidence." *Id.* at 685; see also *In re Zaptocky*, 231 B.R. 260 (N.D. Ohio 1998) (considering the validity of a mortgage bearing a notarized signature and determining the mortgage to be invalid). "Presumptions, however, are subject to being rebutted." *In re Zaptocky*, 231 B.R. at 263 (citations omitted).

³¹³ Many statutes prohibiting the act of self-notarizations read similarly. For example, California mandates that a "notary public shall not take the acknowledgment or proof of

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Florida,³¹⁶ Georgia,³¹⁷ Guam,³¹⁸ Hawaii,³¹⁹ Idaho,³²⁰ Illinois,³²¹ Indiana,³²² Kansas,³²³ Minnesota,³²⁴ Missouri,³²⁵ Montana,³²⁶ Nevada,³²⁷ New Hampshire,³²⁸ North Carolina,³²⁹ North Dakota,³³⁰ the Northern Marianas Island,³³¹ Oklahoma,³³² Oregon,³³³ Puerto Rico,³³⁴ South Dakota,³³⁵ Utah,³³⁶ the Virgin Islands,³³⁷ Virginia,³³⁸ Washington,³³⁹ and West Virginia.³⁴⁰ See Table 1. The almost incredible fact is, therefore, that the following jurisdictions — including several very significant states — have passed no such law: Alabama, Alaska, Arizona, Arkansas, Delaware, the District of Columbia, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, Nebraska, New Jersey, New Mexico, New York, Ohio, Pennsylvania, Rhode Island, South

instruments of writing executed by the notary public nor shall depositions or affidavits of the notary public be taken by the notary public." CAL. GOV'T CODE § 8224.1 (West 1992).

³¹⁴ COLO. REV. STAT. ANN. § 12-55-110(2)(b) (West 1996).

³¹⁵ CONN. GEN. STAT. ANN. § 3-94g (2000).

³¹⁶ FLA. STAT. ANN. § 117.107(11) (West 2001).

³¹⁷ GA. CODE ANN. § 45-17-8(c)(1) (1990).

³¹⁸ GUAM CODE ANN. § 33302(1) (n.d.).

³¹⁹ HAW. REV. STAT. § 456-14 (1993).

³²⁰ IDAHO CODE § 51-108(3) (Michie 2000).

³²¹ Some statutes prohibit the act of self-notarization via a broad statutory restraint that disallows notaries from authenticating any instruments to which their names appear as parties. Illinois is one such state, and its law reads that a "notary shall not acknowledge any instrument in which the notary's name appears as a party to the transaction." 5 ILL. COMP. STAT. 312/6-104(b) (1993).

³²² IND. CODE ANN. § 33-16-2-2(a)(2) (West 1996).

³²³ KAN. STAT. ANN. § 53-109 (1994).

³²⁴ MINN. STAT. ANN. § 359.085(7) (1991 & Supp. 2001). The Minnesota law states that "[a] notarial officer may not acknowledge, witness, or attest to the officer's own signature, or take a verification of the officer's own oath or affirmation." *Id.*

³²⁵ MO. ANN. STAT. § 486.255(1) (West 1987).

³²⁶ Some jurisdictions explicitly ban notaries from authenticating their own signatures. Montana is clear in the language of its statute, which reads that the "notary public may not notarize the notary's own signature." MONT. CODE ANN. § 1-5-416(2) (1999).

³²⁷ NEV. REV. STAT. § 240.065(1) (Michie 2000).

³²⁸ N.H. REV. STAT. ANN. § 455:2-a (1992).

³²⁹ N.C. GEN. STAT. § 10A-9(c)(1) (1999).

³³⁰ N.D. CENT. CODE § 44-06-13.1(3) (Supp. 2001).

³³¹ COMMW. MARIANAS CODE AGR § 3-102(1) (n.d.).

³³² OKLA. STAT. ANN. tit. 49, § 6 (West 2000).

³³³ OR. REV. STAT. § 194.158(1) (1991).

³³⁴ 4 P.R. LAWS ANN. § 2005(a) (1994).

³³⁵ S.D. CODIFIED LAWS § 18-1-12.2 (Michie Supp. 2001).

³³⁶ UTAH CODE ANN. § 46-1-7 (1998).

³³⁷ 3 V.I. CODE ANN. § 777(b) (1995).

³³⁸ VA. CODE ANN. § 47.1-30 (Michie 1998).

³³⁹ WASH. REV. CODE ANN. § 42.44.080(10) (West 2000).

³⁴⁰ W. VA. CODE ANN. § 29C-3-102(a) (Michie 1998).

Carolina, Tennessee, Texas, Vermont, Wisconsin, and Wyoming. The omission of such a basic provision would be just plain silly, if it were not so important.

Although there is some basic similarity of provisions prohibiting self-notarizations, the jurisdictions have taken two different and distinct approaches in implementing such policies. There are jurisdictions that prohibit notaries public only from verifying their own signatures. For example, the statute of Montana expressly recites that the "notary public may not notarize the notary's own signature."³⁴¹ This narrow approach is the statutory law of some seven jurisdictions and is a less effective approach to the outlawing of self-notarization. The other states and territories which bar notaries only from notarizing their own signatures include California,³⁴² Connecticut,³⁴³ Minnesota,³⁴⁴ New Hampshire,³⁴⁵ North Dakota,³⁴⁶ Oklahoma,³⁴⁷ and Washington.³⁴⁸ See Table 1. Certainly, a notary might be a party to a transaction – having been named in the instrument – without being a signer of the instrument. Technically, notaries in those seven jurisdictions might notarize on documents that they have not signed but which bear their names as principals. Such incomplete statutory treatment is confusing.

Some states do not allow notaries to notarize signatures on documents to which they are named as parties.³⁴⁹ Illinois, for example, provides that notaries cannot notarize on documents in which their

³⁴¹ MONT. CODE ANN. § 1-5-416(2) (1999). Interestingly, legislation has been proposed and is pending in Montana under House Bill 443 to expand the self-notarization prohibition to forbid "notarization of a document in which the notary is named or has a direct interest." *Legislative Watch*, NOTARY BULL., Apr. 2001, at 14; see also *Legislative Updates*, *supra* note 147, at 22.

³⁴² Some states devote entire clauses to the subject of self-notarizations and explicitly prohibit the notary from authenticating his or her own signature. California is one such state, and mandates that a "notary public shall not take the acknowledgement or proof of instruments of writing executed by the notary public nor shall depositions or affidavits of the notary public be taken by the notary public." CAL. GOV'T CODE § 8224.1 (West 1992).

³⁴³ The language used in each statute prohibiting self-notarizations is very similar. For example, the Connecticut legislature has mandated that a "notary public is disqualified from performing a notarial act if the notary is the signatory of the document that is to be notarized." CONN. GEN. STAT. ANN. § 3-94g (West 2000).

³⁴⁴ MINN. STAT. ANN. § 359.085 (West 2001).

³⁴⁵ N.H. REV. STAT. ANN. § 455:2 (1992 & Supp. 2000).

³⁴⁶ N.D. CENT. CODE § 44-06-13.1(2) (Supp. 2001).

³⁴⁷ OKLA. STAT. ANN. tit. 49, § 6 (West 2000).

³⁴⁸ WASH. REV. CODE ANN. § 42.44.080(10) (West 2000).

³⁴⁹ For a complete list of those states and territories that do not allow notaries to authenticate signatures on documents to which they are named as parties, see Table 1.

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names appear. The statute specifically mandates that “[a] notary public shall not acknowledge any instrument in which the notary’s name appears as a party to the transaction.”³⁵⁰ Implicit in the language of the statute is that the notary cannot verify his or her own signature. Similarly in Idaho, the statute prescribes that “[f]or the purposes of this chapter, a notary public has a disqualifying interest in a transaction in connection with which notarial services are requested if he is named as a party to the transaction or shares the same beneficial interest as a party to the transaction.”³⁵¹ Table 1 specifies the fourteen jurisdictions that have adopted this approach. Besides Idaho and Illinois, those jurisdictions which bar notaries from notarizing on documents in which the notaries are named include Colorado,³⁵² Florida,³⁵³ Hawaii,³⁵⁴ Indiana,³⁵⁵ Kansas,³⁵⁶ Missouri,³⁵⁷ Nevada,³⁵⁸ Puerto Rico,³⁵⁹ South Dakota,³⁶⁰ Virgin Islands,³⁶¹ Virginia,³⁶² and West Virginia.³⁶³ A few jurisdictions have recognized the distinction between the two different approaches and have articulated prohibitions against both practices,

³⁵⁰ 5 ILL. COMP. STAT. ANN. 312/6-104(b) (West 1993).

³⁵¹ IDAHO CODE § 51-108(3) (Michie 2000).

³⁵² Much of the language used to bar notaries from verifying documents upon which their names are listed is similar. For example, in Colorado, the legislature has determined that:

[A] notary public who has a disqualifying interest in a transaction may not perform any notarial act in connection with such transaction. For the purposes of this section, a notary public has a disqualifying interest in a transaction in connection with which notarial services are requested if he... [i]s named individually, as a party to the transaction.

COLO. REV. STAT. ANN. 12-55-110(2)(b) (West 1996 & Supp. 2000).

³⁵³ FLA. STAT. ANN. § 117.107(11) (West Supp. 2001).

³⁵⁴ HAW. REV. STAT. § 456-14 (1993).

³⁵⁵ IND. CODE ANN. § 33-16-2-2(2) (West 1996).

³⁵⁶ KAN. STAT. ANN. § 53-109(2)(c) (1994).

³⁵⁷ MO. STAT. ANN. § 486.255 (West 1987).

³⁵⁸ NEV. REV. STAT. ANN. § 240.065(1)(b) (Michie 2000).

³⁵⁹ 4 P.R. LAWS ANN. § 2005(a) (1994).

³⁶⁰ S.D. CODIFIED LAWS § 18-1-12.2 (Michie Supp. 2001).

³⁶¹ 3 V.I. CODE ANN. § 777(a) (1995).

³⁶² VA. CODE ANN. § 47.1-30 (Michie 1998).

³⁶³ W. VA. CODE ANN. § 29C-3-102(b)(1) (Michie 1998). In West Virginia, a notary public may not authenticate a signature for a transaction if:

[The notary may] receive directly, and as a proximate result of the notarization, any advantage, right, title, interest, cash or property, exceeding in value the sum of any fee properly received in accordance with section three hundred one, article four of this chapter, or exceeding his regular compensation and benefits as an employee whose duties include performing notarial acts for and in behalf of his employer.

Id.

presumably in order to guarantee thorough coverage of the point.³⁶⁴ Those states and territories include Georgia,³⁶⁵ Guam,³⁶⁶ North Carolina,³⁶⁷ the Northern Marianas,³⁶⁸ Oregon,³⁶⁹ and Utah.³⁷⁰ See Table 1.

Many of the official state notary handbooks and manuals (including guidebooks in some of the states whose statutes do not expressly prohibit notaries from notarizing their own signatures and signatures on documents in which the notaries are named) recommend against those practices. Indeed, no authority advocates to the contrary. None! Although New Mexico has no statute on the books forbidding self-notarization, the *New Mexico Notary Public Handbook* suggests: "New Mexico notaries public should be aware of the following precautions: notaries *should not* notarize documents on which they are a signer or in which they are named."³⁷¹ Similarly, Wyoming has enacted no statute prohibiting self-notarization, but the *Wyoming Notaries Public Handbook* states that "[i]mpartiality is *having no conflict of interest*. A notary must be an impartial witness. . . . Generally this means you should not perform your notarial duties for yourself"³⁷² Thus, there is inconsistency in

³⁶⁴ See *infra* notes 365-70.

³⁶⁵ GA. CODE ANN. §§ 45-17-8(c)(1)-(2) (1990). Georgia, like other states that prohibit notaries from self-notarizations and authenticating transactions in which they are named as a parties, designed such laws in two separate sections. Section 1 notes that a notary shall be disqualified from authenticating a transaction when "the notary is a signer of the document which is to be notarized." *Id.* § 1. Section 2 reads that a notary shall not notarize a signature when "the notary is a party to the document or transaction for which the notarial act is required." *Id.* § 2.

³⁶⁶ 5 GUAM CODE ANN. ch. 33, §§ 33302 (1)-(2) (n.d.).

³⁶⁷ N.C. GEN. STAT. §§ 10A-9(1)-(2) (1999).

³⁶⁸ COMMW. MARIANAS CODE AGR § 3-102(1) (n.d.).

³⁶⁹ OR. REV. STAT. 194.158(1) (1999). Other jurisdictions incorporate the prohibitions in a single section of their statutes. Oregon has determined that a "notary public may not perform a notarial act if the notary is a signer of or named in the document that is to be notarized." *Id.*

³⁷⁰ UTAH CODE ANN. § 46-1-7 (1953).

³⁷¹ NEW MEXICO NOTARY PUBLIC HANDBOOK 6 (July 1996) (emphasis added). Although Alaska statutes do not prohibit self-notarization (see Table 1), the state's handbook flatly declares, "You may not notarize your own signature." ALASKA NOTARY HANDBOOK 12 (n.d.); see also COMMONWEALTH OF KENTUCKY NOTARY PUBLIC HANDBOOK 4 (March 1997) (stating that "[t]hough self-notarization is not specifically prohibited by statute, the practice would defeat the entire purpose of a certificate of acknowledgment, which is to obtain independent, reliable confirmation of the act of signing a document").

³⁷² WYOMING NOTARIES PUBLIC HANDBOOK 2 (June 1999); see also SOUTH DAKOTA NOTARY PUBLIC HANDBOOK 4, 10 (1997) (pointing out that although under the state's Notaries Public statute, a notary may not notarize on a document signed by a notary, the handbook goes further and advises a notary against taking "the acknowledgment of the execution of a document when he is named as a party to the transaction in the document").

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those jurisdictions that do not statutorily bar self-notarization but that advise notaries against self-notarization in official handbooks and websites.

Another source of uncertainty and confusion about self-notarization and family-based notarization is the enactment of general beneficial interest disqualification provisions. In keeping with a section of the Model Notary Act, which forbids a notary "from performing a notarial act if the notary . . . will receive directly from a transaction connected with the notarial act any commission, fee, advantage, right, title, interest, cash, property, or other consideration exceeding in value the [notarial] fees . . .,"³⁷³ some thirteen jurisdictions have passed comparable legislation. Those jurisdictions include California,³⁷⁴ Colorado,³⁷⁵ Florida,³⁷⁶ Georgia,³⁷⁷ Guam,³⁷⁸ Idaho,³⁷⁹ Kansas,³⁸⁰ Nevada,³⁸¹ the

³⁷³ Model Notary Act § 3-102(2) (1984). In Montana, proposed House Bill 443 would add the prohibition "barring a notary from . . . notarizing a document in which the notary . . . has an interest from which the notary will directly benefit by a transaction involving the document. . . ." *Legislative Updates, supra* note 147, at 22. It should be noted that in both Louisiana and Puerto Rico, where notaries follow closely the practices of civil law notaries due to the civil law heritages of those two jurisdictions, notaries will be more professionally involved and interested in instruments and transactions. For instance, consider the following express statutory provision approving such practices in relation to wills in Louisiana:

Notwithstanding any provision in the law to the contrary, a notary public shall have power, within the parish or parishes in which he is authorized, to exercise all of the functions of a notary public and to receive wills in which he is named as administrator, executor, trustee, attorney for the administrator, attorney for the executor, attorney for the trustee, attorney for a legatee, attorney for an heir, or attorney for the estate.

LA. REV. STAT. ANN. § 35:2(A)(3) (1985 & Supp. 2001).

³⁷⁴ CA. GOV'T CODE § 8224(a)-(b) (1993). That statute mandates that a "notary public who has a direct financial or beneficial interest in a transaction shall not perform any notarial act in connection with such transaction." *Id.* The statute then goes on to define financial interests. *Id.* Section (a) determines that "[w]ith respect to a financial transaction, [the notary] is named, individually, as a principal to the transaction." *Id.* § (a). Section (b) mandates that "[w]ith respect to real property, [the notary] is named, individually, as a grantor, grantee, mortgagor, mortgagee, trustor, trustee, beneficiary, vendor, vendee, lessor, lessee, to the transaction." *Id.* § (b). For purposes of this section, "a notary public has no direct financial or beneficial interest in a transaction where the notary public acts in the capacity of an agent, employee, insurer, attorney, escrow, or lender for a person having a direct financial or beneficial interest in the transaction." *Id.*

³⁷⁵ COLO. REV. STAT. 12-55-110(2)(a) (Supp. 2000).

³⁷⁶ FLA. STAT. ANN. § 117.107(12) (Supp. 2001).

³⁷⁷ In Georgia, while the state statute's language does not itemize the particular types of interests that may cause conflicts for a notary, the law does refer to the notary having potential interests arising out of both the instrument on which the notarization is to be

Northern Marianas,³⁸² Utah,³⁸³ the Virgin Islands,³⁸⁴ Virginia,³⁸⁵ and West Virginia.³⁸⁶ Interestingly, all of these jurisdictions have also adopted express provisions against self-notarization. See Table 1. An appropriate question is why these jurisdictions would feel the need to have both provisions on their books. Because the general beneficial interest law is broad enough to prohibit notaries from notarizing their own signatures or from notarizing on documents in which they are named, the narrower provision is certainly redundant. In fact, the full passage from the *Wyoming Notaries Public Handbook*, quoted in part above, equates "a personal financial or beneficial interest in the transaction" with a setting in which a notary would "perform . . . notarial duties for yourself, your family or business associates."³⁸⁷

Why have about eighty percent of the jurisdictions not adopted beneficial interest provisions? The beneficial interest disqualifications, although well-intentioned, are nevertheless troublesome due to their vagueness. These provisions commonly speak of the possibility of a notary receiving any "advantage," "right," "interest," or "other consideration."³⁸⁸ But, the average individual will not know with reasonable certainty, or perhaps any degree of certainty, what is meant by such amorphous terms. Even when read in context with the other enumerated terms ("commission," "fee," "title," "cash," and "property"),

performed and the underlying transaction. GA. CODE ANN. § 45-17-8(C) (1990). The Georgia Code directs that:

A notary shall be disqualified from performing a notarial act in the following situations which impugn and compromise the notary's impartiality: (1) When the notary is a signer of the document which is to be notarized; or (2) When the notary is a party to the document or transaction for which the notarial act is required.

Id.; see also MICHIGAN NOTARIES PUBLIC GUIDE 4 (Feb. 1999) (recommending that the notary have "no interest in the transaction or subject matter").

³⁷⁸ 5 GUAM CODE ANN. ch. 33, § 33302(2) (n.d.).

³⁷⁹ IDAHO CODE § 51-108(3) (2000) (noting that "[f]or the purposes of this chapter, a notary public has a disqualifying interest in a transaction in connection with which notarial services are requested if he is named as a party to the transaction or shares the same beneficial interest as a party to the transaction").

³⁸⁰ KAN. STAT. ANN. § 54-109 (2000). The Kansas legislature devotes an entire section to this subject.

³⁸¹ NEV. REV. STAT. 240.065(1)(b) (2000).

³⁸² COMMW. MARIANAS CODE AGR § 3-102(2) (n.d.).

³⁸³ UTAH CODE ANN. § 46-1-7(2) (1953).

³⁸⁴ 3 V.I. CODE ANN. § 777(b) (1995).

³⁸⁵ VA. CODE ANN. 47.1-30 (Michie 1998).

³⁸⁶ W. VA. CODE ANN. §29C-3-102(b)(1) (Michie 1998).

³⁸⁷ WYOMING NOTARIES PUBLIC HANDBOOK 2-3 (June 1999).

³⁸⁸ See *supra* notes 373-87 and accompanying text.

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the meaning of the words advantage, right, interest, and other consideration are not rendered reasonably certain. Unless a law is concrete enough in meaning to put ordinary people on reasonable notice of what conduct is proscribed, it is imprecise and will be ineffective in deterring misconduct. To add to the confusion about general beneficial interest provisions, the official notary guidebooks for some jurisdictions advise notaries not to notarize on instruments or transactions in which they have interests, even though the statutes of those jurisdictions contain no such express prohibitions.³⁸⁹

Several jurisdictions have passed legislation that bars notaries public from notarizing signatures on documents in which they have vested corporate interests, i.e., where the notaries are shareholders, officers, or directors of companies and are individually named in the instruments to

³⁸⁹ See, e.g., IOWA NOTARIES PUBLIC HANDBOOK 6 (n.d.). Iowa's handbook notes:

A notary may be asked to notarize a document in which he himself is a party to the agreement or a representative of a party to the agreement. If the notary stands to make a substantial financial gain by notarizing such a document, he should refer it to another notary and avoid the risk of a lawsuit initiated on the basis of his financial interest in the agreement.

Id.; see POCKETBOOK FOR IOWA NOTARIES PUBLIC 15 (n.d.) (suggesting that if "the Notary stands to make a financial gain by notarizing such a document or is a party or a representative of a party to the document, they should refer it to another Notary and avoid the risk of a lawsuit based upon the financial interest in the agreement"); see also COMMONWEALTH OF KENTUCKY NOTARY PUBLIC HANDBOOK 4 (March 1997) (containing this question and answer: "Can I notarize a document in which I have financial interest? Again, this is not specifically prohibited, but is definitely a bad practice"); MISSISSIPPI NOTARIES PUBLIC APPLICATION AND REFERENCE GUIDE 2 (May 1997) (recommending that "you [the notary] should be careful not to take any acknowledgments in matters in which you may have personal interest. Be careful to avoid conflicts of interest relating to your duties"). However, there is a curious and contrary beneficial interest provision appearing elsewhere in the Iowa notary statute. See IOWA CODE ANN. § 9E.10A (Supp. 2001). Iowa's statute announces that the "validity of a notarial act shall not be affected or impaired by the fact that the notarial officer performing the notarial act is an officer, director, or shareholder of a corporation that may have a beneficial interest or other interest in the subject matter of the notarial act." *Id.* Worse yet, the South Dakota statute actually expressly endorses the performance by notaries of official services even where notaries are "personally interested directly or indirectly." S.D. CODIFIED LAWS ANN. § 18-1-7 (1995). The section reads:

A notary public who is personally interested directly or indirectly, or as a stockholder, officer, agent, attorney, or employee of any person or party to any transaction concerning which he is exercising any function of his office as such notary public, may make any certificates, take any acknowledgments, administer any oaths or do any other official acts as such notary public with the same legal force and effect as if he had no such interest except that he cannot do any of such things in connection with any instrument which shows upon its face that he is a principal party thereto.

which notarizations are to be affixed.³⁹⁰ A number of 1800s cases challenged the propriety of notaries (who possessed interests in corporate entities) notarizing instruments in which their corporations were also interested, and those cases virtually always upheld the notarizations.³⁹¹ The notarizations were regarded by the courts to be merely ministerial and the notarial relationships with the corporate entities to be remote.³⁹² On the other hand, one case of that vintage prohibited a business co-partner from notarizing another co-partner's signature on a partnership transaction.³⁹³

Statutes creating corporate notarial disqualifications began to be adopted in the late 1800s and that effort has continued to the present time.³⁹⁴ The first such laws that were enacted seem to have targeted the banking and brokerage industries,³⁹⁵ undoubtedly because in earlier days notaries were actively involved in the performance of bank protests and the protests of promissory notes.³⁹⁶ Indeed, one of the very first

Id.

³⁹⁰ For example, in 1917, Nevada enacted a law declaring that:

[I]t shall be unlawful for any notary public to take the acknowledgment of an instrument by or to a bank or other corporation of which he is a stockholder, director, officer, or employee, where such notary is a party to such instrument, either individually or as a representative of such corporation.

NEV. STAT. ch. 38., §1 (1917). Hawaii adopted a statute in 1961 dealing with corporation and trust company notaries which also states that "it shall be unlawful for any notary public to take the acknowledgment of any party to an instrument, or to protest any negotiable instrument, where the notary is individually a party to the instrument." HAW. REV. STAT. § 456-14 (1961).

³⁹¹ See, e.g., *Gibson v. Norway Sav. Bank*, 69 Me. 579 (1879).

³⁹² *Id.*

³⁹³ *Smalley v. Bodinus*, 79 N.W. 567 (Mich. 1899). Nearly 100 years later, a comparable position found its way into the Idaho handbook. "[A] partner in a business partnership could not take another partner's acknowledgment where the other partner is executing a contract on behalf of the partnership. In such case[], the notary is held to have a disqualifying interest." IDAHO NOTARY PUBLIC HANDBOOK 7 (1997).

³⁹⁴ For example, in 1917 Nevada enacted a law declaring that:

[I]t shall be unlawful for any notary public to take the acknowledgment of an instrument by or to a bank or other corporation of which he is a stockholder, director, officer, or employee, where such notary is a party to such instrument either individually or as a representative of such corporation.

NEV. STAT. ch. 38., § 1 (1917). Pennsylvania adopted its notarial disqualification for the banking industry in 1953. See *Clarke & Kovach, supra* note 8, at 967.

³⁹⁵ See *Clarke & Kovach, supra* note 8, at 967-70 (discussing notarial disqualifications for banks, bank officers, and bank clerks).

³⁹⁶ See *Ross, supra* note 38, at 12 (referring to "[t]he 'Notary-intensive' real estate, escrow and banking industries").

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disqualification provisions actually prohibited bankers, brokers, their agents and employees from becoming notaries at all. The 1866 Nebraska notary statute read, in part: "No banker or broker, nor any officer, salaried attorney, stockholder, clerk or agent of any bank, banker or broker, shall be appointed to or shall hold the office of notary public in this territory."³⁹⁷ This expansive kind of prohibition directed at a few industries did not become commonly accepted, and Nebraska eventually abandoned its extreme provision.³⁹⁸

Rather, a much narrower corporate notary disqualification provision emerged, aimed at banking as well as other corporations. In 1935, Illinois, for example, enacted a section which declared that it was permissible for a notary associated with a corporation to notarize on a corporate instrument, "provided such notary public did not sign such instrument on behalf of the corporation."³⁹⁹ The 1909 Michigan section on this point serves as a good example of what was to become the most common form of such provisions:

It shall be lawful for any notary public who is a stockholder, director, officer or employee of a bank or other corporation to take the acknowledgment of any party to any written instrument executed to or by such corporation, or to administer an oath to any other stockholder, director, officer, employee or agent of such corporation, or to protest for non-acceptance or non-payment bills of exchange, drafts, checks, notes and other negotiable instruments which may be owned or held for collection by such bank or other corporation: *Provided, It shall not be lawful for any notary public to take the acknowledgment of an instrument by or to a bank or other corporation of which he is a stockholder, director, officer or*

³⁹⁷ NEB. REV. STAT. ch. 38, § 9 (1866).

³⁹⁸ By 1903, Ohio had enacted a law prohibiting notaries associated with banks and brokers from acting "in any matter to which said bank, banker, or broker is in any way interested," as reported in *Read v. Toledo Loan Co.*, 67 N.E. 729, 732 (Ohio 1903). Pennsylvania has one of the more restrictive contemporary notarial disqualification provisions regarding banks. It "unconditionally prohibits the directors and officers of any bank, banking institution or trust company, who are commissioned notaries, from acting as notaries in transactions for the banks of which they are officers." Clarke & Kovach, *supra* note 8, at 967. This restriction applies "whether or not the officer/director-notary is a party to the transaction." *Id.* at 968. Indeed, Nebraska went from one extreme to the other. See *infra* notes 435-37 and accompanying text.

³⁹⁹ According to the 1975 Illinois statute, the quoted provision was "[a]dded by act approved July 6, 1935. L. 1935, p. 1005." ILL. ANN. STAT. ch. 99, § 14 (1975).

*employee, where such notary is named as a party to such instrument, either individually or as a representative of such bank or other corporation, or to protest any negotiable instrument owned or held for collection by such bank or other corporation, where such notary is individually a party to such instrument.*⁴⁰⁰

In 1917, Nevada adopted a corporate disqualification provision clearly modeled after the 1909 Michigan law.⁴⁰¹ Currently, there are about twenty jurisdictions that bar notaries who are corporate officers, directors, or stockholders from notarizing corporate instruments in which notaries are named individually or as corporate representatives. Those jurisdictions include Arizona,⁴⁰² Arkansas,⁴⁰³ the District of Columbia,⁴⁰⁴ Hawaii,⁴⁰⁵ Louisiana,⁴⁰⁶ Maine,⁴⁰⁷ Maryland,⁴⁰⁸ Michigan,⁴⁰⁹

⁴⁰⁰ MICH. COMP. LAWS ANN. § 55.251 (West 1999) (emphasis added). This current provision notes that it was first adopted as "P.A. 1909, No. 18, § 1, Eff. Sept. 1, 1909." *Id.*

⁴⁰¹ NEV. STAT. ch. 38, § 1 (1917). The statute provided that:

It shall be lawful for any notary public who is a stockholder, director, officer or employee of a bank or other corporation to take the acknowledgment of any party to any written instrument executed to or by such corporation, or to administer an oath to any other stockholder, director, officer, employee, or agent of such corporation, or to protest for nonacceptance or nonpayment of bills of exchange, drafts, checks, notes and other negotiable instruments which may be owned or held for collection by such corporation; *provided*, it shall be unlawful for any notary public to take the acknowledgment of an instrument by or to a bank or other corporation of which he is a stockholder, director, officer, or employee, where such notary is a party to such instrument, either individually or as a representative of such corporation, or to protest any negotiable instrument owned or held for collection by such corporation, where such notary is individually a party to such instrument.

Id.

⁴⁰² Some jurisdictions follow a standard form of language. Arizona mandates that:

It is unlawful for a notary public who is a stockholder, director, officer or employee of a corporation to take the acknowledgment or oath of any party to any written instrument executed to or by the corporation, or to administer an oath to any other stockholder, director, officer, employee or agent of the corporation, or to protest for nonacceptance or nonpayment of bills of exchange, drafts, checks, notes and other negotiable instruments which may be owned or held for collection by the corporation.

ARIZ. REV. STAT. ANN. § 41-320(A) (1997).

⁴⁰³ ARK. STAT. ANN. § 21-14-109(b) (Michie 1993); *see also* ARKANSAS NOTARY PUBLIC HANDBOOK 5-6 (Feb. 1996) (discussing disqualification of a corporate notary).

⁴⁰⁴ D.C. CODE ANN. § 26-110 (1981).

⁴⁰⁵ HAW. REV. STAT. § 456-14 (Michie 1993).

⁴⁰⁶ LA. REV. STAT. ANN. § 35:4 (West 1990).

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Mississippi,⁴¹⁰ Montana,⁴¹¹ Nebraska,⁴¹² New Hampshire,⁴¹³ New Mexico,⁴¹⁴ New York,⁴¹⁵ Oklahoma,⁴¹⁶ Oregon,⁴¹⁷ Pennsylvania,⁴¹⁸ Rhode Island,⁴¹⁹ South Carolina,⁴²⁰ and Wisconsin.⁴²¹ See Table 2. It should be noted that about five of the approximately twenty jurisdictions with corporate notary disqualification provisions also appear in the list of jurisdictions that have adopted some form of section against self-notarization.⁴²² See Table 1. Some of the corporate notary disqualification laws still apply only to certain industries, such as the banking, lending, and insurance fields.⁴²³ Oddly enough, although Illinois greatly expanded its notary law in 1991 and included a provision against notaries notarizing on instruments in which they are named as parties, it simultaneously abolished its corporate notarial disqualification provision.⁴²⁴

A most peculiar fact is that fifteen of the twenty jurisdictions listed in the preceding paragraph have adopted provisions against corporate notaries notarizing on instruments in which they are named individually or as corporate representatives, although those fifteen jurisdictions do not expressly prohibit self-notarization.⁴²⁵ Those states include Arizona, Arkansas, District of Columbia, Louisiana, Maine, Maryland, Michigan, Mississippi, Nebraska, New Mexico, New York, Pennsylvania, Rhode

⁴⁰⁷ ME. REV. STAT. ANN. tit. 4, § 954 (West 1964).

⁴⁰⁸ MD. CODE ANN. § 18-111(a)(1) (1973).

⁴⁰⁹ MICH. COMP. LAWS ANN. § 55.251 (West 1972).

⁴¹⁰ MISS. CODE ANN. § 25-33-21 (1972).

⁴¹¹ MONT. CODE ANN. § 1-5-417 (1999).

⁴¹² NEB. REV. STAT. § 64-215 (1996).

⁴¹³ N.H. REV. STAT. ANN. § 455:2-a (1988).

⁴¹⁴ N.M. STAT. ANN. § 14-12-20 (1978).

⁴¹⁵ N.Y. EXEC. § 138 (McKinney 2001).

⁴¹⁶ OKLA. STAT. ANN. tit. 6, § 904 (West 2001).

⁴¹⁷ OR. REV. STAT. § 194.100 (1991).

⁴¹⁸ PA. STAT. ANN. tit. 57, § 165 (West 1996).

⁴¹⁹ R.I. GEN. LAWS § 19-4-4 (1998) (providing that “[n]o protest of any note, draft or check shall be made by any notary public who is the president, cashier, director, or officer of any bank, savings bank, or trust company wherein such note, draft or check has been placed for collection or has been discontinued”).

⁴²⁰ S.C. CODE ANN. § 33-49-40 (Law. Co-op. 1990).

⁴²¹ WIS. STAT. ANN. § 220.18 (West 2001).

⁴²² These states include Hawaii, New Hampshire, Montana, Oklahoma, and Oregon.

⁴²³ See Table 2 (listing Oklahoma, Pennsylvania and Rhode Island). Consistent with this history of restricting bank notaries, the Louisiana statute’s caption for its corporate disqualification provision is entitled “Notaries connected with banks and other corporations. . . .” LA. REV. STAT. ANN. § 35:4 (West 1990).

⁴²⁴ We are not aware that any other states or territories have repealed such a law.

⁴²⁵ See Tables 1-2.

Island, South Carolina, and Wisconsin. How could it be that legislatures would recognize the possibility that corporate notaries would be named in documents, and forbid such notaries from notarizing in those circumstances, but would not enact legislation to prohibit notaries from notarizing for themselves in non-corporate settings? After all, the more serious conflict of interest arises out of the notary's notarizing an instrument in which the notary is named, not out of the fact the notary is also a corporate agent. The end result is a confusing posture for those several jurisdictions.

With regard to corporate notarial provisions, several other states are responsible for unclear and even counterproductive laws or guidelines. Some states have adopted provisions that affirmatively promote notaries acting on behalf of corporate entities with which the notaries are associated as stockholders, officers, directors, and agents. To illustrate, the Minnesota law provides in two separate sections:

No public officer qualified to take acknowledgments or proofs of written instruments shall be disqualified from taking the acknowledgment or proof of any instrument in writing in which an association is interested by reason of membership in, stockholder interest in, or employment by an association so interested, and any acknowledgments or proofs heretofore taken are hereby validated.⁴²⁶

Any person authorized to take acknowledgments or administer oaths, who is at the same time an officer, director or stockholder of a corporation, is hereby authorized to take acknowledgments of instruments wherein such corporation is interested, and to administer oaths to any officer, director, or stockholder of such corporation as such, and to protest for non-acceptance or non-payment bills of exchange, drafts, checks, notes and other negotiable or non-negotiable instruments which may be owned or held for collection by such corporation, as fully and effectually as if he

⁴²⁶ MINN. STAT. ANN. § 51A.52 (West 1998). Alaska also has a comparable statutory provision about notaries who are associated with cooperative entities. "No person authorized to take acknowledgments under the laws of this state is disqualified from taking acknowledgments of instruments to which a cooperative is a party because the person is an officer, director or member of the cooperative." ALASKA STAT. § 10.25.450 (Michie 2000).

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were not an officer, director, or stockholder of such corporation.⁴²⁷

Because those sections include no limitation on the authority of a corporate notary, could such a notary notarize his or her own signature if it were affixed to a corporate document in a representative capacity for the corporation? Or, would the Minnesota law barring notaries from notarizing their own signatures bar this activity? Could the notary notarize on a document in which the notary was named as representative of the corporation (but where the notary was not a signer of the document)? Why is a law needed to approve, and thereby encourage, corporate notaries notarizing for their corporations?

Then again, there are official notary handbooks that do not exactly square with the laws on corporate notaries in the respective jurisdictions. Although Illinois repealed its corporate notary disqualification provision (a provision that had read like so many of the some twenty statutes currently in place in this country), the drafters of the Illinois notary handbook included this question: "Can I notarize documents that I am signing as an officer on behalf of a corporation?"⁴²⁸ Answer: "No. You can never notarize your own signature, whether you are signing for yourself or for a corporation."⁴²⁹ While that answer seems to be sound guidance, why did the legislature repeal the corporate notary disqualification law? And why does the statute not address such a basic point, leaving its coverage to the less authoritative state notary handbook? Of course, there is the very common problem that many official handbooks do not raise the corporate notary issue at all. Thus, as examples, the official handbooks of Alaska,⁴³⁰ Iowa,⁴³¹ North Dakota,⁴³² Oklahoma,⁴³³ and Oregon⁴³⁴ omit the subject of notarizations performed by notaries affiliated with corporate entities. If neither the notary statutes nor the notary handbooks address the subject, what are notaries to do? They seem to be left to their own devices and their own discretion. That is a sad state of notarial affairs.

⁴²⁷ MINN. STAT. ANN. § 358.25 (West 1998).

⁴²⁸ ILLINOIS NOTARY PUBLIC HANDBOOK 25 (July 2000).

⁴²⁹ *Id.*

⁴³⁰ See generally ALASKA NOTARY HANDBOOK (n.d.).

⁴³¹ See generally IOWA NOTARIES PUBLIC HANDBOOK (n.d.).

⁴³² See generally THE BASIC STEPS IN NOTARIZATION (NORTH DAKOTA) (n.d.).

⁴³³ See generally OKLAHOMA NOTARY PUBLIC GUIDE BOOK (Jan. 1995).

⁴³⁴ See generally OREGON NOTARY PUBLIC APPLICATION MATERIALS FOR NEW OR RE-APPLYING NOTARIES (May 1994).

Perhaps the worst law on notarial conflicts of interest in the country is the treatment of corporate notaries in two sections of the contemporary Nebraska statute. Even lawyers can barely untangle their convoluted language to decipher what they say. But worse yet, what they appear to say promotes conflicted practices. Here is the first sample of Nebraska's twisted position on corporate notaries:

It shall be lawful for a member or shareholder, an appointive officer, elective officer, agent, director, or employee of an insurance company, a cooperative credit association, or a credit union who is a notary public to take the acknowledgment *of any person* to any written instrument executed to or by said association, insurance company, or credit union and to administer an oath to any shareholder, director, elected or appointive officer, employee, or agent of such association, insurance company, or credit union.⁴³⁵

This portion of Nebraska's statute seems to be internally inconsistent and incoherent, for it first refers to both appointive and elective officers and directors being able to take acknowledgments, but then limits its application only to notaries who are not directors or elected officers. Why should appointed officers be treated differently? When this section announces that company notaries who are not directors or elected officers may take the acknowledgment "of any person," does that literally mean all persons including the notaries themselves and their relatives? In addition, why are insurance companies, cooperative credit associations, and credit unions singled out for this treatment — as opposed to banks, savings and loan associations, and other corporations?

The second very troublesome Nebraska provision deals with banks. That statutory section announces:

It shall be lawful for any stockholder, officer, or director of a bank, who is a notary public, to take the acknowledgment *of any person* to any written instrument given to or by the bank and to administer an oath to any *other* stockholder, director, officer, employee or agent of the bank.⁴³⁶

⁴³⁵ NEB. REV. STAT. § 64-212 (1996) (emphasis added).

⁴³⁶ NEB. REV. STAT. § 64-214 (1996) (emphasis added).

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Why did banks need this special exemption from the most fundamental of all notarial principles: that a notary is to be an impartial witness who may not notarize her or his own signature? Because the just-quoted section in its last passage creates a disqualification for a bank notary to administer an oath⁴³⁷ to "other" stockholders, directors, officers, employees and agents, the clear inference is that bank notaries under the first passage can take their own acknowledgments (as they would be included within the phrase "any person"). This is an awful practice for Nebraska to endorse.

On the overall issue of self-notarization, Iowa notaries may be the group who have been most poorly advised. First, there is no Iowa statute that bars notaries either from notarizing their own signatures or from notarizing on documents in which the notaries are named.⁴³⁸ Nor has Iowa enacted either a corporate notary disqualification provision or a beneficial interest disqualification section into its notary law.⁴³⁹ Second, the *Iowa Notaries Public Handbook* states that notaries may notarize for themselves in circumstances that do not involve substantial financial interests to the notaries. In answer to the simple question in the Iowa handbook of whether a notary may "notarize my own signature," this explanation appears: "A notary *should* never notarize his own signature because a notary is to be an impartial witness."⁴⁴⁰ The handbook does not employ the mandatory language that the notary *must* not, or *shall* not, notarize his own signature, but instead uses the merely suggestive language that the notary *should* not do so. The very next question in the handbook asks if the notary may "notarize a document in which I have an interest?"⁴⁴¹ The unsatisfactory answer: "If the notary stands to make a *substantial* financial gain by notarizing . . . a document [in which he himself is a party to the agreement or a representative of a party to the agreement], he should refer it to another notary . . ."⁴⁴² This official suggestion means that ordinary notaries must themselves judge whether their financial involvements are substantial. Instead, it should always be demanded that notaries take the high ethics road and never notarize on

⁴³⁷ More contemporary laws take the enlightened approach of referring not only to "oaths" but also in the alternative to "affirmations." According to *Andersons Manual for Notaries Public*, an affirmation is "a solemn declaration without oath. The privilege of affirming in judicial proceedings is now generally extended to all persons who object to taking an oath." ANDERSONS MANUAL FOR NOTARIES PUBLIC, *supra* note 21, at 723.

⁴³⁸ See Table 1.

⁴³⁹ See Tables 1-2.

⁴⁴⁰ IOWA NOTARIES PUBLIC HANDBOOK 6 (n.d.) (emphasis added).

⁴⁴¹ *Id.*

⁴⁴² *Id.* (emphasis added); see also *infra* notes 505, 514-15 and accompanying text.

instruments in which they have any financial interest, no matter how large or small. They should be instructed to avoid even an appearance of financial interest in the documents on which they notarize.

Disappointingly, few jurisdictions have enacted any kind of statutory prohibitions against notaries performing notarial acts for their family members. Only nine jurisdictions bar notaries from notarizing for their spouses. They are Arizona,⁴⁴³ Florida,⁴⁴⁴ Guam,⁴⁴⁵ Maine,⁴⁴⁶ Nevada,⁴⁴⁷ North Dakota,⁴⁴⁸ the Northern Marianas,⁴⁴⁹ Puerto Rico,⁴⁵⁰ and Virginia.⁴⁵¹ See Table 3. No state or territory has prohibited notaries from notarizing for their domestic partners or significant others, although the June 2001 draft of the revised Model Notary Act of 2001 does include such a prohibition, although two earlier drafts of the revision of the model law had not included such a disqualification.⁴⁵² Again, the National Notary Association has demonstrated its leadership in reconsidering this matter and changing its position. Curiously, the North Dakota statute directs notaries not to notarize for their spouses, but its notary guidebook (*The Basic Steps In Notarization*) tells notaries, “[d]o not notarize in the following situations: [i]f the signer . . . is your spouse or partner, if your spouse is a party to the instrument or your partner is a party to the instrument.”⁴⁵³ Thus, while the North Dakota

⁴⁴³ ARIZ. REV. STAT. ANN. § 41-328(B) (Supp. 2001). Generally, the statutes that bar notaries from authenticating the signatures of their spouses contain similar language. Arizona is a good example, and the legislature there has mandated that a “notary public is an impartial witness and shall not notarizes . . . any person who is related by marriage . . .” *Id.*

⁴⁴⁴ FLA. STAT. ANN. § 117.107(12) (Supp. 2001).

⁴⁴⁵ 5 GUAM CODE ANN. § 33301(3) (n.d.).

⁴⁴⁶ ME. REV. STAT. ANN. tit. 4 § 954-A (1964).

⁴⁴⁷ NEV. REV. STAT. §§ 240.065(c), (2)(a) (1999).

⁴⁴⁸ N.D. CENT. CODE § 44-06-13.1(3) (Supp. 2001). While some states provide an entire list of individuals’ signatures that the notary public cannot authenticate, some states just list a specific person. North Dakota is a prime example of this, and its statute mandates that a notary public may not notarize a signature if “the signature is . . . that of the spouse of the notary public.” *Id.*

⁴⁴⁹ COMMW. MARIANAS CODE AGR § 3-102 (3) (n.d.).

⁴⁵⁰ 4 P.R. LAWS ANN. § 2005 (1994).

⁴⁵¹ VA. CODE ANN. § 47.1-30 (Michie 1998).

⁴⁵² MODEL NOTARY ACT OF 2001 §5-2(3) (June 7, 2001). The earlier drafts of that section dated March 7, 2001, and November 1, 2000, did not include the disqualification for the domestic partner or significant other of the notary. Professor Closen is a member of the drafting committee advising the National Notary Association, and he (and perhaps other members) had urged NNA to include such a provision.

⁴⁵³ THE BASIC STEPS IN NOTARIZATION (NORTH DAKOTA) (n.d.) (emphasis added). The language presented in this section creates confusion. In most states, significant others are not considered to share any legal interests unless specified through written instruments. Thus, it is curious that North Dakota recognizes some legal interests in a non-marital

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notary statute disqualifies notaries from notarizing for their husbands and wives, the official North Dakota guidebook goes further and advises notaries not to notarize for their partners (without clarifying whether this means family-type partners or business partners).

Six of the nine jurisdictions identified above — Florida, Guam, Maine, Nevada, the Northern Marianas, and Puerto Rico — prohibit notaries from notarizing for their parents and children. Just five of those jurisdictions — Guam, Maine, Nevada, the Northern Marianas, and Puerto Rico — disqualify notaries from notarizing for their own sisters and brothers. See Table 3. A few of those laws go even further. To be precise, the Guam statute declares that a notary may not notarize for “a spouse, sibling, or lineal ancestor or descendant.”⁴⁵⁴ In Puerto Rico, where a *notario publico* must also be an attorney and possesses far more authority than other United States notaries,⁴⁵⁵ a notary may not notarize for one who is “related to him within the fourth degree of consanguinity or the second degree of affinity.”⁴⁵⁶ The Nevada law disqualifies a notary from notarizing for “a relative of the notary public by marriage or consanguinity.”⁴⁵⁷ That statute defines “relative” to include:

- (a) A spouse, parent, grandparent or stepparent;
- (b) A natural born child, stepchild or adopted child;
- (c) A grandchild, brother, sister, half brother, half sister, stepbrother or stepsister;
- (d) A grandparent, parent, brother, sister, half brother, half sister, stepbrother or stepsister of the spouse of the notary public; and

setting. Oddly enough, North Dakota has not defined what constitutes someone as a partner. Is it a business partner, significant other, best friend, etc.? Such ambiguities certainly create confusing inconsistencies within the notarial process. Interestingly, because of its civil law heritage, Louisiana includes a provision in its notary statute requiring the identification of the marital status of the parties to certain instruments. “Whenever notaries pass any acts they shall give the marital status of all parties to the act . . .” LA. REV. STAT. § 35:11(A) (1985 & Supp. 2001). However, there is no statutory prohibition against a Louisiana notary performing official services for or affecting his/her spouse.

⁴⁵⁴ 5 GUAM CODE ANN. ch. 33, § 33301(3) (n.d.).

⁴⁵⁵ See Cloisen III, *supra* note 6, at 699.

⁴⁵⁶ 4 P.R. LAWS ANN. § 2005 (1994).

⁴⁵⁷ NEV. REV. STAT. § 240.065(1)(c) (1999).

(e) A natural born child, stepchild or adopted child of a sibling or half sibling of the notary public or of a sibling or half sibling of the spouse of the notary public.⁴⁵⁸

Could anyone reasonably be expected to recall who is included in the extensive Nevada list? What relative is left out of the Nevada list? Why not simply disqualify notaries from notarizing for all known relatives? After all, the "stepchild . . . of the half sibling of the . . . spouse of the notary public" (who is included in the above Nevada listing) is a fairly distant relative.

To demonstrate how utterly inattentive legislators have been toward notarial conflict of interest issues, consider two examples from the group of nine jurisdictions which have disqualified notaries from notarizing for some of their own relatives. First, Maine has passed a fairly expansive prohibition that disqualifies a notary from notarizing for a "spouse, parent, sibling, child, spouse's parent or child's spouse."⁴⁵⁹ Yet, the Maine statute does not even prohibit a notary from notarizing for herself or himself.⁴⁶⁰ Second, Arizona disqualifies notaries from notarizing for any person "related by marriage or adoption."⁴⁶¹ Yet, blood relatives such as parents, children, and siblings are not included. Thus, an Arizona notary could notarize for a son, but not for a son-in-law. That is an absurd result. *The Arizona Notary Public Handbook* recognizes the inconsistency and advises as follows:

Arizona law states that you cannot notarize for anyone related to you by marriage or adoption. The law also states that you as a notary are an impartial witness. While the provision specifying that you cannot notarize for anyone related to you by marriage or adoption would allow you to notarize for your brother or sister but not your brother-in-law or sister-in-law, it's a good idea not to do so because many courts have found that family members have some financial or beneficial interest in transactions involving other family members.

⁴⁵⁸ NEV. REV. STAT. § 240.065(2)(a)-(e) (1999).

⁴⁵⁹ ME. REV. STAT. ANN. tit. 4, § 954-A (1964).

⁴⁶⁰ See Table 1. To officially bar notaries from authenticating the signatures of certain family members is a step in the right direction. However, to pass such legislation without first mandating that notaries cannot authenticate their own signatures seems absurd. A baseball player who hits the ball cannot go to second base without initially touching first base.

⁴⁶¹ ARIZ. REV. STAT. ANN. § 41-328 (Supp. 2001).

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So just because the law allows you to notarize for blood relatives, we recommend that you do not do so, unless you can prove, beyond a shadow of a doubt, that you were an impartial witness to the transaction⁴⁶²

Both Arizona and Maine have adopted incomplete, unsound, and therefore, confusing positions about family-based notarial conflicts of interest.

Furthermore, numerous official state notary handbooks advise notaries against notarizing for family members, even though some of those states' statutes do not expressly bar notaries from doing so. For instance, the admonition of the South Dakota handbook is that notarizing for a relative "takes away some of [the notary's] independence."⁴⁶³ Yet, the South Dakota statutes do not prohibit notaries from notarizing for their relatives. See Table 3. The same is true for Nebraska. See Table 3. However, the official Nebraska handbook and application materials direct that "[y]ou may NOT notarize . . . your own signature" and suggests that "under a Notary's duty to be a disinterested or impartial witness, it would not be prudent to notarize the signature of relatives"⁴⁶⁴ Neither the West Virginia nor Michigan statutes bar notaries from notarizing for their relatives. See Table 3. The *West Virginia Notary Handbook* cautions notaries to "be careful about notarizing papers for members of your immediate family if you could conceivably receive money or [a] property interest from the transaction."⁴⁶⁵ The *Michigan Notaries Public Guide* makes the somewhat confusing statement that "[a] notary public may take the acknowledgment of a relative, even a spouse, if the notary has *no interest* in the transaction or subject matter. However, to avoid questions concerning possible disqualifying interest, it is advisable to use an independent third party notary public, if possible."⁴⁶⁶ According to the

⁴⁶² ARIZONA NOTARY PUBLIC HANDBOOK (July 2000), available at http://www.sosaz.com/notary/notary_handbook/.

⁴⁶³ SOUTH DAKOTA NOTARY PUBLIC HANDBOOK 10 (1997). Although the Alaska notary law does not prohibit notarizing for any relatives (see Table 3), the state's handbook declares that "it is not a good idea" to do so. ALASKA NOTARY HANDBOOK 12 (n.d.).

⁴⁶⁴ NEBRASKA NOTARY PUBLIC REFERENCE GUIDE 6 (n.d.). Even more emphatic on this point is the Wyoming guidebook. It states: "Impartiality is having no conflict of interest. . . . Generally, this means you should not perform your notarial duties for yourself, your family or business associates." WYOMING NOTARIES PUBLIC HANDBOOK 2-3 (June 1999) (emphasis added).

⁴⁶⁵ WEST VIRGINIA NOTARY HANDBOOK 3 (1998).

⁴⁶⁶ MICHIGAN NOTARIES PUBLIC 3 (Feb. 1999) (emphasis added); see also COMMONWEALTH OF KENTUCKY NOTARY PUBLIC HANDBOOK 4 (March 1997) (explaining that "[t]here is no

Oregon guidebook, *Notary Public Application Materials For New or Re-Applying Notaries*, "[e]ven though Oregon law does not prohibit notarizing documents for relatives, we recommend that the signer(s) obtain the services of a Notary Public a court would consider truly unbiased."⁴⁶⁷ Notaries simply should not notarize the signatures of their relatives because blood cannot be thicker than professional responsibility. Yet, the states and territories have certainly made the matter of family-based notarial practices confusing.

The roles of the judiciary and the attorney general must not be overlooked. Courts and attorneys general have rightly shown unbending opposition to self-notarization. The earliest reported American decision considering whether a notary public could notarize for himself announced what was to become the sole line of judicial reasoning on the matter.⁴⁶⁸ In the 1865 case of *Groesbeck v. Seeley* before the Supreme Court of Michigan, there was a challenge to a notarization of a signature on a deed, in part, because the real party in interest was alleged to be the notary who acknowledged the signature and who had secured the grantee for the transaction.⁴⁶⁹ The court in dicta wrote: "[W]e should have no hesitation in holding that a person could not take the acknowledgment of a deed made to himself. Such a point is too plain for doubt."⁴⁷⁰ In 1866, the Supreme Court of Iowa reached the same conclusion in the case of *Wilson v. Traer & Co.*, in which a notary, who was a party in interest to a mortgage, had taken the acknowledgment of the debtor on the mortgage.⁴⁷¹ Certainly, an even more conspicuous abuse would occur if the notary were to acknowledge his or her own signature. Prior to 1865, there had been a number of cases, involving

specific prohibition against notarizing for a family member. You should probably avoid the practice, however, to avoid any possible challenges based upon allegation of bias, conflict of interest or other impropriety").

⁴⁶⁷ OREGON NOTARY PUBLIC APPLICATION MATERIALS FOR NEW OR RE-APPLYING NOTARIES 21 (May 1994). Even though Oregon does not prohibit notaries from notarizing for any of their relatives, the Oregon handbook at one point declares: "The notary must not be related to the signer." OREGON NOTARY PUBLIC GUIDE 6 (Jan. 1996). What is confusing about these state notary handbooks is the fact that the legislature has not banned the practice, but that an official state agency has recommended notaries refrain from certain practices. If the state disapproved of family-based notarizations, it would make sense to have the legislature pass such a statute and eliminate any confusion.

⁴⁶⁸ Court opinions on this issue have not often explained the reasoning behind their conclusions, because this result is so inherently justified. Indeed, it is fundamentally in keeping with the old maximum, quoted earlier, that no one should obtain an advantage from her/his wrongdoing. See *supra* note 223.

⁴⁶⁹ 13 Mich. 329 (1865).

⁴⁷⁰ *Id.* at 345.

⁴⁷¹ 20 Iowa 231 (1866).

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public officials such as magistrates who had acknowledged signatures on deeds in which they had interests, where courts held the acknowledgements to be void except, of course, as between the actual parties to the instruments.⁴⁷²

The small number of more modern court cases on notarial disqualification due to the possible self-interest of notaries have tended to involve issues of what constitutes direct beneficial or financial interests. The outcomes have not been uniform.⁴⁷³ For instance, two decisions from 1956 and 1964 are split on the question of whether notaries who are candidates for office can lawfully notarize signatures on documents relating to the elections in which the notaries are candidates — such as the signatures on absentee ballots and on nominating petitions.⁴⁷⁴ Sadly, courts have sometimes made comments that would seem to undermine rigorous notarial ethics. When one appellate court confronted the 1964 case of a business co-partner notarizing a co-partner's signature on an automobile title transfer instrument, the judges characterized this conduct as “a thin cloud” and as “a taint probably growing out of innocent ignorance of an obscure principle of public policy,” and upheld the notarization.⁴⁷⁵ A few attorney general opinions have also addressed the issue of self-notarization, and each has concluded self-notarization to be unlawful.⁴⁷⁶ Importantly though, the well known fact is that the general public, including notaries public, remain almost completely unaware of common law decisions and opinions of the attorneys general, particularly on a subject as obscure as notary practice.

About the issue of the legality of notaries performing official services for other family members, the early cases were not uniform in their outcomes. Unfortunately, the cases and attorney general opinions often

⁴⁷² See, e.g., *Beaman v. Whitney*, 20 Me. 413 (1841); *Lynch v. Livingston*, 6 N.Y. 422 (1852).

⁴⁷³ “The determination of exactly what constitutes an impermissible interest is a debatable issue.” *Clarke & Kovach*, *supra* note 8, at 971.

⁴⁷⁴ *State ex rel. Reed v. Malrick*, 137 N.E.2d 560 (Ohio 1956). In this case, the court determined that if a candidate for office notarizes signatures on nominating ballots, he is allowed to do so and is not disqualified as having a beneficial interest. *Id.*

⁴⁷⁵ *Loucks v. Foster & Ward Used Cars*, 334 F.2d 86, 89-90 (6th Cir. 1964).

⁴⁷⁶ See, e.g., 1992 Fla. Op. Atty. Gen. 279 (announcing a notary public/court reporter is prohibited from notarizing her own certificate that a deposition transcript is true and correct); 1985 Nev. Op. Atty. Gen. 14 (referring to the prohibition of notaries to take acknowledgments to instruments in which they are named or to notarize on transactions from which they are “expected to directly receive a fee or commission”); 1991 Va. Op. Atty. Gen. 207 (opining that a notary is disqualified from notarizing a signature on the certificate of a self-executing will in which the notary is named as the executor).

approved of commissioners of deeds,⁴⁷⁷ justices of the peace, and notaries doing so. For instance, in the 1852 case of *Lynch v. Livingston*, the New York Court of Appeals was confronted with a situation in which a commissioner of deeds had taken the acknowledgements to a deed for his aunt and uncle, who bore the same surname as the commissioner.⁴⁷⁸ Because the aunt and uncle had no children, the commissioner was their presumptive heir.⁴⁷⁹ The court held the acknowledgments to be valid because "the act of taking and certifying the acknowledgments, involved the discharge of no judicial duty," but rather constituted "acts merely ministerial."⁴⁸⁰ Curiously, cases involving the very same ministerial acts would be resolved differently if the commissioners or notaries were certifying their own signatures. The Supreme Court of Iowa in *Wilson v. Traer & Co.*, reached that very conclusion in 1866.⁴⁸¹ There, as previously noted, the court concluded that an acknowledgment taken by a notary public was invalid where the notary was a party to the mortgage.⁴⁸² However, in dicta, the same court remarked that "mere relationship to the parties will not disqualify or incapacitate an officer from taking and certifying an acknowledgment to a conveyance," citing *Lynch v. Livingston* as authority.⁴⁸³ In 1861, the Supreme Court of Wisconsin upheld the validity of the acknowledgment of a mortgage, where the justice of the peace who took the acknowledgment was the husband of the mortgagee. Without further reasoning, the court simply announced that, "[w]e do not think [the justice of the peace] was disqualified on that account from taking [the

⁴⁷⁷ According to Peter Van Alstyne, a commissioner of deeds is "an official, rarely appointed today, residing outside his home state, appointed and empowered to perform notarial acts for residents of his home state who are temporarily living away from their home state." VAN ALSTYNE, *supra* note 17, at 76.

⁴⁷⁸ *Lynch v. Livingston*, 6 N.Y. 422 (1852).

⁴⁷⁹ *Id.* at 433.

⁴⁸⁰ *Id.* at 434. Numerous other cases have considered whether notarial acts are judicial or ministerial in nature. "There is quite a conflict of authority and diversity of holding in the different states upon the question of whether the act of taking an acknowledgment to a deed or other instrument is a ministerial or judicial act." *Cooper v. Hamilton*, 37 S.W. 12 (Tenn. 1896). Some cases have said notarial acts are judicial. *See, e.g., Krueger v. Dorr*, 161 N.E.2d 433 (Ill. App. Ct. 1959); *Thames v. Jackson Prod. Credit Assoc.*, 600 So. 2d 208 (Miss. 1992); *Commonwealth v. Pyle*, 18 Pa. 519 (1852); *Murdock v. Nelms*, 186 S.E.2d 46 (Va. 1972). More cases by far have said notarial acts are ministerial. *See, e.g., Anthony v. Collier County Sch. Bd.*, 420 So. 2d 895 (Fla. App. 1982); *Kimmel v. New York*, 660 N.Y.S.2d 265 (1997); *Owens v. Chaplin*, 228 N.C. 205 (1948); *Martin v. Mooney*, 695 S.W.2d 211 (Tex. App. 1985); *see also supra* note 44.

⁴⁸¹ 20 Iowa 231 (1866).

⁴⁸² *Id.* (determining that the officer who took and certified the acknowledgement of the mortgage had a "direct interest in it . . . [and] that such acknowledgment was void").

⁴⁸³ *Id.*

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acknowledgment]."⁴⁸⁴ Similarly, in the 1883 case of *Welsh v. Lewis & Son*, the Georgia Supreme Court declined to find illegal the attestation of a notary public to a mortgage, where the mortgagee was the notary's brother-in-law.⁴⁸⁵ Without any reasoning or explanation, in 1880, the New York Court of Appeals simply upheld an acknowledgment taken by a justice of the peace to a deed from his father to his wife, even though there was a factual dispute over the validity of the signature on the deed.⁴⁸⁶ In 1896, the Tennessee Supreme Court in *Cooper v. Hamilton Perpetual Building & Loan Ass'n*, announced this rule:

While acknowledgments taken before officers who are related to either party or interested in the instruments are contrary to public policy, and by no means to be encouraged, and while the practice which has become so prevalent should be discountenanced and discontinued, still such acknowledgments are not absolutely invalid and void because of such interest or relationship, without more.⁴⁸⁷

The more recent court decisions and attorney general opinions have regularly approved the practices of notaries in notarizing for their family members.⁴⁸⁸ However, those decisions and opinions hesitate to announce brightline rules. A South Carolina attorney general opinion addressed the question of whether "it was legal for a notary public to

⁴⁸⁴ *Kimball v. Johnson*, 14 Wis. 674 (1861).

⁴⁸⁵ 71 Ga. 387 (1883).

⁴⁸⁶ *Remington Paper Co. v. O'Dougherty*, 81 N.Y. 474 (1880).

⁴⁸⁷ *Cooper v. Hamilton*, 37 S.W. 12 (Tenn. 1896). The Virginia statute adopts a comparable position. See VA. CODE ANN. § 47.1-30 (Michie 1998) (stating, in part, that "[a] notarial act performed in violation of this section [on conflicts of interest] shall not automatically be void for such reason, but shall be voidable in the discretion of any court of competent jurisdiction upon the motion of any person injured thereby"). Interestingly, on the other hand, some state statutes declare certain notarial defects to invalidate notarizations. See, e.g., IDAHO CODE § 51-117 (Michie 2000). The Idaho Code provides that:

Without excluding other conditions which may impair the validity of a notarial act, the following conditions invalidate the notarial act: (a) Failure of the notary public to require a person whose acknowledgment is taken to personally appear before him; (b) Failure of the notary public to administer an oath or affirmation when the notary certificate indicates that he has administered it; (c) As to only the notary public who performs the notarial act and any party who shares the same beneficial interest in the transaction, the existence of a disqualifying interest

Id.; see also IND. CODE ANN. § 33-16-2-4 (Michie 1996) (declaring that "all notarial acts not attested by such [notary] seal shall be void").

⁴⁸⁸ See *infra* notes 489-96.

notarize his wife's signature?"⁴⁸⁹ Although this opinion commented that "[t]he nature of an interest which will disable a notary must be determined in each case from the peculiar facts and circumstances," the opinion went on to approve of a husband doing so, "absent any express prohibition against a notary" doing so.⁴⁹⁰ Untrained notaries are hardly in the position to evaluate the "peculiar facts and circumstances" of each case about possible conflicts of interest. They need much more definite guidance.⁴⁹¹ An attorney general opinion from Virginia is especially troublesome.⁴⁹² The notary statute of Virginia provided in part that "[n]o notary shall perform any notarial act with respect to any document or writing to which the notary or his spouse shall be a party."⁴⁹³ In answer to the question of whether the statute would be violated if a notary-wife "notarizes documents signed by her husband as president of the company which employs her as bookkeeper,"⁴⁹⁴ the opinion, relying on a hyper-technical interpretation, concluded that the notary-wife could do so. The opinion reasoned that the husband signed his name as an agent of the company and that he was therefore not a "party" to its documents under the precise wording of the statute.⁴⁹⁵ In an Alabama opinion, the attorney general decided that:

[although no] law . . . prohibits a notary public from notarizing a relative's or spouse's signature, . . . the better practice would be for a notary public to refrain from notarization of the signature of his or her spouse or immediate family member so the impartiality of the notary public would not be [an] issue should the authentication of the document be questioned.⁴⁹⁶

Many other unofficial sources of information regarding notarial practices also contribute to the uninformed and confused state of beliefs about family-based conflicts of interest. To illustrate, not one of the three general encyclopedia entries describing notaries public that were quoted early in this Article included any reference to notarial conflicts of interest

⁴⁸⁹ 1975 S.C. Op. Atty. Gen. 69, at 1.

⁴⁹⁰ *Id.*

⁴⁹¹ *Id.*

⁴⁹² 1984-85 VA. ATTY. GEN. BIENNIAL REP. Pt. 228.

⁴⁹³ *Id.* at 1.

⁴⁹⁴ *Id.*

⁴⁹⁵ *Id.*

⁴⁹⁶ 240 Ala. Op. Atty. Gen 24 (1995).

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and disqualifications.⁴⁹⁷ Even in the publications of the notarial community, many neglect to address family-based conflicts of interest. This Article has already noted the failure of the American Society of Notaries *Code of Ethics* to cover the issue of notarizing for family members, although it does direct notaries not to self-notarize.⁴⁹⁸

Some authoritative books on notarial law and practice have omitted the subject of notarial conflicts of interest arising from family relationships or have treated the subject inadequately.⁴⁹⁹ For example, Carl Meier wrote the 1940 version of *Anderson's Manual for Notaries Public* in 456 pages.⁵⁰⁰ In it, he devoted approximately one page to disqualifications due to conflicts of interest.⁵⁰¹ Meier did not squarely confront the subject of self-notarization, although he briefly discussed the beneficial interest and corporate notarial conflicts and disqualifications.⁵⁰² Interestingly, he found the time and space to proclaim "[t]he fact that the notary public is related to one of the parties signing the instrument does not disqualify him from taking the signer's acknowledgment."⁵⁰³ This kind of unqualified approval of conflicted practice did not have to happen. It has merely aggravated the already unenlightened circumstances.

The 1978 book, *Notary Public Practices and Glossary*, by Raymond Rothman, contained some 100 pages, but just one page was devoted to the coverage of disqualifying interests.⁵⁰⁴ While Rothman correctly stated that "[a] Notary should never, under any circumstances, notarize his own signature," he also made this much less effective comment:

If the Notary stands to make a substantial financial gain by notarizing such a document, he should refer it to another Notary and avoid the risk of a lawsuit initiated on the basis of his financial interest in the agreement.

⁴⁹⁷ See *supra* notes 35-37; see also THE NEW AMERICAN ENCYCLOPEDIA, *supra* note 34, at 1018 (including no reference to any conflict of interest issues or disqualifications).

⁴⁹⁸ See *supra* notes 183-84 and accompanying text.

⁴⁹⁹ See *supra* notes 34-38 and accompanying text.

⁵⁰⁰ See MEIER, *supra* note 17, at 21-22 (including just over one page of 201 pages on the subject of disqualifications).

⁵⁰¹ See generally MEIER, *supra* note 17.

⁵⁰² Meier notes that in a number of states, "there is a statute which declares that no banker, broker, cashier, director, teller, clerk, or other person holding an official relationship to a bank, banker, or broker, shall be competent to act as a notary public in any matter in which the bank, banker, or broker is interested." *Id.* at 14.

⁵⁰³ *Id.* at 22.

⁵⁰⁴ RAYMOND ROTHMAN, NOTARY PUBLIC PRACTICES & GLOSSARY, *supra* note 17, at 51-52.

The question of how much is a 'substantial' financial gain depends on the specific case and ultimately can only be decided in a court of law. With this in mind, if there is any question, the Notary should refer the party to another Notary, the Notary fee involved not being worth the chance of a lawsuit.⁵⁰⁵

The advice should have been firm — notaries must not notarize if they have any direct financial or beneficial interests (beyond their notarial fees) in the documents on which notarizations are performed or in the underlying transactions. Moreover, Rothman's statement that what constitutes a substantial financial interest must be decided under the particulars of each case seems wholly illusory when the one to make the judgment is an uninformed and indifferent notary and is the individual with the disqualifying interest. Unfortunately, Rothman did not at all address the issue of notarizing for other family members.⁵⁰⁶ This omission constituted more tacit endorsement of conflicted practices.

In 1996, Alfred Piombino, in his 375-page book, *Notary Public Handbook*, spent only three pages (or less than one percent) on the subject of conflicts of interest.⁵⁰⁷ His discussion began with this statement: "[m]ost state statutes are generally clear in providing the fundamental evaluation criteria to assist a notary public in making the decision whether or not to disqualify himself from performing an official act."⁵⁰⁸ That statement represents quite an exaggeration because a majority of United States jurisdictions do not clearly address the self-notarization issue. Piombino included the remark that "a notary public may officiate in certain circumstances which might otherwise appear to be improper," although such a notarization "could . . . be . . . overturned in a court of law."⁵⁰⁹ What does that remark mean? What kind of guidance was that remark in the eyes of ordinary notaries? Concerning the performance of notarial services for other family members, Piombino suggested that "[i]t is highly recommended to avoid performing any notarial services for any

⁵⁰⁵ *Id.*

⁵⁰⁶ *Id.* It is quite disappointing that a nationally recognized notarial expert failed to highlight such a basic tenet in the notarial community, namely that a notary public should not notarize for members of his or her family so as to avoid both actual and apparent conflicts of interest.

⁵⁰⁷ PIOMBINO, *supra* note 17, at 54-57.

⁵⁰⁸ *Id.* at 54.

⁵⁰⁹ *Id.* at 55.

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relative . . . ”⁵¹⁰ While that admonition was fairly strong, it could have been even stronger.

Peter Van Alstyne’s 1998 book, *Notary Law, Procedures And Ethics*, consists of 128 pages of which about four pages deal with notarial impartiality and conflicts of interest⁵¹¹ (and with another three pages devoted to attorney-notaries and conflicted practices).⁵¹² He correctly explains “[i]t is well established that a notary cannot notarize his own signature. It is procedurally impossible and it is illegal. Such an act is inherently invalid.”⁵¹³ Van Alstyne wisely counsels that “[o]ne who is a party to a transaction or document, no matter how small or nominal his interest therein, should not act as the notary with reference thereto,”⁵¹⁴ for the notary “should continuously . . . seek . . . to avoid the slightest appearance of wrongdoing.”⁵¹⁵ However, Van Alstyne could have said the notary *must not* or *shall not* notarize in the described situations. Even Van Alstyne’s perceptive description of notarial ethics standards falters when he gets to the topic of notarizing for other family members. He readily accepts the absence of meaningful standards on the point and announces that “[a] notary is generally not disqualified per se from notarizing for persons to whom they are related, whether by blood or by marriage, unless . . . prohibited by statute.”⁵¹⁶ Yet, he approvingly cites a case that stands for the proposition that one business partner cannot notarize for a fellow partner on company matters.⁵¹⁷ If business partners are to be disqualified for conflicts of interest, then it would seem that life partners, spouses, and family must also be prohibited from notarizing for one another. Moreover, because Van Alstyne is dedicated to the strongest disqualification position for conflicted financial interests — no matter how small they are — it would seem that he should have also opposed notarizing for family members. Because Van Alstyne’s book includes the most extensive treatment of notarial ethics, his acquiescence to some family-based conflicted practices is disappointing.

⁵¹⁰ *Id.*

⁵¹¹ VAN ALSTYNE, *supra* note 17, at 3-6. Van Alstyne cites extensive case law to support his point of view.

⁵¹² *Id.* at 6-9. Again, Van Alstyne provides adequate support for his position and provides a test to determine whether the attorney-notary has a conflict of interest or not when authenticating a signature.

⁵¹³ *Id.* at 5.

⁵¹⁴ *Id.* at 3.

⁵¹⁵ *Id.* at 5.

⁵¹⁶ *Id.* at 13.

⁵¹⁷ VAN ALSTYNE, *supra* note 17, at 4-5 (citing *Smalley v. Bodinus*, 79 N.W. 567 (Mich. 1899), which determined that “[o]ne copartner cannot as a notary public, take the oath of his copartner in a matter in which the firm is interested”).

Finally, the 1999 edition of *Anderson's Manual for Notaries Public* dedicates only one-half page of its forty-seven page introduction to notary practices on the subject of disqualifications. The topic of that short summary is corporate disqualifications, with no treatment whatsoever of family-based conflicts.⁵¹⁸ Thus, in all the books reviewed here, the topic of family-based conflicted notarial practices received, at best, minimal attention. That coverage was not often clear and seldom advocated the highest and soundest standards of practice.

While the leading books on notarial practice give little attention to the conflicts of interest, the patchwork of legislation on notarial conflicts of interest in this country is also an embarrassment. Unfortunately, not one jurisdiction has adopted all of the four types of notarial conflict of interest disqualification provisions addressed in this Section (provisions against self-notarization, notarization for relatives, notarization where one has a beneficial interest, and notarization where one is associated with a corporation or other business entity). Even worse, a dozen states have not adopted any of those four disqualification provisions. They include: Alabama, Alaska, Delaware, Iowa, Kentucky, Massachusetts, New Jersey, Ohio, Tennessee, Texas, Vermont, and Wyoming. See Table 4. Because so many notaries are not experienced or trained in the business or legal professions, they need more thorough and understandable direction from the legislatures. Treatment of family-based conflicts of interest in the official notary handbooks of the states and territories is not a satisfactory alternative because those publications do not carry the authority of statutes and such coverage often tends to

⁵¹⁸ ANDERSON'S MANUAL FOR NOTARIES PUBLIC, *supra* note 21, at 13-14. The manual observes that:

In a number of states, there is a statute which declares that no banker, broker, cashier, director, teller, clerk, or other person holding an official relationship to a bank, banker or broker, shall be competent to act as a notary public in any matter in which the bank or broker is interested. Contrary to the situation in those states, most states have adopted a more liberal attitude. They allow any notary public who is a stockholder, director, officer or employee of a bank or other corporation to take the acknowledgment of any party to any written instrument to or by such corporation, or to administer an oath to any other stockholder, director, officer, employee or agent of such corporation, or to protest for nonacceptance or nonpayment bills of exchange, drafts, checks, notes, or other negotiable instruments which may be owned or held for collection by such corporation. Such notary is disqualified from acting, however, if he is a party to the instrument, either individually or as a representative of the corporation, or has a financial interest in the subject thereof.

Id.

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confuse readers who appreciate the apparent inconsistencies between the statutes and the handbooks. Once the common law decisions, the opinions of attorneys general, and the comments of other sources are considered, the result is a hodgepodge that could confuse even the most dedicated notaries.

V. PROPOSALS TO ELIMINATE FAMILY-BASED NOTARIAL CONFLICTS

*"Primum est non nocere."*⁵¹⁹

Almost seventy-five years ago, Professor John Wigmore called for a reformation of notarial practice in this country. "[T]he time has come for a revival of soul and practice. The notary must be restored to the position of respect which his office merits."⁵²⁰ More recently this dire assessment of the present status and future prospects for notaries public was published: "[N]otaries in this country have suffered a downhill regression commencing in about the second half of the nineteenth century. This unrelenting slide toward obscurity has been profound, and for most ordinary notaries the backward momentum may very well be irreversible."⁵²¹ One way to effect a revival of notarial practice is to reform it one feature at a time. For now, the focus is upon family-based notarial practices.

Several actions can and should be undertaken to end family-based conflicted notarial services. After all, disqualification of professionals from acting as their own agents, acting in matters in which they have direct interests, and from serving their family members, is a commonly accepted protocol in numerous fields of endeavor.⁵²² State and territorial

⁵¹⁹ Latin maxim which means "first do no harm." *Latin Maxims*, at <http://user.tninet.se/~df732s/show-off.html> (last updated Jan. 20, 1999).

⁵²⁰ John H. Wigmore, *Notaries Who Undermine Our Property System*, 22 ILL. L. REV. 748, 749 (1928).

⁵²¹ Closten & Richards I, *supra* note 49, at 716.

⁵²² See, e.g., *Code of Ethics for Arbitrators in Commercial Disputes*, reprinted in CODES OF PROFESSIONAL RESPONSIBILITY, *supra* note 182, at 304 (asserting that "[a]fter accepting appointment and while serving as an arbitrator, a person should avoid entering into any financial, business, professional, family or social relationship, or acquiring any financial or personal interest, which is likely to affect impartiality or which might reasonably create the appearance of partiality or bias"). The *National Prosecution Standards* declares that "[o]ne potential conflict [of interest] which may confront the prosecutor occurs when the prosecutor must testify as a witness in proceedings in which the prosecutor is a participant . . . the prosecutor should withdraw from the case if it is apparent that the prosecutor will be called as a witness on behalf of the State." *Id.* at 427; see also, e.g., ILL. SUP. CT. R. 205(d) (announcing that "[n]o deposition shall be taken before a person who is a relative of or

legislatures, governmental agencies which supervise notarial functioning, notary membership organizations, employers of notaries, businesses that depend heavily upon notarizations on documents, other consumers of notarial services, relatives of notaries, and notaries themselves, should all join in the effort to stop notaries from performing their official services for themselves and other family members. The reason to do so is pragmatic and simple. It is in everyone's interest to do so. If, as the quoted Latin passage from the Hippocratic oath points out, the physician's first obligation is to do no harm, then the notary's first duty is to never put a notarization in jeopardy.⁵²³ The *Iowa Notaries Public Handbook* in a passage, previously quoted in full, notes that while "[t]he law does not forbid . . . notarizing the signatures of relatives . . . , if the notarized document was ever contested, a judge might determine the notary was not an impartial witness" and invalidate the instrument.⁵²⁴ This similar warning appears in the *Idaho Notary Public Handbook*:

If a notary performs a notarial act despite having a disqualifying interest in the transaction, it does not automatically invalidate the transaction. However, it does make the transaction subject to attack by a party whose interest is adverse to that shared by the notary and the person for whom he or she performed the notarial act.⁵²⁵

Virginia has actually incorporated that approach into its notary statute, as follows: "A notarial act performed in violation of this section [on conflicts of interest] shall not automatically be void for such reason, but shall be voidable in the discretion of any court of competent jurisdiction upon the motion of any person injured thereby."⁵²⁶ Translation: "In dubious cases, you should not act."⁵²⁷

attorney for any of the parties, a relative of the attorney, or financially interested in the action").

⁵²³ See *supra* note 519. "The signer has come to you with every justifiable expectation that you will perform the notarization competently so that the needed notarization will be viewed as valid and enforceable." *Understanding Our Fiduciary Duties As Notaries, supra* note 39, at 3. "The utmost responsibility of notaries is to perform their services thoroughly and competently so as not to subject documents to challenges — just as doctors under the Hippocratic oath are to do no harm to their patients." Closen II, *supra* note 4, at 7; see also Closen & Orsinger II, *supra* note 5, at 27 (analogizing to a doctor's first duty).

⁵²⁴ IOWA NOTARIES PUBLIC HANDBOOK 6 (n.d.).

⁵²⁵ IDAHO NOTARY PUBLIC HANDBOOK 7 (1997).

⁵²⁶ VA. CODE ANN. § 47.1-30 (1998).

⁵²⁷ See *supra* note 1.

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Before notaries can be expected to honor ethical standards and to avoid intra-family notarizations, notaries must have enough education and knowledge to appreciate what conduct is forbidden. Remember Colonel Coolidge's comment that he did not know he should not have administered an oath to his son.⁵²⁸ Former California Governor Edmund G. Brown has written, "[t]o faithfully serve the public, the Notary must be aware of these situations in which he is not qualified to act so that he does not do his constituents and himself a disservice."⁵²⁹ The notarial setting should be one more situation where "knowledge is power."⁵³⁰ If the law clearly barred notaries from performing intra-family notarizations and if notaries were made aware of the law and the justifications for it, then notaries would be empowered with the knowledge to help them resist misconduct. Not only would notaries have the information necessary for them to understand the limits of their authority, but they would also have an explanation to convey to relatives when refusing to notarize.⁵³¹ Peter Van Alstyne has also thoughtfully and correctly pointed out that notaries owe a professional responsibility to educate consumers of notarial services about notarial matters.⁵³² That is, notaries should not simply walk through the steps of notarizations like ministerial robots without any meaningful interaction with document signers. Rather, notaries should utilize the many notarizations they perform as brief opportunities to inform document signers about the purposes and procedures of notarial acts. Over time,

⁵²⁸ See *supra* note 248. "Of course, there are many instances in which employers and customers of notaries are unfamiliar with proper notarial law and practice, and those parties suggest notarial misconduct at least in part due to their ignorance of legal and ethical requirements." Anderson & Closen II, *supra* note 12, at 896.

⁵²⁹ Edmund G. Brown, quoted in ROTHMAN, *supra* note 17, at vi.

⁵³⁰ "Knowledge is power" is a well-recognized proverb set out in at least one book of quotations. THE MACMILLAN DICTIONARY OF QUOTATIONS, *supra* note 32, at 457. The more information a notary is able to gather about correct notarial practice, the better position in which he or she will be to determine whether a conflict of interest exists.

⁵³¹ Some notaries will be able to explain to their family members that it is simply illegal to authenticate the signatures of relatives. See Table 3. Those notaries who live in states that allow family-based notarizations may have to explain to the family member why the state does not endorse such practices in the notary handbooks. Other notaries who live in states with no guiding principles for family-based notarizations may have to explain to family members that such practices are unethical and compromise the integrity of the document.

⁵³² "There are compelling reasons why notaries should assume a fiduciary duty to their customers by informing them what the notarial process is about." *You Owe It To Your Customers: Don't Leave Them In The Dark*, THE NOTARY, Sept/Oct 2000, at 1; see Closen II, *supra* note 4, at 7 (opining that "[n]otaries should do more than simply trudge perfunctorily through the steps in a notarization, and instead at least briefly explain the process to document signers and oath-takers").

with the great volume of notarizations performed in this country, a substantial amount of education about notarial practices would occur.

The legislatures should enact laws of six varieties that unequivocally forbid family-based conflicted notarial practices. Preliminarily, it should be noted that although in some conflict of interest situations, disclosures to the parties and express waivers of the conflicts may be permissible, family-based conflicted practices in notarial settings obviously cannot be among them.⁵³³ Third parties who rely upon instruments bearing notarizations often will not be present and will not even be identified at the times of the notarizations. Moreover, notaries act as public officers representing a citizenry that cannot effectively waive the conflicts.

First, statutes should disqualify notaries from notarizing their own signatures and from notarizing on documents in which they are named. Some current statutes bar notaries from notarizing their own signatures, but those laws do not expressly extend to situations or documents in which notaries are named or interested.⁵³⁴ See Table 1. Furthermore, some current laws bar notaries from notarizing on documents in which the notaries are named as "parties to the instruments."⁵³⁵ The meaning of such provisions may be uncertain. Is there a difference between being named in a document and being named as a party to the document? Could an attorney who is named as the draftsman of an instrument notarize signatures upon it, because he/she would not then be a party to it? Hopefully not. Although a few misguided notary laws allow lawyer-notaries to both draft documents for their clients and notarize their own clients' signatures on those documents,⁵³⁶ such practices are unseemly and should be avoided and prohibited under conflict of interest

⁵³³ See Hayden, *supra* note 182, at 371-74 (discussing both the concept of disclosure in conflict of interest circumstances and the concept of forbearance). On the issue of disclosure, Hayden notes that:

At times even complete disclosure of a potential or actual conflict and its ramifications is insufficient to eliminate its negative effects. This may be because the conflict implicates intrinsic concerns and by its nature cannot be 'cured' by disclosure, or because disclosure cannot restore the [conflicted individual's] ability to perform core job functions competently — which may occur simply because the conflict is too pervasive.

Id. at 374.

⁵³⁴ See *supra* notes 313-438 and accompanying text.

⁵³⁵ See *supra* notes 352-63 and accompanying text.

⁵³⁶ See *supra* notes 211-14 and accompanying text.

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principles.⁵³⁷ The broader provision should be adopted, which bars notaries from notarizing their own signatures and notarizing on instruments in which they are named.

Second, statutes should disqualify persons who are business owners, officers, directors, stockholders, or employees from notarizing on documents that are related to the businesses and in which the notaries are named individually or as company representatives. As noted earlier, numerous jurisdictions already have such statutes on their books, although there is some variation from place to place regarding the covered business entities.⁵³⁸ See Table 2. While such provisions relating to notaries connected with business entities would be redundant if the previously recommended provision against self-notarization were adopted, at worst the result would be a bit of overkill. To the extent that the business disqualification provisions clarify the reach of the prohibition against self-notarization, they should be applauded and encouraged.

Third, statutes should disqualify notaries from notarizing the signatures of any and all of their known relatives, including domestic partners or significant others and family by marriage or adoption. Piombino has also advocated this inflexible and appropriate disqualification in his book.⁵³⁹ While this prohibition would obviously constitute a more expansive provision than any United States jurisdiction has enacted to date, this sweeping prohibition would be the more effective approach to intra-family conflicts of interest.⁵⁴⁰ See Table 3. The few current laws prohibiting notarization for relatives (other than spouses) can be faulted for being ambiguous and inconsistent. Those provisions, for example, do not make clear whether they apply to in-laws or family by marriage, and whether they apply to relatives by adoption.⁵⁴¹

Each of the few current laws on the point applies only to a limited number of relatives. To the extent that all of these laws attempt in effect

⁵³⁷ The June 7, 2001 draft of the *Model Notary Act*, under the provision entitled "disqualifications" declares that "[a] notary is disqualified from performing a notarial act if the notary . . . is an attorney who has prepared the document for the principal [signer] for a fee." MODEL NOTARY ACT OF 2001 § 5-2(4) (June 7, 2001); see also *supra* notes 211-16 and accompanying text. See generally Closen & Mulcahy, *supra* note 211.

⁵³⁸ See *supra* notes 402-21 and accompanying text.

⁵³⁹ See *supra* note 510.

⁵⁴⁰ See *supra* notes 443-57 and accompanying text.

⁵⁴¹ See *supra* notes 443-52.

to define "close relatives" or "immediate family" by announcing a list of covered family members, such laws are somewhat arbitrary and incomplete. They are arbitrary because the answer to the question of who should be regarded as too close a relative for notarial services will vary depending upon who makes that judgment. To prove this arbitrariness, those few existing laws themselves differ markedly from jurisdiction to jurisdiction.⁵⁴² See Table 3. Most importantly, they are incomplete. Everyone knows that family is special, no matter how remote the degree of relationship. Virtually everyone has had the experience of being first introduced to some distant relative, as well as the experience of instantly bonding with the person simply because he/she is family. It is an inherent and unavoidable outcome in almost every instance.

The recommended expansive approach of prohibiting notarization of the signatures of all known relatives would have the advantages of uniformity and certainty. It will protect notaries in cases where they might notarize for someone who is related but who is so remote as to be unknown as a relative to the notary. Moreover, there is simply no need in a country with more than 4.2 million notaries for family members to be seeking out the services of notary-relatives. They can readily find unrelated notaries to perform notarial acts.⁵⁴³

Fourth, statutes should disqualify notaries from notarizing on documents that are parts of transactions in which they have direct financial or beneficial interests (in excess of the fees to be assessed for notarial services), regardless of the levels of the interests. This full scale disqualification is just as Van Alstyne has also urged in his book.⁵⁴⁴ Several states already have enacted such provisions.⁵⁴⁵ See Table 1. The beneficial interest section of the Model Notary Act illustrates how such a prohibition has been expressed. As previously noted, it reads: "A notary is disqualified from performing a notarial act if the notary . . . will receive directly from a transaction connected with the notarial act any commission, fee, advantage, right, title, interest, cash, property, or other consideration exceeding in value the [notarial] fees . . ." ⁵⁴⁶ As also

⁵⁴² See *supra* notes 443-67 and accompanying text.

⁵⁴³ See *infra* note 614; see also *supra* note 127. With 4.2 million notaries public in the United States, there is roughly one notary public for every three or four citizens. If a person wishing to have a signature notarized can only find a family member to perform the ceremony, he or she is not looking diligently enough!

⁵⁴⁴ See *supra* note 5.

⁵⁴⁵ See *supra* notes 350-63 and accompanying text.

⁵⁴⁶ See MODEL NOTARY ACT OF 2001 § 3-102 (2).

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suggested previously, some of that language (references to such items as advantage, right, and interest) may be ambiguous to the ordinary reader and, therefore, may be confusing. The language should be more precise, perhaps by simply eliminating the vague terms. While provisions like the one just illustrated would certainly overlap the previously recommended prohibitions against both self-notarizations and intra-family notarizations, such provisions would extend even further. For instance, in many cases notaries will not be the signers of documents and will not even be named in documents, and yet the notaries will have quite direct interests in the outcomes of the transactions. Perhaps a notary's spouse or domestic partner will receive a valuable property interest from a transaction, but neither the spouse nor the domestic partner is to be a signer whose signature will be notarized. If the notary will effectively obtain a beneficial interest shared with the spouse or partner, the notary should be disqualified from notarizing instruments related to the hypothesized transaction.

Fifth, statutes should declare invalid any and all notarizations performed in violation of the previously described provisions.⁵⁴⁷ No exceptions should be recognized. Although this approach may at first seem to be a rather drastic measure, it should serve to get the attention of notaries, their employers, businesses that deal regularly with notarizations on documents, state agencies, and perhaps even document signers. There are really only two possible views of faulty notarizations performed by notaries having family-based conflicts of interest, namely that such notarizations are either valid or not.⁵⁴⁸ If such notarizations are

⁵⁴⁷ See *Closen II*, *supra* note 4, at 7 (noting that the "utmost responsibility of notaries is to perform their services thoroughly and competently so as not to subject documents to challenges - just as doctors under the Hippocratic oath are to do no harm to their patients"). To ensure that the integrity of a document is strong, it is imperative that a notary does not authenticate the signature of a family member - no matter what the circumstance. If the notary does notarize a family member's signature, the instrument should be considered invalid because the notarization was not performed with complete objectivity. This approach cannot possibly be a surprise to anyone, because under the present system a faulty notarization may cause the rejection of a document. "[A notarial] error could cause a document to be rejected by the receiving agency." NATIONAL NOTARY ASSOCIATION, WHAT YOU NEED TO KNOW AS A NOTARY-EMPLOYEE OR NOTARY-EMPLOYER (1998).

⁵⁴⁸ Because impartiality is the cornerstone of notarizations, every jurisdiction should adopt the view that family-based notarizations are unacceptable and invalid. The Attorney General of Nevada stated that family-based notarizations should be prohibited because "of the high potential for a financial or emotional interest that would compromise impartiality." 1985 Nev. Op. Atty. Gen. 63.

treated as valid, there would be little incentive for notaries or document signers to avoid conflicted practices.

Treating such faulty notarizations as invalid has the advantage that it sends a strong message about the seriousness of conflict of interest standards. It should affect behavior modification, in that notaries and signers presumably will not want to jeopardize their notarizations. It is a clear rule that would promote consistent results and would not be subject to case-by-case decision-making by county recorders, arbitrators, judges, and others. It is a sanction that fits the offense because a family-based notarial conflict is truly the fault of both the document signer and the notary. Document signers should know better than to enlist their own family to provide official governmental services such as notarizations.⁵⁴⁹ Of course, in order to prevent parties to transactions from taking advantage of their own wrongdoing and from unfairly asserting their own misconduct to avoid obligations (about which they have had second thoughts), courts can in appropriate circumstances, hold parties bound under the doctrine of actual notice even if notarizations are technically invalid — as caselaw has done on many previous occasions.⁵⁵⁰

In order to prevent the invalidity of family-based notarizations from working hardships upon innocent third parties who might otherwise rely on the faulty and invalid notarizations, some procedures can and should be implemented to help protect third parties.⁵⁵¹ Certificates of notarization should be revised to include statements to the effect that the notaries and document signers have no known family relationships. Notary journal entries should be similarly modified to include a component whereby notaries can verify the absence of any known family relationships with document signers.⁵⁵² Incidentally, only a small

⁵⁴⁹ Because the level of awareness regarding notary laws leaves much to be desired, document signers (and even notaries) need to know how important it is for impartiality to be the key to every notarization. Having a notary authenticate the signature of a family member destroys the impartiality of the official state witness to the document. See generally Anderson & Closen II, *supra* note 12.

⁵⁵⁰ See, e.g., Beaman v. Whitney, 20 Me. 413, 420 (1841) (reciting that “the acknowledgment was taken and certified by a magistrate, who was a party interested. With regard to the latter objection, it is at most a void acknowledgment, leaving the deed operative between the parties . . .”); Stevens v. Hampton, 46 Mo. 404, 407 (1870) (reciting that “[t]he want of a proper acknowledgment [because taken by the party in interest] does not, however, invalidate the deed, but only goes to the effect of the record”).

⁵⁵¹ See *infra* notes 552-55 and accompanying text.

⁵⁵² Many notaries document notarizations in the National Notary Association-produced journal. There are ten sections that should be filled for the proper journal entry (including

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number of United States jurisdictions presently require notaries to maintain journals or ledgers recording their official acts,⁵⁵³ but journaling notarizations is perhaps the most valuable practice available to promote the validity of those notarizations.⁵⁵⁴ Hence, all states and territories should enact provisions mandating journal record-keeping by notaries public.⁵⁵⁵

the document signer's right thumbprint). Among the list of categories in the journal is an "additional information" section. A notary could reasonably place any information about whether he or she is related to the document signer in that section, but a specific column might ensure that notaries would be less likely to notarize the signature of a family member. NATIONAL NOTARY ASSOCIATION, OFFICIAL JOURNAL OF NOTARIAL ACTS (1999).

⁵⁵³ See Cloisen et al., *supra* note 8, at 198-200. The authors note that:

Eighteen states and territories require notaries to maintain records or journals of their notarial acts, including: Alabama, Arizona, California, Colorado, Hawaii, Maryland, Mississippi, Missouri, Nevada, North Dakota, Oklahoma, Oregon, Pennsylvania, and Texas, as well as the District of Columbia, Guam, the Commonwealth of the Northern Marianas, and the Virgin Islands. Many of the remaining states encourage notaries to maintain journals of their notarial activities.

Id. Unfortunately, a few states that had required the keeping of a notary register or journal have actually repealed those provisions. See, e.g., SOUTH DAKOTA NOTARY PUBLIC HANDBOOK 10 (1997) (stating that "[w]hile South Dakota law no longer requires a register to be kept by a notary, it would certainly be to the advantage of the notary to do so").

⁵⁵⁴ "Most lawsuits against notaries could be avoided if the notary kept a record." SOUTH DAKOTA NOTARY PUBLIC HANDBOOK 10 (1997); see also Cloisen et al., *supra* note 8, at 192 (commenting that "[b]ecause the certificate of notarization leaves the possession of the notary, it is more susceptible to being lost, stolen, damaged, or tampered with than would a document or record that remains in the protective custody of the notary"). See generally Peter J. Van Alstyne, *The Notary's Duty to Meticulously Maintain a Notary Journal*, 31 J. MARSHALL L. REV. 777 (1998). By keeping a journal, the notary will always ensure that the integrity of the document remains intact because would-be frauds are less likely to cheat if they know that the notary will keep a record of the transaction.

⁵⁵⁵ The authors of this Article are not the first to recommend nationwide, mandatory journal provisions. For example, the Wyoming handbook recommends that:

The notary journal protects the notary from accusations of wrong doing and it helps prevent the notary from engaging in wrong doing. Every journal entry is legally presumed to be truthful. Wyoming statutes do not require keeping a journal but is wise and *highly recommended* by the Secretary of State.

WYOMING NOTARIES PUBLIC HANDBOOK 17 (June 1999) (emphasis added); see also MODEL NOTARY ACT of 2001 § 7-1(a) (providing that "[a] notary shall keep, maintain, protect as a public record . . . a chronological official journal of notarial acts . . ."); NOTARY PUBLIC CODE, *supra* note 186, at Guiding Principle VIII (declaring "[t]he Notary shall record every notarial act in a bound journal or other secure recording device . . ."). All states should adopt a provision that requires its notaries to rigorously maintain a journal. See Cloisen et al., *supra* note 8, at 194 (determining that "[t]he notary journal has been said to be 'worth its weight in gold' to the notary. Not only has the completion of the certificate of notarization and the notary journal become customary, but their use has also been approved by law").

Sixth, statutes should impose sanctions upon notaries who violate the previously described provisions. Penalty provisions are already included in numerous notary statutes to punish a variety of notarial violations.⁵⁵⁶ The sanctions should be severe enough to indicate to notaries the importance of conflict of interest standards, to deter notaries from engaging in intra-family notarizations, and to punish offending notaries commensurate with the offenses. Fines and suspensions of notary commissions should be automatically levied for first offenders.⁵⁵⁷ Fines of perhaps \$300 to \$500 or more would seem appropriate, along with suspensions of commissions for three to six months or longer.⁵⁵⁸ For second offenses, fines of \$500 to \$1000 or more would seem appropriate, and those notaries should suffer the permanent revocation of their commissions.⁵⁵⁹

⁵⁵⁶ WYOMING NOTARIES PUBLIC HANDBOOK 21 (June 1999). "Three types of penalties for notary misconduct are (1) Criminal prosecution for fraud — fines, imprisonment, restitution; (2) Civil liabilities — unlimited financial damages, court costs and attorney fees; (3) Administrative — revocation or denial of your notary commission." *Id.* Similarly, Kansas and West Virginia notaries are subject to civil, criminal, and administrative sanctions. See KANSAS NOTARY PUBLIC HANDBOOK 12 (n.d.); WEST VIRGINIA NOTARY HANDBOOK 10-11 (1998). "[T]he appointing authority may revoke or suspend a Notary's appointment, or impose a fine . . . [T]he Notary may be subject to disciplinary action by the appointment authority and even liable for damages." CLOSEN ET AL., *supra* note 17, at x. "Administrative remedies are levied by the Secretary of State, and can range from an advice letter to revocation of the commission and a fine." OREGON NOTARY PUBLIC GUIDE 9 (Jan. 1996). The Louisiana notary statute has provisions for fines for notarial infractions of certain types. LA. REV. STAT. ANN. § 35:284, 286 (1985 & Supp. 2001); see, e.g., Lambert, *supra* note 8, at 1 (referring to a case where a notary commission was revoked because it had been obtained under false pretenses).

⁵⁵⁷ Curiously, the March 7, 2001 draft of the Model Notary Act of 2001 does not expressly grant the authority to notary commissioning officials to impose fines against notaries. Rather, the draft Act provides only for non-monetary remedies or sanctions such as warnings, injunctions, and revocations of commissions. See MODEL NOTARY ACT OF 2001 §§ 6-101-6-103 (March 7, 2000).

⁵⁵⁸ In 1895, North Dakota set a \$100 fine for certain notarial misconduct. N.D. REV. CODES art. 12, §475 (1895) (declaring the described notarial misconduct to be "a misdemeanor and on conviction . . . punishable by a fine of one hundred dollars for each offense, and shall also be removed from office"). One current Louisiana notary provision assesses a fine of \$100 for each notarial infraction of a certain kind. LA. REV. STAT. ANN. § 35:286 (1985 & Supp. 2001). Many states revoke the notary's commission if he or she engages in inappropriate notarial conduct. However, some states have imposed criminal sanctions for such conduct. For example, Illinois distinguishes notarial misconduct as either reckless or willful. Notaries convicted of these crimes are guilty of a misdemeanor punishable by a fine and, or a jail term. 5 ILL. COMP. STAT. 312/7-105 (2001).

⁵⁵⁹ The thought here is to approximately double the fine for a second offense. Again, the sum of \$500 to \$1000 is not too high, as penalty amounts in the range of \$1000 appeared in some notary statutes of the 1800s. See, e.g., 1867 Idaho Sess. Laws 13 (providing "[f]or any willful violation or neglect of duty any notary public shall be subject to criminal

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Unless sanctions are imposed upon notaries for violating the conflict of interest statutes suggested earlier, there would be no penalties against the principal offenders: the notaries. Declaring faulty notarizations to be void does not really penalize the notaries who performed them. Instead, document signers suffer the wrath of government when intra-family notarizations are treated as invalid. If the levels of these sanctions discourage some people from becoming notaries, or encourage some notaries to voluntarily cancel their commissions, then so be it. If the recommended sanctions were adopted and actually imposed upon some notaries, and if some of those notaries lost their commissions temporarily or permanently, then so be it. Indeed, the system should strive to eliminate incompetent and/or unethical notaries. With more than 4.2 million notaries, the country can afford to lose some of them.⁵⁶⁰

In order to establish consistent guidelines that forbid intra-family notarizations and to draw additional attention to the unlawfulness of intra-family notarizations, the Model Notary Act, the National Notary Association *Notary Public Code of Professional Responsibility*, and the American Society of Notaries *Code of Ethics* should all be amended to reflect the proposed positions regarding notaries notarizing for other family members. Regarding the matter of self-notarizations, all three documents currently and effectively prohibit notaries from notarizing their own signatures and from notarizing on documents in which they

prosecution, and may be punished by fine not exceeding one thousand dollars, or removal from office, or both"); 1821 ME. LAWS §6 (setting the penalty against a notary or anyone else who knowingly defaced or destroyed notarial records at "a sum not less than two hundred dollars, nor more than one thousand dollars"). As the former provision makes clear, even in the 1800s there were provisions for the revocation of notarial commissions or removal from notarial office. See N.D. REV. CODES art. 12, §474 (1895) (dealing with revocation of the notarial commission). Under current Virginia practice "[w]hen errors are found [in notarizations] in the authentication division [of the office of the Secretary of the Commonwealth, the Secretary] sends the offending notary a letter of reprimand and notification that his or her commission will be revoked if another error is made by that notary." Workman, *supra* note 43, at 9. "[O]nce a [Virginia] notary's commission is revoked, the notary is not eligible to be commissioned again. The penalty exemplifies the importance of a notary's responsibility to his commission . . ." *Id.* "Notaries who neglect to administer the required oral oaths or affirmations should be subject to stiff fines and revocations of their commissions. Both California and Ohio already have statutes for the removal of notaries who fail to administer required oaths or affirmations." Closen II, *supra* note 4, at 7.

⁵⁶⁰ See Ross, *supra* note 38, at 11 (pointing out that California had about 150,000 notaries in 1989). As of 1997, California had some 139,000 notaries. The reduction resulted from efforts there to heighten the qualifications of its notaries.

are named.⁵⁶¹ All three contain general beneficial interest provisions that disqualify notaries from performing notarizations on transactions in which they have direct interests beyond the amounts of their fees for notarial services.⁵⁶² However, not one of the three documents adequately addresses notarial services for other relatives.

Regarding notarizations for other family members (besides notaries themselves), all three documents — the Model Notary Act, the NNA *Code of Professional Responsibility*, and the ASN *Code of Ethics* — should forbid notaries from notarizing the signatures of any and all of their known family members, including their domestic partners, biological family, and family members by adoption and marriage. Not one of the three documents presently covers notarizing for domestic partners.⁵⁶³ If society is going to increasingly treat domestic partners as the functional equivalents of spouses for purposes of extending rights to individuals in these non-traditional relationships (and the authors certainly support such an agenda),⁵⁶⁴ then such pairs should be saddled with the

⁵⁶¹ The *Model Notary Act of 2001* also disqualifies notaries from performing self-notarizations. MODEL NOTARY ACT OF 2001 § 5-2(1) (declaring: “A notary is disqualified from performing a notarial act if the notary . . . is a party to or named in the document that is to be notarized . . .”).

⁵⁶² See generally MODEL NOTARY ACT (1984); CODE OF ETHICS, *supra* note 183; NOTARY PUBLIC CODE, *supra* note 186. The draft of the *Model Notary Act of 2001* also includes a general beneficial interest disqualification provision. MODEL NOTARY ACT OF 2001 § 5-2(2) (June 7, 2001) (disqualifying a notary who “will receive as a direct or indirect result any commission, fee, advantage, right, title, interest, cash, property, or other consideration” in excess of the notarial fees).

⁵⁶³ Although states do not recognize unmarried cohabitants as having any rights, the conflict of interest in notarizing documents for these cohabitants is no less severe. Although the legal relationship may not be officially recognized, real conflicts of interest still arise. Thus, it is illogical for the three major standards of notary law to strictly prohibit parties who live together from notarizing each other’s documents.

⁵⁶⁴ See generally Michael L. Closen & Joan E. Maloney, *The Health Care Surrogate Act in Illinois: Another Rejection of Domestic Partners’ Rights*, 19 S. ILL. U. L.J. 479 (1995) (proposing inclusion of domestic partners or significant others in health and medical care statutes allowing surrogate decision-making); Michael L. Closen & Carol R. Heise, *HIV-AIDS and the Non-Traditional Family: The Argument for State and Federal Judicial Recognition of Danish Same-Sex Marriages*, 16 NOVA L. REV. 809 (1992) (urging the approval of non-traditional relationships as a means to promote containment of HIV). “Increasingly, the theoretical and practical implications of family law have been shifting from moral to economic issues . . .” GREGORY ET AL., *supra* note 23, at 1. “American family law is currently in a state of flux and transition . . .” *Id.* “Broadly, a ‘family’ may include a nontraditional family, meaning one of a group living in the same household.” *Id.* at 5. “Nonmarital cohabitation, as an American social development, has experienced a five-fold increase from 1970-1980, and there are strong indications that this trend will continue in the future.” *Id.* at 19. The authors also note that:

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responsibilities that spouses are required to uphold.⁵⁶⁵ Both the Model Notary Act (including the November 1, 2000, draft of the Revised Model Notary Act) and the NNA *Code of Professional Responsibility* presently prohibit notaries from notarizing for their spouses,⁵⁶⁶ but the ASN *Code of Ethics* includes no such provision.⁵⁶⁷ It should. It provides only that a notary must “never perform any notarial act in which [the notary is] a party in interest or from which [the notary will] stand to benefit.”⁵⁶⁸ That language should be revised to cover notarizing for all known family members, which obviously includes spouses.

The language of all three documents must be strengthened substantially regarding notarizations for relatives. The ASN *Code of Ethics* is completely silent on the point.⁵⁶⁹ Both the Model Notary Act (and the November 1, 2000, draft of the REVISED MODEL NOTARY ACT) and the NNA *Code of Professional Responsibility* unsuccessfully attempt to define what that *Code of Professional Responsibility* calls “close relative[s]” by listing them.⁵⁷⁰ But, such provisions require notaries and others to

[U]nmarried heterosexual and homosexual cohabitants in many states may now contractually agree to define their property and support rights separate and apart from any marital rights and obligations; and some American cities have recently passed various ‘domestic partners’ ordinances that recognize an unmarried domestic partnership status for municipal purposes. [S]ome other countries have recognized a legal status for unmarried domestic partners

Id. at 10. “[I]t is becoming clear that the preferable approach is for state legislatures and courts to recognize and protect the legal rights and obligations of both traditional and non-traditional families as they currently coexist in American society” *Id.* at 11.

⁵⁶⁵ It seems rather obvious that rights come along only with relevant responsibilities. Yet, the advocates on both sides of the debate about extending the rights of marriage to same-sex or non-traditional couples regularly and exuberantly overstate the righteousness of their positions without acknowledging the negative features, such as the attendant responsibilities. See generally Michael L. Closen, *Marriage not Really all that Hallowed*, NAT’L L.J., Sept. 2, 1996, at A16 (commenting that, “[b]oth sides [in the same-sex marriage debate] must accept blame for neglecting to put that debate in its full historical context, for refusing honestly to portray marriage. . . . Both sides in the feud need to be more realistic”).

⁵⁶⁶ See MODEL NOTARY ACT § 3-102 (1984) (providing that a “notary is disqualified from performing a notarial act if the notary . . . is related to the person whose signature is to be notarized as a spouse, sibling, or lineal ascendant or descendant”); see also NOTARY PUBLIC CODE, *supra* note 186, at § II-B-5 (directing that a notary “shall decline to notarize the signature of a close relative or family member, particularly a spouse, parent, grandparent, sibling, son, daughter or grandchild of the Notary, or a stepchild, stepsibling, stepparent, stepgrandparent or stepgrandchild of the Notary”).

⁵⁶⁷ See *supra* note 183.

⁵⁶⁸ See CODE OF ETHICS, *supra* note 183.

⁵⁶⁹ See *supra* note 164.

⁵⁷⁰ See NOTARY PUBLIC CODE, *supra* note 186, at § II-B-5 (asserting that a notary “shall decline to notarize the signature of a close relative or family member”).

recall which relatives are on the list and which are not. A more definite and workable approach would be for all three documents to prohibit notaries from notarizing the signatures of all known relatives.

Other steps are also needed. Every measure that is taken to improve the general knowledge and competence of notaries should help notaries recognize and deal with possible conflict of interest situations. The principle that knowledge is power means, among other things, that with increased knowledge notaries will be empowered to better appreciate the full boundaries of their responsibilities, including ethical duties, the full range of adverse consequences that may result from their misconduct and ethical breaches.⁵⁷¹ Hence, the credentials and training of notaries should be heightened significantly. Notaries should be required to have obtained a minimum level of general education — such as, at least, an associates degree or perhaps a bachelors degree.⁵⁷² Notaries should be required to attend a minimum program of six hours of instruction in notary law, ethics, and practice and be required to pass a proctored written examination on those course materials.⁵⁷³ As already recommended, notaries should be required to maintain journals or ledgers of their official acts.⁵⁷⁴ Renewal of notary commissions should

⁵⁷¹ As West Virginia Secretary of State Ken Hechler remarked, “Unless you know how to perform a notarial act correctly, you may cause serious inconvenience or loss.” WEST VIRGINIA NOTARY HANDBOOK (front cover) (1998). “Conflicts of interest are of particular concern to professionals who owe fiduciary duties to others (such as trustees), or who depend upon the trust and respect of others in order to perform core functions competently (such as judges, journalists, and scientific researchers).” Hayden, *supra* note 182, at 359. Notaries public seem to fit both of those categories. See *supra* notes 143-50 and accompanying text; see also Closen & Orsinger I, *supra* note 2 (referring to “the chance that an untrained and indifferent notary will do the right thing”).

⁵⁷² See *supra* notes 145-46 and accompanying text.

⁵⁷³ This suggestion is an expansion upon the requirements already in place in Florida and North Carolina for mandatory notary education, and upon the notary testing in place in some 15 jurisdictions (including Alaska, California, Connecticut, District of Columbia, Guam, Hawaii, Louisiana, Maine, New York, North Carolina, Ohio, Oregon, Puerto Rico, Utah, and Wyoming). See *Guide to Notary Commission Eligibility*, NAT’L NOTARY, May 2000, at 23; see also *supra* notes 147-50 and accompanying text. “The states should raise [notary] qualifications, education, testing and fees dramatically” Closen I, *supra* note 2, at A24.

⁵⁷⁴ See Closen et al., *supra* note 8, at 192-93. The authors determined that:

Because the certificate of notarization leaves the possession of the notary, it is more susceptible to being lost, stolen, damaged, or tampered with than would a document or record that remains in the protective custody of the notary The notary journal, with its detailed description of each notarial act (including the data contained in the certificate of notarization as well as the original signature of the document signer) provides a valuable record in the event of loss, theft,

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not be automatic, but should require refresher courses and re-examinations.⁵⁷⁵ The legislatures should dramatically raise the maximum fee levels to be charged for notarial services by notaries, to at least twenty-five to fifty dollars each or more.⁵⁷⁶ As an incidental benefit of such increases, there would undoubtedly be a sharp reduction in the number of documents on which signatures are unnecessarily required to be notarized.⁵⁷⁷ The legislatures should also impose obligations for all notaries to be covered by substantial errors and omissions insurance and surety bonds in the amount of \$100,000 or more.⁵⁷⁸ This change may

damage, destruction, or alteration of the certificate of notarization or loss of memory about the specifics of the notarization ceremony.

Id. The legislatures should accept what notary authorities recognize, that the journal is "the notary's most important notarial tool." Van Alstyne, *supra* note 554, at 802. "[A]t least 99 percent of all notarial errors would be prevented or detected instantly [and avoided] if notaries would rigorously complete a contemporaneous and thorough journal entry for every notarization." Closen & Shannon, *supra* note 214, at 32. "You are not required by [Alaska] law to keep [a] permanent record of your notary acts, however, this office cannot emphasize enough the importance of recording every notarization you complete." ALASKA NOTARY HANDBOOK 4 (n.d.). "[I]t is advisable to keep a record book of your official acts because a journal provides documentation of the notary's personal knowledge of performance of the notarization." COMMONWEALTH OF KENTUCKY NOTARY PUBLIC HANDBOOK 5 (Mar. 1997). "Montana State Law does not require that notaries maintain a journal of their notarial acts. However, it is the *very strong recommendation* of the Office of the Secretary of State that they do so." A GUIDE FOR NOTARIES PUBLIC PRACTICING IN MONTANA 3 (June 1995) (emphasis added). "Although not required by law, the notary should keep a notary register." ARKANSAS NOTARY PUBLIC HANDBOOK 3 (Feb. 1996); see also Closen II, *supra* note 7, at 7 (suggesting that "[s]tate statutes should require that notaries keep journals").

⁵⁷⁵ See *supra* notes 149-50 and accompanying text.

⁵⁷⁶ "Most states regulate the maximum fees that may be charged, and in a majority of the states, the maximum charge for ordinary notarizations is \$2 or less." Closen I, *supra* note 2, at A23. Because the highest notary fee in place anywhere in this country is the almost trivial amount of ten dollars for jurat and acknowledgment notarizations, raising the fee level substantially will draw more attention to notarial acts and will cause all parties to take notarial acts more seriously. See *supra* notes 164-67 and accompanying text.

⁵⁷⁷ Far too many documents are being unnecessarily notarized. This proves to be a substantial misuse of a notary's time and commission. Certainly, legislation needs to be in place to reduce the amount of documents being notarized on a daily basis. See Closen I, *supra* note 2, at A24. The article asks:

Why do so many documents need to be notarized? There are already criminal and civil penalties for most of the falsification that notarizations are intended to prevent. Adding one more layer of threatened sanction (for perjury) serves no real purpose, especially since prosecutions for perjury are rare.

Id. "[B]usiness and government should reduce drastically the number of documents designated for notarization." *Id.*

⁵⁷⁸ See Closen & Osty, *supra* note 161, at 14. The authors comment that:

Increasing the amount of the bond for notaries is not the solution to the concerns we have raised. A bond is not insurance. Yet, simply

increase the cost of being a notary, and thus, may force some individuals out of the office of notary public or deter them from becoming notaries in the first place.⁵⁷⁹ That result would foster the image and the quality of notaries. Employers of notaries should be encouraged to cooperate fully in these efforts to improve the competence of notaries and the quality of their performance of official services.⁵⁸⁰

Employers of notaries should even allow and encourage employee-notaries to attend continuing education programs on notarial law, ethics, and practice (and even on company time and at company expense).⁵⁸¹

eliminating the bond requirement altogether is not the answer either (although about 20 states have done so). That act does not protect anyone. Instead, a statutory requirement for substantial errors and omissions insurance is the way to best protect everyone involved.

Id. Similarly, the Idaho handbook comments on the notary bond misconceptions: It is a common misconception that the notary bond protects the notary against such liability. Nothing could be further from the truth, however. The bond gives protection only to the person who is damaged by the notary's misconduct. The bonding company then recovers its loss from the notary. For that reason, it may be advisable for notaries to carry errors and omissions (E & O) insurance to protect them from personal liability for acts of negligence, whether or not they amount to official misconduct. E & O coverage is quite inexpensive.

IDAHO NOTARY PUBLIC HANDBOOK 8 (1997).

If you have filed a bond and are required to pay damages, the bondsman pays for you out of the bond amount, but you still have to pay the bondsman back. Insurance pays for you and only collects periodic premiums. Therefore, errors and omissions insurance protects the notary, and bonding protects the public from the notary.

OREGON NOTARY PUBLIC GUIDE 10 (Jan. 1996); *see also* ALASKA NOTARY HANDBOOK 2 (n.d.).

Alaska's handbook explains that:

It is a common misunderstanding among notaries that the bond protects them from civil lawsuits. It does not . . . The notary must reimburse the surety for any bond funds paid to a person who has suffered losses caused by the notary's improper performance of official duties. *Notaries have unlimited financial liability for intentional and unintentional misconduct . . .*

ALASKA NOTARY HANDBOOK 2 (n.d.) (emphasis added).

⁵⁷⁹ Some states have had the experience of a noticeable decline in the number of notaries after implementing heightened credentialing efforts. California, for example, lost a significant number of notaries due to such efforts. Specifically, between 1992 and 1997 California lost more than 30,000 notaries. Birenbaum, *supra* note 2, at 31.

⁵⁸⁰ It should be recalled that many, and perhaps most, notaries become notaries because their employers ask or insist upon having one or more notary-employees on the premises to foster the employers' businesses, including promotion of customer good will. *See supra* notes 50-51 and accompanying text. Hence, it is in the employers best interests to have notarial services performed competently and professionally.

⁵⁸¹ *See* Closen et al., *supra* note 8, at 232 (commenting that "[a] most serious complication for notaries is that the public, which includes both employers of notaries and consumers of

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After all, it is in the employers' best interests to reduce the risk of being held vicariously liable for the misconduct of their employee-notaries.⁵⁸² In further keeping with the notion that knowledge is power, employers and customers of notaries should be better educated about notarial practices, including ethical considerations. As has already been suggested, the employers and customers of notaries quite frequently are the sources of the temptations for notaries to engage in misconduct.⁵⁸³ Sometimes, it is simply ignorance of the law that is the real cause of notarial misconduct, as opposed to fraudulent or criminal intent by notaries, their employers, their customers, and their relatives.⁵⁸⁴ Basic information about notarial practices should be provided in business courses in the high schools, junior colleges, and universities. It should be available on-line through the notary oversight agency in each jurisdiction, so that anyone who needs notarial services can review the steps in the process in advance of the notarization ceremony. The better educated everyone is about sound notarial practices, the better the system will work. After all, virtually everyone needs the services of notaries at one or more times in their lives.

notarial services, is at least as poorly informed about notarial law and practice as notaries"). Many of the notary associations offer training seminars on a wide variety of topics, ranging from basic and advanced notary skills to notarizations in the age of technology. There are a plethora of books and literature to help aid notaries, and there should always be a reference manual in every office for notaries who may have questions. "To faithfully serve the public, the notary public must be knowledgeable about his or her responsibilities." SOUTH DAKOTA NOTARY PUBLIC HANDBOOK 1 (1997).

⁵⁸² It is not uncommon for employers to be held liable for their employee-notaries misconduct, as long as the notaries were acting within the scope of company business. See *supra* note 46 and accompanying text. Employers should be particularly concerned because the practicing bar has taken notice of notarial mistakes and misconduct. "In fact, one of the fastest-growing areas of litigation in the country is actions against notaries for losses caused by improper notarial acts." IDAHO NOTARY PUBLIC HANDBOOK 2 (1997). Every lawyer knows that employers of notaries generally have deeper pockets (including insurance coverage) than ordinary employee-notaries.

⁵⁸³ See Closen et al., *supra* note 8, at 232-33. The authors acknowledge that:

Moreover, notaries are human, and suffer from the same failings as others regarding matters of integrity. The assignment of governmental commissions does not change the risk that they may be tempted by dishonest opportunities for financial gain We face a crisis of integrity and responsibility within the notarial community as well as within society as a whole.

Id.

⁵⁸⁴ *Id.* at 232 (asserting that a most "serious complication for notaries is that the public, which includes both employers of notaries and consumers of notarial services, is at least as poorly informed about notarial law and practice as notaries").

If effective and progressive reform is to take place regarding notarial ethics and practices in this country, it must come in the form of a substantial overhaul. Nominal changes cannot save the present notarial system. Every facet of notary qualifications and notarial procedures must be subjected to intense scrutiny and reconsideration. Serious troublespots can be identified and sweeping improvements can be implemented.⁵⁸⁵ As time passes without such significant review and progress, there will be less and less assurance that notaries will “first do no harm” and will not jeopardize the very notarizations they have been appointed to perform.

VI. CONCLUSION

*“Honores mutant mores.”*⁵⁸⁶

The maxim that “power corrupts” represents a truism in so many cases, among them many instances involving notaries.⁵⁸⁷ Notaries undoubtedly believe they can get away with shortcuts or misdeeds in violation of notary laws and ethical standards because they control the performance of notarizations and there is so little risk of the corruption’s disclosure.⁵⁸⁸ There will be few if any independent witnesses to the corruption, the notaries will be in control of the evidence of notarial improprieties, few individuals will know about notary ethics and practice,⁵⁸⁹ and even fewer people will care about notarial matters.⁵⁹⁰

⁵⁸⁵ See Closen & Shannon, *supra* note 214, at 32 (suggesting what is effectively a sweeping risk management plan for notarial practice in law firms, that addresses even the most basic features of notarial practice).

⁵⁸⁶ Latin maxim which means “power corrupts.” *Latin Maxims*, at <http://user.trinet.se/~df732s/show-off.html> (last updated Jan. 20, 1999).

⁵⁸⁷ *Id.*

⁵⁸⁸ “Misconduct in connection with notarizations is a pervasive problem . . .” Anderson & Closen II, *supra* note 12, at 887. Notaries are the commissioned state officers in attendance at notarial ceremonies, and not many people (including lawyers and other business professionals) are likely to challenge notaries because other people tend to know even less than notaries about the subject. See Closen et al., *supra* note 8, at 189. The authors note that:

The historic decline in the status of the notary in this country is an unfortunate fact of life, which is not likely to be reversed. Yet, notaries in the United States, many of whom are neither interested in nor knowledgeable about their roles, are entrusted to deter document fraud by properly identifying document signers.

Id.

⁵⁸⁹ “[E]ven with the enormous daily volume of [notarial] activity, the basic function is not fully understood by many attorneys, business people, members of the public and even by many notaries themselves.” CLOSEN ET AL., *supra* note 17, at 109.

⁵⁹⁰ “Many notaries do not take their commissions and public official status as seriously as they should, and buy into the proposition that an improper notarization is unimportant

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Moreover, document signers and their family member notaries will not be inclined to report the ethical breaches (i.e., to tell on themselves).

Just a few years ago, the National Notary Association noted a “crisis of responsibility” in the country at large and within the ranks of notaries public in particular.⁵⁹¹ The notarial system in the United States is so badly flawed that it does not amount to much of a real system at all.⁵⁹² It depends more upon chance than regulation and supervision — the chance that most notaries will learn the mundane steps in the conduct of simple notarizations and the chance that not too many unscrupulous people will buy notary commissions.⁵⁹³ Besides, the view undoubtedly prevails behind the scenes in the legislatures and notary oversight agencies that individual notaries cannot do much harm individually and appropriate damage control can protect against any major injury to the images of legislators and regulators (and that is what they care about most).

There can be no more basic grounds for concerns about the validity of official acts than that they were performed by officials for themselves, out of self-interest, or that they were performed for their family members. In the final hours of President Bill Clinton’s administration, the pardon of Clinton’s half-brother represented a most unseemly and unfortunate episode of fundamental ethical standards being disregarded.⁵⁹⁴ What kind of example is set when officials at the

and/or undetectable.” Anderson & Closen II, *supra* note 12, at 895. In the eyes of some people, including some lawyers, “the duties of the notary may be considered inconsequential . . .” McWilliams, *supra* note 49, at 63.

⁵⁹¹ See generally *The Crisis of Responsibility*, NAT’L NOTARY, May 1995, at 11. “We have witnessed a time of declining ethics in this country particularly in the last two decades, and the profession of notary public has not been immune to the downward spiral toward the lowest common denominator of behavior.” Closen III, *supra* note 6, at 664.

⁵⁹² Many notaries fail to understand the importance of their office, and as a result, the notarial system in the United States has declined in stature. This problem could be remedied with tougher notary laws and extensive training. By failing to recognize the vital role notarizations play in the United States, notaries and those who oversee them undermine what remains of the notarial system. See Closen et al., *supra* note 8, at 252 (asserting that “[h]undreds of new notaries are minted across the nation every day, and many of them do not have the faintest idea of the importance of their duties”).

⁵⁹³ In another notarial context we have made a comparable assessment. “To the extent there have not been widespread breaches of privacy of notarial records to date, that result has been more a matter of luck, rather than design.” Closen et al., *supra* note 8, at 251-52.

⁵⁹⁴ Although Presidents are not required to give reasons for their issuance of pardons, the reason Bill Clinton pardoned his own half brother, Roger Clinton, who had suffered a 1985 felony drug conviction, seems rather obvious. Maybe blood is thicker than ethics. See generally, FOXNEWS, *Clinton Pardons Brother, Business Partner, Former Cabinet Official*, at http://www.foxnews.com/fn99/politics/012001/clinton_pardon.sml; NEWSWEEK, *Oh*

pinnacles of our elective and appointive departments of government and at the helms of our business and financial entities in the private sector disregard both actual conflicts of interest as well as the appearance of such conflicts? Such indifference to impartiality and ethics assuredly filters down to perhaps the lowliest of all officials: the notary public.

Another important reason for the states and territories to seriously reconsider the subject of family-based conflicts of interest in the rendition of notarial services is to promote interstate and international recognition of notarial acts.⁵⁹⁵ The basic law on the subject of interstate recognition of notarial acts is straightforward and in keeping with the law of interstate recognition of other official state acts.⁵⁹⁶ That is, under the Full Faith and Credit Clause of the United States Constitution,⁵⁹⁷ the states and territories are required to extend recognition to the notarial acts of sister jurisdictions,⁵⁹⁸ provided that the notarial acts comport with

Brothers!, at <http://stacks.msnbc.com/news/535668.asp?cp1=1>. The President's pardoning of his brother was as unseemly as would be a school teacher's or university professor's grading of his/her own child or sibling. See Hayden, *supra* note 182, at 374 (opining that the seriousness of the conflict caused by a family relationship is such that "a teacher should . . . refrain from evaluating the work of a student who is related by blood or marriage").

⁵⁹⁵ One of the purposes announced for the *Model Notary Act of 2001* is "to enhance cross-border recognition of notarial acts." MODEL NOTARY ACT OF 2001 §1-2(4) (June 7, 2001); see CLOSEN ET AL., *supra* note 17, at 217-46, 417-82. See generally Stevenson, *supra* note 173, at 23 (discussing circumstances where "documents are drafted in one state and sent to be signed and notarized in another").

⁵⁹⁶ See Closen III, *supra* note 6, at 694-96.

⁵⁹⁷ According to Article IV, Section 1, of the United States Constitution, "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." U.S. CONST. art. IV, § 9. Thus, "constitutional law mandates the interstate recognition of notarial acts." Closen III, *supra* note 6, at 694. In addition, statutes have been adopted directing the recognition of notarial acts. See, e.g., S.D. CODIFIED LAWS § 18-1-10 (Michie 2001) (providing for "[f]ull faith and credit" recognition of notarial acts).

⁵⁹⁸ "Within the bounds of the public acts and records referenced [under the Full Faith and Credit clause] are notarial acts and any official public records that are created . . ." Closen III, *supra* note 6, at 694-95; see, e.g., *Pape v. Wright*, 19 N.E. 459 (Ind. 1889) (holding that a New York notarization would be recognized in Indiana); *Stearns v. Chenault*, 23 S.W. 351 (Ky. 1893) (finding that an Ohio notarization would be approved in Kentucky); *Nicholson v. Eureka Lumber Co.*, 75 S.E. 730 (N.C. 1912) (resulting in North Carolina recognizing a Texas notarization). Several jurisdictions have also adopted express statutory provisions for the recognition of the notarial acts of other United States jurisdictions. See, e.g., LA. REV. STAT. ANN. § 35:5 (2001) (regarding recognition of notarial acts of other jurisdictions); LA. REV. STAT. ANN. § 35:513 (2001) (regarding acknowledgments). Such laws do not change the rule that a notarial act must be lawful in the jurisdiction where performed in order to be entitled to recognition elsewhere.

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the laws in the jurisdictions where the acts were performed.⁵⁹⁹ In other words, if the notarization was valid where it was performed, it will be valid everywhere in the United States, including in the forum jurisdiction where its recognition is sought.⁶⁰⁰ If invalid where performed, a notarization will be treated as invalid everywhere else as well.⁶⁰¹ However, under the antiquated and incomplete statutes on family-based conflicts of interest, the forum court may be inclined to decline recognition of a notarization from a sister jurisdiction if executed for oneself or for one's family member(s).

Of course, many documents travel across international borders, and therefore, commercial and governmental instruments are regularly presented for recognition outside their countries of origin.⁶⁰² Because

⁵⁹⁹ See, e.g., *Stearns*, 23 S.W. at 351 (declaring that an Ohio notarization would be recognized in Kentucky because it was "in compliance with the law of Ohio"); *Nicholson*, 75 S.E. at 730 (holding that a Texas notarization performed by a female notary in compliance with Texas law would be recognized in North Carolina although North Carolina at the time did not allow women to serve as notaries).

⁶⁰⁰ "[I]f a notarial act is lawful in a state or United States territory where it is performed, that notarization must be recognized by other states and territories." Closen III, *supra* note 6, at 695. "Regardless of where a document originated or where it is going, every Notary must follow the rules of his or her own jurisdiction when notarizing it." Stevenson, *supra* note 173, at 23. "As a notary of your state, you are subject to the laws of your state only." *One State Can't Tell Another What To Do*, THE NOTARY, May/June 2000, at 4. For instance, in *Firstcom Broadcast Services v. New York Sound Inc.*, 709 N.Y.S.2d 329 (N.Y. Civ. Ct. 2000), New York gave recognition to a notarial oath administered in Texas by a Texas notary. Interestingly, the Kentucky handbook actually incorrectly states the law on this point in the following passage: "It should be noted that some states require a seal or stamp; therefore, if you are notarizing a deed or other document which is to be recorded or used out of state there is a possibility a seal or stamp is required." COMMONWEALTH OF KENTUCKY NOTARY PUBLIC HANDBOOK 5 (Mar. 1997).

⁶⁰¹ See, e.g., *Donegan v. Wood*, 20 Am. Rep. 275 (Ala. 1873) (finding a notarization invalid and not entitled to recognition in part because it was performed by a notary commissioned by the Confederate States of America, which was not a lawful government).

⁶⁰² Indeed, the need for the international exchange of commercial documents was a primary reason for the creation and development of the office of notary public in the early colonial period of this country. "In the American colonies of the seventeenth century, the settlers who were businessmen quickly came to realize that their commercial documents would not be widely acceptable in international trade unless they followed the European practice and custom of having such documents prepared and authenticated by notaries." Closen et al., *supra* note 8, at 178-79. "Essential to the efficient functioning of . . . transnational commerce is the . . . international recognition of notarial acts. The recipients of documents passing from . . . country to country must have some degree of confidence in their trustworthiness, or else commerce would falter." Closen III, *supra* note 6, at 694; see, e.g., *People v. Frontier Pac. Ins. Co.*, 81 Cal. Rptr. 2d 921 (Cal. Ct. App. 1999) (involving a case in which a Spanish language document prepared in Mexico by a Mexican notary was submitted in a United States court). See generally *Coping With The Complexities Of International Documents*, NOTARY BULL., Apr. 2001, at 13 (reporting an interview with an Iranian-born United States notary

English notaries and civil law notaries (which constitute the other two types of notaries of the world, in addition to United States notaries⁶⁰³) possess heightened qualifications, training, and responsibilities, the United States ordinarily recognizes the official acts of foreign notaries.⁶⁰⁴ In 1890, the Minnesota Supreme Court in writing about the issue of United States recognition of a foreign notarization, explained: "A public notary is considered not merely an officer of the country where he is admitted or appointed, but as a kind of international officer, whose official acts, performed in the state for which he is appointed, are recognized as authoritative the world over."⁶⁰⁵ However, other countries may not share that high opinion about notaries in this country. United States notarizations already suffer in the international commercial and governmental arenas and are sometimes refused recognition under international comity principles.⁶⁰⁶ "[N]otaries in the United States have far less training, power, and status than do notaries in other countries."⁶⁰⁷ If conflicted practice is added to the already tarnished international reputation of United States notaries, then their notarizations will be even less likely to receive approval.⁶⁰⁸ Clarification

literate in at least three languages who commented that she has "had to notarize a lot of documents, both from Armenia and Iran, especially documents sent through embassies").

⁶⁰³ See Closen et al., *supra* note 8, at 175-76. Specifically, the authors note that: "Around the rest of the world, the civil law notary is the predominant kind of notary and is recognized as a highly trained and experienced professional. . . . While the civil law notary predominates throughout the world, the English notary developed into a unique species of notarial officer." *Id.*

⁶⁰⁴ "The United States tends to give effect to notarizations of many other countries because their notaries tend to be more highly educated, trained, authorized, and respected than our notaries." Closen III, *supra* note 6, at 699.

⁶⁰⁵ Wood v. St. Paul City Ry. Co., 44 N.W. 308, 308 (Minn. 1890); see also Pierce v. Indseth, 106 U.S. 546, 549 (1883) (commenting that notaries are "officers recognized by the commercial law of the world").

⁶⁰⁶ Unlike the constitutional mandate of recognition under the Full Faith and Credit Clause, in the international field the discretionary doctrine of comity prevails. Sister countries may choose not to recognize United States notarizations, if those foreign countries have any reason to reject them. "In the global arena of notarizations and their recognition across national boundaries, matters are not so clear . . . [D]ocuments may be recognized under the rules of comity, which is a discretionary doctrine." Closen III, *supra* note 6, at 697-99. "In many other countries, businesspeople and government agents rarely take American notarizations seriously, and sometimes reject them." Closen I, *supra* note 2, at A24; see also *Do It Right in Any Language*, NOTARY BULL., June 2001, at 4 (setting out the anecdotal account of a California notarization refused recognition in a German trial court).

⁶⁰⁷ See Closen I, *supra* note 2, at A-24.

⁶⁰⁸ *Id.* "The marginal role of American notaries is in stark contrast to the seriousness with which they are taken in many foreign countries. They are an embarrassment when it comes to international commerce." *Id.*

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of the law on family-based notarial conflicts of interest would advance both interstate and transnational recognition of notarial acts.

The proposals offered in this Article are reasonable in scope and tailored to achieve the goal of eliminating family-based conflicts of interest in notarial practices. The authors would not be so presumptuous as to warn of impending doom in public and private transactions if the suggested reforms are not adopted. If notarial abuses become more widespread and more notorious, the attitudes of citizens, regulators, and legislators may change.⁶⁰⁹ The time could come when measures more drastic than those recommended in this Article may be in order. On one extreme, the office of notary public could be abolished, with procedures for self-authentication of signatures and fingerprinting of document signers to be expanded beyond their limited spheres of application under the status quo.⁶¹⁰ Other public and private officials, such as judges, county recorders, court reporters, arbitrators, military officers, and the like, could continue to perform certain notary-like functions including the administration of oral oaths and affirmations. On the other extreme, the office of notary public could be nationalized, with heightened credentialing and heightened ethical standards invoked to create a true professional post as the result of consolidation of authority. After all, there is a movement afoot to create a new civil law notarial practitioner in this country (combining the roles of attorney and notary to compete more effectively with the *notario publico* and other forms of the civil law notary of so many foreign countries).⁶¹¹ Some have even

⁶⁰⁹ "When enough notaries notarize falsely frequently enough, the interests of the state and the public are severely harmed. Credibility and confidence in the notarial process are diminished, if not lost, indefinitely." *Understanding Our Fiduciary Duties As Notaries*, *supra* note 39, at 5. "We don't have to scrap the whole [United States notarial] system, but we could make it much more sensible." Closen I, *supra* note 2, at A24.

⁶¹⁰ "For example, California — one of the largest real estate markets in the nation — has a distinctive law to help thwart real estate fraud. For signatures notarized on a deed, quitclaim deed or deed of trust affecting real property, signers must leave their right thumbprint in the Notary's journal entry." David S. Thun, *Springing Forward with the Real Estate Market*, NAT'L NOTARY, May 2001, at 13; *see* Gnoffo, *supra* note 16, at 1078-85 (proposing that in the planned revision of the *Model Notary Act* provisions requiring document signers to leave thumbprints to identify them and deter fraud); Vincent J. Gnoffo, *Requiring a Thumbprint for Notarized Transactions: The Battle Against Document Fraud*, 31 J. MARSHALL L. REV. 803 (1998) (presenting the arguments for requiring thumbprints). The draft of the *Model Notary Act of 2001* includes requirements for all document signers to leave thumbprints in notary journals. MODEL NOTARY ACT OF 2001 § 7-2 (a)(6) (June 7, 2001) (establishing that "[f]or every notarial act, the notary shall record in the journal at the time of notarization . . . the thumbprint of each principal . . .").

⁶¹¹ Florida and Alabama, have already established the position of civil law notarial practitioner. *See, e.g.*, FLA. STAT. ANN. §118.10 (West Supp. 2001). The draft revision to the

recently been calling for federalization of the post of certification authority (or cybernotary) as the country and the world enter more earnestly the realm of electronic on-line transactions and digitalized signatures.⁶¹²

The reform suggested in this Article is not extreme. The central feature of the main proposal of this Article is neither complicated nor costly. In fact, it would be easy to invoke and would cost absolutely nothing, for it is simply the abolition of an unethical practice. After all, "the most effective way to avoid becoming enmeshed in a tangle of conflicting interests is to 'anticipat[e] the probability or possibility that a conflict situation will develop.'"⁶¹³ The Iowa Supreme Court made the point most succinctly and capably in an 1866 decision, as follows:

It is always within the power of the parties to secure a disinterested officer to take the acknowledgment, and it is certainly no hardship to require them to do so To hold that a party beneficially interested in an instrument is incapable of taking or certifying an acknowledgement of it cannot work any possible injury to any one, while it will keep closed a door of temptation, at least, to fraud and oppression.⁶¹⁴

It should not have taken 135 years to realize the wisdom of those thoughts.

Model Notary Act of 2001 contains an entire article on the civil law notary, to encourage United States jurisdictions to recognize and establish such posts. See MODEL NOTARY ACT OF 2001 art. IV (June 7, 2001).

⁶¹² For example, it has been suggested that "federal statutes and regulations may be more appropriate to ensure that the certification authority's role in electronic commerce will receive the paramount and uniform national attention it deserves." Anderson & Closen I, *supra* note 3, at 867.

⁶¹³ Hayden, *supra* note 182, at 363 (quoting Robert H. Aronson, *Conflict of Interest*, 52 WASH. L. REV. 807, 813 (1977)).

⁶¹⁴ *Wilson v. Traer & Co.*, 20 Iowa 231 (1866). Similarly, in the conclusion to the opinion in *Rothschild v. Daugher*, 20 S.W. 142 (Tex. 1892), the Supreme Court of Texas commented: "To hold that a party to a deed is incompetent to take the acknowledgment of a party to it, we think a safe and salutary rule." *Id.* at 143. "With more than 4.2 million U.S. Notaries, there certainly is no need for Notaries to be notarizing for family members." Closen & Orsinger II, *supra* note 5, at 27.

TABLE 1

Statutes Prohibit Notarizing For Oneself^a

California^{b, e}
Colorado^{c, e}
Connecticut^b
Florida^{c, e}
Georgia^{d, e}
Guam^{d, e}
Hawaii^c
Idaho^{c, e}
Illinois^c
Indiana^c
Kansas^{c, e}
Minnesota^b
Missouri^c
Montana^b
Nevada^{c, e}
New Hampshire^b
North Carolina^d
North Dakota^b
Northern Marianas^{d, e}
Oklahoma^b
Oregon^d
Puerto Rico^c
South Dakota^c
Utah^{d, e}
Virgin Islands^{c, e}
Virginia^{c, e}
Washington^b
West Virginia^{c, e}

^a Statutes prohibit notaries from notarizing if they are named as parties to instruments, or if they are signers on instruments, or both.

^b Bars only notaries who are signers of instruments.

^c Bars only notaries named in or parties to instruments.

^d Bars both b and c.

^e Also has a general beneficial interest disqualification.

TABLE 2

Statutory Corporate Prohibitions^f

Arizona
Arkansas
District of Columbia
Hawaii
Louisiana
Maine
Maryland
Michigan
Mississippi
Montana
Nebraska^g
New Hampshire
New Mexico
New York
Oklahoma^h
Oregon
Pennsylvania^h
Rhode Island^h
South Carolina
Wisconsin

^f Statutes prohibit notaries who are corporate officers, directors, or stockholders from notarizing corporate instruments in which notaries are named individually or as corporate representatives.

^g Confusing statutory limitations in insurance, banking, credit union, and credit association practices.

^h Statutory prohibition applies only to banks, or certain bank practices.

TABLE 3

Statutory Prohibitions Against Notarizing For Relatives

	Spouses	Certain Other Relatives
Arizona	X	X ⁱ
Florida	X	X ^j
Guam	X	X ^k
Maine	X	X ^l
Nevada	X	X ^m
North Dakota	X	
Northern Marianas	X	X ⁿ
Puerto Rico	X	X ^o
Virginia	X	

ⁱ ARIZONA - any person "related by marriage or adoption."

^j FLORIDA - "son, daughter, mother, or father" of notary.

^k GUAM - "sibling or lineal ancestor or descendant."

^l MAINE - "parent, sibling, child, spouse's parent or child's spouse."

^m NEVADA - the following relatives:

- (a) A spouse, parent, grandparent or stepparent;
- (b) A natural born child, stepchild or adopted child;
- (c) A grandchild, brother, sister, half brother, half sister, stepbrother or stepsister;
- (d) A grandparent, parent, brother, sister, half brother, half sister, stepbrother or stepsister of the spouse of the notary public; and
- (e) A natural born child, stepchild or adopted child or adopted child of a sibling or half sibling of the notary public or of a sibling or half sibling of the spouse of the notary public.

ⁿ NORTHERN MARIANAS - "brother, sister, parent or child."

^o PUERTO RICO - related to notary "within the fourth degree of consanguinity or the second degree of affinity."

TABLE 4

**Notary Statutes Include None of the Disqualifications Identified
in Tables 1, 2, 3^P**

Alabama
Alaska
Delaware
Iowa
Kentucky
Massachusetts
New Jersey
Ohio
Tennessee
Texas
Vermont
Wyoming

^P These states have enacted none of the four notary conflict of interest disqualification provisions included in Table 1 (against self-notarization and notarizing where notary has a general beneficial interest), Table 2 (against notarizing where notary has a vested corporate interest), and Table 3 (against notarizing for certain family members).

